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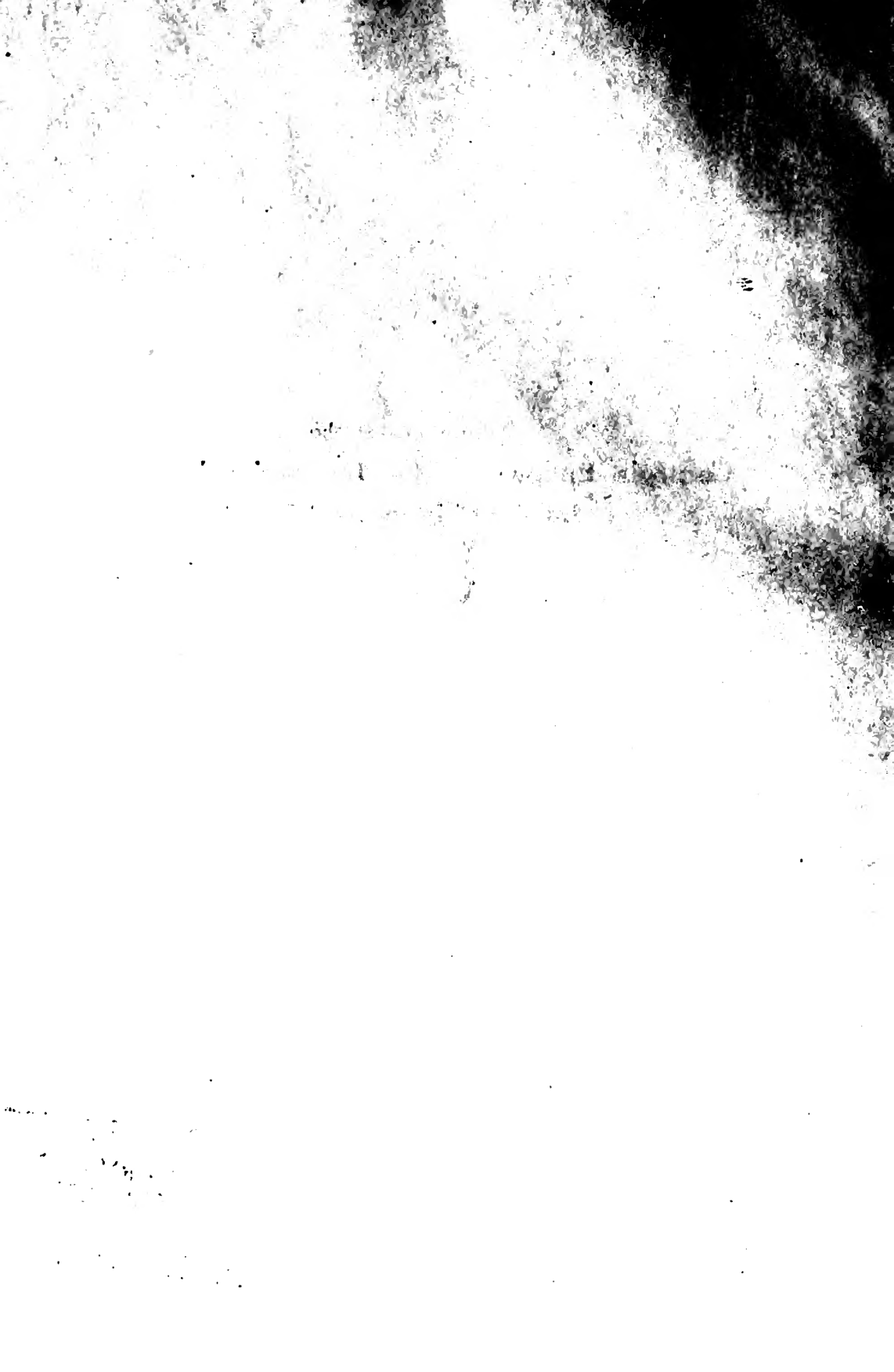
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THE
CLASSICS OF INTERNATIONAL LAW

EDITED BY
JAMES BROWN SCOTT

President of the Institute of International Law
President of the American Institute of International Law

DE JURE BELLI AC PACIS
LIBRI TRES

BY HUGO GROTIUS

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- VOL. II. A Translation of the Text, by Francis W. Kelsey, with the collaboration of Arthur E. R. Boak, Henry A. Sanders, Jesse S. Reeves, and Herbert F. Wright, with an Introduction by James Brown Scott.

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DE JURE BELLI AC PACIS LIBRI TRĒS

BY
HUGO GROTIUS

VOLUME TWO
THE TRANSLATION
BOOK III

BY FRANCIS W. KELSEY

WITH THE COLLABORATION OF
ARTHUR E. R. BOAK, HENRY A. SANDERS,
JESSE S. REEVES AND HERBERT F. WRIGHT

AND AN INTRODUCTION BY
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HUGO GROTIUS

ON

THE LAW OF WAR AND PEACE

BOOK III



CHAPTER I

GENERAL RULES FROM THE LAW OF NATURE REGARDING WHAT IS PERMISSIBLE IN WAR; WITH A CONSIDERATION OF RUSES AND FALSEHOOD

I.—*The order of treatment in the discussion which follows*

WE have considered both those who wage war and on what grounds war may be waged. It follows that we should determine what is permissible in war,¹ also to what extent, and in what ways, it is permissible.

What is permissible in war is viewed either absolutely or in relation to a previous promise. It is viewed absolutely, first from the standpoint of the law of nature, and then from that of the law of nations. Let us see, then, what is permissible by nature.

II.—*The first rule: In war things which are necessary to attain the end in view are permissible. This is explained*

1. First, as we have previously said on several occasions, in a moral question things which lead to an end receive their intrinsic value from the end itself. In consequence we are understood to have a right to those things which are necessary for the purpose of securing a right, when the necessity is understood not in terms of physical exactitude but in a moral sense. By right I mean that which is strictly so called, denoting the power of acting in respect to society only.

Hence, if otherwise I cannot save my life, I may use any degree of violence to ward off him who assails it, even if he should happen to be free from wrong, as we have pointed out elsewhere. The reason is that this right does not properly arise from another's wrong, but from the right which nature grants me on my own behalf.

2. Furthermore, [425] I can also take possession of another's property from which an imminent danger threatens me, without

Victoria,
*De Iure
Belli*,
no. 15.

[II. i. 3.]

Victoria,
*De Iure
Belli*,
nos. 18, 39,
and 55.

¹ It has been well said by Augustine, *Letters*, lxx [ccxx. 12], *To Count Boniface*: 'May you, in war itself, if it is still necessary for you to engage in war, cleave to the faith, and seek peace.' Again in *Letters*, ccv [clxxxix. 6]: 'Be therefore a man of peace, even when engaged in war.'

Regarding the maintenance of justice in waging war, [437] there is an excellent discourse of Belisarius to his soldiers in Procopius, *Vandalic War*, I [I. xvii]. Orosius, Book VII [VII. xxii], says: 'Behold in what fashion civil wars are waged by Christian kings in Christian ages, when they cannot be avoided.' The same author [VII. xxiii] refers thus to Theodosius: 'Let them mention some one war, from the time of the founding of the city, which was undertaken by reason of so righteous a necessity, and concluded with so divine a felicity, that battle did not exact great slaughter or victory a bloody vengeance.'

taking account of the other's guilt; yet not in such a way as to become its owner (for this procedure is not adapted to that end), but in order to guard it until adequate security has been given for my safety. This point also we have treated elsewhere.

Thus I have by nature a right to seize property of mine which another is holding; and if such seizure is too difficult I have the right to seize something else of equal value, as in the case of recovering a debt. From these causes ownership also arises, because the equality which has been disturbed can in no other way be restored.

3. Where therefore the punishment is just, all use of force necessary for the infliction of the penalty is likewise just; and everything which is a part of the penalty, as the destruction of property by fire or by other means, is certainly within the limit of that which is just and befits the crime.

III.—*The second rule: A right is to be viewed as arising not only from the origin of the war but also from causes which subsequently develop*

In the second place the fact must be recognized that our right to wage war is to be regarded as arising not merely from the origin of the war but also from causes which subsequently develop; just as in lawsuits a new right is often acquired by one party after suit has been brought. Thus those who associate themselves with him who assails me, either as allies or subjects, confer upon me the right to protect myself against them also.

In like manner those who join in a war that is unjust, especially if they can or ought to know that it is unjust, obligate themselves to make good the expenses and losses incurred, because through their guilt they cause the loss. Similarly, those who join in a war that has been undertaken without a cause worthy of approval draw upon themselves the desert of punishment, in a degree proportionate to the injustice which lies in their action. For this reason Plato approves of war 'until the guilty are compelled, by the guiltless who have suffered, to pay the penalty'.

IV.—*The third rule: Some things, which are not permissible according to the purpose of a war, may follow therefrom without wrong; a precaution is added*

1. In the third place, it must be observed that in addition to the right of action many things follow indirectly, and beyond the purpose of the doer,¹ for which in and of themselves a right would not exist. We have explained elsewhere how this may occur in a case

¹ See on this point Thomas Aquinas, II. i, qu. 73, art. 8; Molina, tract. ii, disp. 121.

II. ii. 10.

Sylvester,
word *bel-*
lum, I,
no. 10,
v. *prima*.

[*Republic*,
V. xvi =
471 B.]

Victoria,
op. cit.,
no. 37.
[II. i. 4.]

of self-defence. Thus in order to obtain what is ours, if we cannot get that by itself, we have the right to accept more, subject to the obligation, nevertheless, of restoring the value of the excess. Similarly we may bombard a ship full of pirates, or a house full of brigands, even if there are within the same ship or house a few infants, women, or other innocent persons who are thereby endangered. Says Augustine: 'A man is not guilty of homicide if he has built a wall about his property and another is killed by the fall of it when trying to make use of it.'

Letters,
cliv [xlvii.
5], *To*
Publicola.

2. But, as we have admonished upon many occasions previously, what accords with a strict interpretation of right is not always, or in all respects, permitted. Often, in fact, love for our neighbour prevents us from pressing our right to the utmost limit.

Wherefore we must also beware of what happens, and what we foresee may happen, beyond our purpose, unless the good which our action has in view is much greater than the evil which is feared, or, unless the good and the evil balance, the hope of the good is much greater than the fear of the evil. The decision in such matters must be left to a prudent judgement, but in such a way that when in doubt we should favour that course, as the more safe, which has regard for the interest of another rather than our own. 'Let the tares grow', said the best Teacher, 'lest haply while ye gather up the tares ye root up the wheat with them.' Said Seneca: 'To kill many persons indiscriminately is the work of fire and desolation.' History teaches us with how deep repentance Theodosius, on the admonition of Ambrose, expiated such an unrestrained vengeance.

Matthew,
xiii. 29;
Thomas
Aquinas,
II. ii, qu.
64, art. 2.
Seneca, On
Clemency,
II, end [I.
xxvi. 5].

3. Further, if at times God does something of this kind, it is not for us to take that as an example, in view of the most perfect [426] right of dominion which He has over us, but which He has not granted to us over one another, as we have noted elsewhere. And yet God Himself, lord of men in His own right, is wont to spare a community of evil men, however large, for the sake of a very few good men; in this He makes manifest His fairness as a judge, as the conference of Abraham with God regarding Sodom clearly teaches us.

[II. xxi.
14.]

From these general rules we may learn how much is by nature permissible against an enemy.

Genesis,
xvii[xviii]
23 ff.

V.—*What is permissible against those who furnish supplies to our enemies is explained through distinctions*

1. But there often arises the question, What is permissible against those who are not enemies, or do not want to be called enemies, but who furnish our enemies with supplies? For we know that this subject has been keenly debated in both ancient and modern

times, since some champion the relentlessness of warfare and others the freedom of commercial relations.

2. First, we must make distinctions with reference to the things supplied. There are some things, such as weapons, which are useful only in war; other things which are of no use in war, as those which minister to pleasure; and others still which are of use both in time of war and at other times, as money, provisions, ships, and naval equipment.¹

Regarding the first class of things, the saying of Amalasintha to Justinian holds true, that he who supplies an enemy with things necessary for warfare is on the side of the enemy.

Things of the second sort give rise to no complaint. Thus Seneca says that he will do a favour to a tyrant, if the kindness will not give to the tyrant greater powers for the ruin of all² nor strengthen the powers which he has; that is, a kindness which may be done to him without harm to the state. In explaining this Seneca adds:

Money, by means of which a satellite may be kept in service, I shall not supply. If he shall desire marbles and robes, that which his luxurious taste amasses will harm no one; soldiery and arms I shall not furnish. If, as a great favour, he seeks craftsmen of the stage and things which may soften his savagery, I shall gladly proffer them. To him to whom I would not send triremes or ships with bronze rams, I shall send pleasure craft, and sleeping-barges, and other follies of kings who revel on the sea.

In the judgement of Ambrose, to be generous toward him who conspires against his country is not approvable liberality.

3. Regarding things of the third sort, useful in both war and peace, we must take into account the conditions of the war. For, if I am unable to protect myself without intercepting the goods which are being sent to the enemy, necessity, as we have elsewhere said, will give me a right to intercept such goods, but with the obligation to make restitution, unless another cause arises.

If, now, the enforcement of my right shall be hindered by the supplying of these things, and if he who supplied them has been in a position to know this (for example, in case I should be holding a town under siege or keeping ports under blockade, and a surrender or the conclusion of peace should already be in anticipation), then he will be liable to me for injury culpably inflicted, just as one who releases a debtor from prison or secures his escape, to my detriment. As in the case of the infliction of an injury, his goods may be seized, and ownership over them may be sought, for the purpose of recovering damages.

Designated by the Athenians ἀπόρητα; that is, 'things of which the export is forbidden', rope, water-skins, timber, wax, and pitch. See the Scholiast on Aristophanes' *Clouds* [rather *Frogs*, line 365], and *Knights* [line 282].

² See Paruta, Book VII.

Procopius,
Gothic War, I
[iii].

[*On Benefits*, VII.
xx.]

On Duties,
I. xxx
[144].

[II. ii. 6.]
Decretals,
V. vi. 6
and 17.

If he who furnishes supplies has not yet caused me injury, but has wished to do so, I shall have the right, through the retention of his goods, to oblige him to give security for the future, by means of hostages, by pledges, or in some other way.

If, moreover, the injustice of my enemy toward me is palpably evident and the one who furnishes supplies to him strengthens him in a very wicked war, in that case the latter will be responsible for the injury, not only by civil law but also by criminal law, just as one would be who should deliver an obviously guilty party from a judge who is about to inflict punishment. On this ground it will be permissible to pass upon the furnisher of supplies a sentence which suits his crime, in accordance with what we have said regarding punishments; within the limits there indicated he may even be despoiled.

4. For the reasons which have been stated, those who engage in war usually address public proclamations¹ to other peoples, with

¹ See the examples in the joint war against the Egyptians, Saracens, and others; *Decretals*, I. xxxvi. 11; V. vi. 11; *Extravagantes*, viii. un.; *Extravagantes Communes*, V. ii. 1.

There has been published in Italian a book called *Consolato del Mare*, in which have been collected the edicts of the emperors of Greece and Germany, and of the kings of France, Spain, Syria, and Cyprus; also those of the Balearic Isles, the Venetians, and the Genoese. In title cclxxiv of that book questions of the kind under consideration are discussed, and the following principles are stated:

If both the ship and the cargo belong to the enemy, the case is clear that they become the property of those who take them; if, however, the ship belongs to those who are at peace, but the cargo to the enemy, the belligerents may force the ship to convey the cargo to some port belonging to them, upon condition, however, of paying the cost of the voyage to the owner of the vessel. On the other hand, if the ship belongs to the enemy, but the cargo to others, the latter must bargain for the price of the vessel; or, if the shippers do not wish to bargain, they must be compelled to go with the ship to some port belonging to the side of the captor, and to pay to the captor the price due for the use of the vessel.

In Holland, in the year 1438, when the Dutch were at war with Lübeck and other cities on the Baltic and the Elbe, in a full meeting of the Senate it was decided that merchandise clearly belonging to others, even if it were found in vessels of enemies, did not form part of the booty; and since then this has been recognized as the law there. This was also the view of the king of Denmark, when, in 1597, he sent an embassy to the Dutch and their allies to claim for his subjects freedom of navigation and of carrying merchandise to Spain, with which the Dutch were waging a very bitter war.

In France there has always been granted to those at peace freedom to carry on commerce, even with those who were enemies of the French. So indiscriminately has such freedom been taken advantage of that the enemy have often concealed their property under the names of others, as appears from an edict of the year 1543, chap. xlii, which has been carried over into an edict of the year 1584, and subsequent edicts. In these edicts it is expressly provided that it is permissible for those on friendly terms with the French to carry on commerce in time of war, provided that this is done in their own ships, and by their own people, ships, and cargoes; it is permissible to carry their goods wherever they may wish, provided that these goods shall not be material serviceable in war, by means of which they wished to help the cause of the enemy; in case material serviceable for war should be transported, the French are permitted to take such material for themselves, paying a fair price for it. Here we must note two things; by these [438] laws material of war did not become legitimate spoil, and innocent merchandise was much farther removed from the same danger.

I should not deny that the northern nations have at times made use of another right, but in different ways, and having in view rather a temporary advantage than the maintenance of permanent justice. For when, making a pretext of their own wars, the English interfered with the commerce of the Danes, for this cause war arose between the peoples with the result that the Danes imposed tribute upon the English. Although the cause of the payment was changed, the name of it, *Danegeld*, remained until the time of William [the Conqueror], who founded the dynasty now ruling in England; this is recorded by the very reliable De Thou, in his history of the year 1589 [XCVI. xv].

Again, Elizabeth, the wisest queen of England, in the year 1575, sent Sir William Winter and Robert Beal, Secretary of the Royal Council, to Holland in order to make it plain that the English could not suffer the Dutch, in the very midst of Holland's war with Spain, to detain English ships which had

the object of making clear both the justice of their cause and the probable hope of enforcing their right.

5. In this inquiry we have referred back to the law of nature for the reason [427] that in historical narratives we have been

sailed for Spanish ports. This is reported by Van Reyd for the year 1575 in his *Dutch History*, and by the Englishman Camden for the following year. However, when the English had themselves become enemies of the Spaniards and were interfering with the exercise of the right of navigation to Spain on the part of German cities, from the controversial writings of both peoples, which deserve to be read for an understanding of this controversy, it appears that the English had availed themselves of such interference without any clear right. It is to be noted that the English themselves in their writings admit this, when they adduce as the two chief points in support of their case that the things which were being carried by the Germans to Spain were material for war, and that previous treaties had forbidden such transportation.

Such treaties were afterward made by the Dutch and their allies with Lübeck and its allies in 1613, providing that neither the one party nor the other should permit subjects of the enemy to trade within their territory, or aid the enemy with money, soldiers, ships, or provisions. Later, in 1627, it was agreed between the kings of Sweden and Denmark that the king of Denmark should prevent all commerce with the people of Danzig, who were enemies of Sweden, and should not permit any merchandise to pass through the Cimbrian Strait [Baltic Sound] to the other enemies of Sweden; for these services the king of Denmark stipulated certain advantages for himself.

These, however, are special agreements, from which no inference can be drawn which would be binding upon all. This was in fact said also by the Germans in their writings, that not all merchandise was excluded by the treaties in question but only such merchandise as had been imported into England or manufactured there. The Germans, nevertheless, were not the only ones who opposed the English when the latter forbade commerce with their enemy. Even Poland sent an embassy and complained that the law of nations was being infringed upon when, because of the war between England and Spain, the Poles were deprived of the freedom of commercial relations with the Spaniards; this is related under the year 1597 by Camden and Van Reyd, whom we have cited already.

Moreover, after the Treaty of Vervins had been made with Spain, while Elizabeth, queen of England, remained at war, the French refused to accede to the request of the English that the English should be allowed to search French ships that were sailing to Spain, in order that munitions of war might not be secretly conveyed therein; the reason alleged was that this was seeking a pretext for plundering and disturbing commerce. In the treaty which the English made with the Dutch and their allies in 1625, an agreement was reached that other nations, to whose interest it was that the greatness of Spain should be diminished, should be invited voluntarily to forbid commerce with the Spaniards; if, nevertheless, the nations should not do this of their own accord, it was decided that vessels should be searched to see [439] if they carried any war material, but that otherwise neither the ships nor their cargoes should be detained, and that damage should not be done on this pretext to those who remained at peace.

In the same year it happened that certain men sailed from Hamburg for Spain in a ship laden chiefly with military stores; these stores were seized by the English, but the value of the rest of the merchandise was paid. The French, however, when French ships sailing for Spain were confiscated by the English, made it plain that they would not permit such procedure.

We have, therefore, well stated the case in saying that public proclamations are required. The English themselves came to hold the same opinion. An example of such a proclamation made by them is given by Camden under the years 1591 and 1598. However, such proclamations have not always been obeyed, and distinctions have been made between times, causes, and places. In 1458, in fact, the city of Lübeck decided that it would not obey the proclamation made by the city of Danzig, forbidding them to carry on trade with Malmö and Memel, then at war with Danzig. Similarly the Dutch in 1551 refused to obey when Lübeck notified them that they should refrain from commerce with the Danes, who were then their enemies.

In 1522, when there was war between the Swedes and the Danes, the king of Denmark requested the Hanseatic cities not to carry on commerce with the Swedes. Some of the cities, being in need of his friendship, complied, but the others did not. When war was raging between Sweden and the king of Poland, the Dutch never suffered themselves to be prohibited from commerce with one or the other nation. The Dutch, moreover, always restored to France the French ships which on their way to or from Spain were intercepted by Dutch vessels, Holland and Spain being at war. See the speech of Louis Servin, one time royal advocate, delivered in 1592 in the case of citizens of Hamburg.

But the same Dutch did not permit merchandise to be brought by the English into Dunkirk, off which they kept a fleet: just so the city of Danzig, in 1455, notified the Dutch not to carry anything into the city of Königsberg, as Gaspar Schütz narrates in his *Prussian History*. Add Cabedo, *Decisiones*, xlviii. 2, and Seraphinus de Freitas in his book *On the Just Asiatic Empire of the Portuguese*, where he cites various others.

unable to find anything established by the volitional law of nations¹ to cover such cases. The Carthaginians sometimes captured Romans who had brought supplies to their enemies; and they surrendered such persons to the Romans who demanded them. When Demetrius was occupying Attica with an army, and had already taken the near-by towns of Eleusis and Rhamnus and was intending to starve Athens into surrender, he hanged both the master and the pilot² of a ship that attempted to carry in grain; having in this way deterred others he made himself master of the city.

Polybius,
I [lxxxiii].

Plutarch,
Demetrius
[xxxiii =
p. 904 E].

VI.—*Whether it is permissible to use a ruse in war*

1. So far as the manner of conducting operations is concerned, violence and frightfulness are particularly suited to wars. The question is often raised, however, whether one may resort to ruses also. Homer, at any rate, said that one must harm his foe—

By ruse or violence, by open ways or hidden.

[Cf. Ho-
mer,
Odyssey,
I. 296 ;
Stobaeus,
liv. 46.]
[*Isthmaean*
Hymns,
iii. 69.]

In Pindar we find :

And every means must be employed
To bring the foeman low.

[*Aeneid*,
II. 390.]

In Virgil there is also this :

Whether craft or valour, who would ask in war ?

Soon there follows,

Ripheus, who among the Trojans was the one most just,
And most observant of the right.

[II. 426 f.]

We read that Solon, who had a famous reputation for wisdom, sought to follow this type. Silius [Italicus], narrating the exploits of Fabius Maximus, says :

Deceit henceforth on valour's side is placed.

[Plutarch,
Solon, viii
= p. 82.]
XV [327].

2. In Homer Ulysses, the typical man of wisdom, is at all times full of wiles against the enemy; whence Lucian deduced the rule that those who deceive the foe deserve praise. Xenophon asserted that in war nothing is more useful than deceptions. In Thucydides Brasidas says that the renown won by the stratagems of war³ is

Lucian,
*Philo-
pseudes*
[begin-
ning].
Xen.,
Training
of Cyrus,
I [vi. 29 f.];
and *On*
*Horseman-
ship* [The
Cavalry
*Com-
mander*,
v. 9].

¹ The learned Jan de Mers has much on this topic in his *History of Denmark*, I and II. There you will see that Lübeck and the Emperor are for commercial intercourse, and the Danes against it. See also Krantz, *Vandalica*, XIV [XIV. xxix]; De Thou, on the aforementioned year 1589, *Histories*, XCVI [XCVI. xv]; and Camden, besides the places previously cited, on the years 1589 and 1595, where the dispute between the English and the Germans, who are called Hanseatics, is discussed.

² Not very different is the incident related of Pompey by Plutarch in his *History of the Mithridatic War* [*Life of Pompey*, xxxix = p. 639 E]: 'He placed guards at the Bosphorus to watch for any traders who might sail in; for those who were caught the penalty was death.'

³ So says Virgil also, *Aeneid*, XI [XI. 515], and Sallust, who is cited by Servius.

Thuc.,
V [ix].
Plutarch,
Apoth.

[= p.
209 B].
Polybius,
IX [xii].
V [100].

Plutarch,
Marcellus
[xxii = p.
311 B].

[*Lysander*,
vii = p.
437 A.]

[*Philopoemen*,
xiii = p.
363 E.]

[XVII.
v. 6.]

Dig. IV.
iii. 1. § 3.
Digest,
XLIX. xv.
26.

On Joshua,
qu. x [On
*Hepta-
teuch*, VI.
x].
*On the
Priest-
hood*,
I [viii].

particularly conspicuous; and in Plutarch Agesilaus declares that to deceive an enemy is both just and permissible.

Polybius thinks that what is accomplished by main force in war is to be considered of less importance than what is done by taking advantage of opportunities and by the use of deception. Hence Silius represents Corvinus as saying :

War must be waged with guile; ¹ force brings less fame to the leader.

Similar, according to Plutarch, was the view even of the stern Spartans: he observes that a larger victim was sacrificed by the one who had gained a victory through a ruse than by him who had won by open fighting. The same writer thinks highly of Lysander ² for 'varying with ruses most of the operations of war'. Plutarch counts it among the merits of Philopoemen that, having been trained in the Cretan system, he combined the straightforward and honourable method of fighting with craft and ruses. It is a saying of Ammianus that 'All successful issues of war are to be praised without distinction of valour or guile'.

3. The Roman jurists call it a good ruse 'whenever any one lays a plot against the enemy'; and again, they say that it makes no difference whether any one escapes from the power of the enemy by force or by trickery. This is 'deception which cannot be censured, such as that of a general', as Eustathius notes in his commentary on the fifteenth book of the *Iliad*. Among the theologians, Augustine declares: 'When one undertakes a righteous war, it makes no difference, [428] in respect to justness, whether he fights openly or by ambuscades.' Chrysostom says that generals who have won a victory by a ruse receive the highest praise.

4. However, there is no lack of opinions which seem to advocate the opposite view, and some of these we shall present below. The final conclusion will depend upon the answer to the question whether deceit belongs to the class of things that are always evil, in regard to which the saying is true that one must not do evil that good may come; or whether it is in the category of things which from their very nature are not at all times vicious but which may even happen to be good.

There is a similar saying of Mohammed, 'el-harbu hud'atun', [440] that is, 'battles require deceit'. According to Virgil [*Aeneid*, XII. 336], in the following of Mars are:

Wrath and ambuscades.

Thereon Servius comments: 'He shows that he is accompanied not only by valour, but also by stratagems.'

¹ Plutarch compares him to Sulla, in whose soul Carbo used to say there were a lion and a fox [*Sulla*, xxviii = p. 469 E].

VII.—*In a negative action, deceit is not in itself unpermissible*

It must be observed, then, that deceit is of one sort in a negative action, of another sort in a positive action. The word deceit I extend, on the authority of Labeo, even to those things which occur in a negative action; he classes it as deceit, but not harmful deceit, when any one 'protects his own or another's possessions through dissimulation'. It cannot be doubted that Cicero spoke too sweepingly when he said: 'Pretence and dissimulation must be removed from every phase of life.' For since you are not required to reveal to others all that you know or desire, it follows that it is right to dissimulate, that is to conceal and hide some things from some persons. 'One may', said Augustine,¹ 'conceal the truth wisely, by the use of dissimulation in some degree'. Cicero himself in more than one place admits that such dissimulation is absolutely necessary and unavoidable,² especially for those to whom the care of the state is entrusted.

The narrative of Jeremiah (*Jeremiah*, chap. xxxviii) offers a notable example touching this point. The prophet had been questioned by the king as to the outcome of the siege, but in the presence of the princes, at the king's request, he wisely concealed that fact, assigning another and yet not untrue reason for the conference. With this, again, we may class the action of Abraham³ in concealing his marriage and calling Sarah his sister, that is, according to the usage of the time, a near relative.

VIII.—*Deceit in a positive action falls under two heads: deceit exhibited in actions not limited in significance, and that exhibited in actions the significance of which is, as it were, fixed by agreement; it is shown that deceit of the former sort is permissible*

1. Deceit which consists in a positive action, if it is exhibited in acts, is called pretence; if in words, falsehood. Some persons establish this distinction between the two terms, because they say that words are naturally the signs of thoughts, while acts are not. But the contrary is true, that words by their very nature and apart from the human will have no significance, unless perchance a word is confused and 'inarticulate', such as is uttered by a person in grief, when it comes rather under the term act than speech.

If now the assertion is made that the nature of man possesses

¹ Also on Psalm v, verse 'Thou wilt destroy all': 'It is one thing to lie, and another to conceal the truth.' This is cited in the *Decretum*, II. xxiii. 2 [II. xxii. 2. 14].

² See Chrysostom, *On the Priesthood*, I [I. viii. end].

³ 'He wished the truth to be concealed, but not to utter a lie': Augustine, *On Genesis*, qu. xx [On *Heptateuch*, I. xxvi], quoted by Gratian, in the aforementioned *Decretum*, II. xxii. 3 [II. xxii. 2. 22].

Dig. IV.
iii. 1. § 2.

On Duties,
III [xv.
61].

Against
Lying, x;
Thomas,
II. ii, qu.
40, art. 3,
ans. to
obj., and
qu. 71,
art. 7;
Sylvester,
word
bellum, pt.
1, no. 9.
Cicero,
For Milo
[xxiv. 65];
Letters,
VII. ix
[X. viii.
4]; *For*
Gn. Plancius
[vi.
16].

Genesis,
xx;
Thomas,
II. ii, qu.
110, art. 3,
ans. to
obj.

superiority over that of other living creatures in this, that it can convey to others the ideas of the mind and that words were invented for this purpose, that is true. But it must be added that such conveying of thought is accomplished not by means of words alone but also by signs,¹ as among dumb persons, whether these signs naturally have something in common with the thing signified or whether they possess significance merely by agreement.

Similar to these signs are those characters which, as Paul the jurist says,² do not express words formed by the tongue but objects themselves, either from some resemblance, as in the case of hieroglyphic signs, or by mere arbitrary convention, as among the Chinese.

2. At this point then we must introduce another distinction, such as we employed to remove the ambiguity in the term law of nations. For we said that the term law of nations includes both what is approved by separate nations without mutual obligation and what contains a mutual obligation in itself. Words, then, and signs, and the written characters we have mentioned, were invented as a means of expression under a mutual obligation; as Aristotle called it, 'by convention'. This is not the case with other things. Hence it comes about that we may avail ourselves of other things, even if we foresee that another person will derive therefrom a false impression.³ [429] I am speaking of what is intrinsic, not of what is incidental. And so we must give an example, in which no harm follows as a consequence,⁴ or in which the harm itself, without consideration of the deceit, is permissible.

3. An example of the former case is found in Christ, who in the presence of His companions on the way to Emmaus 'made as though He would' go further, that is, gave the impression of intending to go further; unless we prefer truly to believe that He wished to go further, on condition, nevertheless, that He should not be detained by a great effort. Thus God is said to will many things which do not come to pass, and in another place Christ is said to have intended to pass by the Apostles who were in a ship, that is had He not been urgently entreated to embark.

Another example may be found in Paul's circumcision of Timothy, when he was well aware that the Jews would interpret this as though the injunction of circumcision, which had in fact already

¹ Pliny, on the nation of the Ethiopians, [*Natural History*], VI. xxx, says: 'Some of them use noddings of the head and movements of the limbs instead of speech.' See *Decretals*, IV. i. 25.

² 'We are not', he says, 'bound by the form of the letters, but by the speech which the letters express, in so far as it is agreed that what is indicated by the writing has not less force than what is indicated by words formed by the tongue.' In a truly philosophic spirit has he said 'it is agreed', in order to show that these things have force 'by convention' (*ἐκ συνθήκης*).

³ See Augustine, *On Christian Doctrine*, II. xxiv [II. xxxiv].

⁴ As in the deed of Michal, *1 Samuel*, xix. 16.

Digest,
XXXIII.
x. 7. § 2.

Digest,
XLIV.
vii. 38.

*On Inter-
pretation*,
iv.

Luke,
xxiv. 28.

Mark, vi.
48.

Acts, xvi.
3.

been done away with, was still binding upon the children of Israel, and as though Paul and Timothy themselves thought so. However, Paul did not have this in view, but merely sought to obtain for himself and Timothy the opportunity of associating with the Jews on more intimate terms. After the removal of the divine law circumcision no longer implied such an obligation by agreement; and the evil arising from the error, which followed for the time being, and was later to be corrected, was not of so great importance as the good which Paul sought, that is the introduction of the truth of the Gospel.

This sort of pretence the Greek fathers often call 'management'.¹ In regard to it there is a notable opinion of Clement of Alexandria, who in a discussion of the good man speaks thus: 'For the benefit of his neighbour he will do things which otherwise he would not do of his own accord and original purpose.' Of this nature was the act of the Romans who threw bread from the Capitol into the posts of the enemy that they might not be believed to be distressed by famine.

4. An example illustrating the latter case is found in a pretended flight, such as Joshua ordered his men to make so as to take Ai by storm, and such as other commanders have frequently ordered. For in this instance we regard the injury which follows as legitimate according to the justice of war. Moreover, flight itself has no significance by agreement, although an enemy may interpret it as a sign of fear; such interpretation the other party is not obliged to guard against in his use of his freedom to go hither and thither, more or less rapidly, and with this or that gesture or outward appearance. In the same category we may class the actions of those of whom we read that they made use of the weapons, standards, uniforms, and tents of their enemies.

5. All these things are in fact of such a sort that they may be employed by any one at his discretion, even contrary to custom; for the custom itself was introduced by the choice of individuals, not as it were by universal consent, and such a custom constrains no one.

IX.—*The difficulty of the inquiry in respect to the second sort of deceit is indicated*

1. Of greater difficulty is the discussion with respect to those types of deceit which, if I may so say, are in common use among men in commerce and in which falsehood in the true sense is found.

¹ For so this is to be called, and not *ἀνάχη*, that is, 'deceit', according to Chrysostom in the work previously cited, *On the Priesthood*, I [I. ix].

The same author comments as follows *On First Corinthians*, iv. 6 [Homily XII, i]: 'Here there was no deceit, but a sort of obedience and management.' Also, in his comment on ix. 20 [Homily XXII, iii]: 'For that he might correct those who were in truth such, he himself became such, not in truth being other than what he was, but pretending to be, doing such things as they did, but not with the same purpose.' With this we may associate the pretended madness of David.

[*Stromata*, VII. ix.]

Livy, V [xlvi. 4].

Joshua, viii; Sylvester, word *bellum*, pt. 1, no. 9.

There are many injunctions against falsehood in Holy Writ. 'A righteous man', that is the good man, 'hateth lying' (*Proverbs*, xiii. 5); 'Remove far from me falsehood and lies' (*Proverbs*, xxx. 8); 'Thou wilt destroy them that speak lies' (*Psalms*, v. 6); 'Lie not one to another' (*Colossians*, iii. 9).

This point of view is rigidly maintained by Augustine; and even among the philosophers and poets there are those who are seen to be in sympathy with it. Well known is this saying of Homer :

[*Iliad*,
IX, 312 f.]

To me as hateful as the jaws of Hell is he
Whose mind thinks other than his tongue reveals.

[430] Sophocles says :

[Fr. of
Creusa, in
Stobaeus,
xii. 4.]

What is foreign to truth it is never fitting to utter.
Yet, if the telling of truth will bring sure doom to another,
Pardon to him must be granted who does that which is not fitting.

[Menan-
der, in
Stobaeus,
xii. 16 a.]

Cleobulus has this line :

Falsehood is hateful to him who in his heart is wise.

[*Nicom.*
Ethics,
IV. xiii.]

Aristotle said : 'Falsehood in itself is base and worthy of censure, but truth is noble and deserving of praise.'

[*On Lying*,
i. 1 and
xviii. 38.]
Plato, *Re-*
public, I,
II and V.
Xen.,
Socrates,
IV [*Me-*
morab., IV.
ii. 16 ff.]
Plutarch,
Contrad.
of Stoics
[xlvi = p.
1055.
1056].
Quintilian,
[*Inst.*,]
XII. i [38].
Nic. Eth.,
VII. iii ;
IV. viii
[II. vii ;
IV. xiii].
[*On Nic.*
Ethics,
V. viii.]

2. Nevertheless authority is not lacking in support of the opposite view also. In the first place in Holy Writ there are examples of men cited without a mark of censure ;¹ and, in the second place, there are the declarations of the early Christians, Origen, Clement, Tertullian, Lactantius, Chrysostom, Jerome, and Cassian, indeed of nearly all, as Augustine himself acknowledges. Although disagreeing with them, he nevertheless recognizes that it is 'a great problem', 'a discussion full of dark places', 'a dispute in which the learned are at variance', to use words that are all his own.

3. Among the philosophers there stand openly on this side Socrates and his pupils Plato and Xenophon ; at times, Cicero ; if we may trust Plutarch and Quintilian, also the Stoics, who among the endowments of the wise man include ability to lie in the proper place and manner. In some places Aristotle too seems to agree with them, for his phrase 'in itself', which we have quoted, may be interpreted generally, that is, considering the thing without regard to attendant circumstances. The commentator upon Aristotle, Andronicus of Rhodes, thus speaks of the physician who lies to a sick man : 'He deceives indeed, but he is not a deceiver,' adding the reason : 'for his aim is not the deception of the sick man, but his cure'.

¹ Irenaeus learned from the instruction of an ancient presbyter, and taught that : 'We should not become accusers in things which the Scriptures simply state, but do not censure.' The passage is in Book IV, chap. 1 [IV. xxxi].

4. Quintilian, whom I have mentioned, in defending this same view says that there are many things which are made honourable or base, not so much by the nature of the facts as by their causes. Says Diphilus :

The falsehood told for safety's sake,
If I may judge, can cause no detriment.

[*Inst. Or.*,
XII. i. 36.]

[Stobaeus,
xii. 12.]

In Sophocles, when Neoptolemus asks :

Do you not think a lie is base ?

[*Philocletes*,
108 f.]

Ulysses answers :

If safety from the lie arise, I do not.

Similar views may be cited from Pisander and Euripides. In Quintilian, again, I read : ' For to tell a lie is sometimes permissible even for the wise man.' Eustathius, Metropolitan of Thessalonica, commenting *On the Odyssey*, II, writes : ' The wise man will lie when occasion demands ' ;¹ and on this point he adduces evidence from Herodotus and Isocrates.

[Euripides
Hecuba,
247 f.]
[*Inst. Or.*,
II. xvii.
27.]

X.—*Not every use of an expression, which is known to be taken in another sense, is unpermissible*

I. Perhaps we may find some way of reconciling such divergent views in a wider or more strict interpretation of the meaning of falsehood.

Thomas
Aquinas,
II. ii, qu.
110, art. 1
ans. to
obj.

Adopting the point of view of Gellius when he distinguishes between telling an untruth and lying, we do not understand as a falsehood what an ignorant person happens to say ;² but we are concerned with that which is consciously uttered with a meaning that is at variance with the idea in the mind, whether in understanding or in an act of will. For ideas of the mind are what are primarily ' and immediately ' indicated by words and similar signs ; so he does not lie who says something untrue which he believes to be true, but he lies who says that which is indeed true but which he believes to be false. [431] Falsity of meaning, therefore, is that which we need to exemplify the general nature of falsehood.

Gellius,
XI. xi.

From this it follows that, when any term or phrase has ' several meanings ' , that is, may be understood in more than one way, either

¹ On occasion, as Donatus says, *On [Terence's] Brothers*, IV. iii. [IV. iii. 18] : ' And some writers on moral obligations think that it is right for one to deceive on occasion.' Cicero, *For Quintus Ligarius* [v. 16], calls such a falsehood ' an honourable and merciful lie '.

² ' Nothing except a guilty mind makes a guilty tongue ' , and ' No one is to be considered a liar who has said something false which he thinks to be true, because, so far as it is in his power, he himself does not deceive, but is deceived ' . These are the words of Augustine, in his *On the Words of the Apostle*, XXVIII [= *Sermones de Scripturis*, clxxx. 2], and *Enchiridium*, xxii [xviii], cited by Gratian, in the *Decretum*, II. xxii. 1 [II. xxii. 2. 3 and 4].

from common usage, or the practice of an art, or some figure of speech easily understood, then, if the idea in mind fits one of these meanings, it is not held to be a lie, even if it is thought that he who hears it will understand it in another way.¹

2. It is indeed true that the rash employment of such a mode of speech is not to be approved. It may nevertheless be justified by incidental causes, as, for instance, if thereby aid is rendered in the instruction of one who has been entrusted to our care, or in avoiding an unfair question.

Christ Himself gave an example of the former sort, when He said: 'Lazarus our friend is fallen asleep', which the Apostles understood as though it were said of the sleep of the living. Again, what He had said about rebuilding the Temple, meaning it in regard to His own body, He knew the Jews took with reference to the actual Temple. Similarly when He promised to the Apostles twelve exalted seats next to the King, like judges of the tribes among the Jews, and elsewhere that they should drink of a new wine in His Father's kingdom, He seems to have been fully aware that they took this to refer to none other than some kingdom in this life, with the expectation of which they were filled until the very moment when Christ was about to ascend up into heaven. On another occasion also He spoke to the people through the indirectness of parables, that those who heard Him might not understand, unless, that is, they should bring thereto such earnestness of mind and readiness to be taught as were required.

An example of the latter use may be given from profane history in the case of Lucius Vitellius, whom Narcissus pressed to explain his ambiguities and reveal the truth fully, but whom he could not force to refrain from giving replies that were dubious and capable of varied interpretation.² Here applies a saying of the Jews:³ 'If any one knows how to use ambiguous language, it is well: but if not, let him remain silent.'

3. On the other hand, a case may arise when it is not only not praiseworthy but even wicked to employ such a mode of speech; as

¹ Just as [441] Abraham spoke deceptively to his servants; on this incident Ambrose [*On Abraham*, I. viii. 71] passes judgement with approval. He is followed by Gratian, after the aforementioned *Decretum*, II. xxii. 2. 20.

² The same Tacitus, *Histories*, III [III. iii], says: 'He spoke obscurely, with the intention of interpreting his words in such a way as might be advantageous.' Also [III. lii]: 'Having so phrased his statements that, according to the outcome, he might repudiate connexion with what was unfavourable, or assume credit for what was successful.'

³ To the Jews belongs the following also: 'It is permissible to speak ambiguously for the sake of a good thing.' This is cited by the erudite Manasses Ben-Israel in his *Conciliator*, qu. xxxvii.

Chrysostom, *On the Priesthood*, I [I. ix. end], says: 'He is rightly called a deceiver who avails himself of such a means unjustly, but not he who does so for a beneficial purpose.'

John,
xi. 11.

John, ii.
20-1.

Luke,
xxii. 30.

Matthew,
xxvi. 25
[xxvi. 29].

Acts, i. 6.

[*Matthew*,
xiii. 13.]

Tacitus,
Annals,
VI [XI.
xxxiv].

when the glory of God,¹ or the love due to our neighbour,² or reverence toward a superior, or the nature of the thing in question requires that everything which is thought in the mind shall be completely revealed. Just so in the case of contracts, we said that that must be made known which the nature of the contract is understood to demand; and in this sense we may not inaptly interpret the rule of Cicero, 'All falsehood must be removed from matters of contract', which is taken from the ancient Athenian law prohibiting 'the uttering of falsehoods in the market-place'. In these passages apparently the word falsehood receives so broad a meaning that it covers even an obscure statement. But this, strictly speaking, we have already excluded from the idea of a falsehood.

[II. xii. 9.]

[On
Duties,
III. xv.
61.]Demo-
sthenes,
Against
Leptines
[xx. 9 =
459.]

XI.—*The character of falsehood, in so far as it is unpermissible, consists in its conflict with the right of another; this is explained*

I. In order to exemplify the general idea of falsehood, it is necessary that what is spoken, or written, or indicated by signs or gestures, cannot be understood otherwise than in a sense which differs from the thought of him who uses the means of expression.

Upon this broader signification, however, a stricter meaning of falsehood must be imposed, carrying some characteristic distinction. This distinction, if we regard the matter aright, at least according to the common view of nations, can be described, we think, as nothing else than a conflict with the existing and continuing right of him to whom the speech or sign is addressed; for it is sufficiently clear that no one lies to himself, however false his statement may be.

By right in this connexion I do not mean every right without relation to the matter in question, but that which is peculiar [432] to it and connected with it. Now that right is nothing else than the liberty of judgement³ which, as if by some tacit agreement, men who speak are understood to owe to those with whom they converse. For this is merely that mutual obligation which men had willed to introduce at the time when they determined to make use of speech

¹ Philo, *On the Life of Moses* [III. xxi]: 'I am speaking of things which concern the glory of God, in regard to which even one who is otherwise of a lying disposition must speak the truth. For truth is the companion of God.' Augustine, *Letters*, viii [xxviii. 3]: 'It is one question, whether a good man should ever lie; and another question, whether a writer of the Holy Scriptures should lie.' See what follows below in III. i. 15.

² Aeschylus, *Prometheus Bound* [lines 609 ff.]:

Openly shall I say what you seek to hear,
In simple speech, and not in dubious phrase,
But as is right to hold discourse with friends.

³ Hence the Hebrews say that he who takes away the means of knowing 'steals the heart'; *Genesis*, xxxi. 20, 26-7, with the commentary of Onkelos thereon, and the *Septuagint*. Also Rabbi David in his *Book of Roots*, Rabbi Salomon in his commentary, and Aben-Ezra.

and similar signs ; for without such an obligation the invention of speech would have been void of result.

2. We require, moreover, that this right be valid and continuing at the time the statement is made ; for it may happen that the right has indeed existed, but has been taken away, or will be annulled by another right which supervenes, just as a debt is cancelled by an acceptance or by the cessation of the condition. Then, further, it is required that the right which is infringed belong to him with whom we converse, and not to another, just as in the case of contracts also injustice arises only from the infringement of a right of the contracting parties.

Perhaps you would do well to recall here that Plato, following Simonides, refers truth-speaking to justice ; that falsehood, at least the type of falsehood which is forbidden, is often described in Holy Writ as bearing false witness or speaking against one's neighbour ; and that Augustine himself in determining the nature of falsehood regards the will to deceive¹ as essential. Cicero, too, wishes that inquiry in regard to speaking the truth be referred to the fundamental principles of justice.

3. Moreover, the right of which we have spoken may be abrogated by the express consent of him with whom we are dealing, as when one says that he will speak falsely and the other permits it. In like manner it may be cancelled by tacit consent, or consent assumed on reasonable grounds, or by the opposition of another right which, in the common judgement of all men, is much more cogent.

The right understanding of these points will supply to us many inferences, which will be of no small help in reconciling the differences in the views which have been cited above.

XII.—*The view is maintained that it is permissible to say what is false before infants and insane persons*

The first inference is that even if something which has a false significance is said to an infant or insane person no blame for falsehood attaches thereto. For it seems to be permitted by the common opinion of mankind that

The unsuspecting age of childhood may be mocked.

Quintilian, speaking of boys, said : ' For their profit we employ many fictions.' The reason is by no means far to seek ; since infants and insane persons do not have liberty of judgement, it is impossible for wrong to be done them in respect to such liberty.

¹ Lactantius, *Institutes*, VI. xviii : ' Let him never lie in order to deceive or do harm.'

Republic,
I [v. end =
331 D].

[*Enchiridion*,
xxii.]
On Duties,
I [x. 31].

Lucretius
[I. 939].

[*Institutes
of Oratory*,
XII. i.
38.]

XIII.—*It is permissible to say what is false when he to whom the conversation is not addressed is deceived, and when it would be permissible to deceive him if not sharing in it*

1. The second inference is that, so long as the person to whom the talk is addressed is not deceived, if a third party draws a false impression therefrom there is no falsehood.

There is no falsehood in relation to him to whom the utterance is directed because his liberty remains unimpaired. His case is like that of persons to whom a fable is told when they are aware of its character, or those to whom figurative language is used in 'irony', or in 'hyperbole', a figure which, as Seneca says, reaches the truth by means of falsehood,¹ while Quintilian calls it a lying exaggeration. There is no falsehood, again, in respect to him who chances to hear what is said; the conversation is not being held with him, consequently there is no obligation toward him. Indeed if he forms for himself an opinion from what is said not to him, but to another, he has something which he can credit to himself, not to another. In fine, if, so far as he is concerned, we wish to form a correct judgment, the conversation is not a conversation, but something that may mean anything at all.

On Benefits, VII. xxiii.

[*Inst. Or.*, VIII. vi. 67.]

2. Cato the censor therefore committed no wrong in falsely promising aid to his allies, nor did Flaccus, who said to others that a city of the enemy had been stormed by Aemilius, although in both cases the enemy was deceived. A similar ruse is told of Agesilaus by Plutarch. Nothing in fact was said to the enemy; the harm, moreover, which [433] followed was something foreign to the statement, and of itself not unpermissible to desire or to accomplish.

Livy, XXXIV [xii].

Appian, *Spanish Wars*

[xiii. 8r.]
[*Agesilaus*, xvii = p. 605 c.]

To this category Chrysostom and Jerome² refer Paul's speech, in which at Antioch he rebuked Peter for being too zealous a Jew. They think that Peter was well aware that this was not done in earnest; at the same time the weakness of those present was humoured.

[Chrysost. *On Gal.*, ii. 7-8;
Jerome, *Letters*, cxvi. 10.]
[*Galatians*, ii. 14.]

XIV.—*It is permissible to say what is false when the conversation is directed to him who wishes to be deceived in this way*

1. The third inference is that, whenever it is certain that he to whom the conversation is addressed will not be annoyed at the infringement of his liberty in judging, or rather will be grateful therefor, because of some advantage which will follow, in this case

¹ 'He makes unbelievable assertions, in order to arrive at what is believable.' Seneca, in the same passage.

² Also Cyril, *Against Julian*, IX, near the end. Not very differently also Tertullian, *Against Marcion*, Books I and III [I. xx; IV. iii].

also a falsehood in the strict sense, that is a harmful falsehood, is not perpetrated; just so a man does not commit theft who with the presumed consent of the owner uses up some trifling thing in order that he may thereby secure for the owner a great advantage.

In these matters which are so certain, a presumed wish is taken as one that is expressed. Besides, in such cases it is evident that no wrong is done to one who desires it. It seems, therefore, that he does not do wrong who comforts a sick friend by persuading him of what is not true, as Arria did by saying what was not true to Paetus after the death of their son; the story is told in the *Letters* of Pliny.¹ Similar is the case of the man who brings courage by a false report to one who is wavering in battle, so that, encouraged thereby, he wins victory and safety for himself, and is thus 'beguiled but not betrayed', as Lucretius says.

2. Democritus says: 'We must speak the truth, wherever that is the better course.' Xenophon writes: 'It is right to deceive our friends, if it is for their good.' Clement of Alexandria concedes 'the use of lying as a curative measure'. Maximus of Tyre says: 'A physician deceives a sick man, a general deceives his army, and a pilot the sailors; and in such deception there is no wrong.' The reason is given by Proclus in commenting on Plato: 'For that which is good is better than the truth.'

To this class of untruths belong the statement reported by Xenophon,² that the allies would presently arrive; that of Tullus Hostilius, that the army from Alba was making a flank movement by his order; what histories term the 'salutary lie' of the consul Quinctius, that the enemy were in flight on the other wing; and similar incidents found in abundance in the writings of the historians. However, it is to be observed that in this sort of falsehood the infringement upon the judgement is of less account because it is usually confined to the moment, and the truth is revealed a little later.

XV.—*It is permissible to say what is false when the speaker makes use of a superior right over one subject to himself*

1. A fourth inference, akin to the foregoing, applies to the case when one who has a right that is superior to all the rights of another³ makes use of this right either for his own or for the public

¹ III. xvi.

² 'And when Agesilaus had come into Boeotia and had learned that Pisander had been beaten in a naval battle by Pharnabazus and Conon he gave orders that the opposite should be told to his troops; and he came forth wearing a wreath, and he offered sacrifice as if in gratitude for a victory.' Plutarch, *Agesilaus* [xvii = p. 605 C].

³ In the *Iliad*, II [II. 73 f.], Agamemnon the leader of the Greeks says:

But first I shall prove the Greeks with words, as my right is,
And bid them swiftly to flee with their brazen ships

[I. 941.]

[Stobaeus,
xii. 13.]
[*Training*
of Cyrus,
I. vi. 31.]
[*Stromata*,
VII. ix.
53.]
[*Dissertations*,
xix.
3.]

Socrates,
IV [*Memorabilia*,
IV. ii. 17].
Livy,
XXXIV
[I. xxvii.
8].
[Livy, II
lxiv. 6.]

good. This especially Plato seems to have had in mind when he conceded the right of saying what is false to those having authority. Since the same author seems now to grant this privilege to physicians,¹ and again to deny it to them, apparently we ought to make the distinction that in the former passage he means physicians publicly appointed to this responsibility, and in the latter those who privately claim it for themselves. Yet Plato also rightly recognizes that falsehood is not becoming to deity, although deity has a supreme right over men, because it is a mark of weakness to take refuge in such devices.

Republic,
III [iii =
389 D].

[*Republic*,
II = 382
D E.]

2. An instance of blameless mendacity, of which even Philo approves, may perhaps be found in Joseph,² who, when ruling in the king's stead, accused his brothers first of being spies, and then of being thieves, pretending, but not really believing, that they were such. Another instance is that of Solomon, who gave an example of wisdom inspired by God, when to the women who were disputing over the child he uttered the words which indicated his purpose to slay it, although his real intent was the furthest possible from such a course, and his desire was to assign to the true mother her own offspring. [434] There is a saying of Quintilian: 'Sometimes the common good requires that even falsehoods should be upheld.'

[*On Joseph*,
xxviii.]

[*1 Kings*,
iii. 25.]

II. xviii
[*Inst. Or.*,
II. xvii.
36].

XVI.—*It is perhaps permissible to say what is false when we are unable in any other way to save the life of an innocent person, or something else of equal importance*

A fifth inference may be applicable to cases where the life of an innocent person, or something else of equal importance, cannot be saved without falsehood, and another person can in no other way be diverted from the accomplishment of a wicked crime.³ Such was the deed of Hypermnestra, who is often lauded for this reason:

Nobly false ⁴ and for all time
A maiden famed.

Horace,
Odes, III.
xi [35].

¹ [442] Chrysostom, in the aforementioned *On the Priesthood*, I [I. ix], adduces examples of physicians.

² 'When with pretended severity he accuses his brothers of espionage', says Cassiodorus [Peter of Blois] in his *On Friendship*.

³ Augustine, *On Psalm V* [§ 7], cited by Gratian, in *Decretum*, II. xxii. 2. 14, says: 'There are, however, two sorts of lies in which there is no great fault, yet which are not entirely free from fault. The one sort is told when we are joking, the other when we lie for the benefit of our neighbour. Now the first sort, which consists in a joke, is not so dangerous, because it does not deceive. For he to whom it is told knows that it has been told in jest. But the second sort of lie is still less dangerous, because it contains some element of kindness.'

Tertullian, *On Modesty* [chap. xix], classes among the sins of daily occurrence, to which we are all subject, the necessity of lying.

⁴ On this the Scholiast comments: 'Fittingly. For it is noble to lie for the sake of justice.' Of like tenor is what Chrysostom [*On Penitence*, VII. v] says of Rahab: 'O fair falsehood, O praiseworthy deception, not of one who breaks divine commands, but of one who is a guardian of the truth', or, as other manuscripts have it, 'guardian of true piety'.

XVII.—*The authors who have judged that falsehood spoken in the presence of enemies is permissible*

1. The principle which the learned generally lay down, that it is permissible to speak falsely to an enemy, goes beyond what we have just said. Accordingly, to the rule forbidding a lie the exception, unless against enemies, is added by Plato and Xenophon; also by Philo among the Jews, and by Chrysostom among the Christians.¹ To this exception you would perhaps refer the lie of the men of Jabesh when under siege, as recorded in Holy Writ, and the similar deception on the part of the prophet Elisha;² also that of Valerius Laevinus, who boasted that he had slain Pyrrhus.

2. To the third, fourth, and fifth of the conclusions which we have stated, applies the passage of Eustratius, Metropolitan of Nicaea, *On Nicomachean Ethics*, Book VI [VI. ix]:

He who gives good counsel does not necessarily speak the truth. It can in fact happen that he who plans aright makes falsehood itself a part of his plan, that he may lie intentionally, either to an enemy, in order to deceive him, or to a friend, to deliver the friend from evil; historical narratives are full of instances of this sort.

Quintilian says that, if a footpad must be deterred from killing a man, or if an enemy must be deceived to save the country, we shall find it necessary to praise in the wise man himself conduct that otherwise we should have to censure in slaves.

3. These doctrines do not meet with the approval of the school of writers of recent times, since in almost all matters they have chosen to follow Augustine³ alone of the teachers of antiquity. But the same school admits of unspoken interpretations, which are so repugnant to all practice that one may question whether it would not be more satisfactory to admit to certain persons the use of falsehoods in the cases we have mentioned, or in some of them (for I assume that nothing has been settled here), than so indiscriminately to exempt such interpretations from the definition of falsehood. Thus when they say 'I do not know', it may be understood as 'I do

In regard to the Egyptian midwives, Augustine [*On Heptateuch*, II, beginning] says: 'O great instinct of humanity, O pious lie uttered to save life!' Jerome, *On Ezekiel*, xxvii [xxxviii] and *On Isaiah*, lvi [lxv], praises these same midwives and believes that rewards, even eternal rewards, have been given to them. Also Ambrose, *Letters*, VI [V. 10], *To Syagrius*, and Augustine himself, *Against Lying*, *To Consentius*, chap. xv, varying, as often.

Tostado denies that there is sin in this. Augustine, *On Exodus*, II [*On Heptateuch*, II. i], and Thomas Aquinas, II. ii, qu. 110, art. 55, ans. to obj. 4, and Cajetan thereon, are doubtful. See, if you have the time, Erasmus, in his *Praise of Folly*, and the erudite Maes, *On Joshua*, ii. 5.

¹ He speaks thus: 'If you should call to account the most eminent generals, you would find that most of their victories have been won through deception; and yet such generals receive more praise than those who have won by open warfare.'

² A similar act of the same Elisha is recorded in *2 Kings*, viii. 10, according to the reading of the Masorites, which is followed by the Latin Vulgate version.

³ Augustine's later view in this matter has been opposed by the Abbot Rupert.

Republic, II [xxi=382 c]; Training of Cyrus, II [I. vi. 28], and Socrates, V [Memorabilia, IV. ii. 16]; Philo, *On the Migr. of Abr.* [On the Cherubim, v]; Chrysostom, *On the Priesthood*, I [viii]; *1 Samuel*, xi [10]; *1 Kings*, vi. 18 ff. [Frontinus, *Stratagem.*, II. iv. 9]. [*Inst. Or.*, XII. i. 39]. Thomas, II. ii, qu. 110, art. 1 and 3; Covarruvias, *On Sext.*, I. xviii. 2, pt. 1, § 5, no. 15; Soto, *De Iustitia*, V, qu. 6, art. 2; Toledo, IV. xxi; V. lviii; Lessius, *De Iustitia*, II. xlii, dub. 9.

not know so as to tell you'; and when they say 'I have not' it may be understood as 'so as to give you'; and other things of this sort which the common sense of mankind repudiates, and which, if admitted, will offer no obstacle to our saying that whoever affirms anything denies it himself, and whoever denies affirms.

4. It is assuredly quite true that in general there is no word which may not have a doubtful meaning;¹ for all words, in addition to the significance which is called that of the first notion, have another of a second notion,² and this significance varies in the different arts;³ moreover, words have different meanings also in metaphor and other figures of speech.

Again, I do not approve of the view of those who apply the term jokes to falsehoods which are uttered with a particularly serious expression and tone, as if they shrank from the word rather than the thing.

XVIII.—*The use of falsehood is not to be extended to statements containing a promise*

We must, however, bear in mind that what we have said regarding falsehood is to be applied to assertions, and such indeed as injure no one but a public enemy, but not to promises.⁴ For by a promise, as we have just begun to say, a new and particular right is conferred upon him to whom the promise is made.

This holds true even among enemies, without any [435] exception arising from the hostility existing at the time. It holds true not only in the case of promises actually expressed, but also in the case of those that are implied, as we shall show in discussing the demand for a parley when we come to the part that deals with the observing of good faith in warfare.

XIX.—*The use of falsehood is not to be extended to oaths*

This also must be repeated from the portion of our foregoing discussion which dealt with the subject of oaths, that whether the oath is assertive or promissory it has the force to exclude all exceptions which might be sought in the person of him with whom we are dealing. The reason is that an oath establishes a relation not only

[II. xiii]

¹ This view is supported by Chrysippus in Gellius, [*Attic Nights*,] XI. xii. It is championed also by Seneca, *On Benefits*, II. xxxiv: 'There is a vast number of things without name which we do not designate by characteristic terms, but by convenient borrowed names.'

² Augustine, *De Magistro* [vii. 20]: 'We have learned of no symbol which, among the things that it signifies, does not signify itself also.'

³ See what we have noted above, on III. i. 10.

⁴ Agesilaus, and with him Plutarch [*Agesilaus*. ix = p. 600 D], make this distinction: [443]. 'To violate sworn agreements is to despise the gods. Otherwise, to deceive the enemy with words is not only just but glorious, and brings glory and satisfaction together with gain.'

with a man, but also with God, to whom we are bound by the oath, even if no right arises for the man.

In the same place we have furthermore stated that in an oath we do not, as we do in other speech, admit that interpretations not wholly without warrant may be put upon words, in order to absolve us from falsehood; but we do require that the truth be spoken with the meaning which a man listening is supposed to understand in perfect good faith. Obviously, then, we must abhor the impiety of those who did not hesitate to assert that it is proper to deceive men by oaths just as boys do by means of dice.

XX.—*Nevertheless it is more noble, and more becoming to Christian simplicity, to refrain from falsehood even toward an enemy; this view is illustrated by comparisons*

1. We know, too, that certain types of fraud, which we have said were naturally permitted, have been rejected by some peoples and persons. But this does not happen because they view such means of deception as unjust, but because of a remarkable loftiness of mind, and, in some cases, because of confidence in their strength. There is in Aelian a saying of Pythagoras, that in two things man comes very close to God, in speaking the truth at all times and in doing good to others; and in Iamblichus veracity is called a guide to all good things, divine and human. For Aristotle 'the magnanimous man is a lover of free speech and of the truth'. For Plutarch 'to lie is worthy of a slave'.¹

Arrian says of Ptolemy: 'And for him, who was a king, it was more disgraceful to lie than for another.' In the same author, Alexander declares: 'The king must speak nothing but the truth to his subjects.' Mamertinus says of Julian: 'In our emperor there is a marvellous agreement between mind and tongue. He knows that lying is not only a mark of a low and mean spirit, but also a slavish vice; and in truth, since want or fear makes men liars, the emperor who lies is ignorant of the greatness of his fortune.' In Plutarch, praise is given to Aristides' 'character rooted in firm morality and tenacious of justice, not even resorting to falsehood in any kind of sport'. Of Epaminondas Probus says that he was 'so devoted to truth that he did not lie even in jest'.

2. This point of view assuredly is all the more to be insisted on by Christians; for not only is simplicity enjoined upon them (*Matthew*, x. 16), but vain speaking is forbidden (*Matthew*, xii. 36);

¹ Philo, in the book *That Every Virtuous Man is Free* [xxi], says: 'Whence men are accustomed to style illiberal, and of a servile mind, those who are two-faced and deceptive.'

[*Various History*, XII. lix.]

[*Protrepticon*, xx.]
[*Nic. Eth.*, IV. viii.]
[*On Ed. of Children*, = p. 11 c.]

[*Anabasis of Alexander*, I [preface]. VII [v].]
[*Panegyric of Julian*, xx.]

[*Aristides*, ii = p. 319 D.]
[*Nepos, Epaminondas*, iii.]

and He is set for their example in whose mouth no guile was found. Lactantius says : ' And so the true and upright traveller will not quote that saying of Lucilius :

[*Divine Institutes*, VI. xviii.]

I lie not to a man who is my friend and intimate.

But he will think that he should not lie even to an enemy and a stranger ; nor will he ever consent that his tongue, the interpreter of his mind, shall disagree with his meaning and thought.'

Of like opinion is Neoptolemus in the *Philoctetus* of Sophocles ' excelling in simplicity and nobleness ', as Dio of Prusa rightly observes, for to Ulysses, who urges him to practise deception, he thus replies :

[*Orations*, lii = p. 552.]

[Sophocles, *Philoctetes*, 86 ff.]

Child of Laertes, what plans with grief I hear
With far more loathing would I carry out ;
For to devise deceits I was not born, [436] nor he
Of by-gone days, my sire, as men relate ;¹
But by main force, not wiles, the captive to bear off,
Prepared am I.

Euripides in the *Rhesus* says :

[510 f.]

Upon the foe a noble soul cannot inflict
A guileful death.

3. Thus Alexander declared that he would not steal a victory. Polybius relates that the Achaeans shrunk from all deceit against the enemy, because they considered that the only sure victory which, if I may express his meaning in the words of Claudian,

[Plutarch, *Alex.*, xxxi = p. 683 D.] IX

[XIII. iii.]

[*On the Sixth Consulship of Honorius*, 249.]

[*Various History*, XII. xxxiii.]

[Livy, XLII. xlvii. 4-8.]

Conquers foes whose minds have been subdued.

Such was the attitude of the Romans almost to the close of the second Punic War. Aelian records that ' The Romans know that they are brave, and that they have not overcome their foes by artifice . . . and trickery '. Hence when Perseus, king of Macedon, was deceived by hopes of peace, the elder senators declared that they did not recognize the methods of the Romans, that the ancestors of these never boasted that they had waged war more by craft than by courage ; that it had been the Roman method to wage war not by the ruses of the Carthaginians, nor by the subtlety of the Greeks, who would esteem it

¹ Achilles, of whom Horace says, *Odes*, IV. vi [lines 13 ff.] :

He did not hide in the horse which feigned to be
An offering to Minerva, to deceive the Trojans
In untimely festivals, and the court of Priam
Gay with choral dances ;
But openly he fought, and harsh was he to the captives.

See also what follows, upon which the Scholiast remarks : ' Achilles never fought by underhand means, but always openly, in reliance upon his valour.' Note the phrase ' In reliance upon his valour ', which fits excellently with what we have said in the text at the beginning of this paragraph.

more glorious to outwit an enemy than to overcome him by force. Then they added the following :

In some cases, for the moment, more is accomplished by deceit than by valour, but only his mind is forever conquered from whom the confession has been extorted that he has been conquered not by artifice, nor by chance, but after joining forces in battle in a just and righteous war.

Annals,
II
[lxxxviii].
Scholiast
on Apol-
lonius, II
[1010].
[VII. ix.]

Later we read also in Tacitus : ‘ The Roman people takes vengeance on its enemies, not by fraud, nor in secret, but openly with arms in hand.’ Such men were the Tibareans also, who even agreed upon the place and time of battle. In Herodotus Mardonius makes a similar assertion regarding the Greeks of his time.

XXI.—*It is not permissible for us to force any one to do what is right for us but not for him*

To the conduct of operations this principle also applies, that it is not permissible to force or to entice any one to anything which may not be permissible for him to do.¹ The following may serve as examples. It is not permissible for a subject to slay his king, nor to surrender towns without public consent, nor to despoil his fellow-citizens. Therefore it is not permissible to influence a subject, who remains such, to do these things. For he who gives to another cause to sin always sins himself as well.

[*On the
Customs of
the Catholic
Church*, II.
xvii. 57.]

It is not enough to urge in reply that for him who forces such a man to a crime an act of this kind, as the killing of an enemy, is legitimate. The deed it is in fact permissible for him to compass, but not in this way. Augustine well says : ‘ It makes no difference whether you yourself commit the crime, or whether you wish another to commit it for you.’

XXII.—*Nevertheless we may make use of assistance voluntarily offered*

Dig. XLI.
i. 51.

The case is different when for a thing which is permissible for him a person avails himself of the help of one who does wrong voluntarily and not at his instigation. That this is not wicked we have proved elsewhere by the example of God Himself.² ‘ We receive a deserter by the law of war ’, says Celsus ; that is, it is not contrary to the law of war for us to receive him who abandons the side of the enemy and chooses our own.³

¹ This is also the teaching of Maimonides in *Halakot Toubal*, v. 10.

² In II. xxvi. 5.

³ And such persons are not to be surrendered, unless this has been agreed upon in the terms of peace, as in the peace with Philip, the Aetolians, and Antiochus. See Polybius, *Selections on Embassies*, ix, xxviii and xxxv [= *Historics*, XVIII. xliv ; XXI. xxx ; XXI. xlv]. Menander Protector also supports this view [frag. 11, p. 22, edit. Dindorf].

CHAPTER II

HOW BY THE LAW OF NATIONS THE GOODS OF SUBJECTS MAY BE HELD FOR THE DEBT OF THEIR RULERS; AND THEREIN, ON REPRISALS

I.—By natural law no one except an heir is bound by the act of another

1. Let us proceed to principles derived from the law of nations. These principles relate in part to war in general, and in part to a particular aspect of war. Let us begin with the general considerations.

By the strict law of nature no one is bound by another's act, except one who inherits his property; for the principle that property should be transferred with its obligations dates from the establishment of proprietary rights.¹ The Emperor Zeno says that it is contrary to natural justice for persons to be harassed for the debts of strangers. Hence the titles in the Roman Law; the wife is not to be sued for her husband, nor the husband for his wife, the son for his father, nor the father or mother for their son.

Code, XI.
lvii. 1.

Code, IV.
xii, xiii.

2. The debt of the corporation, moreover, is not a debt of the individuals, [444] as Ulpian well declares, especially if the corporation has property; for the rest the members of a corporation are bound not as individuals, but as a part of the corporate body. Seneca says: 'If any one lends money to my country, I shall not say that I am his debtor, nor will I admit this is my loan; yet I shall give my share towards paying it off'.² He had previously said: 'As one of the people I shall not pay as though for myself, but I shall contribute as for my country'; also, 'Individuals will be indebted not as if for their personal debt, but for a share of the public debt.'

Dig. III.
iv. 7. § 1.

On Benefits, VI. xx

[VI. xix.]

[VI] xix.

Hence in the Roman Law it was specifically provided that no member of a village should be held for the debts of other villagers; and elsewhere it is ordered that no property of one person is to be sued for the debts of others even if public debts. In a novel of Justinian, 'pledge-taking',³ that is, the taking of sureties for others, is forbidden, and the reason given is that it is not reasonable for one person to be the debtor and another to be made to pay. Here also exactions of this sort are called hateful. King Theodoric, in Cassiodorus, calls it disgraceful to permit one person to give sureties for another.

Code, XI.
lvii. 1.

Code, XII.
lx. 4.
Novels,
lii and
cxxxiv [7].

Variae,
IV [x].

¹ See above, II. xxi. 19. Add *Decretals*, V. xvii. 5; *Decretals*, V. xix. 9.

² See the *Law of Sicily*, Book I [title c].

³ *Sext*, V. viii. 1: 'Sureties which current speech commonly calls reprisals (*repressalias*).' It would be more correct to write, as certain books do, *repressalias*, for this corresponds exactly to the Saxon word 'withernam', but usage has accepted the other.

II.—Nevertheless it has been established by the law of nations that both the possessions and the acts of subjects are liable for the debt of a ruler

1. Although what has just been stated is true, nevertheless by the volitional law of nations there could be introduced, and appears to have been introduced, the principle that for what any civil society, or its head, ought to furnish, whether for itself directly, or because it has bound itself for the debt of another by not fulfilling the law, for all this there are held and made liable all the corporeal or incorporeal possessions of those who are subject to such a society or its head.

This principle, furthermore, is the outgrowth of a certain necessity, because otherwise a great licence to cause injury would arise; the reason is that in many cases the goods of rulers cannot so easily be seized as those of private persons, who are more numerous. This then finds place among those rights which, as Justinian says, have been established by civilized nations in response to the demands of usage and human needs.

2. This principle, however, is not so in conflict with nature that it could not have been introduced by custom and tacit consent, since sureties are bound without any cause, merely by their consent. It was hoped that members of the same society would be able through mutual relations to obtain justice from one another, and provide for their indemnification, more easily than foreigners, to whom in many places slight consideration is given. Hence the advantage derived from this obligation was common to all peoples, so that he who might now be burdened by it at another time might in turn be relieved.

3. That this usage has been accepted, appears from the perfect wars¹ which peoples wage against peoples. The practice observed in such wars is in fact revealed by the formulas of declaration, as: 'I declare and make war upon the peoples of the ancient Latins and the men of the ancient Latins,' and in the question 'whether they wished and ordered that war be declared upon King Philip and the Macedonians who were under his rule'. It is evidenced also by the decree itself, as, 'The Roman People orders that war be waged upon the people of the Hermunduri and upon men of the Hermunduri', which is cited from Cincius on military affairs; and elsewhere, as, 'Let him be an enemy, and also those who are within his defences.'

¹ The wise Nicholas of Damascus distinguishes wars from seizures of this sort, in showing that Herod, who had no right to make war upon the Arabs, could 'take reprisals' (*ῥύσια λαμβάνειν*) to use as a pledge for what was due to him in accordance with a contract. The words are those of Josephus, *Antiquities of the Jews*, VI [XVI. x. 8], where we find also this: [448] 'After relating that five hundred talents were owed to Herod, and that the written bond regarding these stipulated that when the day appointed had passed Herod could seize sureties from all the territory of the Arabs, he [Nicholas] declared that this invasion was not an invasion, but the just collection of a debt.'

Institutes,
I. ii. 2.

Thomas
Aquinas,
II. ii. qu.
40, art. 1;
Molina,
disp. 120
and 121;
Valentia,
*Disputa-
tions*, iii,
qu. 16,
no. 3;
Navarrus,
xxvii, no.
136.

Livy, I
[xxxii. 13].

Livy,
XXXI
[vi. 1].
Gellius,
XVI. iv.
Livy,
XXXVIII
[xlviii. 9],
and else-
where.

We see that the same right is invoked also where a state of perfect war has not yet been reached, but where nevertheless there is need of an enforcement of a right by violent means, that is, by means of an imperfect war. Long ago Agesilaus said to Pharnabazus, who was a subject of the king of Persia: 'Formerly, Pharnabazus, when we were friends of the king, we treated his possessions as became friends; now that we have become enemies, we treat them as belonging to a foe. Since, therefore, we see that even you desire to be classed among the king's possessions, we do right to strike at him through you.'

Plutarch, *Agesilaus* [xii = p. 602 D E], and Xenophon, *Greek History*, IV [*Hellenica*, IV. i. 34 ff.].

[445] III.—*An example in the seizure of persons*

1. One form of the enforcement of right regarding which I am speaking was what the Athenians called 'seizure of men'. Of this a law of Attica said: 'If any one die by a violent death, for his sake it shall be right for his relatives and next of kin to proceed to apprehend men, until either the penalty has been paid for the murder, or the murderers are given up. Such seizure may extend to three persons, and no more.' Here we see that for the debt of the state, which is bound to punish its subjects who have injured others, there is put under obligation a certain incorporeal right of its subjects, that is, their liberty of remaining where they wish and of doing what they wish; in consequence such subjects are temporarily in servitude, until the state does that which it is bound to do, that is, until it punishes the one who is guilty.

[Demosthenes, *Against Aristocrates*, xxiii. 82 = p. 647.]

Although the Egyptians, as we learn from Diodorus Siculus, used to maintain that neither a person nor his liberty should be bound for a debt, nevertheless there is nothing in this that is repugnant to nature, and the practice not only of the Greeks, but of other nations also, has prevailed to the contrary.

[I. lxxix.]

2. Aristocrates, the contemporary of Demosthenes, had proposed a decree to permit the apprehension anywhere of any one who should slay Charidemus, and to number among the public enemies any who should resist such seizure. In this proposal Demosthenes criticizes many points: first, that Aristocrates did not distinguish between killing justly and killing unjustly, although sometimes it may be just to kill; secondly, that he did not require that a trial be previously demanded; and, further, that he wished those who received the homicide to be held responsible and not those among whom the killing was done. The words of Demosthenes are:

[*Against Aristocrates*, xxiii. 84-5 = p. 648.]

For the law ordains that if those, among whom the wrong is suffered, do not pay the penalty nor surrender the culprits, these shall be apprehended to the number of three. But he lets these indeed go unpunished, and makes no mention of them; while he proposes that those shall be outlawed who have received the murderer when he has

taken refuge with them if they do not freely surrender him; I shall state the case in accordance with the custom common to mankind, which bids us receive the fugitive.

The fourth point of criticism is that Aristocrates at once brings the matter to a state of perfect war, when the law would have been satisfied with an arrest.

3. Of these criticisms the first, second, and fourth are not without reason. But the third objection, unless it is restricted to the single case of killing by accident or in self-defence, can only have been offered rhetorically, and more for the sake of argument than according to truth and right. For the law of nations that suppliants shall be received and protected applies, as we have previously said, only to those who are endangered by ill fortune and not by crime.

II. xxi. 7
[5].

4. In other respects the law is the same for those among whom the crime has been committed and for those who refuse to punish or surrender the guilty person. Therefore either that very law, on which Demosthenes relies, received from practice the interpretation that I give, or afterward it was more explicitly formulated against such quibbles. That one of these alternatives is true will not be denied by any one who has given attention to the following definition of Julius Pollux: 'Seizure of men takes place when any one upon demand does not receive murderers who have fled to some persons for refuge, for in that case he has the right [446] to carry off as many as three persons of those who have not surrendered the culprits.' In the same sense Harpocration says: 'Seizure of men is the right to carry off men from some city. For they used to take sureties from a city which held a murderer and would not give him up for punishment.'

[*Onomas-
ticon,*
VIII. vi
[VIII. 1.]

[under
word
ἀρδρo-
ληψία.]

5. Similar to this right of seizure is the right of detention of citizens of another state in which a manifest wrong has been done to a national, in order to secure his recovery. Accordingly at Carthage certain persons prevented the seizure of Ariston of Tyre, giving it as their reason that 'The same thing will happen to Carthaginians both at Tyre and in the other commercial centres to which they go in large numbers'.

Livy,
XXXIV
[xi. 13].

IV.—*An example in the seizure of goods*

Another form of the enforcement of right by violence is 'seizure of goods' or 'the taking of pledges between different peoples'.¹ This is called by the more modern jurists the right of reprisals; by the Saxons and Angles 'withernam', and by the French, among whom such seizure is ordinarily authorized by the king, 'letters of

Baldus,
Consilia,
III. 58;
Bartolus,
*On Re-
prisals*,
qu. v, ans.
to obj. 3,
no. 9.

¹ This is called *σύλας* by Demosthenes in his oration *For the Crown* [*For the Crown of the Trierarchy*, li. 13 = p. 1232]; also by Aristotle, *Economics*, II [II. ii. 10].

marque'. This enforcement of right occurs, as the jurists say, where a right is denied.

V.—*Seizure is warranted after a right has been denied, and when it may properly be considered as settled that this has been done; wherein it is shown that a judicial decision does not properly give or take away a right*

1. Seizure by violence may be understood to be warranted not only in case a judgement cannot be obtained against a criminal or a debtor within a reasonable time, but also if in a very clear case (for in a doubtful case the presumption is in favour of those who have been chosen by the state to render judgement) judgement has been rendered in a way manifestly contrary to law; for the authority of the judge has not the same force over foreigners as over subjects.

Even among subjects such a decision does not cancel a true obligation. 'A true debtor, even though he is absolved, still remains a debtor by the law of nature,'¹ says Paul the jurist. 'And when by a wrongful decision of a judge a creditor had taken away from its owner, as if it had been bound over to him, property which did not belong to the debtor, and the question was raised whether, after the payment of the debt, this should be restored to the debtor, Scaevola approved of its restitution.' There is this difference, that subjects cannot legally hinder by force the execution of a judgement even if it is unjust, or assert their rights by force against it, because of the effectiveness of the authority over them; but foreigners have the right of compulsion, which they may not use, however, so long as they can obtain what is theirs by a judgement.

2. The principle, therefore, was not introduced by nature, but has been widely accepted in practice, that for such a cause the persons,² or movable property, of the subjects of him who does not render justice, may be seized. The most ancient instance is given by Homer, in the *Iliad* [XI. 674]. Here it is recounted that Nestor seized the flocks and herds of the men of Elis in revenge for the horses stolen from his father, 'taking reprisals',³ as the Poet

¹ Here applies what is said by Gail, *De Pace Publica*, II. viii. 7, and Vázquez, *Controversiae illustres*, IV. x. 41.

² See the example in Ammianus, Book XVII [XVIII. ii], where Julian detains certain of the Franks until the prisoners should be set free according to the agreement. Add what Leo of Africa has on the subject of Mt. Beni Gualid, Book III [= p. 435].

³ You will find *ῥύσια* in this sense in the *Selections on Embassies*, from Polybius, no. xxxviii [= p. 276], where he speaks of the Achaeans acting against the Boeotians; and in no. cxliii [= p. 352] *ῥύσια* is found in the *Excerpta Peiresiana* [*Excerpta de Virtutibus et Vitiis*, I = p. 214] from Diodorus Siculus. Elsewhere, however, the phrase *ῥύσια καταγγέλλειν* is employed in speaking of war, as we shall say shortly in III. iii. 7; for these things are closely connected.

Dig. XII.
vi. 60.

Dig. XX.
v. 12. § 1.
Innocent
and Panormitanus,
On Decretals, III.
xlix. 8;
Soto, III,
qu. iv,
art. 5.

Jac. de
Can., An-
charano,
Domin.,
Franciscus,
On Sext, V.
viii. 1;
Fulgosius
and Salic.,
On Auth.,
Code, IV.
x; Jac. de
Belvisio,
On Auth.,
*Ut non
fiant
pignora*;

Syl., word *repressalia*; Bartolus, *On Reprisals*; Guy de la Pape, qu. xxxii; Gail, *De Pigno.*, i no. 5; Victoria, *De Iure Belli*, no. 41; Covarruvias, *On Sext.*, V. ult. 4, pt. II, § 9. [Homer, *Iliad*, XI. 705.] Livy, II [xxxiv. 4]. Halicar., VII [xii].

says; in this passage Eustathius explains 'reprisals' as 'what is confiscated in return for something, that is, dragged off and seized in return for what has been previously taken'. The narrative goes on to say that all those to whom anything was owed by the Eleans were summoned by proclamation to secure their rights, surely,

Lest any one of his just due should be deprived.

Another instance is in Roman history, in the case of the Roman ships which Aristodemus, the heir of the Tarquins, held at Cumae as compensation for the property of the Tarquins. Dionysius of Halicarnassus states that slaves, cattle, and money were held. Still another instance is given by Aristotle, in the second book of the *Economics*, on the law of the Carthaginians relating to seizure of the ships of foreigners, 'if any one has a right of seizure', as the condition is there expressed.

VI.—*Such seizure does not warrant the taking of human life*

That for such a cause the lives of innocent subjects are liable, has perhaps been believed among some peoples, because [447] they supposed that every man has in himself a full right over his life, and that it was possible to transfer this to the state. That supposition, as we have elsewhere said, is by no means capable of proof, nor is it in harmony with a more sound theology.

Nevertheless it may happen that those who wish by force to hinder the enforcement of a right may be killed, not intentionally but accidentally. But if this can be foreseen, we have shown elsewhere that we ought rather to surrender the furthering of the right, in accordance with the law of love. According to this law, particularly for Christians, the life of a man ought to be of greater value than our property, as has been proved in another connexion.

VII.—*The distinction between what there is relating to this matter in municipal law and in the law of nations*

1. In this matter, no less than in others, we must take care not to confuse the things which properly belong to the law of nations and those which are established by municipal law or treaties between peoples.

2. By the law of nations all subjects of him who does the injury are liable to the furnishing of sureties, provided they are subjects from a permanent cause, whether native or immigrant, and not persons who are present anywhere for the purpose of travel or for a brief residence. The furnishing of pledges is treated after the manner of burdens which are imposed in order to pay the public debts, and from which those are immune who are only temporarily

Decio, *Consilia*, cecili; Baldus, *On Digest*, I. xxii. 3.

[II. xv. 16; xxi. 11.]

I [II]. i. 12 and 13.

subject to the laws of the place. However, ambassadors are excepted by the law of nations from the number of subjects, provided that they have not been sent to our enemies; and their goods also are excepted.

3. By the municipal law of states, however, the persons of women and children are often excepted; and in fact even the property of those who are engaged in literary pursuits or come to carry on trade. By the law of nations individuals possess the right of taking sureties, as at Athens, in the seizure of men. By the municipal law of many countries this right is ordinarily sought in some cases from the supreme authority, in other cases from judges.

By the law of nations ownership is acquired over seized goods by the mere act of seizure, up to the limit of the debt and expenditure, in such a way that the residue shall be restored.¹ By the municipal law the parties concerned are usually summoned, and afterwards by public authority the property is sold or assigned to those who are affected. But for these and other topics reference should be made to those who discuss the municipal codes; on this subject particularly Bartolus, who has written on reprisals.

4. A further statement I shall add, because it concerns the mollification of this law, which is in itself sufficiently rigorous. Those who, by not paying what they owe or by not furnishing satisfaction, have given occasion for the taking of sureties, by natural and divine law are bound to make good the damages² to others, who for that reason have incurred a loss.

Aegidius
Regius,
*De Actibus
Superna-
turalibus*,
disp. 13,
dub. 7,
no. 117.

¹ Gregoras, Book IX [IX. v], records that the Venetians followed this principle of justice, upon the capture of the Genoese ships at Galata: 'But they did not destroy any of the cargo of the ships they had taken, which cargo consisted of wheat and barley, and in addition salt fish from the Copaic and Maeotic Marshes and the river Don. These they preserved with care, in their full measure, until they should restore them intact upon the receipt of what was owed them.'

² Plutarch, in his *Cimon* [viii = p. 483 C], says of the Scyrians: 'The majority did not wish to make a monetary contribution, but they gave orders that those who possessed or had seized the property of others should make good the loss.'

CHAPTER III

ON WAR THAT IS LAWFUL OR PUBLIC ACCORDING TO THE LAW OF NATIONS; AND THEREIN, ON THE DECLARATION OF WAR

I.—*A public war according to the law of nations is a war between different peoples*

[449] 1. In a previous passage¹ we began to say that by authors of repute a war is often called lawful not from the cause from which it arises, nor, as is done in other cases, from the importance of its exploits, but because of certain peculiar legal consequences. Of what sort a lawful war is, however, will best be perceived from the definition of enemies given by the Roman jurists.

‘Enemies are those who in the name of the state declare war upon us, or upon whom we in the name of the state declare war; others are brigands and robbers’, says Pomponius. Similarly Ulpian:

Enemies are those upon whom the Roman people have publicly declared war, or who have themselves declared war upon the Roman people; others are called thieves and brigands. And so he who has been captured by robbers is not their slave,² and has no need of the right of postliminy. But he who has been captured by enemies, as by the Germans or Parthians, is a slave of the enemy, and recovers his former status by postliminy.

Paul says: ‘Those who are captured by pirates³ and brigands remain free.’ There is a further statement by Ulpian:

In civil contentions, although the state is thereby often injured, nevertheless the destruction of the state is not aimed at; the citizens who support either side after the manner of enemies are not in the position of those who possess rights of captivity or postliminy. In consequence it has been decided that for those who have been captured, sold, and later set free, it would be superfluous to attempt to recover from the emperor their free status, which they had not lost by captivity.

2. It needs only to be noted further that we may understand that any one who has the supreme authority in a state may take the place of the Roman people in our illustration. ‘An enemy’, says Cicero, ‘is the one that has a state, a senate, a treasury, the agreement and concord of the citizens, and the power, if the course of events leads thereto, to conclude peace and an alliance.’

¹ I. iii. 4.

² Hence the plot of the *Poenulus* of Plautus, and the *Eunuch* of Terence. Such a one was also Eumaeus, *Odyssey*, XV [lines 402 ff.].

³ Pompey pronounced those free who had been captured by the pirates; Appian, *Mithridatic Wars* xiv. 96]. See also Herrera, vol. II.

II.—*The distinction between a people, although acting unjustly, and pirates or brigands*

1. Moreover, a commonwealth or state does not immediately cease to be such if it commits an injustice, even as a body; and a gathering of pirates and brigands is not a state, even if they do perhaps mutually maintain a sort of equality, without which no association can exist. The reason is that pirates and brigands are banded together for wrongdoing;¹ the members of a state, even if at times they are not free from crime, nevertheless have been united for the enjoyment of rights, and they do render justice to foreigners. If the treatment of members of other states is not in all respects according to the law of nature, which, as we have showed elsewhere, has become partly obscured among many peoples, it is at least according to agreements entered into with each state or in accordance with customs.

[II. xv. 5.
1.]

Accordingly the scholiast on Thucydides notes that, at the time when it was considered legitimate to plunder at sea, the Greeks refrained from murder and raids by night, and from the seizure of the cattle of ploughmen. Strabo relates that other peoples also, who lived in like manner by plunder, upon returning home after being at sea, sent word to the owners in order that these might, if they wished, recover their stolen property at a fair price.² To such persons applies the passage in Homer's *Odyssey*, XIV :

I [v].

XI [ii. 12].

Themselves eager for loot, who to the land
Of strangers fare; if gods above grant booty,
With laden ships they leave and homeward go,
And dread fear falls on those they leave behind.

[XIV.
85 ff.].

[450] 2. In moral questions, furthermore, the principal element is considered as determining the essential character. As Cicero has rightly said in the fifth book *On Ends*: 'The whole of an object takes its name from that constituent of it which comprises the most important elements and has the most far-reaching effect.' With this accords the saying of Galen: 'Names are taken from the most potent element in the compound.' The same author often designates such things as 'named after the chief element'.

[V. xxx.
92.]

Cicero, then, spoke too sweepingly when he said, *On the Commonwealth*, Book III, that where an unjust man is king, or where the aristocracy or the people itself is unjust, there is not a wicked state, but

[In
August.,
City of
God, II.
xxi.]

¹ 'A mob not in lawful association, but brought together in order to commit wrong'; Procopius, *Vandalic War*, II [II. xv].

² Such were those who are mentioned by Saxo, XIV [p. 234]. To such a degree, as Plutarch [*Cimon*, viii = p. 483 c] notes, the Scyrians had deteriorated in course of time: 'Although from antiquity they had practised piracy at sea, finally they did not refrain from committing injury upon those who were sailing to them to carry on trade.'

On the City
of God,
XIX.xxiv.

none at all. In correction of this view Augustine says: 'Nevertheless, I should not go so far as to assert that the people as such does not exist, or that its organization is not a state, so long as there remains some sort of union in a reasoning populace, associated through harmonious participation in the things which it chooses.' A body that is sick is nevertheless a body still; and a state, although seriously diseased, is a state so long as there remain tribunals and the other agencies that are necessary in order that foreigners, no less than private citizens, in their relations one with the other may there obtain their rights. Dio Chrysostom offers a more correct judgement in saying that the law (especially that which goes to make up the universal common law) exists in a state just as the mind in the human body; for when this is taken away the state ceases to exist.¹ In the speech in which he urges the Rhodians to harmony, Aristides shows that many good laws may exist even under a tyranny. Aristotle in his *Republic* [*Politics*], Book V, chapter ix, says that if any one presses the violence of the few, or of the people, too far, the state first becomes full of faults, and finally ceases to be.

Let us illustrate this subject by examples.

3. We heard Ulpian saying above that captives taken by brigands do not belong to those who capture them. He says further that captives taken by the Germans lose their freedom. And yet among the Germans marauding expeditions which are sent beyond the borders of a state 'involve no disgrace', as Caesar states. Of the Venedi, Tacitus says: 'With their marauding expeditions they overrun the forests and mountains that lie between the Peucini and the Fenni.' In another place he says that the Chatti, a famous people of Germany, engaged in marauding expeditions. In the same author the Garamates are a nation fertile in marauding expeditions, but still a nation.

The Illyrians without distinction were accustomed to plunder on the sea, yet a triumph was celebrated over them; Pompey celebrated no triumph over the pirates. So great is the distinction between a people, however wicked it may be, and those who, although not forming a people, associate together for the sake of crime.

III.—*Sometimes a transformation is effected*

Nevertheless a transformation may take place, not merely in the case of individuals, as when Jephthes, Arsaces, and Viriathus instead of being leaders of brigands became lawful chiefs, but also in

¹ Cicero, *Letters*, X. i [X. i. 1]. 'There are neither laws, nor courts, nor any semblance and trace of a state.'

Borys-
thenitica
[Orations,
xxxvi =
P. 443],
and On
the Law
[Orations,
lxxv. end].
[On Con-
cord = p.
385 A B.]

[Digest,
XLIX.
xv. 24.]
[Gallic
War], VI
[xxiii].
On the
Customs
of the Ger-
mans
[xlvi].
Annals,
XII
[xxvii].
Histories,
IV [1].

Appian,
Illyrian
Wars [ii.
9].

[Judges,
xi. 3 ff.]
[Justin,
XLI. iv ;
XLIV. ii.]

the case of groups, so that those who have only been robbers upon embracing another mode of life¹ become a state. In discussing brigandage Augustine says: 'If by accessions of desperate men this evil grows to such proportions that it holds lands, establishes fixed settlements, seizes upon states and subjugates peoples, it assumes the name of a kingdom.'

On the City of God, IV. iv.

IV.—*It is essential to the nature of a public war that it should have the support of the sovereign power; in what way this is to be understood*

What persons have the sovereign power, we have already stated. Hence it may be understood that, if any possess the sovereign power in part, they may to that extent wage a lawful war.

This principle applies with even greater force to those who are not subjects, but are allied on an unequal footing.² So we learn from history that all formalities of lawful war were observed between the Romans and their allies, the Volsci, Latins, Spaniards, and Carthaginians, although these had an inferior status in the alliance.

Cajetan, *On II. ii.*, qu. 40, art. i.

V.—*A declaration of war is also requisite*

That a war may be lawful in the sense indicated, it is not enough that it be waged by sovereign powers on each side. It is also necessary, as we have said, that it should be publicly declared, and in fact proclaimed so publicly that the notification of this declaration be made by one of the parties to the other;³ whence [451] Ennius spoke of battles proclaimed in advance. In the first book *On Duties* Cicero says: 'But the right usage of war has indeed been most scrupulously prescribed by the fetial law of the Roman people. According to this we are given to understand that no war is lawful unless it is waged for the recovery of property, or has been previously threatened and proclaimed.'

[Cf. Gellius, xx. 10.]
[I. xi. 36.]

More concisely speaks an ancient writer in Isidore: 'A lawful war is one that is waged by declaration, for the recovery of property or to repel enemies.' Thus Livy, in his description of a lawful war, says that the war is waged openly and in accordance with public

[*Etymologies*, XVIII. i.]
I [xxvii. 3].

¹ An example is found in the case of the Mamertini; Diodorus Siculus, fragments [XXI. x and XXII].

² Like the Duke of Lorraine, in Krantz, *Saxonica*, XII. xiii. The city of Stralsund declared war upon its Pomeranian rulers; Krantz, *Vandalica*, XIV. xxxv.

³ Josephus, *Antiquities* [455] of the Jews, XV [XV. v. 3], says: 'It is not lawful to wage a war that has not been previously declared.'

For examples of this practice among the nations see Krantz, *Saxonica*, XI [XI. v], and Oderborn in his *Life of Basilides*, III. The opposite conduct of the Turk Olizasthlan [Chlizasthlan], and the Serb Neemon, are censured by Nicetas, [*On Manuel Comnenus*,] III [III. vi] and IV [V. iv].

XXXI
[xiv. 10].

decree. Also, after relating that the Acarnanians had laid waste Attic territory, he adds : ' This was the first manifestation of hostile feeling ; afterward a lawful war was declared by decrees and voluntary proclamations of the states.'

VI.—*What element in the declaration of war is in accordance with the law of nature, and what is peculiar to the law of nations, is set forth with distinctions*

1. To understand the foregoing passages, and others dealing with the declaration of war, we must carefully distinguish what is due according to the law of nature, what is not due by nature but is honourable, what is required by the law of nations to secure the effects peculiar to this law, and what, in addition, is derived from the particular institutions of certain peoples.

I [lxxxvii].

[*Rom. Ant.*, I [lviii].
[*Tactica*, i.]
[*Orations*, xxxviii = p. 473.]

In a case where either an attack is being warded off, or a penalty is demanded from the very person who has done wrong, no declaration is required by the law of nature. This is what Sthenelaidas, the ephor, says in Thucydides :¹ ' We who have been wronged in more than words are not to seek satisfaction in words or judicial proceedings.' Latinus in Dionysius of Halicarnassus declares : ' Every one who is attacked repels him who begins the war.' Aelianus, quoting from Plato, says that a war which is undertaken to repel force is proclaimed, not by a herald, but by nature. Hence Dio Chrysostom, in his address *To the Nicomedians*, says : ' Most wars begin without declaration.'

[XXXV. li. 2.]

For no other reason Livy criticizes Menippus, an officer of Antiochus, because he had slain certain Romans when war had not yet been declared, and when no hostilities had been engaged in, so that they could have heard that swords had been drawn or even that blood had been shed ; by this he shows that either of these two steps could have sufficed to justify the action. Not more necessary, by the law of nature, is a declaration of war in case an owner wishes to seize what belongs to him.

2. But whenever one thing is seized in place of another, or the property of a debtor is taken for his debt, and all the more if one wishes to take possession of the property of those who are subject to the debt, then a demand for settlement is required, to establish the fact that it is impossible in any other way to obtain what is ours

¹ See also Thucydides, Book III [III. lvi], in the speech of the Plataeans : ' According to the law that is in vogue among all peoples, it is right to defend ourselves against him by whom we are assailed in a hostile manner.'

In Diodorus Siculus, *Excerpta Peiresciana* [i = p. 272], Flaminius ' called all the gods and men to witness that the war had been begun by the king'. See also what is in Mariana, XIX. xiii. On war that has not been declared see Dexippus, *Selections on Embassies* [= frag. 22, p. 195, edit. Dindorf].

or what is owed to us. For this is not a primary right, but a secondary and vicarious right, as we have elsewhere explained. Thus, even before the possessor of sovereign power is attacked for the debt or crime of a subject, a demand for settlement should be made, which may place him in the wrong, and in consequence of which he may be held either to be causing us loss or to be himself committing a crime, according to the principles which have previously been discussed.

3. But even in case the law of nature does not require that such a demand be made, still it is honourable and praiseworthy to make it,¹ in order that, for instance, we may avoid giving offence, or that the wrong may be atoned for by repentance and compensation, according to what we have said regarding the means to be tried to avoid war.² Here applies this verse also :

At first no one has sought to try extremes.

Here, too, applies the command which God gave to the Jews,³ that they should first invite to peace the city which was to be attacked. This command, although given to that people for a particular case, has been wrongly confused by some with the law of nations. For the peace there referred to is not peace in general, but one dependent upon a condition of subjection and tribute. [452] When Cyrus came into the territory of the Armenians, before doing harm to any one he sent to the king those who represented him in order to demand the tribute and soldiery due according to the treaty, 'thinking that this was a more friendly procedure than to advance without a previous declaration', as Xenophon says in his *History*. But by the law of nations a proclamation is required in all cases in order to secure these particular effects, not, however, from both parties but from either one.

[Seneca,
*Agamem-
non*, 153.]

*Deutero-
nomy*,
xx. 11
[xx. 10].

History, II
[*Training
of Cyrus*,
II. iv. 32].

VII.—*A declaration of war is sometimes conditional, sometimes absolute*

1. Now the declaration of war is either conditional or absolute.

It is conditional when it is joined with a demand for restitution. Moreover, under the title of things sought in recovery,⁴ the fœdial law included not merely a claim by right of ownership, but also the effort to obtain that which is owed on a civil or criminal charge,

¹ See Mariana, XXVII. xiii.

² II. xxiii. 7.

³ Josephus, *Antiquities of the Jews*, V. ii [V. ii. 9]: 'But the council of the elders restrained them, showing them that they should not suddenly wage war on their fellow citizens, before the causes of complaint had been argued in words, since the law did not permit them to lead an army even against foreigners when they had suffered wrong, unless they had first sent an embassy and tried means by which the wrongdoers might be brought back to a more reasonable frame of mind.'

⁴ See Paruta, *On the War in Cyprus*, Book I Bizarri, Book XXIII, with regard to the Turks; Reinkingk, II. III. 4.

[II. i. 2. 2 ;
xxi. 4.] as Servius¹ rightly explains. Hence arises this phase in the formulas, 'to be restored, satisfied, surrendered', where, as we have elsewhere said, 'surrendered' must be understood with a reservation, to wit: unless those on whom the demand is made prefer to punish the guilty party themselves. Pliny² bears witness that this demand for restitution was called a 'verbal demand'.

VIII
[xxiii. 7.] A conditional declaration is recorded by Livy: 'That they would themselves use every means to free themselves from this injury unless it were removed by those who had inflicted it.' Another is given by Tacitus: 'unless they should inflict punishment upon the guilty, he would carry out a general massacre.' There is also an ancient example in the *Suppliants* of Euripides, when Theseus gives to the herald these instructions for his mission to Creon the Theban:

Theseus, who holds the neighbouring kingdom's soil,³
The dead demands for burial; granted that,
Erechtheus' people will become your friend.
If this with favour meet, retrace thy steps;
But if no heed is given, these other words employ:
Let them soon look to see my youth in arms.

[*Thebaid*,
XII. 598.]

Papinius in his description of the same event has:

Proclaim either funeral pyres for the Danai
Or for Thebes, battles.

[IV. liii.] Polybius calls this 'to give notice of reprisals', and the ancient Romans 'to give formal notice'.

An absolute declaration is what is called in particular a proclamation or edict. This is made when one party either has begun hostilities (and this is what in Isidore is said to be a war for the repulse of enemies), or has himself committed crimes that call for punishment.⁴

[*Etymologies*,
XVIII. i.]

2. Sometimes, indeed, an absolute declaration follows one that is conditional, although this is not necessary but superfluous. Hence arises the formula:

[Livy, I.
xxxii. 10.]

I bear witness that this people is unjust, and does not give satisfaction.

There is also a second formula:

Whatever things, disputes, causes of complaint,⁵ of which the *pater patratus* of the Roman people of the Quirites has formally notified the *pater patratus* of the people of the

¹ On the *Aeneid*, X [line 14].

² [*Natural History*,] XXII. xii [XXII. xii. 2]: 'And when ambassadors were sent to the enemy to make verbal declaration, that is, audibly to demand back the things that had been carried off, one of them was called the Verbenarius.' Again, in speaking of the plant verbenia, the same author says, XXV. ix: 'This it is which, as we have pointed out, the ambassadors carried to the enemy.' See Servius, On the *Aeneid*, IX [line 53], and X [line 14].

³ A similar formal declaration is in the *Battle of the Frogs and Mice* [line 135 ff.], and at the beginning of the *Amphitruo* of Plautus [203 ff.]. See also Kromer, XXI.

⁴ See the example in Bembo, Book VII.

⁵ Compare the Greek of Dionysius of Halicarnassus, *Selections on Embassies*, ii [= p. 9].

Ancient Latins, which things the men of the Ancient Latins ought to have surrendered, done, paid, which things they have not paid nor surrendered nor done, these things I hold ought to be sought in just and righteous warfare ; and I agree and approve.

The third formula is :

Whereas the tribes of the Ancient Latins have acted and committed offences against the Roman people of the Quirites, whereas the Roman people of the Quirites has ordered that there be war with the Ancient Latins, and the Senate of the Roman people of the Quirites has decreed, consented, agreed that war should be waged with the Ancient Latins, for this cause I and the Roman people declare and make war upon the tribes of the Ancient Latins.

That in this case, as I have said, a proclamation is not strictly necessary, becomes apparent from the fact that it was formally made at the nearest garrison point. So the fetials declared when consulted in the case of Philip of Macedon, and afterward in the case of Antiochus, since the first proclamation had to be made to the person who was attacked in the war. The declaration against Pyrrhus [453] was in fact made to one of his soldiers, and that too in the Circus Flaminius, where this soldier was ordered to purchase a bit of ground for form's sake, as Servius narrates in his commentary on the ninth book of the *Aeneid*.

Livy,
XXXI
[viii. 3]
and
XXXVI
[iii. 7].

[IX. 52.]

3. Further proof of the superfluity of this formality is found in the fact that war is often declared by both parties. Thus the Peloponnesian War was declared by the Corcyreans and by the Corinthians, although it is sufficient that such a declaration be made by either one party or the other.

[Thucydides, I.
xxix.]

VIII.—*What elements in declarations of war pertain to municipal law and not to the law of nations*

To the customs and institutions of certain peoples, moreover, and not to the law of nations, belong the use of the herald's staff among the Greeks ;¹ the sacred herbs and bloody spear used first by the Aequicolae, then by the Romans, who followed their example ; the renunciation of any existing friendship or alliance ; the period of thirty days set after the demand for restitution ; the hurling of the spear² the second time ; and other formalities of this sort which should not be confused with those that properly belong to the law of nations.

Arnobius informs us that in his time a great part of these formalities had ceased to be observed ; and, indeed, some were

Arnobius,
Against the Heathen, II [lxvii].

¹ The origin of the herald's staff you will learn from Pliny, [*Natural History*], XXIX. iii, and Servius, *On the Aeneid*, IV [IV. 242] and VIII.

² See Servius, *On the Aeneid*, IX [IX. 53] ; Ammianus, XIX [XIX. ii. 6], with the notes of the erudite Lindenbrog.

Varro, *On the Latin Language*, IV. [LII. xv.]

already neglected in the time of Varro. The third Punic War was begun at the same time with the declaration. In Dio, Maecenas holds that certain of these formalities are peculiar to a democratic state.

IX.—*A war declared against any one is at the same time declared against his subjects and allies, in so far as they take his side*

Baldus, *On Code*, VII. ix. 2, no. 70.

Furthermore, a war declared against him who holds the sovereign authority in a state is held to be declared at the same time not only upon all his subjects, but also upon all who will join him as allies in such a way as to become an accession to him. This is what the more modern jurists mean when they say that defiance of the prince is defiance of his supporters; for to declare war they call to send forth defiance.

Livy, XXXVI [iii. 11].

This principle is to be understood as applicable to the type of war waged against him upon whom it has been declared in the manner illustrated in the war against Antiochus. It was decided not to declare war against the Aetolians separately, because they had openly associated themselves with Antiochus. 'The Aetolians have voluntarily declared war against themselves', was the response of the fetials.

X.—*A war declared against any one is not held to be at the same time declared against his subjects and allies in so far as they are considered by themselves; illustration by examples*

If, on the conclusion of a war declared against one who holds the sovereign power, another people or king is to be attacked, because of the aid that they have furnished, a new declaration of war will have to be made in order to meet the requirements of the law of nations. For in such a case the people or king is now not regarded as an accessory, but as a principal. It was therefore rightly said that the war of Manilius against the Gallo-Grecians and that of Caesar against Ariovistus were not lawful wars according to the law of nations.¹ The Gallo-Grecians and Ariovistus were in fact attacked not as accessories to another war, but principals; and for such a procedure by the Roman law a new authorization of the Roman people was required, just as a new declaration was required by the law of nations.

Livy, XXXVI [i. 5].

What was said in putting the question in regard to the war against Antiochus: 'Did they desire, and did they direct, that war be begun with King Antiochus and with any who had espoused his

¹ Unlawful also was that of the companions of Ulysses against the Ciconians, who were at one time allies of Priam, and who are mentioned by Homer, *Odyssey*, I [rather i = IX. 39 ff.], and Didymus thereon.

cause,' also what was provided in the decree against King Perseus, should, as it seems, be understood as meaning, so long as there should be a war with Antiochus or Perseus, and as referring to those who actually had a part in this war.

[Livy,]
XLII
[xxx. 1].

XI.—*The reason why a declaration is required in order to secure certain effects*

Furthermore the reason why nations required a declaration for the kind of war which we have called lawful according to the law of nations was not that which some adduce, with the purpose that nothing should be done secretly or deceitfully, for this pertains to an exhibition of courage rather than to law, just as certain nations are said to have even appointed the date and place of battle.¹ The purpose was, rather, that the fact might be established with certainty that war was being waged not by private initiative but by the will of each of the two peoples or of their heads.

Alberico
Gentili,
I. ii [II. i].

From this consideration arise the peculiar effects which do not develop in a war against brigands, nor in a war which a king wages against his subjects. Thus Seneca distinguishes 'wars declared upon neighbours, or waged with citizens'.

On Anger,
III. ii.

XII.—*The effects referred to are not found in other wars*

What certain writers point out and teach by citing examples, to the effect that even in [454] such wars what is seized belongs to those who take it, is indeed true, but only from one standpoint, that of the law of nature. It is not true by the customary law of nations, since this concerns nations only, not persons who have no existence as a nation or form a part of a nation.

Ayala, I.
v.

The writers in question err in this also, that they think that a war undertaken for the defence of one's person or property does not require a declaration. Such a war does require a declaration, not indeed of itself, but for the sake of those effects of which we have begun to speak, and which we shall shortly explain.

Alberico
Gentili,
II. ii [II. i],
just cited.

XIII.—*Whether war may be waged simultaneously with its declaration*

This also is not true, that war cannot be waged at once upon being declared. That was the procedure of Cyrus against the Armenians, and of the Romans against the Carthaginians, as we

¹ Just as the Romans did to Porsena, as is recorded by Plutarch in his *Publicola* [xvi = p. 105 c]. The Turks kindle a great number of fires two days before a battle; Chalcocondylas, VII [= p. 344, edit. Bekker].

have stated above. By the law of nations, in fact, no interval of time is required after the declaration. Nevertheless, it may happen that, from the character of the affair, by the law of nature some time may be required, as when restitution or punishment for a guilty person has been sought, and this has not been refused. In such a case time must be granted in order that that which has been sought may be properly performed.

XIV.—*Whether war must be declared against him who has violated the right of embassy*

Even if the right of embassy has been violated, there will not cease to be need of a declaration of war, for the sake of the effects of which I speak. However, it will be sufficient that this be made in a way in which it may be done with safety, as by means of writing, for example; for custom sanctions the use of writing for both summonses and other notices to be served in unsafe places.

ON THE RIGHT OF KILLING ENEMIES IN A PUBLIC WAR, AND ON
OTHER VIOLENCE AGAINST THE PERSONI.—*The effects of a public war are explained in general terms*

I. ON the verse of Virgil,

Then to strive in hatred, then to plunder,
Will become permissible,

[On
Aeneid,
X. 14.]

Servius Honoratus, after tracing the fetial law from Ancus Martius, and more remotely from the Aequicoli, makes this comment :

If at any time it happened that either men or cattle had been carried off from the territory of the Roman people by any nation, the *pater patratus*, with the fetials, that is, the priests who preside over the conclusion of treaties, would set out, and standing before the frontier would state the cause of war in a loud voice ; if they refused to restore the things that had been carried off, or to surrender the wrongdoers, he would hurl a spear toward them. This constituted the beginning of hostilities, and then it was permissible to pillage in accordance with the usage of war.

Servius, moreover, had previously said : ‘The ancients were accustomed to use the words “to inflict injury (*laedere res*)” where we say “to pillage (*rapere*)”, even if no crime of pillaging had been committed ; in like manner they used to say “to make restitution (*res reddere*)” where we say “to give satisfaction (*satisfacere*)”.’

[On
Aeneid,
X. 14.]

From these facts we learn that a war declared between two peoples, or the heads of two peoples, has certain particular effects¹ which do not arise from the nature of war itself. This conclusion, again, agrees excellently with what we have just now cited from the Roman jurists.

II.—*A distinction is made between the word ‘permissible’ as referring to that which is done with impunity, although not without moral wrong, and to that which is free from moral wrong even if virtue would enjoin not to do it ; with examples*

I. But let us see the import of the ‘will become permissible’ in Virgil’s line. For sometimes that is said to be permissible which is right from every point of view and is free from reproach, even if there is something else which might more honourably be done, as indicated in that statement of Paul the Apostle : ‘All things (that

1 *Corinthians*, vi.
17 [vi. 12].

¹ Krantz, *Saxonica*, XI. v.

is of the sort which he had touched upon and was going to discuss) are lawful for me, but not all things are expedient.’

Thus it is lawful to contract marriage, but for a holy purpose the chastity of celibacy is more worthy of praise,¹ as Augustine, following the same apostle, wrote to Pollentius. Also to marry a second time is lawful, but it is more honourable to be content with one marriage; this is according to the correct elucidation of that question by Clement of Alexandria.² A Christian husband may lawfully leave his pagan wife, as Augustine thinks³ (this is not the place to discuss in what circumstances this is true), but he may also keep her, and so Augustine adds: ‘Either course is indeed equally permissible according to the justice which waits upon the Lord; and so [457] the Lord forbids neither of them, but each one is not expedient.’ Ulpian says of the seller who is permitted to empty out wine after the appointed day: ‘Nevertheless it is more praise-worthy if he does not empty it, when he might do so.’

2. In another sense, however, something is said to be permissible, not because it can be done without violence to right conduct and rules of duty, but because among men it is not liable to punishment.⁴ In this sense fornication is permitted among many peoples; among the Lacedaemonians and Egyptians even thieving was permissible. In Quintilian we find: ‘There are certain things which are not praiseworthy according to nature, but which are legally

[To Pollentius,] I. xviii.

To Pollentius, I. xv [I. xiii, xix].

Digest, XVIII. vi. 1. § 3.

[Institutes,] III. viii [III. vi. 84].

¹ Tertullian, *Against Marcion*, I [I. xxix], says: ‘The proof of abstinence is wanting if permission to act is taken away.’ See on this point, and on the question of flight in time of persecution, the same author, *To his Wife*, Book I [I. iii]. Jerome, *Against Helvidius* [*On Perpetual Virginity*, xxi], says: ‘A virgin is worthy of greater praise, because she despises that which she could do without sin.’ [465] Also *Against Jovinianus* [I. xii]: ‘Christ loves the virgins the more for this, that of their own accord they offer what was not demanded from them.’ Again, *To Pammachius* [*Letters*, lxvi. 8]: ‘Great things are always left to the judgment of those who dare. Constraint is not laid upon you, to the end that your will may attain the reward.’

Chrysostom, *On First Corinthians*, vii [Homily XIX, ii, on verse 9], declares: ‘He [Paul] shows that chastity is preferable.’ *On Romans*, vii. 6 [Homily XII. iv], he says: ‘He has threatened us with Gehenna, unless we obey his commands, and he shows that the things which he demands are not among those which men may offer in zealous emulation, such as virginity and the renunciation of possessions, but those which absolutely must be fulfilled.’ In his second discourse *On Fasting*, II [*On Penitence*, VI. iii], he says: ‘He has left virginal chastity outside of the course, outside of the rules of the contest, that those who offer it may show the greatness of their spirits, and those who do not offer it may enjoy the mercy of God.’ The same thought he shortly after applies to ‘the renunciation of possessions’.

Add also what Gratian has cited from Augustine and other writers in *Decretum*, II. xiv. 1.

² *Stromata*, IV [III. xii. 82], where, among other things, he says of the man who contracts a second marriage: ‘He does not indeed sin against the covenant, for there is no law to prevent him, but he does not accomplish the most excellent perfection of the life according to the Gospel.’

³ In *De Conjugiis Adulterinis ad Pollentium*, I. xiii and xix; from these passages Gratian has cited at length in *Decretum*, II. xxviii. 1.

⁴ Tertullian, in his *Exhortation to Chastity* [chap. viii], says: ‘Permission is oftentimes the trial of teaching.’ In the same passage: ‘All things are permissible, but all things are not for salvation.’ Chrysostom, *On Penitence*, VIII [VIII. iii, ed. Migne, vol. VIII, p. 762], says: ‘He who lived upon herbs and wild honey said with authority to him who was accustomed to have set before him a splendid and regal table, “This is not permissible for you.” Nevertheless all things appear permissible for a king.’

Columella, in the preface to Book VII [*On Farming*, I. vii. 2], declares: ‘We must not assert our right to whatever is permissible, for the ancients held that the extreme enforcement of right is extreme cruelty.’ Jerome, *To Jovinianus* [*To Innocentius*, *Letters*, i. 14], says: ‘The extreme insistence on right is the extreme of wickedness.’

permissible; thus according to the Twelve Tables it was permitted to divide the body of the debtor among his creditors.'

This, however, is hardly a proper meaning of the word 'permitted' in the strict sense, as Cicero rightly observes in his *Tusculan Disputations*, Book V. Here, speaking of Cinna, he says: 'To me, on the contrary, he seems wretched not only because he did this, but also because he so conducted himself that it would be permissible for him to do it. Although it is not permissible for any one to do wrong, still we are misled by an error of speech; for we say that that is permitted which each one is allowed to do.' This is, nevertheless, an accepted meaning, as shown by Cicero's address to the judges in his plea *For Rabirius Postumus*: 'You should have regard to what becomes you, not merely what is permissible for you; for if you seek only what is permitted you may remove from the state whomsoever you wish.'

[V. xix. 55.]

[v. ii.]

Similarly it is said that for kings all things are permitted because they are 'not liable to be held accountable', that is, they are beyond the reach of human punishments, as we have said elsewhere. But for the instruction of a king, or an emperor, Claudian rightly says:

Consider not what you may do, but that of which the doing will honour bring.

Musonius rebukes those kings 'who are in the habit of saying, "This is permissible for me", not "This is right for me".'

[On the Fourth Consulship of Honorius, 267 f.]

3. In this sense we often see what is permitted contrasted with what is right. Such a contrast is presented by Seneca the Father¹ more than once in his *Controversies*. Ammianus Marcellinus says: 'There are some things which it is not right to do, even if it is permitted.' With this accords what Pliny says in his *Letters*: 'It is right to avoid what is dishonourable, not as being not permissible, but as being shameful.'

[In Stobaeus, xlvi. 14.]

Ammianus, XXX [viii. 8].

Pliny, V [xiii].

Cicero, again, in the speech *For Balbus*, has this: 'For there is something which is not right, even if it is permitted.' In the speech *For Milo* he refers the standard of right (*fas esse*) to nature, and the standard of what is permissible (*licere*) to the laws. In a declamation of Quintilian the Father there is a saying that it is one thing to have regard to rights, and another to have regard to justice.

[iii. 8.]

[xvi. 43.]

Declamations, ccli.

III.—*The effects of a public war in general are concerned with permission that grants impunity*

With this restriction, therefore, it is permitted to harm an enemy, both in his person and in his property; that is, it is per-

¹ In his *Controversies*, IV. xxiv [=VII. viii. 1], and elsewhere.

missible not merely for him who wages war for a just cause, and who injures within that limit, a permission which we said at the beginning of this book was granted by the law of nature, but for either side indiscriminately.

As a consequence, he who happens to be caught in another's territory cannot for that reason be punished as a murderer or a thief, and war cannot be waged upon him by another on the pretext of such an act. With this meaning we read in Sallust: 'To whom in the hour of victory all things were permitted by the law of war.'

[On Public
Adminis-
tration, ad-
dressed to
Caesar, II.
iv. 1.]

IV.—*Why such effects have been introduced*

The reason why such effects met with the approval of nations was this. To undertake to decide regarding the justice of a war between two peoples had been dangerous for other peoples, who were on this account involved in a foreign war; just so the Massilians said, in relation to the struggle between Caesar and Pompey, that it was not within the province of their judgement or their power to determine which party had the juster cause. Furthermore, even in a lawful war, from external indications it can hardly be adequately known what is the just limit of self-defence, of recovering what is one's own, or of inflicting punishments; in consequence it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgements of others. The Achaeans in their speech to the Senate, as recorded by Livy, said: 'In what way do those things which have been done in accordance with the law of war [458] come under discussion?'

[Civil
War,
I. xxxv.]

XXXIX
[xxxvi.
12].

In addition to this effect of permissibility, that is of impunity, there is another, that of ownership, which we shall discuss later.

V.—*Testimony regarding these effects*

1. Moreover that licence to injure, which we have now begun to consider, extends in the first place to persons; in regard to it there are many evidences in writers of authority. There is a Greek proverb from a tragedy of Euripides: ¹

Pure are all they who shed the blood of foes.

According to an ancient custom of the Greeks it was not lawful to bathe, to eat or drink, and much less to perform sacred rites, in company with those who had slain a man in time of peace; but to do so with those who had killed in war was right.

¹ *Ion* [line 1334].

In general, killing is called a right of war. Says Marcellus in Livy: 'Whatever I have done to the enemy is defended by the law of war.' In the same writer Alco says to the men of Saguntum: 'But I think that you ought rather to endure these things than to suffer your bodies to be butchered, your wives and children to be seized and dragged off before your faces in accordance with the law of war.' Again, in another passage, after telling of the slaughter of the Astapenses, Livy adds that this was accomplished in accordance with the law of war.

In his speech *For Deiotarus*, Cicero says: 'Why should he be your enemy, when he remembered that he and his son had been made kings by you, who would have been justified by the law of war in killing him?' Also, in the speech *For Marcus Marcellus*: 'For although by the terms of victory itself you might lawfully have slain us all, we were preserved by the mercifulness of your judgment.' Caesar informed the Aeduans 'That those through his kindness had been preserved whom according to the law of war he could have put to death'. Josephus says in his *Jewish War*: 'It is a noble thing to die in war, but by the law of war, that is, at the hands of the victors.' Papinius [Statius] has this:

And we mourn not the fallen; such are the rights of war¹
And hazards of arms.

2. However, it is clear from other passages that when these writers say 'by the law of war' we must not understand such a law as would free what is done from all blame, but such immunity from punishment as I have mentioned. Tacitus says: 'In peace we consider causes and deserts; when war breaks out, innocent and guilty fall together.' The same author elsewhere has this: 'Human justice would not permit them to approve such slaughter, nor the principles of warfare to avenge it.'

In no other sense should we understand the right of war which, according to Livy, the Achaeans refrained from availing themselves of against Aeneas and Antenor because these had always been advocates of peace. Seneca, in his tragedy the *Trojan Women*, says:

Whate'er he will, 'tis permitted the victor to do.

In his *Letters*, also: 'Deeds which they would atone for with their lives if committed in peace, we praise them for having done under arms.'²

Cyprian declares: 'Murder committed by individuals is a crime;

¹ Servius, *On the Aeneid*, II [II. 538], in the Fuldensian excerpts: 'In accordance with the law of war Pyrrhus had slain Polites; but why before his father's eyes?' Spartianus, in his *Life of Septimius Severus* [chap. xiv], writes: 'In addition to those whom the law of battle destroyed.'

² Cf. II. i. 1, above.

XXVI
[xxx. 2].

XXI [xiii.
9].

XXVIII
[xxiii. 1].

[ix. 25.]

[iv. 12.]

Comm.
[on Gallic
War], VII
[xii].

[III. viii.
5.]

[*Thebaid*,
XII. 552f.]

Annals, I
[xlvi].

Histories,
III [li].

[I. i. 1.]

[335.]

Letters,
xcvi [xcv.
31].

Letters, ii
[i. 6].

when accomplished by public authority it is called a virtue. Wicked deeds acquire immunity not on the plea that they are void of guilt but because their ruthlessness is on a grand scale.' Later he adds: 'The laws have come to terms with crimes; whatever is public begins to be permissible.' Similarly Lactantius says that the Romans in accordance with law inflicted injuries. And in the same sense Lucan speaks of 'right given over to crime'.

VI.—*Out of this right arises the right to kill and injure all who are in the territory of the enemy*

Furthermore, this right of doing what is permissible has a wide application. In the first place it extends not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy's territory. This is made plain by that very formula in Livy: 'Let him be accounted an enemy, and those who are within his defences.' The reason is that injury may be feared from such persons also; and this is sufficient, in a prolonged and general war, to give rise to the right which we are discussing.

The situation is different from that which arises from the taking of guarantees, which, as we have said, originated in the manner of the impositions levied for the payment of the debts of a state. Therefore, as Baldus notes, it is no wonder that much [459] more is permissible in war than in the exacting guarantees.

At any rate what I have said is beyond all dispute true of foreigners who enter hostile territory after a war has commenced and they are aware of it.

VII.—*What is the situation in case foreigners have entered a country before the outbreak of war?*

But foreigners who have gone to a country in a period prior to the war, after the lapse of a moderate time,¹ in which they could have departed, are apparently to be regarded as enemies according to the law of nations. Accordingly the Corcyreans, who were going to blockade Epidamnus, first gave to the foreigners an opportunity of leaving the city, telling them that if they should remain they would be regarded as enemies.

¹ Bembo, *History*, Book VII. Cicero makes use of this principle in his speech *For Ligarius* [ii. 4]. You have an example in Livy, Book XXV [XXV. xxii. 11], with regard to the citizens of Campania. Others in Thucydides, Books I and V [IV. cv].

Div. Inst.,
IV. ix [VI.
ix. 4].
Pharsalia,
I [2].

XXXVII
[XXXVIII.
xlvi. 9]
and num-
erous
other pas-
sages.

[III. ii. 7.]

On Dig.,
I. i. 5.

Thucy-
dides,
I [xxvi].

VIII.—*The right to inflict injury extends to subjects of enemies anywhere, unless the law of the foreign territory prevents it*

1. Now those who are truly subjects of the enemy, that is to say from a permanent cause, may in respect to their persons be lawfully injured in any place whatsoever, according to the law of nations. For when war is declared upon any one it is at the same time declared upon the men of his people, as we showed before in the formula of declaration ; so also in the proposal for voting : ‘ Did they wish, did they command, that war be declared upon King Philip and the Macedonians who were under his rule?’

Livy,
XXXI
[vi. 1.]

Moreover, according to the law of nations, any one who is an enemy may be attacked anywhere. As Euripides says :

[frag.
1076.]

The laws permit to harm a foe where'er he may be found.

Marcianus the jurist says : ‘ It is permissible to slay deserters, just the same as enemies, wherever they may be found.’

Digest,
XLVIII.
viii. 3. § 6.

2. Such persons therefore may be slain with impunity in their own land, in the land of an enemy, on land under the jurisdiction of no one, or on the sea. The fact that it is not permissible to slay or injure such persons in territory which is in a state of peace is based on a right derived not from their persons but from the right of him who exercises sovereignty there.¹ For political societies were able to agree that no violent measures should be taken against persons who are in territory at peace except by recourse to legal proceedings ; of such purport is the passage from Euripides which we have already quoted :

[Children
of Her-
cules,
251 ff.,
cited
above in
II. xxi. 6.
1.]

If some charge against these guests you prove,
Justice you shall obtain ; by violence
You shall not drag them hence.

Where tribunals exist regard is had to the deserts of individuals, and that promiscuous right of inflicting injury, which we say arises as between enemies, there ceases. Livy² records that seven Carthaginian ships of war were in a harbour that fell under the authority of Syphax, who at that time was at peace with the Carthaginians and the Romans. Scipio came to the harbour with three ships of war, which might have been sunk by the Carthaginians before they entered the harbour ; but a strong wind brought them into port

XXVIII
[xvii. 12.]

¹ Compare what we have to say below, III. vi. [466] 26, and Alberico Gentili, *Hispanica Advocatio*, I. vi ; Wechner, *Consilia Franconica*, xcii.

² For a similar act of the Venetians, who prevented the Greeks from injuring Turks in a port under Venetian jurisdiction, see Chalcocondylas, IX [IX = p. 478] ; with regard to the Venetians and Turks at Tunis, Bembo, IV ; with regard to the Pisans and Genoese in Sicily, Bizarri, *On the Pisan War* ; and with regard to Rostock and Greifswald, Paulinus of Gotha.

before the Carthaginians weighed anchor. Then, in fact, the Carthaginians did not dare to make any attack in the port since it belonged to the king.

IX.—*The right to inflict injury extends even over infants and women*

1. But to return to the point under consideration: How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity, and that this is included in the law of war.

I shall not urge, in support of this statement, that the Jews killed the women and children of the Hesbonites, and that they were commanded to execute a like vengeance upon the Canaanites and those who were allied with the Canaanites¹; for these are the works of God, whose right over men is greater than that of men over brutes, as we have explained elsewhere. Of greater pertinence, as evidencing the common practice of nations, is the fact that in the *Psalms* it is said that he will be happy who dashes the infants of the Babylonians against a rock. This is paralleled by the saying of Homer:²

Bodies of infants dashed upon the ground,
While ruthless war all things affrights.

[460] 2. In ancient times, as Thucydides relates, upon capturing Mycalessus the Thracians slew both women and children. Arrian records the same of the Macedonians when they had taken Thebes. After Ilurgia, a city in Spain, had been captured,³ the Romans 'slew alike both children and women', to use the words of Appian.

Tacitus records that Germanicus Caesar laid waste the villages of the Marsi, a people of Germany, with fire and sword, and adds: 'Neither sex nor age found mercy.' Titus even exposed Jewish children and women to be slaughtered by wild beasts in a public spectacle. And yet these two men are believed to have been by no means cruel in disposition—to such an extent had cruelty of this

¹ Like the Amalekites, of whom Josephus, in relating the history of Saul, VI. viii [*Antiquities of the Jews*, VI. vii. 2] writes: 'He proceeded to slay even women and children, considering that in this he was doing nothing cruel or contrary to human nature, first because those to whom he did it were enemies,' &c.

² Severus, threatening the Britons, cited [in Xiphilinus, LXXVI. xv] these words from the same Homer [*Iliad*, VI. 58]:

Nor will he cruel fate escape,
Who still lies hidden in his mother's womb

³ Scipio, after the capture of Numantia; the soldiers of Julian, who slew the women that had been left at Dacira, Zosimus, III [III. xv]. Ammianus in Book XIV [XXIV. iv. 25] says that after this same Julian had taken Majozamaltha 'the violence of the enraged soldiery slew whatever they met in their onset without distinction of age or sex'.

Deuteronomy, ii. 34.
Deuteronomy, xx. 16.

Psalms, cxxxvi [cxxxvii. 9].

[*Iliad*, XXII. 63 f.]

I [VII. xxix].

[*Anabasis of Alexander*, I. viii.]

[*Spanish Wars*, vi. 32.]
Annals, I [ii].

sort become a custom. It is, then, less surprising if old men too are killed, as Priam by Pyrrhus.

Aeneid, II
[550 f.].

X.—*The right to inflict injury extends even over captives, and without limitation of time*

1. Not even captives are exempt from this right to inflict injury.¹ In Seneca Pyrrhus says, in accordance with the accepted custom of the time,

Trojan Women
[333].

 No law the captive spares or punishment restrains.

In the *Ciris*, attributed to Virgil, such is said to be the law of war, even against captive women; Scylla there speaks thus:

[447.]

 But by the law of war a captive you had slain.

Also in the passage cited from Seneca the killing of a woman, Polyxena in fact, was under discussion. This practice gave rise to that saying of Horace:

[*Epistles*,
I. xvi. 69.]

 When you can sell a prisoner, slay him not;

for the words imply the postulate that it is permissible to kill a captive.

Donatus says that those were called slaves (*servi*) who had been saved (*servati*), 'when by the law of war they could have been killed'. Thus the captives from Epidamnus were slain by the Corcyreans, as Thucydides relates. Thus five thousand prisoners were put to death by Hannibal. In the *African War* of Hirtius a centurion of Caesar thus addresses Scipio: 'I thank you for having promised life and safety to me, although a captive by the law of war.'

[*On Terence's Adelphi*, II. i [128], I [xxx]. Appian, *Hann. Wars* [iii. 14]. Dio Cass., XLVII [xlviii]. [*Hirtius, African War*, xlv.]

2. So far as the law of nations is concerned, the right of killing such slaves, that is, captives taken in war, is not precluded at any time, although it is restricted, now more, now less, by the laws of states.

XI.—*The right to inflict injury extends even over those who wish to surrender, but whose surrender is not accepted*

Furthermore we meet with frequent examples of the slaughter of suppliants, as by Achilles in Homer, and in Virgil the cases of Mago and Turnus. These instances of the killing of suppliants, we see, are related in such a way that they are defended by the law of

[*Homer, Iliad*, XX. 463; XXI. 74; Virgil, *Aeneid*, X. 524; XII. 930.]

¹ In Josephus [*Antiquities of the Jews*, IX. iv. 3] Elisaeus 'said that it was right to slay those who had been made prisoners by the law of war'. And so Virgil [*Aeneid*, X. 524 f.] introduces a prisoner who utters the prayer:

 By the shades of thy sires, by thy hope in the youthful Iulus,
 Preserve, I beseech thee, this life to my son and my sire.

Wittekind, Book II [III, p. 34], relates that Otho put to death 70,000 [700 in Wittekind's text] Slavs who had been made prisoners.

war of which I have spoken. In fact, Augustine also, when praising the Goths, who had spared suppliants and those that had taken refuge in temples, says: 'What would have been permissible by the law of war they judged was not permissible for them.'

Again, the surrender of those who give themselves up is not always accepted. Such was the case of the Greeks who fought in the service of the Persians at Granicus; in Tacitus is another instance, that of the Uspenses, who sought pardon for their freemen: 'Their plea the victors rejected', he says, 'that they might rather perish by the law of war.' Note here also the expression 'the law of war'.

XII.—*The right to inflict injury extends even over those who have surrendered unconditionally*

But you may read also that captives, whose unconditional surrender was accepted, have been put to death,¹ as the rulers of Pometia by the Romans; Samnites, by Sulla; Numidians, and Vercingetorix himself, by Caesar.

There was indeed almost a permanent custom among the Romans with respect to the commanders of the enemy, whether captured or received by surrender, that they should be put to death on the day of the Roman triumph.² So Cicero informs us in his fifth oration *Against Verres*, Livy both in Book XXVIII and elsewhere, Tacitus in his *Annals*, Book XII, and many other authors. As Tacitus also relates, Galba ordered the decimation of those whom he had received under his protection as suppliants; and Cecinna, after receiving the surrender of Aventicum, punished Julius Alpinus, one of the foremost men, as the instigator of the war, and left the rest to the mercy, or savagery, of Vitellius.

[461] XIII.—*It is incorrect to refer this right to other causes, as retaliation, or obstinacy of defence*

1. Sometimes historians assign the reason for the slaughter of enemies, particularly of captives or suppliants, either to retaliation, or to obstinacy in resisting;³ but these causes, as we have indicated elsewhere, are plausible rather than justificatory. In fact, retaliation that is lawful, and properly so called, must be inflicted upon the very person who has done wrong, as may be seen from what has previously been said on the sharing of punishment.

In war, on the contrary, what is called retaliation very frequently brings harm to those who are in no way to blame for that on which

¹ See De Thou, book LXX [LXX. xvii], on the year 1580, with regard to events in Ireland.

² There is a similar occurrence in the *Chronicle* of Regino for the year 905.

³ As Chalcocondylas, Book VIII.

City of God, I. ii [I. i].

Annals, XII [xvii].

Livy, II [xvii. 6].
Dion., XLV [XLIII. ix].
[Dio Cassius, XL. xli.]

[V. xxx. 77.]
[XXVI. xiii. 15.]
[XII. xix.]

Histories, I [xxxvii].

[*Histories*, I. lxviii.]

the issue is joined. The point of view is thus set forth by Diodorus Siculus: 'Having learned from actual experience, since the hazard of war is the same for all belligerents, they were not unaware that either side if defeated must expect to receive the treatment which it would have accorded to the vanquished.' In the same author Philomelus, leader of the Phocians, 'made the enemy cease from their insolent and cruel punishment by inflicting an equivalent penalty'.¹

2. In truth there is no one who holds that an obstinate devotion to one's party is worthy of punishment; this is illustrated by the reply of the Neapolitans to Belisarius, in Procopius. The statement holds particularly true when the party to which allegiance is maintained has been assigned by nature, or chosen for an honourable reason.

In fact, so far from there being any crime involved in such allegiance, it is accounted a criminal act to desert one's post. This was insisted on especially in the military law of ancient Rome, which in such cases hardly admitted any excuse of fear or danger. 'Among the Romans to leave one's post is a capital crime', says Livy. For his own advantage, therefore, each one resorts to so extreme severity in cases in which it seems expedient; moreover, such severity is defended among men by the law of nations, of which we are now treating.

XIV.—*The right to inflict injury extends over hostages also*

This right to inflict injury has also been exercised against hostages, not merely against those who had bound themselves, as by an agreement, but also against those who have been surrendered by others. In ancient times two hundred and fifty hostages were put to death by the Thessalians; and hostages of the Volsci Aurunci, to the number of three hundred, by the Romans.

Furthermore we must remember that even boys were commonly given as hostages; we read that this was done by the Parthians and by Simon, one of the Maccabees. Women also were given as hostages by the Romans in the time of Porsena, and by the Germans, according to Tacitus.

XV.—*By the law of nations it is forbidden to kill any one by means of poison*

1. However, just as the law of nations, through that form of permission which we have now explained, permits many things which

¹ See the same Diodorus on Spondius and Hamilcar Barca in the *Excerpta Peiresciana* [*Excerpta de Virtutibus et Vitiis*, i = p. 262].

[XIV. xlv.]

[XVI. xxx.]

Gothic War, I [viii].

Polybius, I [xvii] and VI [xxxvii]. XXIV [xxxvii. 9]

Plutarch, *On Noble Traits of Women* [= p. 244 B]. Dionysius, [*Roman Antiquities*,] XVI [VI. xxx]. Tacitus, *Annals*, XII [x]. *1 Maccabees*, xiii. 17 [xiii. 16]. *Histories*, IV [Germania viii]

are forbidden by the law of nature, so it forbids certain things which are permissible by the law of nature. If you take account only of the law of nature, in case it is permissible to kill a person, it makes no difference whether you kill him by the sword or by poison. By the law of nature, I repeat, for it is indeed more noble to kill in such a way that he who is killed may have a chance to defend himself; but this is not an obligation due to one who has deserved to die. Nevertheless from old times the law of nations—if not of all nations, certainly of those of the better sort—has been that it is not permissible to kill an enemy by poison.

Agreement upon this matter arose from a consideration of the common advantage, in order that the dangers of war, which had begun to be frequent, might not be too widely extended. And it is easy to believe that this agreement originated with kings, whose lives are better defended by arms than those of other men, but are less safe from poison, unless they are protected by some respect for law and by fear of disgrace.¹

2. In speaking of Perseus Livy calls the poisoning of enemies secret crimes. Claudian, in discussing the plot against Pyrrhus which was rejected by Fabricius, characterizes it as impious, and Cicero, touching on the same story, refers to it as an atrocity. From the point of view of an example for all, it is important that no such deed be done, say the Roman consuls [462] in the letter to Pyrrhus which Gellius quotes from Claudius Quadrigarius. In Valerius Maximus is the saying, 'Wars ought to be waged with weapons, not with poisons.'

Tacitus records that, when the leader of the Chatti offered to bring about the death of Arminius by poison, Tiberius refused the offer, by this glorious act placing himself on a level with the generals of olden days. Wherefore those who argue that it is permissible to kill an enemy by poison,² as does Baldus, following Vegetius, have regard to the law of nature only; they quite overlook that which takes its rise in the will of the nations.

XVI.—*By the law of nations it is forbidden to poison weapons or waters*

1. Different in a degree from poisoning of this sort, and more closely allied with the use of force, is the poisoning of javelins. This is a doubling of the causes of death which Ovid relates of the Getae,³

¹ The senators [the Consuls, rather] wrote to Pyrrhus: 'that if anything should befall you it may not bring infamy upon us' [Plutarch, *Pyrrhus*, xxi = p. 396 C].

² On the Venetians, see Bembo, Book III, end.

³ Of the Scythians Pliny, [*Natural History*,] XI. liii, observes: 'The Scythians foul their arrows with the poison of vipers and human blood; this wickedness, for which no remedy can be found, produces death at once by a light touch.' On the Serbians see Helmold, *Supplement*, chap. iv.

Livy, XLII [xviii. 1].
War with Gildo [274].
On Duties, III [xxii. 86].
[*Attic Nights*,] III. viii.
V. v.
[VI. v. 1].
Annals, III [II. lxxxviii.]

Consilia, II. 188.

[Ovid, *From the Pontus*, I. ii. 15 ff.]

Lucan of the Parthians, Silius of certain of the Africans, and Claudianus of the Ethiopians in particular. But this also is contrary to the law of nations,¹ not indeed of all nations, but of European nations, and of such others as attain to the higher standard of Europe.

John of Salisbury has rightly stated the principle in these words: 'I do not read that it is permissible under any law to use poison, although I see that poisoning is sometimes resorted to by unbelievers.' Of like implication are the words of Silius, 'To disgrace iron with poison.'

2. The poisoning of springs also, though the act either is not secret or does not long remain so, is said by Florus to be not only contrary to ancestral custom but also contrary to the law of the gods; just as we have pointed out elsewhere, writers frequently ascribe the laws of nations to the gods. It should not indeed seem remarkable if there exist some such tacit agreements among belligerents to lessen the risks of war, when in olden times the Chalcidians and Eretrians, while at war, covenanted 'not to make use of missile weapons'.

XVII.—*It is not forbidden by the law of nations to pollute waters in another way*

The rule just stated has not been established in regard to the pollution of waters without the use of poison,² in such a way that one cannot drink from them. Such pollution, we read, Solon and the Amphictyons considered lawful against barbarians; and according to Oppian, in his *On Fishing*, Book IV, it was customary in his time. This is considered to be like the diverting of a river, or cutting off the veins of a spring,³ which is permissible by nature and by convention.

XVIII.—*Whether or not the use of assassins is contrary to the law of nations*

1. The question is frequently discussed whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him.

In general a distinction must be made between assassins who violate an express or tacit obligation of good faith, as subjects resorting to violence against a king, vassals against a lord, soldiers against him

¹ And so Ilus, the son of Mermerus, refuses Ulysses poison for his spears, *Odyssey*, I [I. 263]: [467] Fearing the wrath of the immortal gods.

² With corpses, or with asbestos, which Belisarius used in the siege of Auximium, Procopius, *Gothic War*, II [II. xxvii]; or with lime, as the Turks at Dibra, Nicetas, *On Alexis*, I [I. vii], brother of Isaac [Comnenus]. Similar acts are related by Otto of Freising, and Gunther, *Ligurinus*.

³ See Priscus, *Selections on Embassies* [p. 29].

[Lucan, VII. 304
Silius, III. 273;
Claud., *On Consulship of Stilicho*, I. 351.]
John of Salisbury, [*Policraticus*], viii. 20.
[III. 273.]

II [xx].

[II. xix. 1. 2.]

Strabo, X [i. 12].

Pausanias, ult. [X. xxxvii]
Frontinus, [*Stratagemas*], III [vii. 6]:
Aeschines, *On the Badly Conducted Embassy* [cxv].
[*Halieutica*, IV. 687 f.]

whom they serve, those also who have been received as suppliants or strangers or deserters, against those who have received them; and such as are held by no bond of good faith. In the latter class is Pepin,¹ the father of Charlemagne, who, accompanied by one attendant, is said to have crossed the Rhine and to have slain an enemy in his bedchamber; a similar deed was attempted upon Ptolemy of Egypt, and Polybius, attributing it to Theodotus the Aetolian, calls it 'a manly deed of daring'.

[V. lxxxii.]

Livy,
II [xii. 9].III. iii
[II. iii. 1].

[xxi. 48.]

Of such a character was also the attempt of Quintus [Gaius] Mucius Scaevola,² celebrated by historians, which he himself defended thus: 'As an enemy I wished to slay an enemy.' Porsena himself saw nothing but bravery in this deed. Valerius Maximus calls it an attempt free from reproach and brave; and Cicero also praises it in his speech *For Publius Sestius*.

Justin, II
[xi. 15].Livy,
XXVII
[xxvii].
Tacitus,
Histories,
V [xxii].
On Duties,
I. xl [197].

2. Not merely by the law of nature but also by the law of nations, as we have said above, it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are who do the deed, or who suffer. Six hundred Spartans with Leonidas entered the hostile camp of the enemy and made straight for the tent of the king. The same venture would have been permissible for a smaller number.³ Those were few in number who from an ambuscade surrounded and slew the consul Marcellus; and few likewise were those who all but stabbed Petilius Cerialis in his bed. [463] Ambrose praises Eleazer⁴ for attacking an elephant which towered above the rest, in the belief that the king was seated thereon.

Livy,
II [xii. 14].

According to the law of nations not only those who do such deeds, but also those who instigate others to do them, are to be considered free from blame. Scaevola was incited to his daring deed by those Roman senators of old, who were so scrupulous in warfare.

Digest,
XIVIII.
viii. 3. § 6.

3. No one ought to be influenced by the fact that when persons who have made such attempts are caught they are usually subjected to refined tortures. This result does not follow because they have violated the law of nations, but because, by that same law of nations, anything is permissible as against an enemy. In such cases, however, each decides upon a more severe or more lenient punishment from the point of view of his personal advantage.

¹ See Paul Warnefrid [Paulus Diaconus], VI [VI. xxxvii].

² Who is, in Plutarch [*Publicola*, xvii = p. 106 B], 'a man pre-eminent in all virtue'.

³ Valens promised a monetary reward to any one who should have brought in the head of a Scythian. Thus peace was secured; Zosimus, IV [IV. xxii].

⁴ Also Josephus. *Antiquities of the Jews*, XV. xiv [XII. ix. 4]. A similar act of Theodosius against Eugenius is mentioned by Zosimus, IV [IV. lviii]; of the Gauls against the Persian king, in Agathias; of ten Persians against Julian, in Ammianus, XXIV [XXIV. iv. 4], and Zosimus, III [III. xx]; of Alexius Comnenus against Toruses, in Nicetas of Chonae, *On Manuel*, IV [IV. iv]; and of the Bulgars against the Emperor Nicephorus, in Zonaras [XV. xv].

Under these conditions spies, whose sending is beyond doubt permitted by the law of nations—such as the spies whom Moses sent out, or Joshua himself—if caught are usually treated most severely. ‘It is customary’, says Appian, ‘to kill spies.’ Sometimes they are treated with justice by those who clearly have a just care for carrying on war; by others, however, they are dealt with in accordance with that impunity which the law of war accords. If any are to be found who refuse to make use of the help of spies, when it is offered to them,¹ their refusal must be attributed to their loftiness of mind and confidence in their power to act openly, not to their view of what is just or unjust.

4. But a different point of view must be adopted in regard to those assassins who act treacherously. Not only do they themselves act in a manner inconsistent with the law of nations, but this holds true also of those who employ their services. And yet, in other things those who avail themselves of the aid of bad men against an enemy are thought to sin before God, but not before men; that is, they are thought not to commit wrong against the law of nations, because in such cases—

Custom has brought law beneath its sway;

and ‘to deceive’, as Pliny says, ‘in the light of the practices of the age, is prudence’.

Nevertheless the warrant of custom in such cases does not extend to the right of killing; for he who makes use of another’s treachery in causing death is believed to have violated both the law of nature and the law of nations. This is apparent from the words of Alexander to Darius: ‘You are waging an unrighteous war; and, although you have arms, you set a price on the heads of your enemies.’ Later he says: ‘You who have not even observed the laws of war towards me.’ In still another passage: ‘I must pursue him to the death, not as a just foe, but as an assassin and a poisoner.’

Of similar purport is the statement concerning Perseus: ‘He was not undertaking a just war with the spirit of a king, but was making his attacks by means of all the secret crimes of robbers and poisoners.’ In treating these same deeds of Perseus, Marcius Philippus said: ‘In the ruin of his fortunes he will perceive how hateful all his acts are to the gods also.’ Here, again, the statement of Valerius Maximus applies: ‘The slaying of Viriathus² produced a twofold

¹ See Kromer, [Book V,] p. 113.

² The author of *De Viris Illustribus* [Aurelius Victor, lxxi] says: ‘This victory, because it had been purchased, was not approved of by the Senate.’ Eutropius [IV. xvi] says: ‘When his murderers sought the reward from the consul Caepio, they received the reply that the Komans never approved of a general being killed by his own troops’; perhaps one should read ‘the reward promised by the consul Caepio’. Similarly the assassination of Sertorius is condemned by Ammianus, XXX [XXX. i. 23].

Punic Wars
[xxxix.]

[Plautus,
Trinummus, 1037.]
Letters,
VIII
[xviii. 3],
To Rufinus

Curtius,
IV [i.
12-13].

XIV [IV.
xi. 18].

Livy,
XLII
[xviii. 1].

Livy,
XLIV
[i. 10].
IX. vii
[IX. vi. 4].

charge of treachery : against his friends, because he was killed by their hands ; against Quintus Servilius Caepio, the consul, because he was the instigator of the crime by his promise of immunity, and did not earn his victory, but purchased it.⁷

5. The reason why in this matter men have reached a conclusion different from that adopted in other cases is the same that we advanced above with regard to the use of poison. It has in view the purpose to prevent the dangers to persons of particular eminence from becoming excessive. According to Justin, Eumenes declared that ' he did not believe that any general wished to conquer by such means that he would set a very bad example against himself '.

In Justin, again, the murder of Darius by Bessus is said to be an example and a cause common to all kings ; and, in Sophocles, Oedipus, when about to avenge the death of King Laius, says :

Then in avenging him I serve myself.

Likewise in Seneca's tragedy on the same theme :

Kings, above all, king's safety must protect.

The Roman consuls wrote in a letter to Pyrrhus : ' It seemed an example of good faith for all that we should desire your safety.'

6. In a public war, therefore, or among those who [464] have the right to declare a public war, the practice under consideration is not permissible ; however, apart from a public war, by the same law of nations it is held to be permissible. Accordingly, Tacitus does not admit that a plot of this sort laid against the renegade Gannascus was degrading.¹ Curtius says that the treachery of Spitamenes could seem less hateful, since no one thought anything wicked that was done against Bessus, who slew his king. So, too, treachery towards robbers and pirates is not indeed blameless, but goes unpunished among nations by reason of hatred of those against whom it is practised.

XIX.—*Whether rape is contrary to the law of nations*

1. You may read in many places that the raping of women in time of war is permissible, and in many others that it is not permissible. Those who sanction rape have taken into account only the injury done to the person of another, and have judged that it is not

¹ Thus Ammianus [XXVI. ix. 10] says of Florentius and Barchalba, who handed over the rebel Procopius : ' If they had betrayed a legitimate prince, justice itself would have declared that they could have been rightly killed ; but if they had betrayed a rebel and an opponent of peace within the state, as it was said, they should have received a rich reward for the memorable deed.' So Artabanus is praised for the death of Gontharides, in the historian Procopius, *Vandalic War*, at the end of Book II [II. xxviii]. Compare Kromer, Book XXVIII [p. 604], on the killing of Sechodolius.

Justin,
XIV [i.
12].

XII [v.
10 ff.].

[*Oedipus
the King*,
141.]

[*Oedipus*,
242.]

[Gellius,
III. viii.]

Annals,
XI [xix].

VII [v.
20].

inconsistent with the law of war that everything which belongs to the enemy should be at the disposition of the victor. A better conclusion has been reached by others, who have taken into consideration not only the injury but the unrestrained lust of the act; also, the fact that such acts do not contribute to safety or to punishment, and should consequently not go unpunished in war any more than in peace.

The latter view is the law not of all nations, but of the better ones. Thus Marcellus, before capturing Syracuse, is said to have taken pains for the protection of chastity,¹ even in the case of the enemy. In Livy, Scipio says that it is a matter of concern for himself and for the Roman people 'that they should not violate what is anywhere held sacred'. 'Anywhere', that is to say, among the more advanced peoples. Diodorus Siculus says of the soldiers of Agathocles: 'They did not abstain from insults and lawlessness² towards women.' Aelian, having related that the chastity of the women and girls of Pellene was violated by the victorious Sicyonians, exclaims: 'These are most brutal acts, ye gods of Greece, and not held honourable even among barbarians, so far as my memory serves.'

2. Among Christians³ it is right that the view just presented shall be enforced, not only as a part of military discipline, but also as a part of the law of nations; that is, whoever forcibly violates chastity, even in war, should everywhere be subject to punishment. No one could have committed such an act with impunity under the Hebraic law, as may be perceived from that part which deals with the taking of a woman⁴ captive and not subsequently selling her. On this passage the Jewish rabbi Bacchai comments: 'God wished that the camp of the Israelites should be holy, not abandoned to fornication and other abominations like the camps of the Gentiles.'

Arrian, after relating that Alexander, captivated by the love for Roxane, 'did not desire to misuse her as a captive, but thought it proper to marry her', adds his approval of the act. Of the same act Plutarch says: 'He did not misuse her, but took her to wife, as was becoming for a philosopher.' Plutarch relates also that a certain Torquatus was banished to Corsica⁵ by a decree of the Romans, because he had violated a maiden of the enemy.

¹ Also Lucullus, according to Xiphilinus [Dio Cassius, XXXVI. iv]. See the proclamation of the Moor Cabaon in Procopius, *Vandalic War*, I [I. viii].

² Appian, *Mithridatic Wars* [xlvii], says of the captured Chians: 'The women and children were barbarously violated by those who carried them off.'

³ Belisarius everywhere observed this, as did Totila at the capture of Cumae and Rome. This is recorded by Procopius, *Gothic War*, III [III. i, viii and xx].

⁴ As Philo eloquently explains in his book, *On Humanity* [xiv]. Says Josephus, *Against Apion*, II [II. xxix. 212]: 'The law also cared for prisoners of war, that they might be protected, especially the women, from insult.'

⁵ But Chosroes, the Persian king, crucified a man who had assaulted a girl of Apamea; Procopius, *Persian War*, II [II. xi].

Augustine,
*City of
God*, II
[I. vi].

XXVI
[xlix. 14].

[XIX.
viii.]

*Various
History*,
VI [i].

*Deutero-
nomy*, xxi.
10.

[*Anabasis
of Alex-
ander*, IV.
xix. 9.]

[*On the
Bravery of
Alexander*,
xi = p.
332 E.]
Parallels
[xiii = p.
308 F].

ON DEVASTATION AND PILLAGE

I.—*Enemy property may be destroyed and pillaged*

On Duties,
III [vi.
32].

[V. xi.]

XXXI
[xxx. 2-3].

THAT it is not contrary to nature to despoil him whom it is honourable to kill,¹ was said by Cicero. Therefore it is not strange that the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted. Consistently with this, Polybius in the fifth book of his *Histories* says that the plunder or destruction of enemy fortifications, harbours, cities, men, ships, crops, and anything else of the kind, is included in the law of war. We read in Livy that 'there are certain rules of warfare which it is proper for us both to enforce and to endure: the burning of crops, the destruction of buildings, and the driving off of men and cattle as spoil.'

Annals,
XIII
[xlii].

On almost every page of historical writings you may find accounts of the destruction of whole cities, or the levelling of walls to the ground, the devastation of fields, and conflagrations. It must be noted furthermore that such acts are permissible also against those who have surrendered. 'The townsmen', says Tacitus, 'voluntarily opened the gates and placed themselves and their belongings in the hands of the Romans, and this secured safety for themselves; but Artaxata was set on fire.'

II.—*Even enemy property that is sacred may be destroyed and pillaged; how this is to be understood*

Dig. XI.
vii. 36.

[IV. lv.
122.]

1. Now the law of nations in itself, apart from the consideration of other obligations of which we shall speak below, does not exempt things that are sacred, that is, things dedicated to God or to the gods. 'When places are taken by the enemy, all things cease to be sacred',² says Pomponius the jurist. 'Victory had made profane the sacred things of Syracuse', says Cicero in his fourth oration *Against Verres*.

¹ Suetonius, *Nero*, xl: 'As though by the law of war an occasion had arisen for plundering the wealthiest provinces'. Cyprian, *On Mortality* [chap. viii]: 'So when possession has been taken of a state through an invasion of enemies, captivity falls upon all alike.'

² Tertullian, *Apology* [xxv]: 'Furthermore wars and victories consist very often in the capture and destruction of cities. Such procedure is not without injury to the gods. There is the same destruction of fortifications and of temples, a like slaughtering of citizens and of priests, a like plundering of treasures sacred and profane. Thus the sacrileges of the Romans are as numerous as their trophies, their triumphs over gods as numerous as those over peoples; and their spoils of war are numbered by the images of captured gods which remain unto this day.' Soon after [xi]: 'And rightly so, for if any reverse has overtaken the cities their temples have suffered the same ruin as their walls.'

The reason is that the things, which are called sacred, are in fact not withdrawn from human use, but are public¹; however, they are called sacred from the purpose to which they are devoted. The proof of what I say is that when any people surrenders itself to another people, or to a king, there are also at the same time surrendered the things which are called divine. This is clear from the formula which we have cited elsewhere from Livy; and with that the verse in the *Amphitruo* of Plautus agrees,

Their city, lands, their altars, hearths, and persons
Let them give up;

I. iii. 8
[Livy,
VII. xxxi.
4].

[226.]

and then :

They yield themselves and all possessions, human and divine.

[258.]

2. In consequence Ulpian says that even sacred things are included under public law. In his description of Arcadia Pausanias says that it was a custom common to both Greeks and barbarians, that sacred things should be at the disposal of those who had captured cities. Thus he relates that when Troy was taken the image of Hercaean Jupiter was granted to Sthenelus; and he gives many other examples of the same custom. Thucydides, in Book IV, says: 'It was the custom among the Greeks, that those who had power over a country, whether large or small, should also possess its shrines.'² With this agrees the statement in Tacitus: 'In the Italian towns, all ceremonies, and temples, and statues of the gods, are subject to the Roman law and authority.'

[Digest, I.
i. i. § 2.]
[VIII.
xlvi.]

[IV.
xcviii.]

Annals,
XII [III.
lxxi].

3. Hence, furthermore, a people, having changed its mind, may make profane what has been sacred, as is clearly indicated by the jurists Paul and Venuleius. We see that, under the necessity of the times, sacred things have been converted to the uses of war³ by those who had consecrated them. This, we read, was done by Pericles, though with a promise of restitution, by Mago in Spain,

Digest,
XLV. i.
83. § 5,
and 137.
§ 6.

¹ Marsilius of Padua in the *Defensor Pacis*, chap. v, pt. 2; Nicolas de Bohier, *Decisions*, lxxix, no. 1; Bossius, *Practica Criminalia, De Foro Competente*, no. 101; Cothmann, *Consilia*, c. no. 30.

² This custom is also revealed by a passage from Polybius cited below, III. viii. 4.

³ As by the Syracusans in the time of Timoleon, in whose life Plutarch records this [*Timoleon*, xxiii = p. 247 E]. The Chians made up even from the sacred vessels the fine which Mithridates laid upon them; Appian, *Mithridatic Wars* [vii. 47]. Pliny, Book VII, last chapter [*Natural History*, XVII. xxviii. end], in speaking of Marcus Porcius Cato, says: 'He sanctioned the cutting down of sacred trees [471] and groves, after the offering of sacrifice; and he has handed down the reason for this in the same volume.'

In the Mithridatic War, Sulla removed the votive offerings from Olympia, Epidaurus, and Delphi, as is related by Plutarch [*Sulla*, xii = p. 459 B] and Appian [*Mithridatic Wars*, viii. 54]; and he also restored their value; Diodorus Siculus in the *Excerpta Peiresciana* [*Excerpta de Virtutibus et Vitiis*, i = p. 322]. Augustus borrowed treasures from the temples, as we learn from Appian, *Civil Wars*, V [V. ii. 13]. Cassiodorus relates that Agapetus gave sacred vessels in pledge, [*Variarum*] XII. xx.

In time of grave need Heraclius coined money from the vessels of the Church, but afterwards restored their value, as Theophanes relates. See also Anna Comnena, V [V. ii] and VI [VI. iii]; Kromer, XXIII; and the speech of Laurentianus in Bembo, Book VI. Add what is to be said below in III. xxi. 23.

by the Romans in the Mithridatic War, [469] by Sulla, Pompey, Caesar, and others. In Plutarch Tiberius Gracchus says: 'There is nothing so sacred and holy as offerings to the gods. Nevertheless no one has hindered the people from using, moving, or transferring these.'

In the *Controversies* of Seneca¹ the Father we read: 'Often-times the temples are stripped for the sake of the state, and we melt down offerings to serve as pay.' Trebatius, a jurist of the time of Caesar, says: 'That is profane, which, from being religious or sacred, has been transferred to the use and ownership of men.'² Of this law of nations, therefore, Germanicus made use against the Marsi, when, as Tacitus relates: 'Profane and sacred structures alike, even the temple most famed among these peoples, which they called the shrine of Tanfana, were levelled to the ground.' Here apply the lines of Virgil:

If I your altars always have revered,
Which the Trojans have profaned in war.

Pausanias has recorded that gifts to the gods are as a rule seized by the victors³; and Cicero, speaking of Publius Servilius, calls this the law of war. 'He removed statues and ornaments', Cicero says, 'from the city of the enemy which had been taken by force and valour, in accordance with the law of war and the right of a commander.' Thus Livy says that the adornments of the temple, which Marcellus brought to Rome from Syracuse, 'were acquired by the law of war'. Gaius Flaminius, in speaking for Marcus Fulvius, says: 'Statues were carried off and other things done which are usually done when cities are captured.' Fulvius⁴ also in a speech calls this very thing the law of war. Cato [Caesar] in a speech reported by Sallust, in recalling what usually happens to the vanquished, mentions likewise the pillaging of shrines.⁵

4. Nevertheless this is true, that if a divinity is believed to

¹ In the *Excerpta*, IV. iv.

² Servius, *On the Aeneid*, II [II. 713], says of the temple of Ceres: 'Aeneas knew that it had previously been profaned.' He says the same *On the Aeneid*, III, IX, and XII. Moreover, *On the Eclogues*, VII [VII. 31], he remarks: 'Gifts offered to deities are sacred, and may be called offerings, only so long as they have not been profaned.'

³ Virgil, *Aeneid*, V [line 360]:

By Greeks ta'en down from Neptune's sacred door.

Plutarch, in his *Fabius* [xxii = p. 187 c, D], relates that he captured a statue of Hercules at Tarentum and sent it to the Capitol; he left to the Tarentines the rest of their gods, because they were hostile. In harmony with this is the quotation we have just made from Tertullian, and also the following from the same author, *Against the Nations*, II [II. xvii]: 'Hence as many triumphs over gods as over peoples. Still remaining among them are their captive idols, and if these perceive their conquerors they do not love them.'

⁴ See Polybius, *Selections on Embassies*, xxvii [= *Histories*, XXI. xxx].

⁵ See Kromer, *Book XVII* [p. 402]. With regard to the property of the Church at Antioch captured by Chosroes, see Procopius, *Persian War*, II [II. ix].

[Tiberius
Gracchus,
xv =
p. 832 A.]

Macrobius,
Saturnalia,
III [iv].

Annals, I
[ii].

[*Aeneid*,
XII.
778 f.]

VIII
[xlii].
Against
Verres, III
[I. xxi. 57].

XXV
[xl. 2].

[Livy,
XXXVIII.
xliii. 10.]

[Livy,
XXXIX
[iv. 12].

[*Catiline*,
ii. 9.]

reside in an image it is unlawful that the image shall be defiled or destroyed by those who share such belief. On the assumption that such a belief is held, those who have committed acts of this character are sometimes accused of impiety or of contravention of the law of nations. The case is different if the enemy do not hold the same view; so the Jews were not only permitted but even enjoined to destroy the idols of the Gentiles.

The reason why the Jews were forbidden to take the idols of their enemies was, that they might the more abominate the superstitions of the Gentiles, having been warned against contamination by the very prohibition of contact. The purpose was not to spare what was sacred to others, as Josephus¹ explains, doubtless from flattery to the Romans, just as in his explanation of the other command, about not naming the gods of the Gentiles; for he explains this as though the Jews were forbidden to speak evil of the gods of the Gentiles, when in fact the law would not permit them to be named for the sake of honouring them, or without execration. The Jews in fact knew, through the most certain admonition of God, that in these idols there dwelt, not the spirit of God, nor good angels, nor the power of the stars, as the misguided Gentiles thought, but base demons, hostile to the human race. As Tacitus rightly said in describing the institutions of the Jews: 'In their view all things are profane which among us are sacred.' Hence it is not strange if we read that the Maccabees more than once set fire to temples of a profane cult.

When, therefore, Xerxes destroyed the images belonging to the Greeks, he did nothing contrary to the law of nations, although Greek writers exaggerate this greatly in order to arouse enmity. For the Persians did not believe that there were any divinities in idols,² but thought that God was the sun, and any fire was a part of him. By the Hebraic law, as Tacitus also rightly says: 'None but the priests were permitted to cross the threshold of the Temple.'

5. Nevertheless Pompey, according to the same author, 'entered the Temple by right of conquest'; or, as Augustine, referring to the same incident, says, 'not with the devotion [470] of a suppliant, but by the right of a conqueror'. He did well to spare the Temple and its furnishings, although, as Cicero expressly says, he did so from shame and fear of his critics, not from respect; but he did wrong to enter, seeing that he despised the true God, an attitude which the Prophets censured in the Chaldaeans also. For this reason some persons even believe that the wonderful providence of God caused

Deuteronomy, vii. 5.

Histories, V [iv].

1 Maccabees, v [44] and x [84].

Asconius Pedianus, *On Cicero's Against Verres*, III [I. xviii. 48].
[*Histories*, V. viii, ix.]
City of God, XVIII. xlv.
For Flaccus [xxviii. 68].

Daniel, v. 23.

¹ Josephus, *Antiquities of the Jews*, IV. viii [IV. viii. 10], and *Against Apion*, II [II. xxxiii. 237].

² Diogenes Laertius at the beginning [proem., vi] says: 'Idols are condemned by the magi.'

the Pompey whom I mentioned to be slain as it were in the sight of Judaea, at Cassius, a promontory of Egypt.

Still, if you consider the point of view of the Romans, nothing in relation to the Temple in Jerusalem was done contrary to the law of nations. Thus Josephus relates that the Temple was destroyed by Titus, and adds that it was destroyed 'in accordance with the law of war'.

Jewish War, VI. xxiv and xxxiv [VI. iv. § 3 and v. § 2].

III.—*Enemy property that is consecrated may be destroyed or pillaged ; a caution is added*

What we have said of sacred things should be understood of consecrated things as well ; for these, also, do not belong to the dead but to the living, being the possession of a people or of a family. Therefore Pomponius in the passage cited above wrote that, just as sacred places, so consecrated places ceased, when taken by enemies, to be such ; and Paul the jurist said : 'The burial-places of the enemy are not consecrated for us, and so we can use for any purpose stones that have been removed from them.'

[*Dig.* XI. vii. 36.]

Digest, XLVII. xii. 4.

Nevertheless the principle laid down must be so interpreted that the bodies of the dead are not to be mistreated, because that is contrary to the law of burials ; and the law of burials, as we have shown elsewhere, was introduced by the law of nations.

[II. xix. i. 1.]

IV.—*How far deceit is permissible in these matters*

At this point I shall briefly repeat, that enemy property may be seized not alone by force, but that ruses which do not involve breach of faith are held to be permissible ; permissible, again, is even the inciting of another to treachery. In truth the law of nations begins to wink at these frequent minor wrongs, just as municipal laws at harlotry and usury.

CHAPTER VI

ON THE RIGHT OF ACQUIRING THINGS TAKEN IN WAR

I.—*What the law of nature is regarding the acquisition of things taken in war*

[472] 1. Besides the impunity among men in relation to certain actions, which we have discussed up to this point, there is also another effect characteristic of public war according to the law of nations.

According to the law of nature, by a lawful war we acquire things which are either equal to that which, although it was owed to us, we could not otherwise obtain,¹ or we inflict upon the guilty a loss that does not exceed an equitable measure of punishment,² as has been said elsewhere. By this law Abraham gave to God a tithe³ of the spoils which he had taken from the five kings, as the inspired writer of the *Epistle to the Hebrews* (vii. 4) explains the story which is found in *Genesis*, xiv. In like manner the Greeks also, the Carthaginians, and the Romans consecrated to their gods, such as Apollo, Hercules, and Jupiter Feretrius, a tenth of their booty.

Jacob, too, in leaving to Joseph a special legacy in preference to his brothers, said: 'I give thee a portion above thy brethren, which I took out of the hand of the Amorite with my sword and with my bow' (*Genesis*, xlvi. 22). In this passage the words 'I took'⁴ apparently are to be understood, in the prophetic manner of speech, as 'I shall assuredly take', and there is attributed to Jacob that which his descendants called by his name were to do, as if the persons of the progenitor and his children were the same. It is in fact more correct to take the meaning thus than to refer these words, as the Jews do, to the pillaging of Shechem, which had already been accomplished by the sons of Jacob; for Jacob, as became his uprightness, always condemned this act as having been associated with treachery, as one may see in *Genesis*, xxxiv. 30, and xlix. 6.

2. Moreover it is clear from other passages also that God approves of this right of spoil within the natural limits which I have mentioned. In His own law, when speaking of the city that has

¹ II. vii. 2.

² II. xx [II. xx. 28 ff.].

³ And victuals to his servants, and a part of the spoil to his allies. See Josephus on this story [*Antiquities of the Jews*, I. x. 2], and what follows below, III. xvi. 3.

⁴ The Chaldaean commentator interprets this as accomplished through prayers to God, who by a certain exceptional benevolence had preserved Shechem for Jacob and his posterity.

Deut., xx.
14.

I Chron.,
v. 20, 21,
22.

2 Chron.,
xiv. 13.

Joshua,
xxii. 8.

[*I Samuel*,
xxx. 26.]

On Benefits,
III. xxxvii
[III.
xxxiii].

On Curses
[i].

been stoned after the rejection of peace, God speaks thus: 'Even all the spoil thereof thou shalt take for a prey unto thyself: and thou shalt eat the spoil of thine enemies, which Jehovah thy God hath given thee.' The men of the tribe of Reuben, of Gad, and part of the tribe of Manasseh are said to have conquered the Ituraeans and their neighbours, and to have taken much spoil from them; and the reason is given, that they had called upon God in the war, and He had listened to them with favour. It is likewise recorded that the pious king Asa, after calling upon God, won both a victory and spoil from the Ethiopians, who were harassing him in an unjust war. The result is all the more noteworthy, because in these cases force was resorted to, not by a special warrant, but by a right common to all.

3. Joshua, again, when following with his blessing the very men of the tribes of Reuben, Gad, and a part of the tribe of Manasseh, whom I have mentioned, said: 'Divide the spoil of your enemies with your brethren.' And David, when he sent to the Jewish elders spoils won from the Amalekites, gave value to the gift in saying: 'Behold, a present for you of the spoil of the enemies of Jehovah.'

In fact, as Seneca said, for soldiers it is perfectly fair to enrich some one with spoils taken from the enemy. Divine laws also regarding the division of booty are to be found in *Numbers*, xxxi. 27. Philo says that it is among the curses of the law that the land should be harvested by the enemy, whence follows 'famine for friends, but abundance for the foe'.

II.—*What the law of nations is; evidences are cited*

1. By the law of nations not merely he who wages war for a just cause, but in a public war also any one at all becomes owner, without limit or restriction, [473] of what he has taken from the enemy. That is true in this sense, at any rate, that both the possessor of such booty, and those who hold their title from him, are to be protected in their possession by all nations; and such a condition one may call ownership so far as its external effects are concerned.

Xenophon,
On the Training of Cyrus, V [VII. v. 73].
Laws [I. ii = 626 B].
Sophist [= 219 ff.].
Comm. IV [Memorabilia, IV. ii, 15].

In Xenophon *Cyrus* says: 'It is an eternal law among men that, whenever a city of the enemy is taken, their property and money belong to the captors.' Plato said: 'All goods of the conquered become the property of the conqueror.' Elsewhere, among the quasi-natural modes of acquisition, he places that 'by warfare', which he also calls 'by pillage', 'by combat', and 'by strength of hand'. In this matter Plato has the approval of Xenophon, whom I have mentioned. In Xenophon's work Socrates, by means of questions, leads Euthydemus to the admission that it is not always

unjust to plunder, as when plundering is done to the detriment of an enemy.

2. On the authority of Aristotle also we read: 'The law is a sort of agreement, according to which things taken in war belong to those who take them.' Of the same purport is the saying of Antiphanes [Antisthenes]: 'One ought to pray that the enemy have possessions without courage; for in that case their possessions become the property, not of those who have them, but of those who seize them.' In Plutarch's *Life of Alexander*¹ we read: 'The possessions of the vanquished should be, and should be called, those of the victor.'

The same author elsewhere says: 'The goods of those who are conquered in battles lie as prizes for those who conquer.' The passage is taken from the second book of Xenophon, *On the Training of Cyrus*. King Philip in his *Letter to the Athenians* said: 'All these cities we hold either because they were left to us by our ancestors or because we have obtained possession of them by war.' Aeschines says: 'If indeed, after making war upon us, you took the city by force of arms, you are in rightful possession of it, since you have it by the law of war.'

3. In Livy Marcellus says that what he took from the Syracusans he took by the law of war.² The Roman envoys said to Philip with regard to the cities of Thrace and other cities that, if he had taken them in war, by the law of war he would hold them as the reward of victory; and Masinissa declared that he held by the law of nations the territory that his father had taken in war from the Carthaginians. Likewise, in Justin, Mithridates said: 'He had not withdrawn his son from Cappadocia, of which, as victor, he had taken possession by the law of nations.'

Cicero states that Mitylene had come into the possession of the Roman people 'by the law of war and the right of victory'. He says also that some things began to be private property either by taking possession of that which was without an owner, or by war; that is, in the latter case things became the property of those who obtained them by victory. Dio Cassius affirms: 'The possessions of the conquered fall to the victors.' Even Clement of Alexandria says that the property of enemies may be carried off and acquired by the law of war.

4. 'What is taken from the enemy, by the law of nations becomes at once the property of those who take it,' says Gaius the

¹ In the same work [xxxii = p. 684 A]: 'Conquerors acquire also for themselves the things which belong to their enemies.'

² [487] Diodorus Siculus, *Excerpta Peiresciana*, no. 467 [*Excerpta de Virtutibus et Vitiis*, i = p. 323], says: 'What is acquired by arms and won by the law of war is not to be given up.' In Agathias, Book II [I. v], the Goths said of Theodoric, after he had conquered Odoacer: 'He held by the law of war all that had belonged to Odoacer.'

Politics, I
[vii].

[In Sto-
baeus, liv.
41.]

[xx =
p. 676 A.]

[II. iii. 2.]
[Demo-
sthenes,
*Oration*s,
xii. 22 =
p. 164.]
*On the
Badly
Conducted
Embassy*
[xxxiii].
[XXVI.
xxx. 9.]

Livy,
XXXIX
[xxix. 2].
XXXIX
[XL. xvii.
4].
XXXVIII
[v. 6].

*Against
Rullus*, II
[xvi. 40].
On Duties,
I [vii. 21].

[XLI. lvi.]
Stromata,
I [xxiii.
157].

Dig. XLI.
i. 5. § 7.

Institutes,
II. i [17].
Aristotle,
Politics,
I. viii.

jurist. Theophilus, in the Greek *Institutes*, calls this a 'natural acquisition', in the sense in which Aristotle said 'acquisition by war is a method according to nature'. The reason doubtless is that the bare fact, not the cause, is held in view, and in the fact the right has its origin.

Dig. XLI.
ii. 1. § 1.

With precisely similar meaning Nerva the Son, as the jurist Paul relates, used to say that the ownership of things arose from natural possession, and that a trace of this remains in relation to those things which are taken on land, in the sea, or in the air; likewise in respect to the things taken in war, all of which become at once the property of those who were the first to take possession of them.

Greek
History,
III [*Hel-*
lenica, III.
i. 26 ff.].

5. Furthermore, what is taken from the subjects of an enemy is also considered as taken from the enemy. Thus Dercyllides argues in Xenophon, [474] that since Pharnabazus was an enemy of the Lacedaemonians, and Mania was a subject of Pharnabazus, the property of Mania stood in such a relation that it could rightfully be seized, according to the law of war.

III.—*When a thing capable of being moved may be held to have been captured, according to the law of nations*

Dig. XLI.
i. 44.

1. In this inquiry in regard to war, however, the nations have agreed that he is to be understood as having captured a thing who retains it in such a way that the original possessor has lost probable expectation of regaining it, or so that the thing has escaped pursuit, as Pomponius says in a similar inquiry. In the case of things that are movable, this principle is so extended that such things are said to have been captured when they have been brought within the borders, that is to say, the defences, of the enemy.

Digest,
XLIX. xv.
10. § 3; 30.
Digest,
XLIX. xv.
5. § 1;
Institutes,
II. i. § 17.
[*Digest*,
XLIX. xv.
5. § 1.]

A thing in fact is lost in the same manner by which it returns, by postliminy; it returns when it begins to be within the borders of the state, and that is elsewhere explained as within the defences. Paul says clearly, with regard to a man, that he is lost when he has gone outside of our frontiers; and Pomponius explains that a captive in war is he whom the enemy have taken from among our men and brought within their own defences. Such a man, before he is brought within the defences of the enemy, remains a citizen.

Institutes,
loc. cit.;
Dig. XLI.
i. 5. § 7.

2. Now as regards this aspect of the law of nations, the same reasoning was applied to a man and to a thing. Whence it is easy to understand that the statement elsewhere made, that captured things immediately become the property of those who capture them, should be understood as implying the condition that possession continue up to this point.

Hence it seems to follow that on the sea ships and other things

may be considered as captured only when they have been brought into dockyards or harbours, or to the place where a whole fleet is stationed; for then recovery begins to appear hopeless. But in the more recent law of nations we see the doctrine introduced among European peoples that such things may be considered as captured when they have been for twenty-four hours¹ in the power of the enemy.

Consolato del Mare, cclxxxiii. and cclxxxvii; *Constitutions of France*, XX. xiii. 24.

IV.—*When territory may be held to have been captured, according to the law of nations*

1. Nevertheless territory is not considered as captured at the moment it is occupied. While it is true that that part of a territory which an army has invaded in great force is temporarily possessed by it, as Celsus has noted, still such possession is not sufficient for that effect which we are discussing, for which secure possession is required. The Romans were so far from considering as lost the land outside the gate which Hannibal was occupying with his camp, that at that very time it sold at a price no lower than before. Therefore only that territory will be regarded as captured which is so surrounded by permanent fortifications that the other party will have no access to it openly unless these have first been taken.

Cornelius a Lapide, *On Genesis*, xiv; Molina, disp. 118. *Dig.* XLI. ii. 18. Livy, XXVI [xi. 6].

2. The origin of the word 'territory' as given by Siculus Flaccus from 'terrifying the enemy' (*terrendis hostibus*) seems not less probable than that of Varro from the word for ploughing (*terendo*), or of Frontinus from the word for land (*terra*),² or of Pomponius the jurist from 'the right of terrifying' (*terrendi iure*), which is enjoyed by the magistrates. So Xenophon, in his book *On Taxes*, says that the possession of territory in time of war is retained by means of fortifications, which he calls 'walls and entrenchments'.

[p. 3, edit. Goes.] [*On the Latin Language*, V. xxi.] [*Dig.* L. xvi. 239, § 8.] [IV. xliii f.]

V.—*Property which does not belong to the enemy is not acquired by war*

This also is clear: In order that something may become ours by the law of war, it must belong to the enemy. Those things which are in the enemy's possession, to be sure, in their towns, for example, or within their fortifications, but of which the owners are neither subjects of the enemy nor hostilely inclined, cannot be acquired by war. It has been shown, among other things, in a passage of Æschines

[*On the Badly Conducted Embassy*, xxxiii.]

¹ That this custom is observed on land also may be learned from De Thou, Book CXIII, on the year 1595. The rule is derived from the Germanic laws, and follows the precedent which these people, not without reason, had established for themselves in regard to a wounded wild animal, as in the *Law of the Lombards*, I. xxii. 6. Alberico Gentili, *Hispanica Advocatio*, I. iii, says that the same rule is observed in England and in the kingdom of Castile.

² [Grotius seems to have misread a passage of Godefroy's note on *Digest*, L. xvi. 239, which states that Frontinus derived it from *terrendis hostibus*, Cujas from *terra*.]

previously cited, that Amphipolis, which was a city of the Athenians, could not have become the property of Philip as a result of Philip's war against the citizens of Amphipolis. For this would be unreasonable, and the right of changing ownership by means of force is too offensive to merit wider application.

VI.—*What of goods found in ships of the enemy?*

Consequently the current statement that goods, which are found in ships of the enemy, are to be considered as belonging to the enemy,¹ should not be accepted as if it were a fixed provision of the law of nations, [475] but as indicating a certain presumption. This presumption, however, may be overthrown by valid proofs to the contrary.

In our native country of Holland formerly, in the year 1438, when war was raging with the Hanseatic towns, a decision to that effect was reached at a full session of the Senate, as I have found, and from that decision the provision passed into a law.

VII.—*Things which our enemies have taken from others by war become ours according to the law of nations; this is attested by evidence*

I. The principle, however, is beyond dispute—if we have reference to the law of nations—that what has been taken by us from the enemy cannot be claimed by those who had possessed it before it came into the possession of our enemy, and had lost it in war. The reason is that the law of nations, through external ownership, first made our enemy the owner, and then us.

By this right, among others, Jephtha defends himself against the Ammonites, because that territory, which the Ammonites claimed, had by the law of war passed from the Ammonites; just so another part also had passed from the Moabites to the Amorites, and from the Amorites to the Jews. Likewise David² regarded as his own,

¹ But the ships of friends do not become prizes because they are carrying goods of the enemy, unless this happens with the consent of the owners of the ship, *Digest*, XXXIX. iv. 11; Rodericus Suarez, *De Usu Maris*, consilium ii, no. 6.

In this sense I think we must interpret the laws of France, which render vessels liable to seizure because of their goods, and goods because of the ships which carry them. Such are the laws of Francis I issued in 1543, chap. xlii; of Henry III, issued in March, 1584, chap. lxix; and the Portuguese Law, Book I, tit. xviii.

Elsewhere the goods themselves are alone liable to seizure; Meurs, *Danish History*, II. Thus in the war between the Venetians and the Genoese Greek ships were searched and any enemies who were concealed in them were removed; Gregoras, IX [IX. v]. See also Krantz, *Saxonia*, II, and Alberico Gentili, *Hispanica Advocatio*, I. xx

² And so Rezin, king of Syria, gave the city Eloth, which had belonged to the Idumaeans, not to the Idumaeans but to the Syrians, for them to dwell there, according to the reading of the Masorites, *2 Kings*, xvi. 6.

and distributed, what he himself had taken from the Amalekites, and the Amalekites had taken from the Philistines.

2. According to Dionysius of Halicarnassus, when the Volscians¹ demanded their former possessions, Titus Largius in the Roman Senate expressed his opinion thus :

[*Roman Antiquities*,] VI [xxxvi].

We Romans consider as our fairest and most lawful possessions those which we have taken and hold by the law of war ; and we would not foolishly suffer valour to be forgotten by surrendering these possessions to those who have lost them. Such possessions we think are not only to be shared in by our citizens who are living, but are also to be left for posterity. If we allow ourselves to be deprived of what we now have, we shall injure ourselves in the same manner in which we injured the enemy.

Similar was the answer given by the Romans to the Aurunci : ' We Romans think that with perfect right one may hand down, as his own, to his descendants, whatever he has acquired by courageously wresting it from the enemy.' Elsewhere, in reply to the Volscians, the Romans speak as follows :

[Dion. Hal., VI. xxxii.]

VII [VIII. x].

But we consider as our best possessions those which we have taken by conquest in war. We were not the first to establish this right, nor do we think that it is a law of men rather than of the gods ; but we know that all, both Greeks and barbarians, make use of it, and we would not yield to you anything in cowardice, nor abandon what we have won in war. For it would be the utmost disgrace if any one through cowardice and folly should be deprived of what had been won by courage and bravery.

There is a similar thought in the reply of the Samnites : ' Since we have acquired these things in war, which is a perfectly fair law of acquisition.'

Selections on Embassies [p. 10].

3. After relating that the land near Luna was divided by the Romans, Livy speaks of it thus : ' This land had been taken from the Ligurians ; it had belonged to the Etruscans before the Ligurians.' By such a right Appian notes that the Romans retained Syria, and did not restore it to Antiochus Pius, from whom Tigranes, an enemy of the Romans, had taken it.² Justin, quoting from Trogus, represents Pompey as replying thus to the same Antiochus : ' Since Pompey had not taken the kingdom from Antiochus when Antiochus held it, inasmuch as Antiochus had yielded it to Tigranes, Pompey

XLI [xiii. 5].

Mithridatic Wars [xv. 106].
XL [ii. 4].

¹ Plutarch, *Romulus* [xxv = p. 33], tells the same story with regard to Veii : ' The people of Veii began the war with the demand that Fidenae should be restored to them, just as if it belonged to them. This was not only unjust but also ridiculous, seeing that they had not aided Fidenae when in distress and engaged in war, but had permitted the population to perish, and now laid claim to the houses and fields from those who held possession of these as the result of war.'

² Appian [*Syrian Wars*, viii. 49] speaks as follows : ' It was not right that the Seleucidae, who had been dispossessed by Tigranes, should occupy Syria, rather than the Romans who had conquered Tigranes.' And elsewhere [*Mithridatic Wars*, xv. 106] : ' He believed that since he had driven the conqueror of Antiochus from this land he had thereby acquired it for the Romans.' Antiochus himself, in Polybius, *Selections on Embassies*, lxxii [= p. 307], ' thought that the possession acquired in war was the surest and most honourable '.

[Appian,]
Civil Wars,
I [iv. 29].

would not give to him what [476] he did not know how to defend.' Likewise the Romans held as their own those parts of Gaul¹ which the Cimbri had wrested from the Gauls.

VIII.—*The opinion, which holds that things taken from the enemy become the property of the individuals who capture them, is refuted*

It is a more serious question, Who acquires the goods of the enemy in a public and formal war : the people itself or the individuals who are of it or within it ?

Bartolus,
On Dig.,
XLIX.
xv. 28 ;
Alexander
and Jason,
On Dig.,
XLI. ii. 1 ;
Angelus,
On Inst.,
II. i. § 17 ;
Panormi-
tanus, *On*
Decretals,
II. xxiv.
13, no. 7 ;
Thomas
Gramma-
ticus, *Deci-*
siones Nea-
politanae,
lxxi, no.
17 ;
Martinus
Laudensis,
De Bello,
qu. 4.
[III. vi.
2. 4.]

On this point the more recent interpreters of the law hold very diverse opinions. The majority of them, having read in the Roman law that captured things become the property of those who take them, but in the collection of canons that booty is divided according to the will of the people, have declared—one following the other, as is usually the case—that in the first place and by the law itself things captured belong to the individuals who lay hands on them, but that they are to be assigned to the commander for distribution among the soldiers. Since this view is as widely current as it is false, we must refute it with so much the greater pains, that it may serve as an example of how little trust, in controversies of this sort, is to be placed in such authorities.

However, it is not to be doubted that by agreement of the nations either practice may be established ; that is, that the ownership of captured goods may fall to the people which wages the war, or to any one who lays hands upon them. But we are inquiring what their will has been ; and we say that the nations have decided that the property of enemies should stand to enemies in the same relation as ownerless property, as we have already indicated from the saying of Nerva the Son.

IX.—*By the law of nature both possession and ownership may be acquired through another*

1. Things which are ownerless, to be sure, become the property of those who take them, but they become just as much the property of those who obtain possession of them through others as of those who take them for themselves. Consequently not only slaves and children, but also free men, who in fishing, fowling, hunting, or gathering pearls, have given their assistance to others, at once acquire

¹ The Franks did not restore to the Romans the lands of Italy which they had received from the Goths ; Procopius, *Gothic War*, IV [IV. xxiv]. See what the king of Sweden says, in De Thou, Book LXXVI, on the year 1582.

what they have taken for those persons whom they serve. Modestinus the jurist was right in saying: 'What is acquired naturally, as a possession, we acquire through any person at all, if we wish to possess it.'

Dig. XLI.
i. 53.

In his collected *Sententiae* Paul says: 'We acquire possession by means of the will and of the body; by our own will, that is, but by either our own body or that of another.' The same writer thus comments on the *Edict*: 'We acquire possession through an agent, a guardian, or an executor'; and he explains that this happens when they act with the intention of rendering us such service. Thus among the Greeks, those who competed in the Olympic games acquired prizes for those by whom they were sent. The reason is that naturally one man by his own volition becomes the instrument of another's will, as we have also said elsewhere.

V. ii [§ 1].

Dig. XLI.
ii. i. § 20.

2. Therefore the distinction in regard to acquisitions, which is handed down as between free and unfree persons, belongs to the civil law, and properly applies only to acquisitions under the civil law, as appears from the passage cited from Modestinus. Nevertheless the Emperor Severus afterward made such acquisitions approach more closely to the type of natural acquisitions, not in the interest of utility only, as he himself claims, but in that of jurisprudence also. If, then, we disregard the civil law, the principle holds good that one may do through another what he can do himself, and that the effect is the same whether any one acts for himself or through another.

[I. v. 3.]

Digest,
XLIV.
vii. 56.
Dig. XLV.
i. 38. § 17.

Code, VII.
xxxii. 1.
Sext., V.
xii. 68 and
72.

X.—*The distinction between hostile acts as public or private*

In our investigation, therefore, we must distinguish between acts of war that are truly of a public character, and private acts which are committed on the occasion of a public war. By private acts a thing is sought primarily and directly for private persons; by public acts, for the people.

It was, then, in accordance with the law of nations that Scipio, as Livy relates, treated thus with Masinissa: 'Syphax has been beaten and captured under the auspices of the Roman people. In consequence he himself, his wife, his kingdom, land, towns, the men who inhabit them, in short whatever belonged to Syphax, are the spoil of the Roman people.' In the same manner Antiochus the Great argued that Coele Syria had been acquired by Seleucus and not by Ptolemy, on the ground that the war was the war of Seleucus, to whom assistance had been rendered by Ptolemy. The account is in Polybius, Book V.

Livy,
XXX
[xiv.9-10].

[V. lxvii.]

[477] XI.—*Territory is acquired for a people, or for him whose war it is*

1. Landed property is not usually taken except by a public act, upon the entry of an army and the establishment of garrisons. Thus, in the opinion of Pomponius, 'Land that has been taken from the enemy is public property', that is, as he explains in the same passage, 'it is not classed as booty', if we take the word booty in its strict sense. In Procopius,¹ Solomon the praetorian prefect said: 'It is not unreasonable that captives and other things should go to the soldiers as booty'—on the understanding that this is done by public consent, as we shall explain below—'but that the land itself should belong to the Emperor and the Roman state.'

2. Thus among the Jews² and the Lacedaemonians land taken by force was divided by lot. So the Romans either kept captured territory in order to lease it, in some cases leaving a small portion to the original possessor as a mark of honour; or they sold it in parcels, or assigned it to colonists, or made it subject to taxes. For such disposition of conquered territory there is abundant evidence in the laws and histories, and in the treatises of the land-surveyors.

In the first book of his *Civil Wars* Appian writes: 'In conquering Italy by war, the Romans confiscated a part of the land.' In the second book he says further: 'Whenever they conquered an enemy, they did not take away all his land, but seized a part of it.' Cicero, in his speech *For [On] his House* addressed to the pontiffs, notes that territory taken from the enemy was in some cases consecrated by the victorious commander, but at the command of the people.

XII.—*Movables, or things capable of motion, when captured by a private act, become the property of the individuals who take them*

1. But things which are movable, or are themselves capable of motion, if captured are taken either in the public service or outside of it. If they are taken outside of the public service, they become the property of the individuals who take them. To this principle should be referred the statement of Celsus: 'Goods of the enemy which are in our midst are not public property but belong to those who have seized them.' By the words 'which are in our midst' we are to understand 'which are found in our midst after war has begun'.

¹ *Vandalic War*, II [II. xiv]. See also what follows there. Even Severus granted to the generals and soldiers on the frontiers lands taken from the enemy, [488] as Lampridius notes [*Alexander Severus*, lviii]. In the Swiss constitution it is provided that towns and fortresses that have been captured fall to the cantons in common, according to many passages of Simler.

² Among the same people the king merely received as much of the captured territory as each tribe; this is indicated in the *Digest of the Talmud*, title *On the King*.

[*Digest*,
XLIX.
xv. 20.]

Dig. XXI.
ii. II.
Dig. VI. ii.
15. § 1.

[I. i. 7.]

[II. xix.
140.]

[xlix. 128.]

Dig. XLI.
i. 51. § 1.

The same practice was observed with regard to men also, at the time when, in respect to the principle stated, captive men were classed with captured property. On this point a passage of Tryphoninus is noteworthy: 'But those who, in time of peace, have arrived among other peoples, if war suddenly breaks out, become the slaves of those among whom, now their enemies, it is their fate to be caught'; for we must here read 'fate', and not 'act' or 'agreement' as the texts have it. This result is ascribed by the jurist to fate because they fall into slavery through no desert of their own.¹ To attribute such things to fate is common. An example is the line of Naevius: 'At Rome by fate the Metelli are made consuls,' that is, without merit of their own.

2. From the same principle it follows that if soldiers capture anything when they are not in formation or engaged in executing an order, but when they are acting under a general right or by mere permission, this they at once acquire for themselves; for they do not make the capture in the capacity of servants. Such are the spoils which are torn from an enemy in single combat; such also are spoils seized by soldiers in free and unauthorized raids at a distance from the army—beyond ten miles the Romans used to say, as we shall see shortly. This sort of booty the Italians at the present day call 'raid-spoil' (*correria*), and distinguish from 'sack' (*bottino*).

XIII.—*Movables, or things capable of motion, when captured by a private act, do not become the property of individuals if the municipal law determines otherwise*

But our statement, that by the law of nations things movable or capable of motion are directly acquired by individuals, must be understood as applicable to the law of nations as unmodified by any municipal law covering the matter. Each people may in fact establish other rules valid over its citizens, and may thus forestall individual ownership; as we see is done in many places with regard to wild animals and birds. In like manner it may also be provided by a law that goods of enemies which are discovered in our midst should become public property.

XIV.—*Things captured by a public act become the property of the people or of him whose war it is*

1. With regard to those things, however, which are captured by an act of war, the situation is different. In this case [478]

¹ So Servius, *On the Aeneid*, I [I. 32], 'Driven on by fate', also contrasts these two ideas: 'Virgil seeks to ascribe nothing to the deserts of the Trojans, but everything to the fates.'

Digest,
XLIX. xv.
12.

[Asconius
Pedianus,
On Cicero's
Against
Verres, II.
i. 29.]

Saliceto,
On Code,
VIII. 1. 2;
Thomas
Grammaticus,
Decisiones
Neapolitanae, lxxi,
no. 18.

individuals represent the person of the state, and act in its stead; hence through them, unless a statute otherwise decrees, the people obtains both possession and ownership, and transfers this to whom-ever it wishes. Because this view is in direct conflict with common opinion, I feel that I must cite proofs more fully than usual from the examples of outstanding peoples.

2. I shall begin with the Greeks, whose practice Homer describes in more than one passage :

[*Iliad*, I.
125.]

But the spoil which we took from the cities now has been divided.

In the same poet Achilles, speaking of the cities which he had stormed, says :

[*Iliad*, IX.
330 ff.]

From all of these much rich spoil did I ravish,
And all I brought and gave to Atreus' son ;
But he by the swift ships remained behind,
And, taking it, shared some with others, but kept much.

Here Agamemnon is to be regarded, on the one hand, as at that time ruler of all Greece, and so taking the place of the people, and by that right dividing the booty, with the approval of his council; and on the other as filling the post of general, hence obtaining a greater share than the rest from the common store. The same Achilles addresses Agamemnon himself as follows :

[*Iliad*, I.
163 f.]

Never have I with you of spoil an equal share,
When Grecian valour has o'erthrown a Trojan town.

[*Iliad*, IX.
279 ff.]

Elsewhere Agamemnon offers to Achilles, by public agreement, a ship full of bronze and gold, and twenty women, to fall to his lot from the spoil. Upon the capture of Troy, as Virgil narrates :

Aeneid, II
[762 ff.].

Phoenix and hard Ulysses chosen guards
Watched o'er the booty : hither from all sides
The spoil of Troy snatched from the blazing shrines,
With tables of the gods and mixing bowls
Heavy with gold, and captured raiment, high
Is heaped.

Plutarch,
Aristides
[v = p.
321 D].
Herodotus,
IX [1xxx
ff.].
Plutarch,
Lysander
[xvi = p.
442 A].

In like manner at a later time Aristides guarded the booty from Marathon. After the battle at Plataea it was strictly forbidden that any one should remove anything from the spoil on his own authority; later the spoil was distributed on the basis of the deserts of the several peoples. When Athens afterward was conquered, the booty was transferred by Lysander to the public treasure. Among the Spartans¹ the name of a public office is 'sellers of booty'.

¹ While Agesilaus was operating in Asia, Spithridates had abstracted booty from the camp of Pharnabazus, which had been captured; but when an inquiry was set on foot by the Lacedaemonian Eripides he took flight [Plutarch, *Agesilaus*, xi = p. 601 F].

3. If we come to Asia, the Trojans, as Virgil teaches us, were accustomed 'to draw lots for booty', as is usually done in dividing things held in common. At other times the decision to divide booty rests with the commander; and by this right Hector, upon the express stipulation of Dolon, promises him the horses of Achilles, so that you may perceive that the right of acquiring ownership was not in the mere act of seizure.

Spoil was brought to Cyrus, the conqueror of Asia; and likewise, at a later date, to Alexander. If we look to Africa, the same custom is found. Thus what was captured at Agrigentum, [479] and in the battle of Cannae, and elsewhere, was sent to Carthage. Among the ancient Franks, as we see from the *History* by Gregory of Tours, things which had been captured were divided by lot¹; and the king himself had nothing else from the spoil than what the lot assigned to him.

4. But the Romans are more worthy of our consideration in respect to their examples in a degree commensurate with their superiority to the other nations in the art of war. Dionysius of Halicarnassus, a most careful observer of Roman customs, informs us on this point as follows: 'The law ordains that whatever has been captured from the enemy in battle becomes public property, in such a way that not only no private person may become owner of it, but not even the commander of the army himself. The quaestor takes possession of the things captured and auctions them off, and deposits the money in the public treasury.' These are the words of those who accuse Coriolanus, and they are to some extent framed to arouse ill-will towards him.

XV.—*Nevertheless in such things some right of decision is usually granted to commanders*

While it was true that the people were the owners of the spoil,² it was not less true that, in the time of the free republic, the commanders were entrusted with the decision in regard to its disposal.³ In Livy, Lucius Aemilius says: 'Cities that have been captured, not surrendered, are sacked, and nevertheless the decision in regard to them belongs to the commander, not to the soldiers.'

¹ This you find in Gregory of Tours, II. xxvii; in Aimoin, I. xii, and in the *Epitome*, edited by Freher, chap. ix. The same custom is an old one among other peoples also. Servius, *On the Aeneid*, III [III. 323], 'She did not endure any casting of lots', says: 'Because captives and spoil were divided by lot among the victors; as: "to draw a lot for spoil".'

With respect to the collecting of the spoil for the common use, and the justification by oath among the Swedes and Goths, see Johan Magnus, XI. xi [Barbeyrac believes this a misquotation].

² See also on this point Simler, in the *Helvetica*.

³ Polybius, in the *Excerpta Peiresciana* [p. 1454], says of Lucius Aemilius Paulus: 'Although he had become master of the entire kingdom, and could dispose of everything at his pleasure, he sought nothing for himself.'

[*Aeneid*, IX. 268.]

Homer, *Iliad*, X [327]; Euripides, *Rhesus* [182].

Pliny, [*Nat. His.*], XXIII. iii [XXXIII. iii].

Plutarch, *Alexander* [xxxiv=p. 685 B ff.]; Curtius

[VIII. iv]; Diodorus,

XVII [lxvi and lxxii]; Strabo,

XV [iii. 6]. Diodorus,

XIII [xc]. Livy,

XXIII [xii].

Gregory of Tours, II. xvii [II. xxvii].

[Dion. Hal., VII. lxi].

XXXVII [xxxii. 12].

This right of decision, which custom vested in the generals, they themselves at times referred to the Senate, as Camillus did, in order that they might be the more free from all suspicion. The commanders who retained the right are found to have made varied use of it, according as they were influenced by scrupulousness, regard for their reputation, and ambition.

XVI.—*Commanders may turn booty over to the public treasury*

1. Generals who wished to be, or wished to be believed to be, most scrupulous, did not touch the booty at all.¹ If there was money in the booty, they ordered that it should be taken over by the quaestor of the Roman people; if there were other things, they ordered that these be auctioned off by the quaestor; and Favorinus, in Gellius, thinks that the money procured by such means was called 'proceeds of spoils' (*manubiae*). Such money was placed by the quaestor in the treasury, after having been first publicly exhibited if the victory had warranted a triumph.

In the fourth book of Livy it is said of the consul Gaius Valerius: 'There was considerable booty from the constant raids, because all the loot had been brought together in a safe place. The consul ordered the quaestors to sell this booty at auction, and deposit the proceeds in the treasury.' The same thing was done by Pompey, with regard to whom the words of Velleius are: 'The treasure of Tigranes, in accordance with Pompey's usual practice,² was placed in the hands of the quaestor and entered in the public accounts.' Marcus Cicero pursued the same course, and in his letters to Sallust he writes thus of himself: 'Of the spoil I have taken, no one except the city quaestors, that is, the Roman people, has touched or will touch a quarter of a penny.' This was the practice especially in the ancient and better days, and Plautus has this in mind when he speaks thus:

Now all this booty to the quaestor I shall take.

In like manner, of captives he says:

Whom I bought from the quaestors, out of the spoil.

2. But others sold the booty themselves, without the aid of the

¹ 'Manius Curius swore that he had touched nothing from the booty except a vessel of beechwood with which to offer sacrifice' [Pliny, *Natural History*, XVI. xxxviii]. The author of the *De Viris Illustribus* [Aurelius Victor], in speaking of Mummius [chap. clx], says: 'He robbed Corinth of statues and paintings, but, although he filled all Italy with them, he collected nothing in his own house.'

Of the Aemilius Paulus just referred to, Plutarch [*Aemilius Paulus*, xxviii = p. 270 D] says: 'Men bestowed no less praise upon his generosity and his magnanimity, because he did not wish even to inspect the great quantity of gold and silver collected from the king's treasures, but gave it to the quaestors to transfer to the public treasury.'

² As on many occasions. See what is cited from Lucan in the following paragraph [III. vi. 17. 4].

Livy,
V [xxii.
1].

XIII. xxiii
[XIII.
xxv].

[IV. liii.
10.]

II
[xxxvii].

Letters, II.
vii [II.
xvii. 4].

[The Two
Bacchises,
1075.]

[Captives,
111.]

quaestor, and deposited the proceeds in the treasury, as we may gather from Dionysius of Halicarnassus in the words which follow [in the passage just cited]. Thus we read that in early times, after the defeat of the Sabines, the spoil and the captives were sent to Rome by King Tarquin. Thus, again, it is related that the consuls Romulius and Veturius sold the booty because of the poverty of the treasury, although the army was annoyed thereat.

Since in fact we frequently find statements showing how much each of the generals deposited in the treasury either through himself or through his quaestor, from Italian, African, Asiatic, Gallic, and Spanish triumphs, [480] there is no need to accumulate examples. Rather is this to be noted, that the booty, or part of it, was given at times to the gods, at times to the soldiers, and at times to others. To the gods either the articles themselves were given, such as the spoils which Romulus hung in the temple of Jupiter Feretrius, or the money derived from them, as when from the proceeds of the booty from Pometia [Tarquinius] Superbus built the temple of Jupiter on the Tarpeian mount.

XVII.—*Or commanders may divide the booty among the soldiers; in what way such a division may be made*

1. The early Romans regarded the granting of the spoil to the soldiers as a form of bribery. Thus Sextus, the son of Tarquinius Superbus, but an exile at Gabii, is said to have given booty to his soldiery with the object of securing power for himself in this way. In the Senate Appius Claudius attacked a largess of similar character as being new, prodigal, and ill-considered.

The booty granted to the soldiery is either divided or left for pillage. It may be divided on the basis of pay or of merit.¹ Appius Claudius desired that the booty be divided on the basis of pay, in case he should be unable to secure the transfer of the money derived from its sale to the treasury. Polybius carefully explains the whole system of distribution. For full days, or for watch periods, a half of the army, or a smaller portion, was regularly sent to collect booty. Each man was ordered to bring into camp what he had found, that it might be equally divided by the tribunes; and a share was given both to those who had guarded the camp (a practice which, we read, was sanctioned also by King David among the Jews, and which from that source passed into law) and to those who had been absent on account of ill-health or assignment to details.

2. Sometimes the booty itself was not granted to the soldiers,

¹ From Josephus, *Antiquities of the Jews*, Book III [III. ii. 5], we learn that this was done among the Jews.

Livy, I
[xxxvii.]

Livy, II
[xxxi. 4]

Dionysius
of Halicarnassus, I
[xxxiv.]

Livy, I
[liiii. 3].

Livy, I
[liv. 4].

Livy, V
[xx. 5].

Livy, V
[xx. 5].

X [xvi].

I Sam.,
xxx. 24.

Livy,
XLV
[xxxiv. 6
xl, xliii.]

but the money derived from it was given to them in place of the booty; this was often done on the occasion of a triumph.

This is the proportionate distribution that I find. A single share was given to a foot-soldier, a double share to a centurion, and a threefold share to a cavalryman. Sometimes a single share was allotted to a foot-soldier, and a double share to a cavalryman. Again, a single share was given to a foot-soldier, a double share to a centurion, and a fourfold share to a tribune and a cavalryman.¹ In many cases account was taken also of merit, as when Marcius was granted a share from the booty of Corioli² by Postumius, because of his brave conduct.

3. Without regard to the way in which the division was made, the commander was allowed his selection³; that is, he was permitted to take for himself, as first choice, as much as he chose, in other words, as much as he considered fair. This privilege was at times accorded to others also on account of their valour.⁴ Euripides in his *Trojan Women*, speaking of the women of Troy of high birth, says :

Outstanding women, who had been given to the chiefs
Of the Grecian host.

Of Andromache the same dramatist says :

Pyrrhus received that noble woman for himself.

In Virgil, Ascanius says of a horse :

Him, the shield, and the ruddy crest, from the lot
I shall exempt.

Herodotus relates that after the battle of Plataea, as choice things, women, horses, and camels, were given to Pausanias. In this way King Tullius received Ocrisia, the chief woman of Corniculum. In Dionysius of Halicarnassus, Fabricius⁵ says in an address to Pyrrhus: 'Of these things seized in war it was lawful for me to take as much as I chose.'

¹ To a tribune and a prefect of horse, says Appian, *Civil Wars*, II [II. xv. 102].

² See Plutarch, *Coriolanus* [ix and x = p. 218 A, B].

³ See Leunclavius, *Turkish History*.

⁴ Thus Nestor acquired a woman—

Exempted from the lot
By the gift of the Greeks.

[489] That is in the *Iliad*, XI [XI. 626 f.]. But in the *Odyssey*, XIV [XIV. 232 f.], Ulysses says :
Excellent Meneaceus I received [Of this I'd choose what chanced to please my mind],
But after, by the lot, I much obtained.

Euripides says of Cassandra [*Trojan Women*, line 249]:

Her the elder son of Atreus made his special prize.

On what 'was chosen' from the spoil for the Athenian general Demosthenes, that is, was given him by right of pre-eminence, see Thucydides, Book II [III. cxiv].

⁵ Whom Julian set as an example for himself and his soldiers; Ammianus, XXIV [XXIV. iii. 5].

Livy
[XLV.
xl. 5;
xxxiv. 5].
Suetonius,
Caesar
[*Divus*
Julius],
xxxviii;
and Ap-
pian, *Civil*
Wars, II
[xv. 102].
Livy
[Dion.
Hal., VI.
xciv].

[33 f.]

[*Trojan*
Women,
274.]

[*Aeneid*,
IX. 269 f.]

[IX.
lxxxii.]
[Dion.
Hal., IV
[i].
[*Selections*
on Embas-
sies, p. 18.]

With this in mind Isidore, in discussing military law, mentions 'The disposition of the booty, the just division in proportion to the rank [481] and services of individuals, and the portion of the prince'. Tarquinius Superbus, as Livy has it, wished both to enrich himself and to win over the affections of the people with spoil. Servilius in his speech for Lucius Paulus says that he could have made himself wealthy by a division of the booty. There are some writers, among whom is Asconius Pedianus, who take the view that the term *manubiae* more correctly designates this share of the commander.

[*Etymologies*, V. vii.]

[I. lvii. 1.]

Livy, XLV [xxxvii. 10].

[*On Cicero's Against Verres*, III [I. lix. 154].

4. But those commanders have won greater renown who, giving up their right, took nothing for themselves from the booty. Such was the Fabricius whom I have mentioned, who 'despised wealth, even when acquired justly, in comparison with fame'; and this he declared that he did after the example of Valerius Publicola and some others.

These commanders were imitated also by Marcus Porcius Cato in his victory over the Spaniards, when he declared that none of the spoils of war would come into his hands, with the exception of those things which he had consumed in food and drink; and yet he added that he did not blame the commanders who had made use of the privileges conceded to them, but that he preferred to rival the best in point of virtue rather than the richest in point of wealth. Very nearly the same praise was merited by those who took of the spoil in moderation, as Pompey, who is praised by Cato in Lucan:

Plutarch, *Marcus Cato* [the Elder, x = P. 342 A].

More than he withheld
Did he contribute.

[*Pharsalia*, IX. 197 f.]

5. Sometimes in making the distribution account was taken of the absent also, as Fabius Ambustus decided at the capture of Auxur. Sometimes, too, for some reason in such a distribution no account was taken of certain persons even though they were present; this was the case with the army of Minucius, in the dictatorship of Cincinnatus.

Livy, IV [lix. 8].

Livy, III [xxix. 2].

6. Furthermore this right, which the commanders had enjoyed under the old republic, after the fall of the republic appears from Justinian's *Code* to have passed to the masters of the soldiers; for under the *Code* there are exempted from inclusion in the reports of military exploits the largesses of movable objects or those capable of locomotion. These the masters of the soldiers grant to their troops from the spoils of the enemy, whether in the actual conduct of wars or in places in which they are known to be stationed.

Code, VIII. liii. 36. § 1.

7. But this kind of division in olden times was often exposed to calumny, as though by this means leaders were seeking to win the goodwill of individuals. On such grounds charges were brought

Dion.
Hal., VI
[xxx], and
VII [lxiii].
Livy, V
[xxxii. 8].

Dionysius
of Halicar-
nassus,
VII [lxiv].

against Servilius, Coriolanus, and Camillus, that they had granted largesses to their friends and clients from the public funds. In reply they defended themselves on the ground of the public advantage, 'that those, who had shared in the undertaking, after having gathered the fruit of their labours, might be the more ready to enter upon other campaigns'—if we may cite the words of Dionysius of Halicarnassus on this matter.

XVIII.—Or commanders may permit pillaging

1. I now come to pillaging. This was conceded to the soldiers either in the devastation of a country, or after a battle, or after the storming of a town, with permission to scatter at a given signal. It was a practice rather unusual in early times, yet it did not lack examples. Tarquin gave over Suessa to his soldiers for pillage; Quintus Servilius, the dictator, the camp of the Aequians; Camillus, the city of Veii; the consul Servilius, the camp of the Volscians. Also Lucius Valerius permitted pillaging in the land of the Aequians, Quintus Fabius, after the rout of the Volscians, and after the capture of Ecetra. Such pillaging was afterward permitted by others on many occasions.

Dion.
Hal., IV
[1].
Livy, IV
[xlvi. 4].
[Livy, V.
xxi. 14.]
Dionysius,
IV; VI
[xxix];
IX [lv];
X [xxi].

Livy,
XLVI
[XLIV.
xiv. 4].
[Livy,
XLV.
xxxiv. 1.]
Appian,
Mithridatic Wars
[xii. 85].
[I. xlv.
85.]

Upon the defeat of Perseus, the consul Paulus granted the spoil of the beaten army to the infantry, and the booty of the surrounding country to the cavalry. The same consul, in accordance with a decree of the Senate, gave over the cities of Epirus¹ to the soldiers to plunder. When Tigranes was conquered, Lucullus² for a considerable time restrained his troops from collecting spoils, but later, when victory was assured, he yielded the right to plunder the enemy. Cicero, in his first book *On Invention*, among the ways of acquiring ownership, includes the capture of anything from the enemy, when a public sale of this booty has not taken place.³

2. Those who condemn this practice [482] say that hands greedy for pillage 'will snatch away the rewards of brave warriors, since it usually happens that the more slothful man takes to plunder',⁴ while all the bravest 'are wont to seek the chief share of toil and peril'—to quote the words of Appian in Livy. Not very different

VI [V.
xx. 6].

¹ As Sulla did in the case of Athens; Appian, *Mithridatic Wars* [vi. 38].

² Plutarch [*Lucullus*, xxix = p. 511 E] relates that he turned over Tigranocerta for his soldiers to plunder, and besides gave to each man eight hundred drachmas from the spoil. Severus granted his troops the plunder of Ctesiphon; and likewise ordered the tribunes, officers, and soldiers to keep the loot from the villages, as Aelius Spartianus records [*Severus*, xvi; Aelius Lampridius, *Alexander Severus*, lv].

Mohammed II promised his soldiery the people of Constantinople with the booty and slaves.

³ Varro [*On Farming*, II. x] enumerates six ways by which one may lawfully become a proprietor: through the acquisition of a lawful inheritance, through purchase, cession, usucaption, sale of booty at auction, and public auction, when a person's property is divided and sold.

⁴ See what we shall cite from Procopius on III. vi. 24..

is the saying of Cyrus in Xenophon : ' I am well aware that in pillaging the worse element would get the greater amount.'

[*Training of Cyrus*, VII. ii. 11.]
Livy, V [xx. 8].

On the opposite side it is said that what each soldier had taken from the enemy with his own hand and had carried off home would prove to be more acceptable and afford greater pleasure than many times as much allotted to him by another's decision.

3. Sometimes, too, pillaging was permitted because it could not be prevented. In the storming of Cortuosa, an Etruscan town, as Livy relates : ' The tribunes decided to reserve the booty for the state, but the order was slower than the decision ; for already the spoil was in the hands of the soldiers, and could not be taken away without causing ill-feeling.' So also we read that the camp of the Galatians was plundered by the army of Gaius Helvius against the will of the commander.

VI [iv. 11].

Livy, XXXVIII [xxiii. 4].

XIX.—*Or commanders may grant the spoil to others*

The practice already mentioned, that in some cases the booty, or money derived from the sale of booty, might be assigned to others than the soldiers, usually had as its purpose to make an equivalent reimbursement to those who had contributed funds for the war.

Dionysius of Halicarnassus, V [xlvii].

You may also note that public spectacles were at times produced with the money derived from the booty.

XX.—*Or commanders, having divided the booty into portions, may employ now one method of distribution and now another ; in what way*

1. Not only in different wars are different methods employed in the disposition of booty, but in the same war booty is often diverted to different uses, after it has been divided into portions or the different kinds have been distinguished.

Thus Camillus gave a tenth of the spoil to the Pythian Apollo,¹ following a Greek precedent, which had previously come from the Jews ; at this time the pontiffs decided that the dedicated tenth included not only movable things but also the city and its territory. When Camillus was again victor the greatest part of the spoil from the Faliscans was assigned to the quaestor ; not so much was given to the soldiers. In like manner Lucius Manlius ' either sold the spoil, in so far as it had to be contributed to the public treasury, or divided it among the soldiers, taking care that it should be as fairly divided as possible ' ; the words are those of Livy.

Livy, V [xxiii. 8].

Livy, V [xix. 8].

XXXVIII [xxiii. 10].

2. The classes into which booty may be divided are these : prisoners, herds, and flocks, which the Greeks when speaking with

¹ This is also recorded by Appian in the *Excerpta Peiresciana* [ii = *Concerning Italy*, viii. 1].

exactness call 'pillageable property'; money, and other movables, costly or cheap.

Dionysius,
VIII
[lxxxii].
Dionysius,
X [xxi].

Quintus Fabius, after defeating the Volscians, gave orders that the pillageable property and spoils be sold by the quaestor; he himself brought back the money. The same general, after the conquest of the Volscians and the Aequians, gave the captives, with the exception of the Tusculans, to the soldiers, and permitted them to carry off the population and the herds in the land belonging to Ecetra. When Antium was captured, Lucius Cornelius deposited in the treasury the gold, silver, and copper, sold the prisoners and booty through the agency of the quaestor, and allowed the troops to have articles of food and clothing. Similar to this was the policy of Cincinnatus, who, after taking Corbio, a town of the Aequians, sent the more valuable objects in the booty to Rome, and divided the rest among the centuries.

Ibid.

Livy, X
[Dion.
Halic.,
X. xxv].

After the capture of Veii Camillus contributed nothing to the public treasury except the money from the sale of the captives; and when the Etruscans were beaten and the captives sold, from the money thus obtained he paid back to the women the gold they had contributed, and set up three libation saucers of gold in the Capitoline temple. When Cossus was dictator, all the booty from the Volscians, except the persons of freemen, was granted to the soldiers.

VI [iv.
2-3].
[Livy, VI.
xiii. 6.]

3. Fabricius, after conquering the Lucanians, Bruttians, and Samnites, enriched his troops, paid back the war taxes to the citizens, and contributed forty talents to the public treasury.¹ Quintus Fulvius and Appius Claudius, when the camp of Hanno was captured, sold the booty and made a division, giving largesses to those whose services had been exceptional. On the taking of Carthage, Scipio gave what was in the city to the troops to plunder, excepting the gold and silver [483] and the votive offerings. Acilius, on the capture of Lamia, in part divided and in part sold the spoil. When the Galatians had been beaten and the arms of the enemy burned in accordance with a Roman superstition, Gnaeus Manlius ordered all to bring together the rest of the spoil, and either sold it, in so far as it was to be brought to the public treasury, or divided it among the soldiers, taking care that the division should be as fair as possible.

Dionysius,
Fragments
[*Selections*
on Embas-
sies, p. 18].
Livy,
XXV [xiv.
12-13].
Appian,
Punic
Wars
[xx. 133].
Livy,
XXXVII
[v. 3].
Livy,
XXXVIII
[xxiii. 10].

XXI.—*The committing of peculation in the distribution of booty*

1. From what we have said it appears that among the Romans, not less than among most other nations, booty was the property of the Roman people, but that some right of decision as to its dis-

¹ Fabius did likewise with the money from the sale of the prisoners after the capture of Tarentum, although he distributed the rest of the spoil to the soldiers.

tribution was granted to commanders; nevertheless, as we have previously stated, under the condition that they owed to the people an accounting for their actions. This, among other things, we learn from the case of Lucius Scipio, who was condemned in a trial for peculation, because, as Valerius Maximus states, he had received 480,000 sesterces in silver more than he transferred to the treasury; and also from the cases of others to which we have previously referred.

2. Marcus Cato, in the speech which he wrote on the subject of booty, according to Gellius, complained in passionate and noble language of the impunity and licence accorded to peculation. Of the speech there remains this fragment: 'Those who steal from private persons pass their days in bonds and fetters; those who steal from the state pass theirs in gold and purple.'

On another occasion the same speaker had said that 'he wondered that any one dared to place as furniture in his house statues that had been captured in war'. Cicero also increases resentment at the peculation of Verres, by pointing out that he had carried off a statue which in fact had been taken from the spoil of the enemy.

3. Not commanders alone, but even soldiers, were held on the charge of misappropriation of booty if they had not brought it to the public treasury; for, as Polybius says, they were all bound by an oath 'that no one would appropriate anything from the booty, but would carry out his pledge in scrupulous regard for his oath'. To this we may perhaps refer the formula of the oath in Gellius, by which, within the lines of the army or within the range of about ten miles, the soldier was enjoined not to carry off anything which was of greater value than a silver sestertius; or in case he had taken anything of the sort, to bring it to the consul, or to confess the fact within the next three days. Hence we may understand what Modestinus meant by the statement: 'He who has secreted booty captured from the enemy is guilty of peculation.' This statement of itself should be sufficient to warn interpreters of the law against believing that things captured from the enemy are acquired by individuals, since it is clear that peculation can only occur in connexion with property that is public, sacred, or religious.

All these considerations clearly lead to the view which we have expressed above, that, apart from the civil law, and primarily, what is captured in acts of war becomes the property of the people or of the king who wages the war.

XXII.—*Some change may be made with respect to this common right of booty by a legal enactment or by another's act of will*

1. In the statement just made we said, 'apart from the civil

V. iii, and
Livy, XL
[XXXVII
iv. 6].

II. xviii
[XI. xviii]

Priscian,
[*Institut.*
Gramm.,]
VII [xix.
95].

Against
Verres,
IV [xii.
88].

[X. xvi.]

XVI. iv.

Digest,
XLVIII.
xiii. 15
(13).

Digest,
XLVIII.
xiii. 1.

law', and 'primarily', or directly. The former restriction is added because with regard to things that have not yet been actually acquired a law may ordain in the public interest, whether that legislative act is a law of the people, as among the Romans, or the law of a king, as among the Jews and elsewhere. Besides, under the name of law we wish to include also custom when rightly introduced.

The second qualification leads to this, that we may know that booty, just as other things, may be conceded by a people to others not only after acquisition, but also prior to acquisition, in such a way that, when the capture has ensued, the claims thereby arising are immediately united in title, as the jurists say. And this concession can be made not only to specific persons, but also to classes, as in the times of the Maccabees part of the spoil was given to widows, old men, and needy wards; or even to chance persons, after the fashion of the things thrown to the mob, which the Roman consuls made the property of those who caught them.

2. Furthermore, this transference of a right, which is brought about by a law or grant, is not [484] always a mere gift. It sometimes represents the fulfilment of a contract; sometimes either a payment of what is owed, or a reimbursement for losses which some one has suffered, or compensation for a personal contribution to the war in money, or in service, as when allies and subjects serve either without any pay or for such pay as does not correspond with their service. It is for these reasons, as we see, that an assignment of the whole booty, or a part of it, has usually been made.

XXIII.—*Thus booty may be granted to allies*

Our jurists, in fact, note that almost everywhere the custom has been tacitly followed, that either allies or subjects, who wage war without pay, at their own expense and danger,¹ appropriate what they capture. In the case of allies² the reason is evident, for naturally one ally is bound to make good to another the losses which ensue from a joint or public enterprise.

There is also the further consideration that it is hardly customary for service to be rendered gratis. 'Thus physicians', says Seneca, 'are paid the price of service, which they earn, because they are called from their own affairs and are at our disposal.' Quintilian judges the same thing fair in the case of orators, because the very giving of their service and time to the business of others deprives them of the opportunity of earning in other ways. This is what Tacitus called 'Neglecting the affairs of one's house in order that

¹ See Kromer, *Poland*, XIX [= p. 430].

² Amalazuntha makes use of it in a letter to Justinian; [Procopius,] *Gothic War*, I [I. iii].

2 *Maccabees*, viii. 28, 30.

Calderinus, *Consilia*, 85; Joh. Lupus, *De Bello*, § *si bene advertas*; Jason, *On Dig.*, XXX. i. 9; Franciscus à Ripa, *On Dig.*, XLI. ii. 1, no. 5; Covarruvias, *On Sext.*, V. ult. 4, pt. 2, § 11; Bonfini, *Decade V*, Book IV. *On Benefits*, IV. xv [VI. xv. 2]. [*Inst. Or.*, XII. vii. 10.] *Annals*, IX [XI. vii].

one may apply himself to the business of others'. Therefore it is credible that, unless some other cause should appear, as for instance pure kindness, or a preceding agreement, the hope of enriching oneself from the enemy was regarded as recompense for loss and service.¹

XXIV.—*Booty is often granted to subjects ; with illustration by means of various examples on land and sea*

1. In the case of subjects the right to booty does not follow with equal clearness, because subjects owe their service to their state. But this reason is offset by the fact that where not all subjects but only a part are in service the latter are entitled to compensation from the body of the state for having contributed more service and expense than the others, and they are much more entitled to compensation for losses. In place of this clearly defined compensation the expectation of the whole or a part of an uncertain booty is readily, and not without reason, conceded. And so the poet writes :

Let the booty fall to those whose labours earned it.

Propertius
[*Elegies*,
III. iv. 21].

2. With respect to allies, there is an example² in the Roman treaty by which the Latins were admitted to an equal share of the booty in the wars which were waged under the auspices of the Roman people. So in the war which the Aetolians waged with the Romans as their helpers, the cities indeed, and the territory, fell to the Aetolians, but the captives and movable property to the Romans. After the victory over King Ptolemy, Demetrius gave a part of the booty to the Athenians. Ambrose, in discussing the story of Abraham, shows the fairness of this custom : 'He wisely asserted that a part of the gain, as recompense for their toil, should be allotted to those who had been with him, perhaps as allies to give him aid.'

Livy, IV
and XXXIV
[II. xxxiii];
Dion.
Hal., VI
[xcv].
Polybius,
XI [X.
xvi-xvii];
Livy,
XXXIII
[xiii. 10].
Plutarch,
Demetrius,
[xvii = p.
896 A].
*On Abra-
ham*, I. iii
[17].
Numbers,
xxii [xxxii],
27, 47 ;
1 Sam.,
xxx. 22,
and later ;
*2 Macca-
bees*, viii.
28, 30.
Plutarch,
*Apo-
thegms*
[= p. 180
c].

3. With respect to subjects there is an example in the case of the Jewish people ; half of the spoil fell to those who had been under arms.³ The soldier of Alexander made his own the booty which he had seized from private persons, excepting that he was accustomed to bring certain things of special value to the king ; hence we see that those who were said to have conspired at Arbela

¹ See Plutarch, *Marcellus* [viii = p. 302].

² The Roman people furnished the ancient Latins with the third part of the spoil ; Pliny, Book XXXIX, v [*Natural History*, XXXIV. v]. The Swiss cantons divide the spoil according to the proportion of the soldiers furnished, as Simler attests. In the war against the Turk, the Pope, the Emperor, and the Venetians made the division on the basis of expenditures ; Paruta, VIII. Pompey granted Lesser Armenia to Deiotarus, king of Galatia, because he had been an ally in the Mithridatic War [Eutropius, VI. xiv].

³ The Pisans gave a part of the booty to those who had guarded the houses ; Chalcocondylas, Book V [V = p. 244].

were accused of claiming for themselves all the booty, so that they would bring nothing into the treasury.

4. But in the case of Alexander's army what had been the public property of the enemy, or royal property, was exempt from this licence. In consequence we read that, when the Macedonians had broken into the camp of Darius at the river Pyramus, they carried off a huge amount of gold and silver, and left nothing untouched except the king's tent,¹ 'in order that', says Curtius, 'following the traditional custom, they might receive the victor in the tent of the vanquished king.' Similar to this was the custom of the Jews, who placed the crown of the conquered ruler upon the victorious king and [485], as we read in the *Digest of the Talmud*, allotted to him the royal furniture taken in the war.

In the same category is that which we read in the exploits of Charlemagne; when he had conquered the Hungarians, the riches of private individuals fell to the soldiers, the riches of the king to the public treasury. But among the Greeks the 'booty' was public property, as we have shown above, and the 'spoils seized while fighting' were the property of individuals. They call 'spoils seized while fighting' (*σικύλα*) what is taken from the enemy in the course of the battle, and 'booty' (*λάφυρα*) what is taken afterwards. This distinction is observed also by some other peoples.

5. However, from what we have said before it is quite clear that among the Romans, at least in the period of the early republic, not so much was granted to the soldiers. In the civil wars they began to receive somewhat greater indulgence. Thus you may read that Aeculanum was sacked by the soldiers of Sulla. After the battle of Pharsalus Caesar turned the camp of Pompey's forces over to his soldiers to plunder, according to Lucan, with these words:

Your reward for bloodshed remains.

This it is my part to point out; for I shall not call a donation
What each to himself shall give.

The troops of Octavian and Anthony pillaged the camp of Brutus and Cassius. In another civil war, when the Flavians had been led to Cremona, although night was at hand, they hastened to take the rich colony by assault. They feared that otherwise the riches of Cremona would come into the possession of the prefects and legates; for they knew that in fact, as Tacitus says, 'the spoil of a city that has been stormed belongs to the soldiers; that of one which has been surrendered, to the general'.

¹ See also Diodorus, Book VI [XVII. xxxv], and Plutarch, *Alexander* [xx = p. 676]. See similar accounts in Xenophon, *On the Training of Cyrus*, II [IV. vi. 11], and Book IV of his war [*Anabasis*, IV. iv. 21] and VII.

[III. xi.
23.]

2 Sam., xii.
30.

Title *On
the King*.

Arias, *De Bello*, no. 162; Bellini, pt. II, tit. xviii, no. 3; Doneau, *Commentaries*, IV. xxi; Sylvester, word *bellum*, 1. pr., from Trovamaala. Wesenbeck, *On Institutes*, II. i. § 17. Appian, *Civil Wars*, I [vi. 51]. [*Pharsalia*,] VII [738 ff.].

Appian, *Civil Wars*, IV [xvii. 135].

Tacitus, *Histories*, III [xix].

6. As discipline declined such looting was the more willingly conceded to the troops, that they might not neglect the enemy and burden their hands with spoil while there was still danger. Disregard of such precaution has made very many victories fruitless.

When Corbulo had stormed the fort Volandum in Armenia, 'the mob unfit for war', as Tacitus relates, 'was sold at auction, and the rest of the booty fell to the victors'. According to the same writer, in a battle in Britain Suetonius urges his men to continue the slaughter without thinking of the booty, adding that when the victory should be won everything would fall to their lot. Similar accounts you may find among other authors generally. Add also what we have just cited from Procopius.¹

Tacitus,
Annals,
XIII
[xxxix].
Annals,
XIV
[xxxvi].

7. There are, however, certain things of so slight value that they are not worth making public property. These things everywhere by consent of the people belong to those who take them. Such under the early Roman republic were spears, javelins, firewood, fodder, water-skins, leathern money-bags, torches, and money smaller than a silver sestertius; for we read in Gellius that these exceptions were added to the military oath.

XVI. iv.

Very like this concession is that which is made to sailors even when they are paid for their service. The French call this spoliation or pillage, and therein include clothing, and gold and silver under ten crowns. Elsewhere a certain part of the booty is given to the soldiers, as in Spain, where now a fifth,² now a third, and again a half remains with the king, and a seventh, or at times a tenth, with the commander of the army; the rest belongs to the individual captors, with the exception of ships of war,³ which fall wholly to the king.

Constitutions of France,
XX. xiii.
10 and 16.
Law of Spain, IV.
xxvi. 2.

8. It may happen also that the division of the booty is made after account has been taken of services, dangers, and expenses, as among the Italians, where a third of a captured ship falls to the master of the victorious vessel, an equal part to those whose goods were in the ship, and the same to those who engaged in the fighting.

Consolato del Mare,
cclxxxv.

Sometimes, again, this occurs, that those who conduct a war at their own risk and expense do not receive all the spoil, but owe a part to the public authority, or to him who derives his right from the public authority. Thus among the Spaniards, when in a war

¹ He records, *Vandalic War*, II [II. xxi], that when Solomon was carrying on war against the Levathae his soldiers were angry with him because he held back the spoil. He said [490] that he did this in order that, when the war was ended, he might distribute it according to each man's deserts. Procopius says also, *Gothic War*, II [II. vii], that all the spoil from Picenum was brought to Belisarius, who divided it on the basis of merit, and adds the reason: 'It was not fair that some, at the cost of much effort, should kill the bees, while others, at their ease, should feed upon the honey.'

² This custom is attributed to the Turks also by Leunclavius, [*Turkish History*,] III and V.

³ So among the Goths an exception was made of engines of war for the kings; Johan Magnus, *Historia Suedica*, XI. xi [Barbeyrac believes this a misquotation].

[*Law of Spain,*]
XIX.
xxvi. 2.
14.
Constitutions of France,
XX. xiv.
1.
Instructiones Rei Maritimae,
xxii.

ships are fitted out at private expense, part of the spoil is due to the king, and part to the highest naval authority. According to the French practice the latter receives a tenth, and the same [486] is customary among the Dutch, but with them a fifth part of the booty is first deducted by the state. On land, however, it is now the general custom that in the sack of towns, or in battle, each should have as his own what he has taken; but what is taken in raids should be the common property of those in the detachment, to be divided among themselves according to their rank.

XXV.—*The application of what has been said*

As a result of these considerations we are to know that, if within the jurisdiction of a nation that is not involved in war a dispute arises with respect to something that has been captured in war, the thing is to be adjudged to him whose case is supported by the laws or customs of the people on whose side capture has been effected; if this is impracticable, then by the common law of nations the thing is to be adjudged to the people itself, provided only that it has been taken in an act of war.

From what we have previously said, it is abundantly clear that what Quintilian adduces in favour of the Thebans is in general not true, that in a matter which can be brought into court the right of war does not hold good, and that what is taken by armed force can only be retained by armed force.

[*Institutes of Oratory,*]
V. iv
[V. x. 114].

XXVI.—*Whether things which have been taken outside the territory of either belligerent may be acquired by the law of war*

1. Things which do not belong to the enemy, even if found among the enemy,¹ do not become the property of the captors; for this, as we have said already, is not in accordance with the law of nature and has not been introduced by the law of nations. Thus the Romans say to Prusias: 'If this territory had not belonged to Antiochus, clearly it would not have been made territory of the Roman people.'² Nevertheless if in such things the enemy enjoys any right which is connected with possession, as a right of pledge, restraint, or servitude, there is nothing to prevent this right being acquired by the captors.

2. The question is also often raised whether things captured outside the territory of either belligerent may become the property

¹ See above, III. iv. 7.

² Thus, after Jugurtha was conquered, Bocchus did not acquire the land which had not belonged to Jugurtha, but to the children of Bocchus [or rather Massinissa]; Appian, *Selections on Embassies*, xxviii [= *Numidian Affairs*, iv]. See a similar instance in Krantz, *Saxonia*, XII [XII. vii].

III. vi. 5.

Livy, LV
[XLV.
xliv. 11].

of the captors ; and this is debated with regard both to things and to persons.

If we take into account the law of nations only, I think that this subject need not be considered, since we have said that an enemy may be justly slain in any place. But he who holds authority in a place may by a law of his own prohibit any such action ; and if such an act is committed contrary to his law he can demand satisfaction for it as for a crime. Similar to this is the ruling that a wild animal caught on the land of another belongs to the captors, but access to it may be prohibited by the owner of the land.

Dig. XLI.
i. 3.
Dig. VIII.
iii. 16.

XXVII.—*In what way the right of which we have spoken is peculiar to a public war*

Now this external right of acquiring things taken in war is so peculiar to a war that is public according to the law of nations that in other wars it finds no place. For in other wars with foreigners property is not acquired by the violence of war but as compensation for a debt which cannot otherwise be obtained.

Sylvester,
word *bellum*, l, §§ 3
and ix,
verse 8.

In wars between citizens, whether these be great or small, no change of ownership is made except by the authority of a judge.

CHAPTER VII

ON THE RIGHT OVER PRISONERS OF WAR

I.—*According to the law of nations all persons captured in a war that is public become slaves*

1. By nature at any rate, that is, apart from a human act, or in the primitive condition of nature, no human beings are slaves, as we have said elsewhere.¹ In this sense it is correct to accept what was said by the jurists, that slavery is contrary to nature. Nevertheless, as we have shown also in another connexion,² it is not in conflict with natural justice that slavery should have its origin in a human act, that is, should arise from a convention or a crime.

Dig. I. v.
4. § 1.

2. But in the law of nations, which we are now discussing, slavery has a somewhat larger place, both as regards persons and as regards effects. For if we consider persons, not only those who surrender themselves, or promise to become slaves, are regarded as slaves, but all without exception who have been captured in a formal public war become slaves from the time when they are brought within the lines, as Pomponius says. And no crime is requisite, but the fate of all is the same, even of those who by their ill-fortune, as we have said, are caught in the enemy's territory when war has suddenly broken out.

Digest,
XLIX. xv.
5. § 1.
Digest,
XLIX. xv.
12.

[II. lviii.]

3. Polybius says in the second book of his *Histories*: 'What should these persons suffer so as to pay a fitting penalty? Perhaps, one would say, being sold as slaves with wives and children, after they have been conquered in war. But this is also appointed by the law of war³ for those to endure who have done no impious deed.' Hence comes what Philo notes in these words: 'Often at unforeseen times many good men have lost their inherited freedom.'

That
Every
Virtuous
Man is
Free [iii].
Orations,
xv [= p.
242].

4. Dio of Prusa, after enumerating the ways of acquiring [491] ownership, says: 'And a third form of possession is whenever one has taken a prisoner in war and in this way holds him as

¹ II. xxii. 11.

² II. v. 27.

³ Servius, *On the Aeneid*, I [I. 619], says of Hercules: 'When Laomedon tried to ward him from this gate, he was killed, and his daughter, Hesione, was carried off in accordance with the law of war, and delivered to Telamon, Hercules's comrade, who had first scaled the wall; of this union Teucer was the issue.' Again, *On the Aeneid*, X [X. 91], in telling the same story: 'The Greeks refused to restore Hesione to the Trojans, saying that they held her by the law of war.'

Josephus, in Book XIV [*Antiquities of the Jews*, XIV. xii. 2], says: 'Since they had not been captured in accordance with the law of war.' 'By the law of captives' and elsewhere, 'By the law established for prisoners of war', says Menander Protector [frag. 29, p. 66, edit. Dindorf].

In the preceding chapter you find much that is applicable also here, for the reason that writers either combine, or treat identically, captured things and captive men.

a slave.' So Oppian in his second book *On Fishery* calls it a law of war to carry off into slavery boys that have been captured in war.

[*Halieutica*, II. 316.]

II.—*Also the descendants of persons captured in war become slaves*

Not only do the prisoners of war themselves become slaves, but also their descendants for ever, that is to say those who are born of a slave mother after her enslavement. This is what Marcianus said, that by the law of nations those become our slaves who are born of our slave women. In speaking of the wife of a German chief, Tacitus said that her womb was subject to slavery.

Dig. I. v. 5. § 1.

Annals, I [lix].

III.—*What may be done to prisoners of war with impunity*

1. Moreover the effects of this law are unlimited, just as Seneca the Father said that there is nothing which a master is not permitted to do to his slave. There is no suffering which may not be inflicted with impunity upon such slaves, no action which they may not be ordered, or forced by torture, to do, in any way whatsoever; even brutality on the part of masters towards persons of servile status is unpunishable except in so far as municipal law sets a limit and a penalty for brutality. 'Among all nations alike', says Gaius, 'we may see that masters have had the power of life and death over slaves.' Then he adds that limits have been set to this power by the Roman law, that is on Roman soil. Here applies the note of Donatus on Terence, 'What is it not lawful for a master to do to his slave?'

Controversies, I. v [X. v].

Dig. I. vi. 1. § 1.
Institutes, I. viii. § 1.

[*On*] *Andria*, Act I, scene i [36].

Inst. II. ix. § 3.

2. Also everything that has been captured is acquired, along with the person, for the master. The slave who is himself under the power of another, says Justinian, can have nothing of his own.

IV.—*The property of captives, even if incorporeal, belongs to their master.*

On these grounds the view of those who say that incorporeal rights are not acquired by the law of war¹ is refuted, or at any rate restricted. It is true that such rights are not acquired primarily and directly, but through the medium of the person to whom they had belonged.

Nevertheless, we have to make exception of those rights which have their source in a peculiar capacity of the person and are hence inalienable, as the right of the father. For if these rights can remain, they remain with the person; if not, they are extinguished.

¹ Valerius Maximus, VI. ix. 11, says of Gnaeus Cornelius Asina: 'As consul he was captured by the Carthaginians at the Lipara Islands, after he had lost everything by the law of war.' 'The slave has lost the right of ownership over other things not less than over himself,' says Philo, *That Every Virtuous Man is Free* [vii].

V.—*The reason why the law has thus been established*

1. All these rights have been introduced by the law of nations, with which we are dealing, for no other reason than this: that the captors, mollified by so many advantages, might willingly refrain from recourse to the utmost degree of severity, in accordance with which they could have slain the captives, either immediately or after a delay, as we have said before. 'The name of slaves (*servi*)', says Pomponius, 'comes from the fact¹ that commanders are accustomed to sell prisoners and thereby to save them (*servare*) and not to kill them.' I have said 'that they might willingly refrain'; for there is no suggestion of an agreement whereby they may be compelled to refrain, if you are considering this law of nations, but a method of persuading them by indicating the more advantageous course.

2. For the same reason this right is transferred to others, just as the ownership of things. Further, it has been agreed that ownership should be extended to children; the reason is that otherwise, if the captors had used their full right, the children would not have been born. Whence it follows that children who were born before the catastrophe do not become slaves, unless they are themselves captured.

Moreover, it has been acceptable to the nations that children should follow the status of the mother, for the reason that the unions of slaves were regulated neither by law nor by definite oversight, and consequently the father was indicated by no adequate presumption. In this sense we are to understand the statement of Ulpian: 'It is a law of nature, that he who is born outside of lawful matrimony follows the status of his mother'; that is, the law represents a general custom which has grown up from a natural reason, just as we have elsewhere shown that the term 'law of nature' is at times employed with some inexactness.

3. The rights under consideration, moreover, have not been introduced by the nations in vain. This we may perceive from what happens in civil wars, in which we find that on many occasions captives [492] have been killed because they could not be reduced to slavery. The fact is noted by Plutarch in his *Otho*, and by Tacitus in the second book of his *Histories*.²

4. Whether those who have been captured become the property of the people, or of individuals, must be decided by what we have said in regard to booty; for in this case the law of nations has

Dig. L.
xvi. 239.
§ 1.

Dig. I. v.
24.

II. xiii.
26.

[xiv = p.
1073 C.]
[II. xliv.]

¹ See also Servius, *On the Aeneid*, Book V [IV. 327], where he explains the origin of the word *saltem*.
² Also in Book III [III. xxxiv], regarding the captured inhabitants of Cremona, whom 'the united opinion of Italy had caused to be a prey useless to the soldiers'.

put men in the same category as things. Gaius the jurist said in his *Daily Questions*, Book II: 'Also what is captured from the enemy becomes at once, by the law of nations, the property of the captors, to the extent indeed that even free men are led off into slavery.'

Dig. XLI.
i. 5 and 7.

VI.—*Whether it is permissible for those who have been captured to flee*

1. Nevertheless, as regards the belief of some theologians, that it is unlawful for those to flee who have been captured in an unlawful war, or are born of captives, unless they flee to their own people, I have myself no doubt that the view is erroneous. There is indeed this difference, that if captives make their escape to their own people while the war is still in progress they attain their freedom by right of postliminy;¹ if they flee to others, or to their own people, after peace has been made, they must be given up to the master who claims them. But it does not follow as a consequence that a bond of conscience is laid also upon the captives; there are many rights which look only to an external judgement, and such are the rights of war which we are now explaining.

Lessius, I.
v, dub. 5.

There is, further, no reason for any one to raise the objection that from the nature of ownership such an obligation becomes binding on the mind. For I shall reply that, since there are many forms of ownership, it is possible that one may exist which is valid only in a judgement that is human and at the same time continues a condition which arises also in other kinds of rights.

2. Such in fact, to some extent, is also the right of nullifying wills, on account of the lack of some formality which the civil laws prescribe. The more acceptable view is, that what has been left by such a will may be retained with a clear conscience, at least as long as the will is not contested.

Soto, *De Iustitia et Iure*, IV, qu. iv, art. 3; Lessius, II, xiv, dub. 3.

Not very different is the ownership of one who in accordance with the civil laws has exercised prescription in bad faith; for his ownership also is protected by the civil courts. By making the distinction, we easily loosen the knot which Aristotle ties in his *Sophistical Refutations*, Book II, chapter v: 'Is it not right for each one to have what is his own? But what any judge may decide according to his opinion, even if this be false, is valid according to the law. Therefore the same thing is both right and wrong.'

[*Sophistical Refutations*, xxv. 9.]

3. In the question before us no reason can be imagined why the nations should have had in view anything else than that external restraint. For the opportunity of claiming a slave and restraining

¹ See below, III. ix. 5. Pliny, *Natural History*, VII. xxviii, says of Marcus Sergius: 'Twice captured by Hannibal, he twice escaped from his chains.'

him, and further, of putting him in bonds and retaining his property, was enough to induce captors to spare captives. If the captors were so ferocious as not to be influenced by these advantages, certainly they would not have been affected by the imposition of any moral restraint. Yet, if they believed such a restraint at all necessary for themselves, they could have exacted an assurance or an oath.¹

4. However, in a law which has been established not according to natural equity, but to avoid a greater evil, we should not rashly adopt an interpretation which would make criminal an act otherwise permitted. Florentinus the jurist says: 'It makes no difference how a captive has returned; whether he has been set free, or has escaped from the power of the enemy by force or by guile.' This is so because the right of captivity is of such a sort, that in another sense it is often also a wrong, a characterization which is applied to it by the jurist Paul. It is a right in respect to certain effects; a wrong, if we regard its intrinsic nature.

Hence this also is apparent. If any one who has been captured in an unlawful war has come into the power of the enemy, his conscience is not tainted by the crime of theft if he secretly takes away his own property, or a recompense for his toil,² in case it is right that any should be furnished him over and above his keep, provided that he neither in his own name, nor in that of his state, is in any way [493] indebted to his master, or to him whose right his master has received. And it does not matter that such flight and abstraction when detected are usually punished with severity. For these things and many others are done by the more powerful, not because they are just, but because it is to the advantage of the more powerful to do them.

5. Certain canons³ forbid any one to persuade a slave to desert his master's service. If you refer this to slaves who are undergoing a just punishment, or have bound themselves by a voluntary agreement, it is a just injunction. But if you refer it to those who have

¹ Bembo, *History*, X, holds that the soul is not tainted by the crime of theft, if one removes his own property.

² Here applies what we have quoted above from Irenaeus and Tertullian, in the notes to II. vii. 2, where there is a discussion regarding the Jews after their exodus from Egypt.

To these the following relates, from Philo's *On the Life of Moses* [I. xxv]: 'Moreover when they were being driven out and pursued, being mindful of their noble race, they began a work worthy of freeborn men, who had not forgotten what they had suffered through injustice and deceit. [495] For they carried forth much spoil, in part on their persons and in part on beasts of burden. Their motive was not avarice, nor, as some calumniator has said, greed of another's property—for whence could this have occurred to them?—but they desired, first, to have the pay which was necessary for so long a period of service; and in the second place, they sought in recompense for servitude forcibly imposed upon them a penalty, not commensurate with it, but far less.' And more that follows in the same author.

There is a similar story of St. Malchus given by Jerome in his *Letters*, and of the Lombard Leupges, which his great-grandson Paul Warnefrid [Paulus Diaconus] tells us in Book IV [IV. xxxix]. Add also, if you please, the *Confession* published under the name Lanicius Patricius.

³ From the Synod of Gangres. See above II. v. end.

Digest,
XLIX. xv.
26.

Digest,
XLIX. xv.
19. pr.

Bañez,
On II. ii,
qu. 40.

Decretum,
II. xvii. 4.
37 f.

been captured in an unlawful war, or have been born of captives, it teaches that Christians should encourage Christians to be patient rather than to engage in an action which, although permissible, might yet offend minds alien to Christianity or otherwise weak.

In a similar way we may understand the admonitions of the Apostles to slaves, except that these are seen rather to demand obedience from slaves while in servitude. This is in accord with natural justice ; for food and service have a reciprocal connexion.

VII.—*Whether it is permissible for those who have been captured to resist their master*

But I think that it was correctly said by the theologians to whom I have just referred, that a slave cannot resist a master who is exercising that external right without violating the duty of justice.

Between this case and that which we have just discussed there is a manifest difference. The external right, which consists not only in impunity of acting but also in the protection of the courts, will be of no effect if a right to offer resistance remains on the other side. For if it is permissible forcibly to resist a master, it will also be permissible forcibly to resist a magistrate who protects the master, when, nevertheless, according to the law of nations, the magistrate should defend the master in such ownership and the enjoyment thereof. This right therefore is like that which we have elsewhere attributed to the highest authorities in each state, in saying that it is not legally nor morally permissible forcibly to resist them. Thus Augustine also joined the two rights when he said : ‘ Princes are to be endured by the commons, and masters by their slaves, in such a way that temporal things may be borne in the exercise of long-suffering, and things eternal may be hoped for.’

VIII.—*The law under consideration has not always existed among all nations*

But the fact must further be recognized that this law of nations with regard to captives has not always been accepted, nor accepted among all nations, although the Roman jurists speak of it as universal, designating the more prominent part by the name of the whole. Thus among the Jews,¹ who by their special institutions were separated from the common practice of other peoples, there was an asylum for slaves ; at least, as the commentators rightly note, for slaves who had come into this unhappy condition through no fault of their own.

From such a source it seems that there may have arisen the

Deut.,
xxiii. 15.

¹ See [Moses de Kotzi,] *Precepts Forbidding*, 180.

Bodin,
De Republica, I. v.

right of claiming their freedom which is given to slaves in the country of the Franks; although we see that this is now granted not only to those captured in war, but also to other slaves of any sort.

IX.—*The law under consideration does not now exist among Christians; what has been substituted for it*

1. Christians¹ furthermore have as a whole agreed that those who are captured in a war which has arisen among themselves do not become slaves so as to be liable to be sold, constrained to labour, and suffer the fate of slaves in other respects. In this they are surely right, because they have been, or should have been, better instructed in the teachings of Him who has sanctioned all charity than to be unable to be restrained from the slaughter of unfortunate men in any other way than by the concession of a lesser cruelty.

Bartolus,
On Digest,
XLIX. xv.
24; Covarruvias,
On Sexti, V.
ult. 4, pt.
II, § ii, no.
6; Victoria,
De Iure Belli,
no. 42;
Bohier,
Decisions,
clxxviii;
Sylvester,
word bellum, I,
no. 1.
[Gregoras.] IV
[ix].

Gregoras² writes that this treatment of captives in former times was handed down from ancestors to descendants among those who professed the same religious belief, and that it was not peculiar to those who lived under Roman rule but was also common to Thessalians, Illyrians, Triballians, and Bulgars. And so this degree of progress at any rate, small though it is, has been accomplished by reverence for the law of Christ; a degree of progress which Socrates [494] failed to secure, although he had recommended such treatment of captives by the Greeks among themselves.

Plato,
Republic,
V [xv =
469 c].

2. Moreover, the practice of Christians in this matter is followed also by Mohammedans among themselves.³ Nevertheless, even among Christians the custom still prevails of keeping prisoners under guard until a ransom is paid, the amount of which is decided by the victor, unless some definite agreement has been made.

Bartolus,
On Digest,
III. v. 20;
Bohier,
Decisions,
clxxviii;
Constitutions
Regni Hispaniae,
VIII. xxvi.
2.

Furthermore the right of guarding captives is usually granted to the individuals who have taken them, except in the case of persons of high rank; for the customs of most nations give the right over these to the state or its head.

¹ And also the Essenes, from whom the first Christians originated. See Josephus [*Antiquities of the Jews*, XVIII. i. 5].

² Gregoras, Book IV [IV. ix], where these words are found: 'This is a custom which has descended from antiquity to posterity, and has never been corrupted, not only among the Greco-Romans and Thessalians, but also among the Illyrians, Triballians, and Bulgars, because of a belief common to all, that it is permissible to collect plunder, but not to make men prisoners nor to kill them after the time of battle.'

Adam of Bremen says of Saint Ansgar: 'Thence he returned to Hammaburg and reproved the peoples north of the Elbe for the sale of Christians.' Bohier also mentions this custom, *Decisions*, clxxviii, and adds that it is a practice in France, England, and Spain, that if the prisoner is a duke, count, or baron, he does not belong to the soldiers but to the ruler who is waging the war.

³ Chalcocondylas, Book III; Leunclavius, Books III and XVII; Busbecq, *Epistolae Exoticae*, iii.

CHAPTER VIII

ON THE RIGHT TO RULE OVER THE CONQUERED

I.—*By war also civil authority is acquired, sometimes as vested in a king, sometimes as vested in a people; the effects of such acquisition*

1. It is not at all strange if he, who can subject individuals to himself in personal servitude, is able to subject to himself an aggregation of men—whether they formed a state, or a part of a state—in a subjection which may be purely civil, or purely personal, or mixed.

Some one in Seneca's *Controversy* about a native of Olynthus uses the following argument: 'He, whom I purchased in accordance with the law of war, is my slave. This, men of Athens, is advantageous for you; otherwise your empire, in so far as it has been acquired by war, is reduced to its ancient limits.' With similar purport Tertullian said that empires are sought by arms and expanded by victories. Quintilian declares that kingdoms, peoples, and the territories of nations and cities, depend upon the law of war. In Curtius, Alexander says that laws are laid down by the victors and accepted by the vanquished.

[*Controversies*, X. v. 15.]

Apology [xxv].
[*Inst. Or.*, V. x. 113.]
[IV. v. 7.]

In his speech to the Romans Minio asks: [496] 'Why do you send a praetor every year with authority and rods and axes to Syracuse and the other Greek cities of Sicily? Clearly, you would say, for no other reason than this, that you have imposed these laws upon those who have been conquered in war.' In Caesar Ariovistus says: 'It is the law of war that those who have conquered should rule those whom they have conquered, just as they please'; also: 'The Roman people has been accustomed to rule the conquered, not according to another's dictation but according to its own judgement.'

Livy, XXXV [xvi. 4].

Gallic War [I. xxxvii].

2. Justin, quoting from Trogus, relates that up to the time of Ninus those who waged war had sought for themselves not sovereignty but glory, and, being content with victory, had abstained from empire; that Ninus was the first who extended the borders of his empire, and subjugated other peoples in war; and that from him this had passed into a general custom. Bocchus, in Sallust, declares 'that he had taken up arms to protect his kingdom; for the part of Numidia, from which he had expelled Jugurtha, had become his by the law of war.'

[I. i. 7.]

Jugurthine War [cii. 13].

3. Sovereignty, furthermore, may be acquired for the victor; either such sovereignty merely as is vested in a king¹ or other ruler,

¹ After the battle at Gaugamela Alexander was hailed as king of Asia [Plutarch, *Alexander*, xxxiv = p. 685 B]. The Romans asserted that what had belonged to Syphax was theirs 'according to the law

and in that case the victor succeeds to the right of the ruler only, and nothing beyond; or such as is vested in a people,¹ in which case the victor holds sovereignty in such a way that he can even alienate it, just as the people could. We have elsewhere said that thus it has come about that certain kingdoms were held as a patrimony.

I. iii. xi.

II.—*The right of a master may be acquired over a people, which then ceases to be a state*

1. Even a more fundamental change may be accomplished, so that, for instance, what was a state may cease to be a state. In such cases the state that was may become an accession of another state, as the Roman provinces did; or it may not be attached to a state, as when a king waging war at his own expense so subjects a people to himself that he wishes it to be governed not for the good of the people but above all else for that of the ruler, and this is the rule of a master, not of civil authority.

[VII. xiv.]

In his *Politics*, Book VII, Aristotle says: 'There is government . . . for the good of the ruler, and government for the good of the ruled. The former is the government of masters and slaves; the latter, the government of free men.' A people, then, which is subject to a power of this kind, will for the future be no state, but a great domestic establishment. It has been well said by Anaxandrides:

A state of slaves, good sir, nowhere exists.

2. The two types of authority are thus contrasted by Tacitus: 'To conceive himself as a governor among freemen, not as a despot among slaves.' Of Agesilaus Xenophon says: 'The states which he brought under his authority he relieved of all the obligations which

of war'; Appian, *Selections on Embassies*, X. xxviii. In Agathias, Book I [I. v], the ambassadors of the Goths said of Theodoric: 'Since he had conquered Odoacer, the stranger from Scyros, he held by the law of war all that had been his.' But when the Huns claimed that the Gepidae were their subjects, because they had captured the king of the Gepidae, the Romans denied this claim on the ground that the Gepidae had a chief rather than a king, and that they did not form a part of his patrimony. This is recorded by Menander Protector [frag. 28, pp. 63-5, edit. Dindorf].

¹ In the same writer Menander [frag. 46, p. 92], the Persians say with regard to the territory of the city of Daras: 'Since the city itself had been conquered by them according to the law of war, it was reasonable that what had been subject to it should belong to them.' After the conquest of the Vandals, Belisarius claimed that even Lilybaeum in Sicily should yield to the Roman authority, on the ground that the Goths had given it to the Vandals. But the Goths denied that they had so given it; Procopius, *Vandalic War*, II [II. v].

Henry, son of Frederick Barbarossa, after having captured Sicily, laid claim to Epidamnus, Saloniki, and other places held by the Sicilians; Nicetas, *On Alexis*, brother of Isaac [Comnenus], Book I [I. vii]. Baianus, Chagan of the Avars, said to the emperor with regard to Sirmium: [498] 'That that city belonged to him, seeing that it had belonged to the Gepidae, who had been conquered by the Avars' [Menander, frag. 64, p. 127, edit. Dindorf].

Peter, the ambassador of Justinian, said in a speech to Chosroes: 'For how shall he who is lord of the principal not be lord of the accessory also? For neither the Lazi nor the Suani ever raised a dispute on this point, that Suania has not from antiquity belonged to the Lazi' [Menander, frag. 11, p. 26, edit. Dindorf]. Each of these citations is from Menander Protector. Add what is in III. viii. 4.

[*Excerpta ex Trag. et Com. Gr.*, edit. Grotius, p. 639.]
Annals, XII [xi].
 [Agesilaus, i. 22.]

slaves render to their masters, and he exacted from them only the things in which freemen obey their rulers.'

III.—*Sometimes the two types of authority are mixed*

Hence we may understand the nature of that mixed authority, which I have said is in part civil and in part that of a master, that is to say, an authority in which servitude is mixed with a degree of personal liberty. Thus we read that arms have been taken from peoples; that peoples have been forbidden to have any iron except for agricultural purposes; and that other peoples have been compelled to change their language and manner of life.

IV.—*The possessions of a people, even such as are incorporeal, are also acquired; herewith is discussed the question of the written bond of the Thessalians*

I. Moreover, just as the possessions which belonged to individuals are, in accordance with the law of war, acquired by those who place the owners in subjection to themselves, so also the possessions of the aggregation of individuals as a whole become the property of those who subject the aggregation to themselves, if they so wish. Livy says in regard to those who have capitulated: 'In case all possessions have been surrendered to him who is superior in arms,¹ the victor has the absolute right to decide what he wishes the vanquished to keep, and of what he wishes to deprive them'; and this statement holds true of those who are conquered in a public war. Surrender in fact voluntarily permits what force would otherwise take.

In Livy Scaptius says that 'the land under [497] dispute had been a part of the territory of the Coriolani; and when Corioli was captured, by the law of war it became public land of the Roman people.' Hannibal, in a speech to his soldiers, recorded by the same author, declared: 'All the possessions of the Romans, won and amassed in so many triumphs, will become ours along with the masters themselves.' The same author makes Antiochus say: 'Since, when Lysimachus was conquered, all his possessions were transferred to Seleucus in accordance with the law of war, he thought that they

[XXXIV.
lvii. 7.]

III [lxxi.
7].

XXI
[xlili. 6].

XLIII
[XXXIII.
xl. 4].

¹ See above, I. iv. 8 [I. iii. 8]; II. v. 31; and III. v. 2, and below, III. xx. 49. Add also the following from Polybius, *Selections on Embassies*, cxlii:

'Those who surrender themselves to the Roman authority, first give up the territory which was theirs, and the cities within that territory, then all men and women who are in this territory or these cities; finally, all rivers, harbours, everything sacred and hallowed in its entirety, so that the Romans are masters of all, but those who have surrendered themselves are masters of nothing at all.'

See what has just been said, III. vii. 4. Justin, in Book XXXV [XXXVI. iii. 8], speaking of the Jews, says: 'Afterwards along with the Persians themselves they passed under the sway of Alexander the Great.'

were now under his rule.' Similarly Pompey acquired for the Roman people what Mithridates had captured in war and had annexed to his empire.

2. Consequently, the incorporeal rights also, which had belonged to the aggregation as a whole, will become the property of the victor, in so far as he wishes. Thus when Alba was conquered the Romans claimed for themselves the rights which the Albans had exercised.

Hence it follows that the Thessalians were entirely acquitted of their debt of one hundred talents. Although they owed this sum to the Thebans, upon becoming master of Thebes, Alexander the Great, by right of victory, made the Thessalians a present of it. Nor is that true which is adduced on behalf of the Thebans in Quintilian, that only what the victor himself holds is his, but a right that is incorporeal cannot be seized by force; and that the position of an heir and that of a conqueror are fundamentally different, because a right passes to the former, but only property to the latter. In fact he who is master of persons is also master of their possessions and of every right which pertains to the persons. He who is the possession of another does not possess for himself, and he who is not his own master does not have anything in his own power.

3. Furthermore, if any one should leave to a conquered people the right to form a state, he might still take for himself certain things which had belonged to the state. It rests with him to decide what he wishes the measure of his beneficence to be. Caesar imitated the act of Alexander by making to the people of Dyrrachium a present of the debt which they owed to some one of the opposite party. In this case, however, the objection might have been raised that the war of Caesar was not of the kind in respect to which this law of nations has been established.¹

¹ Anthony ordered the Tyrians to restore the territories of the Jews which had not been granted them by the Roman senate and which had not been held prior to the war of Cassius. This is recorded by Josephus [*Antiquities of the Jews*, XIV. xii. 4]. See also Bizarri, *History of Genoa*, X.

Strabo,
XII [iii.
1].

Dionysius
of Halicarnassus, III
[xxx1].

[*Inst. Or.*,
V. x. 116.]

Dig. L.
xvii. 118.
Digest,
XLVIII.
v. 22.

Cicero,
*Letters to
Brutus*, vi
[1. vi].

CHAPTER IX

ON POSTLIMINY

I.—*The origin of the word postliminy*

1. Just as in regard to those things which are captured from the enemy, so also in regard to the right of postliminy (*postliminium*) no very sound view has been advanced by those who in more recent times have laid claim to a knowledge of the law. The subject was treated with greater painstaking by the ancient Romans, but often rather confusedly, so that the reader could not distinguish what they ascribed to the law of nations and what to the Roman civil law.

2. With regard to [499] the word *postliminium* we must reject the view of Servius [Servius Sulpicius], who thinks that the latter part is a lengthening of the word without significance; we must rather follow Scaevola, who taught that the word was a compound of *post*, which indicates a return, and *limen*.¹ For *limen* (threshold) and *limes* (boundary) differ in ending and manner of declension, although for the rest they are identical in origin—for they come from the ancient word *limo*,² which signified *transversum* (across)—and in original idea, just as *materia* and *materies*, *pavus* and *pavo*, *contagio* and *contages*,³ *cucumis* and *cucumer*; although in later usage it developed that *limen* referred rather to private, *limes* to public things. So the ancient word which meant ‘to eject from a country’ was *eliminare*, and the Romans called exile *eliminium*.⁴

Cicero,
Topics
[viii. 36],
and Boe-
thius
thereon.

II.—*Where postliminy may occur*

1. Postliminy, therefore, is a right which arises from a return to the threshold,⁵ that is, to the public boundaries. Thus Pomponius says that he who has begun to be within our fortified lines has returned

Digest,
XLIX. xv.
5. § 1.

¹ Whence the name *Postvorta Dea* [Aulus Gellius, *Attic Nights*, XVI. xvii].

² Servius, *On the Aeneid*, XII [XII. 120], and Donatus, *On [Terence's] Eunuch*, on the phrase *limis oculis* [III. v. 63]. Festus: ‘*Limus*, “oblique”, that is, “transverse”, whence also *limina*.’

Isidore [*Etymologies*], XV. xiv: ‘*Limites* are called from the ancient word for “across”, for everything that was “across” the ancients called *lima*, from which comes the *limina ostiorum*, through which one goes out and in; and *limites* because by them one goes out into the fields.’ In the Glossary, *limes* is translated as *πλάγια ὁδός* [*Corpus Glossariorum Latinorum*, vol. II, p. 123].

³ *Compages* and *compago*, a word which itself was formerly *compagen*, as we see from its genitive case, and the verb derived from it, just as *sanguis* was formerly *sanguen*.

⁴ And *colliminius* in Solinus [chap. xv] is what is commonly called *collimitium*.

⁵ Hence, Tertullian, *On Modesty* [xv], metaphorically speaking says: ‘The postliminy of the peace of the Church.’

Digest,
XLIX. xv.
19. § 3.

by postliminy; Paul defines such a return when the captive has entered our frontier.

On similar grounds the agreement of nations has brought the matter to this point, that postliminy occurs also if a man, or a thing of the sort in regard to which it has been decided that postliminy is possible, has come to our friends, as Pomponius says in the passage cited; or, as Paul explains by offering an example, to a king who is our ally or friend. In these passages we are to understand as friends or allies not merely those with whom we are at peace,¹ but those who take the same side in a war. Those who come to such friends, as Paul says, begin to be protected in the name of the state. It makes no difference in fact whether a man or thing has come to them or to his own people.

Polybius,
III [xxiv].

2. Among those who are friends, it is true, but not on the same side, prisoners of war do not change their status unless by a special arrangement. Thus in the second treaty drawn up between the Romans and the Carthaginians it was agreed that if any prisoners taken by the Carthaginians from peoples who were friends of Rome should reach ports subject to the Romans their freedom could be asserted, and that the friends of Carthage should enjoy an equal right. In consequence those Romans who were captured in the second Punic War and had come to Greece by way of sale did not have the right of postliminy there,² because in that war the Greeks had supported neither side, and hence it was necessary for the captives to be ransomed in order to be set free. In Homer, too, in more than one passage we see that those captured in war were sold in places that were at peace, as Lycaon, *Iliad*, XXI [lines 35 ff.], and Eurymedusa, *Odyssey*, VII [lines 8 ff.].

Plutarch,
Flaminius
[xiii = p.
376 F].

III.—By postliminy some things return and some things are recovered

The ancient Roman mode of speech had it that free men also were recovered by postliminy.

Pompeius
Festus (on
the word
*postlimi-
nium*).

Aelius Gallus, in the *Terms Which Apply to the Law*, Book I, says that by postliminy there is recovered (for we must adopt this reading) the freeman who has gone from one state into another, and returns to the same state, according to the law established in regard to postliminy. The same is true of the slave who has gone from us into the power of the enemy, and afterwards returns to us and into the power of his former master, according to the law of postliminy. The same reasoning is applied to a horse, to a mule, and to a ship in recovery by postliminy (for so I think that with a slight change we may

¹ That this was the view of the king of Morocco and Fez, appears from De Thou, Book CXXX [CXXX. iii], on the year 1603.

² Valerius Maximus, V. xi. 6; Diodorus Siculus, *Selections on Embassies*, iii. So also the Rhodians as an act of generosity restored to Athens the Athenian citizens whom they had bought during the war of Athens with Philip; Polybius, *Selections on Embassies*, iii.

retain these three words which that incomparable student of the Roman law, Jacques Cujas, thinks should be deleted) as to a slave; and the same kinds of things, which return from the enemy to us by postliminy, may return from us to the enemy.

[*Observations*, XI. xxiii.]

The later Roman jurists, however, with greater clarity have distinguished two forms of postliminy, according as we ourselves return, or something is recovered by us.

Digest, XLIX. xv. 14.

IV.—*The right of postliminy exists in peace and in war. What is to be done if it has not been mentioned in time of peace?*

1. We must, further, maintain the view of Tryphoninus, who says that the right of postliminy [500] is effective both in war and in peace; the meaning is slightly different from that with which Pomponius had said the same thing.

Digest, XLIX. xv. 12.

In peace postliminy, unless it is otherwise agreed, exists for those who have not been conquered by armed force, but caught by their ill-fortune,¹ as those who are found in the land of the enemy when war has suddenly broken out. For other captives, however, there is not postliminy in time of peace, unless this was provided for in the terms of peace² (according to the excellent emendation of the passage of Tryphoninus by the learned Peter Faber, of which Cujas approves); for the reason which is added and the contrasted clause clearly decide this.

Digest, XLIX. xv. 5, cited above.

Semestria, I. vii.

'He made peace, releasing the prisoners, for so it had been agreed,' says Zonaras. Pomponius says: 'If a prisoner, for whose return in time of peace a guarantee had been given, remains with the enemy of his own accord, for him there is subsequently no postliminy.' Paul states the matter thus: 'If a prisoner of war has fled to his home after peace has been made, by postliminy he returns

Vol. III.

Digest, XLIX. xv. 20.

Digest, XLIX. xv. 28.

¹ See the example in Paruta, *On the War in Cyprus*, I.

² See Josephus, *Antiquities of the Jews*, XIII. ii [XIII. ii. 3]. Polybius mentions agreements providing for the restoration of captives in the peace with Philip, with the Aetolians, although in this case with an exception, and with Antiochus; *Selections on Embassies*, ix, xxviii and xxxv [= *Histories*, XVIII. xlv; XXI. xxx; XXI. xlv]. Livy [XXXIV. xxxv. 4] furnishes the same examples, and an additional example in the peace with Nabis.

Zosimus offers several similar instances, as, for example, the peace of Probus with the Burgundians and the Vandals, which began thus: 'Upon condition that they should restore all the booty and all the prisoners which they had,' Book I [I. lxviii]. He records a similar peace between Julian and the Germans [III. iv], and likewise with the Quadi, who were in Germany, Book III [III. vii].

Ammianus Marcellinus in Book XVII [XVII. x. 3-4] says of Suomarius, king of the Alemanni: 'On bended knees he sought peace, and obtained it, with forgiveness for the past, upon condition that he should restore our captives.' Shortly afterwards [XVII. xii. 11] he says of the Sarmatians: 'Upon being ordered to occupy without fear the lands they held, they restored our prisoners.' In another passage he says the same with regard to another part of the Sarmatians.

In Zonaras there are many such instances. Among others, in the history of Michael, son of Theophilus, speaking of the Bulgarian king this author says [XVI. vi. 3]: [507] 'He promised to release his prisoners of war.' Nicetas in Book II [*Manuel Comnenus*, II. viii] says that all the prisoners were set free, except the Corinthians and Thebans, men and women.

Sometimes it was agreed that prisoners who were held by the state should be restored, as in Thucydides, V [V. xviii].

to him who captured him in the late war, provided that it has not been agreed in the terms of peace that prisoners should be restored.’

[Digest,
XLIX. xv.
12.]

[XXII.
lix. 1.]

2. As indicating the reason why the view just stated came to be held with reference to those who have been captured by valour in war, Tryphoninus quotes the following from Servius, ‘that the Romans preferred that their citizens should place their hope of return in military prowess rather than in terms of peace’, for from antiquity they were in truth, as Livy says, a state by no means merciful to prisoners. But this reason characteristic of the Romans could not have established the law of nations, though it might have been among the causes that led the Romans to embrace that law which had been developed by other nations.

The truer explanation is this, that kings and peoples who undertake war wish that their reasons for so doing should be believed to be just, and that, on the other hand, those who bear arms against them are doing wrong. Now since each party wished this to be believed, and it was not safe for those who desired to preserve peace to intervene, peoples at peace were unable to do better than to accept the outcome as right,¹ and also to consider prisoners thus taken in the act of defending themselves as captured for a just reason.

3. But the same thing could not be said with regard to those who were caught [in hostile territory] after war had broken out; for in them no desire to injure could be imagined. Nevertheless it seemed not unfair that while the war lasted they should be detained, in order to lessen the strength of the enemy; but when the ending of the war had been arranged no reason could be offered for not releasing them. Consequently this was agreed upon, that with peace such prisoners should always obtain their liberty on the ground that they were innocent, by admission of the parties; but that over the others each should assert what he wished to be considered his right, except in so far as agreements should prescribe definite stipulations.

For the same reason neither slaves² nor things taken in war are restored with peace, unless this has been stipulated in agreements, since the victor wishes it to be believed that he had the right to seek these things. To controvert this principle would in truth be to make wars spring up from wars.

¹ See Priscus, *Excerpta Legationibus*, xxviii, and Bizarri, on the War between Genoa and Venice [*On the Venetian War*], Book II.

² Totila declared to Pelagius, the deacon whom the Romans had sent to him, that he would not discuss the question of the restoration of the slaves of the Sicilians, saying that it would be unjust for the Romans [i.e., Goths] to give up their fellow soldiers to their old masters. The passage is in [Procopius,] *Gothic War*, III [III. xvi].

In the light of these considerations it is clear that the argument in Quintilian on behalf of the Thebans was ingeniously presented, but not in accordance with the truth, that is, that prisoners are free if they have returned to their own country, because things won in war may only be held by the same use of force. We have said enough regard to peace.

4. In war men who were free before being captured return by postliminy;¹ but slaves and certain other things are recovered.

V.—*When a free man may return by postliminy while war is in progress*

A free man returns by postliminy only when he has come to his own people with the purpose of sharing their fortunes, as the principle was stated by Tryphoninus. The reason undoubtedly is that for a slave to become free he must, so to speak, acquire himself, which is not done unless he wishes it. But it makes no difference whether a man has been recovered from the enemy by force of arms,² or has escaped by a ruse, as Florentinus has pointed out. It will even be sufficient if he has been voluntarily handed over by the enemy.

What happens if [501] a man comes to his own people after being sold in trade by the enemy,³ as the custom is? This question is discussed by Seneca,⁴ in the case of the Olynthian who was purchased by Parrhasius. Since a decree had been issued by the Athenians whereby it was ordered that the Olynthians should be free, he inquires whether it was provided in the decree that they should be made free or should be considered free; the latter of the two interpretations is more correct.

VI.—*What rights a free man returning by postliminy may recover, and what he may not recover*

1. A free man, moreover, after he has returned to his own people, not only acquires himself for himself, but also all the possessions, whether corporeal or incorporeal, which he had when the peoples were at peace. Peoples at peace accept the fact as indicating a right in the case of the man who has been set free just the same

¹ Julian, in his oration *Against the False Cynics* [Orations, vi=p. 195], says: 'In this way even the prisoners of war whom we set free would be slaves. But to such the laws grant freedom when they have returned to us.'

² As those, who had been captured by the Slavs and were set free by the Huns, likewise in Procopius, *Gothic War*, III [III. xiii].

³ As in the same book of Procopius [III. xiv], the young Childubius said: 'Since he had returned to his own country, for the future he would be a free man in the eyes of the law.' But Leunclavius [*Turkish History*, XIV] notes that among the Turks there was formerly no right of postliminy for prisoners of war.

⁴ *Controversies*, V. xxxiv [X. v].

[*Inst. Or.*, V. x. 115.]

Digest, XLIX. xv. 12. § 9, and 5. § 3, cited above.

Digest, XLIX. xv. 26. *Code*, VIII. 1. 5.

as in the case of the prisoner, in order that they may show themselves fair to both sides. Therefore the proprietorship, which he who possessed the prisoner by the law of war had over the prisoner's possessions, was not free from all limitation; it could in fact cease against his will, if the prisoner should reach his own country. Consequently, the possessor of the prisoner loses these things just as he loses the man to whom they belonged.

2. But what if the possessor of the prisoner has alienated the prisoner's possessions? Will he, who has his title from the man that was at the time owner by the law of war, be protected by the law of nations, or will these things also be recovered? I am speaking of the things which were with a people that did not participate in the war.

It seems clear that we must distinguish between things which are of such a kind that they may return by postliminy, and those which are not of that kind. This distinction we shall shortly explain, so that the things of the former class will seem to have been alienated with a characteristic cause and under a condition, but the latter absolutely. By alienated things I understand also things which have been granted or acknowledged as received.

VII.—*Rights against a free man returning by postliminy also are restored*

Again, just as rights are restored to him who has returned by postliminy, so also rights are revived against him; and, as Tryphoninus says, such are held just as if he had never been in the power of the enemy.

Digest,
XLIX. xv.
12. § 6; 6.

VIII.—*Why those who surrender do not have the right of postliminy*

To this rule in regard to free men Paul justly adds the following exception: 'Those who have been conquered in battle and have surrendered to the enemy do not possess the right of postliminy.' This is doubtless for the reason that agreements with the enemy are valid by the law of nations, as we shall say elsewhere, and against such agreements no right of postliminy holds.

Digest,
XLIX. xv.
17.

[VI. xviii.]

Thus in Gellius those Romans who had been captured by the Carthaginians say that 'They did not have legal postliminy, since they were bound by their oath'. Wherefore, as Paul has properly pointed out, there is no postliminy during the period of an armistice. But Modestinus delivered the opinion that those who are given up to the enemy, that is without any agreement, return by postliminy.

Digest,
XLIX. xv.
19. § 1.

Digest,
XLIX. xv.
4.

IX.—*When a people may have the right of postliminy*

1. What we have said in regard to individual persons holds true, I think, in the case of peoples also; those who were free may recover their liberty in case the power of their allies delivers them from the rule of the enemy. But if the population, which formed the state, has been dispersed, I think it more correct not to consider the people as the same, nor to restore their property by postliminy in accordance with the law of nations, for the reason that a people, like a ship, obviously perishes by the dissolution of its parts, since its whole nature consists in perpetual union.

That was, then, not the same state of Saguntum which previously existed, when this site was restored, eight years later, to the former inhabitants. It was, again, not the same Thebes, after the Thebans had been sold into slavery by Alexander. Hence it is apparent that what the Thessalians had owed the Thebans was not restored to the Thebans by postliminy, and that for two reasons: first, because it was a new people; and, secondly, because Alexander, at the time when he was their master, was able to alienate this right and did so. There is a further reason, that a debt is not in the number of the things which return by postliminy.

2. With what we have said regarding a state [502] agrees closely the fact that according to the ancient Roman law, by which the dissolution of marriage was permitted, it was held that the marriage relation was not restored by postliminy,¹ but renewed by a new agreement.

Digest,
XLIX. xv.
8; 14. § 1.

X.—*What are the provisions of the municipal law in the case of those who return by postliminy*

1. From the preceding discussion the nature of postliminy may be understood according to the law of nations, as regards free men. But by municipal law that same right, in so far as it affects what is done within a state, may both be restricted by the addition of exceptions and conditions and extended to other interests. Thus, by the Roman civil law, deserters are excluded from the number of those who return by postliminy, even the sons of households over whom apparently the authority of the father, which was peculiar to the

Digest,
XLIX. xv.
19. §§ 4
and 7.

¹ Otherwise among Christian peoples. Pope Leo wrote to Nicetas, Bishop of Aquileia [Leo the Great, *Letters*, clix]: 'So that, just as postliminy is observed in the case of slaves or land, or even in the case of houses and other property, for those who have been led into captivity and have returned from captivity former marriages may be re-established, even if the parties have been united to others.' See Hincmar, *De Divortio Lotharii ei Tetbergae*, Interrogation xiii, and the reply of Pope Stephen, chapter xix, in *Concilia Galliae*, II.

Quirites, should have been exercised. But Paul says that this was acceptable, because Roman parents valued the discipline of the camp above their affection for their children. This is consistent with what Cicero says of Manlius, that through his personal grief he sanctioned the discipline of military authority, in order that he might have regard for the safety of his fellow citizens, with which he perceived that his own safety was bound up, and that he set the right of public authority above nature herself and the affection of a father.

The right of postliminy is also in a measure limited by this provision, which we read was first established by the Athenian laws, then by those of the Romans, that the person who should be ransomed from the enemy should serve the one who ransomed him until he paid back the price.¹ But this very provision appears to have been introduced in the interest of liberty, in order that many might not be left in the hands of the enemy because the hope of reimbursement in the sums paid as ransom had been cut off. This kind of servitude is in fact mitigated in many ways by the same Roman laws; and finally by the law of Justinian it is terminated with five years' service. On the death of the ransomed the right of recovering the money also is extinguished, just as it is held to be remitted by the contraction of marriage between the ransomer and the ransomed; and the right is lost by the prostitution of a ransomed woman. Many other provisions were established by the Roman law to favour those who pay ransom, and to punish the next of kin who do not redeem their relatives.

2. On the other hand, the right of postliminy has been expanded by the civil law in this, that not only those things which are included in postliminy by the law of nations, but all things, and all rights, are treated just as if he who has returned had never been in the power of the enemy; and this was also the practice in Attic law. For, as we read in the fifteenth *Oration* of Dio of Prusa, a certain person declared that he was the son of Callias, that he had been taken prisoner in the defeat at Acanthus, and had been in slavery in Thrace; after his return to Athens by postliminy, he claimed the inheritance of Callias from its possessors, and the only question investigated in the trial was whether he was really the son of Callias. The same writer records that, although the Messenians had been in slavery for a long time, they at length recovered both their liberty and their land.

Further, the things which were deducted from a property by usurpation or by liberation, or which seemed to have become extinct

¹ The same provision occurs in Charles the Bald, *Edictum Pistense*, chap. xxxiv [*Monumenta Germanica Historica*, *Leges*, II. vol. II, p. 325].

On Ends, I
[x. 35].

Demo-
sthenes,
Against
Nicostratus [liii. 11
= p. 1249].

Code,
VIII. 1. 20.
Digest,
XLIX. xv.
15.
Code,
VIII. 1.
13.
Code,
VIII. 1. 7.

= p. 239.]

[= p. 242.]

Code,
VIII. 1. 18.

by non-use, are restored by an action for annulment; for in the edict concerning the complete reinstatement of persons of age there is included the man who is in the power of the enemy. This at any rate comes from the ancient Roman law.

*Dig. IV.
vi. 1. § 1.*

3. The Cornelian Law even consulted the interest of the heirs of those who had died as prisoners among the enemy, by conserving their property just as if the captive who did not return was already dead at the time when he was captured. If you should annul these civil laws, there is no doubt that as soon as any one had been captured by the enemy his property would have fallen to those who should seize it,¹ because he who is in the enemy's possession is held to be non-existent. If he who had been captured returned, he would recover nothing except those things which have postliminy by the law of nations. However, the assignment of the goods of prisoners to the treasury, if there should be no heir, is the effect of a special Roman law.

*Digest,
XLIX.
xiv. 31;
xv. 22. § 1.*

[503] We have considered the persons who return; let us now consider the things which are recovered.

XI.—How slaves are recovered by postliminy, even those who have run away; how those who have been ransomed are recovered

1. Among recoverable possessions are, first, male and female slaves, even when having been often alienated,² or after manumission by the enemy.³ The reason is that it is not possible for one of our citizens, who is the owner of a slave, to be affected by a manumission in accordance with the law of the enemy, as Tryphoninus well observes. But for the recovery of a slave, it is necessary that he be actually held by his former master, or that he should be easily obtainable. Therefore, although in the case of other things it is enough for them to have been brought within the frontier, in the case of a slave this will not suffice for the right of postliminy, unless the fact is also known; for it is the view of Paul that such a slave who is in Rome, but is hidden, is not yet recovered.

*Digest,
XLIX. xv.
12. § 9.*

Just as a slave differs in the respect suggested from inanimate things, so in turn the slave differs from a free man in this, that for

*Digest,
XLIX. xv.
30.*

¹ See the *Visigothic Law*, V. iv. 15.

² But in the *Edict* of Theodoric [chap. cxlviii] the rule was laid down thus: 'Let slaves or *coloni* who have been captured by the enemy, and have returned, be restored to their masters, unless they have been previously acquired by another by purchase from the enemy.' See also Cassiodorus, [*Variae*,] III. xliii.

By the *Visigothic Law*, however, a slave recovered in war is restored to his master, and he who recovered him receives a third of a fair price for him. If he has been recovered after being sold by the enemy, he is restored to his master after return of the purchase price and the cost of improvements in his condition (V. iv. 21).

³ As those set free by Mithridates, who were brought back into slavery; Appian, *Mithridatic Wars* [ix. 61].

his recovery by postliminy it is not required that he should come with the intention of adopting our cause. This in fact is required in the case of the man who is going to recover himself, not in the case of him who is to be recovered by another; and, as Sabinus wrote, 'Every one has a full freedom of choice with regard to his own state, but not in relation to the right of his master.'

2. The Roman law furthermore does not exempt runaway slaves from the operation of this law of nations. The master recovers his former right over these also, as Paul teaches us, the intent being that the exercise of a contrary right should not be so injurious to him, who always remains a slave, as fraught with damage for his master. In regard to the general treatment of slaves who are recovered by the valour of the soldiers, the emperors have stated a principle which some persons mistakenly apply to all possessions, that 'We should regard those who have been recovered as not having been captured, and our soldiers ought to be their defenders, not their masters'.

3. By the Roman law slaves who have been ransomed from the enemy become forthwith the property of the person who ransoms them; but when the price has been paid back they are held to have been recovered.

To explain these things in greater detail is the business of the interpreters of the civil law. For some points were changed by later laws; and, to induce captured slaves to return, freedom was offered immediately to those who had broken a limb, and to others after the lapse of five years, as may be seen in the military laws collected by Rufus.

XII.—*Whether subjects may be recovered by postliminy*

We are more concerned with this question, whether peoples who were subject to a foreign rule also relapse into their former relation.

This may be considered in the case that not he to whom the chief command belonged, but some one of his allies, had delivered the people from the enemy. In this case I think we must give the same answer as in the case of slaves, unless it has been otherwise agreed in the treaty of alliance.

XIII.—*Territory is recovered by postliminy*

1. Among things recoverable we have first to do with territory which falls under the right of postliminy. 'It is true', says Pom-

Digest,
XLIX. xv.
12. § 9.

Digest,
XLIX. xv.
19. § 5.

Code,
VIII. l. 12.

Digest,
XLIX. xv.
20. § 1.

ponius, 'that when the enemy have been expelled from the territory which they have taken the ownership of it returns to the former proprietors'.

Furthermore, the enemy ought to be considered as expelled from the time when they are no longer able to approach openly, as we have explained elsewhere. Thus the Lacedaemonians restored to the early proprietors¹ the island of Aegina, which had been wrested from the Athenians. Justinian and other emperors restored to the heirs of the old possessors the lands which had been recovered from the Goths and Vandals, and did not admit against the proprietors those prescriptive rights² which the Roman laws had introduced.

2. The law regarding every right which is connected with the soil I consider to be the same as that regarding territory. Pomponius has written that consecrated and holy places, which have been captured by the enemy, if they have been freed from this misfortune, are restored to their original condition as though returned by a sort of postliminy. With this agrees what Cicero, in the passage on the statues in his speech *Against Verres*, says of the Diana of Segesta: 'Through the valour of Publius Africanus it recovered its veneration together with its seat of worship.' With the right of postliminy Marcianus compares [504] the right by which the ground occupied by a building is restored to the shore, upon the fall of the building.

Wherefore we shall be obliged to say that the usufruct of land that has been recovered is restored, following the precedent set by the response of Pomponius with regard to inundated land. By the law of Spain, provision has been made that the holdings of counts and other hereditary jurisdictions return by postliminy. The larger holdings return without limitation; the smaller, if they are claimed within four years after their recovery, with the exception that the king has the right of retaining a castle lost in war and recovered in any way at all.

¹ That is, those who were of the Lacedaemonian faction. Cf. what has been said above, III. vi. 7.

² And this in accordance with a law of Honorius, who, although he relinquished Spain to the Vandals, would not [508] permit a prescription of thirty years to prejudice the proprietors, while the Vandals were in occupation of it; as is recorded by Procopius, *Vandalic War*, I [I. iii]. Valentinian, in his Novel *De Episcopali Iudicio*, says: 'We have ordained that the rights which were preserved in perpetuity or for an unlimited number of ages shall be terminated by a limit of thirty years; with the exception of the affairs of Africans, who shall prove that they have been subject to the constraint of the Vandals; so that in their cases there may be deducted from the allotted thirty years such time as shall be proven to have been passed under hostile domination.'

In the Council of Seville, cited in *Decretum*, II. xvi. 4 [II. xvi. 3. 13], we read: 'Just as by the law of the state their former possessions are restored to those who have returned by postliminy, after suffering the cruelty of the barbarians in an enforced captivity.' With this agrees the canon, *Decretals*, II. xxvi. 10. See also Cujas, *Paratitla on Code*, VII. xxxix.

Strabo, VIII [vi. 16].
Novels, xxxvi.
Valentinian, Novels, *De Episcopali Iudicio*; Procopius, *Vandalic War*, I [iii]; Cujas, *Observations*, X [xii].
Dig. XI. vii. 36.

[IV. xxxv. 78.]

Dig. I. viii. 6.

Digest, VII. iv. 26.
Constitutions of France, X. xxix. 2.

XIV.—*The distinction that was formerly observed with regard to movable things*

1. With regard to movable things there is a general rule to the contrary, that they do not return by postliminy but belong with the spoil; thus Labeo contrasts such things. Therefore, also, what has been acquired in trade, wherever it is found, remains the property of him who bought it, and the former owner has not the right to reclaim it if it is found among those who are at peace, or brought within the frontier.

In ancient times we see that things which were of use in war were excepted from this rule, which the nations seemed to have sanctioned, in order that the hope of recovery might render men more zealous in procuring them. In those times the institutions of very many states were organized for warfare; wherefore an agreement was easily reached in this matter.

Moreover those things are considered to be of use in war which we lately cited from Aelius Gallus, but which are more specifically designated both in Cicero's *Topics* and in Modestinus. They are warships and transports, but not yachts and fast boats acquired for pleasure; mules, but only such as are pack animals; horses and mares, which have been broken to the bit. And these are possessions which the Romans held were legally disposed of in wills, and entered into claims for the division of an inheritance.

2. Arms and clothing are indeed of use in war, but they do not return by postliminy because those who lose arms or clothing in war are by no means deserving of favour; in fact such loss was accounted a disgrace, as is abundantly clear in the historical writings. But in this respect, it is noted, arms differ from a horse, because a horse may dash away without fault of his rider. We see, further, that this distinction of movables was in force in the west, even under the Goths, down to the time of Boethius. For he, in explaining Cicero's *Topics*, seems to speak of this right as one which retained its force to his own time.

XV.—*What is the current law with regard to movable things?*

But in recent times, if not previously, the distinction noted seems to have been done away with. For those who are familiar with customs generally record that movable things do not return by postliminy; and we see in many places that this has been made a rule with regard to ships.¹

¹ *Decisiones Genuenses*, ci.

[*Topics*,
viii. 37.]
Digest,
XLIX. xv.
2 and 4.

Digest,
XXX. i. 9.
Dig. X. ii.
22 and 23.

Bartolus,
On Dig.,
XLIX. xv.
28; An-
gelus and
Saliceto,
On Code,
VIII. ii. 2;
*Constitu-
tiones Gal-
licae*, XX.
xiii. 24;
*Consolato
del Mare*,
clxxxvii.

XVI.—*What things may be recovered in such a way as not to need postliminy*

Things which, although seized by the enemy, have not yet been brought within his fortifications, have no need of postliminy, because by the law of nations they have not yet changed ownership. Also things which pirates or brigands have taken from us have no need of postliminy, as Ulpian and Javolenus decided; the reason is that the law of nations does not concede to pirates or brigands the power to change the right of ownership.

Relying upon this principle the Athenians wished to receive Halonnesus as restored, not as given by Philip, because the pirates had taken it from them, and Philip had taken it from the pirates.¹ So things which have been captured by freebooters may be claimed wherever they are found, excepting that, as we have elsewhere held, on the basis of the law of nature, he who has obtained possession of a thing at his own expense should be reimbursed in the sum which the owner himself would have been glad to pay for its recovery.

XVII.—*Charges introduced by municipal law as affecting those subject to it*

Nevertheless a different rule may be established by municipal law. Thus by [505] the Law of Spain ships captured from pirates become the property of those who take them from the pirates.² It is in fact not unjust that private interests should yield to the public advantage, especially when the difficulty of recovery is so great. But such a law will not hinder foreigners from claiming their property.

XVIII.—*How postliminy has been observed among those who were not enemies*

I. That is more surprising, to which the Roman laws bear witness, that the right of postliminy was effective not only among enemies, but also between the Romans and foreign peoples. But we have said elsewhere that such laws were relics of the nomadic age, in which the usages had dulled the natural social sense which exists among men. In consequence even among nations which were not waging a public war there was a certain licence of war among individuals, proclaimed as it were by the usages themselves. To prevent this licence from extending to the killing of men, it was acceptable that the rights of captivity should be introduced among

¹ See Philip's very letter in the works of Demosthenes [xii].

² The Venetians had the same law, as appears from the *Letters* of Du Fresne de la Canaye, vol. I.

Digest,
XLIX. xv.
24 and 27;
19. § 2.

Demosthenes, *On Halonnesus* [vii. 2 = p. 77].

II. x. 9, above.

XXXI. xxix. 2
Covarruvias, *On Sext*, V. ult. 4, pt. II. § 2, no. 8.

II. xv. 5.

them, and from this it resulted that there was also a place for postliminy, on a different basis than with brigands and pirates, because this use of force led to fair agreements which are usually held in contempt by brigands and pirates.

2. Formerly it seems to have been a disputed right whether those from an allied people, who are in servitude among us, return by postliminy, in case they have made their way home. Thus Cicero presents the problem, *On the Orator*, Book I. Aelius Gallus indeed speaks as follows: 'With peoples that are free, and with peoples in alliance, and with kings, we have postliminy just as with enemies.' On the other hand Proculus declares: 'I have no doubt that allied and free peoples are foreign to us; there is no postliminy between us and them.'

3. I think that a distinction should be made between treaties, in order that, if there were any which were entered into for the sake of settling or avoiding a public war, these should not for the future stand in the way of captivity or of postliminy. If, on the contrary, there were treaties containing this provision, that whoever should come from one side to the other should be protected in the name of the state, then with the abolition of captivity postliminy also should cease. It seems to me that Pomponius indicates this, when he says:

If with any people we do not have relations of friendship or hospitality, nor a treaty made for the sake of friendship, they are not indeed enemies; but whatever of our belongings goes to them becomes theirs, and a free man of our people captured by them becomes also their slave. It is the same if anything comes to us from them; and so in this case also postliminy is recognized.

When Pomponius said a 'treaty for the sake of friendship', he showed that there could be other treaties also, in which there is no right of hospitality or friendship. That by peoples in alliance with one another are to be understood those who have promised friendship or secure hospitality, is also made abundantly clear by Proculus, when he adds: 'For what need then is there of postliminy between us and them, when they in our country retain both their liberty and the proprietorship of their own possessions as fully as among themselves, and we have the same privileges in their country?' Therefore what follows in Aelius Gallus, that 'There is no postliminy with the nations which are under our sway', as Cujas correctly reads it, must be supplied with the addition, 'nor with those with whom we have a treaty establishing friendship'.

XIX.—*When the right of postliminy may be enforced at the present day*

1. In our times, however, not only among Christians but also among most Mohammedans, both the right of captivity apart from

[I. xl. 182.]
[Festus,
on the
word *post-*
liminium.]

Digest,
XLIX. xv.
7.

Digest,
XLIX. xv.
5. § 2.

Observa-
tions, IX.
xxiii.

Bodin,
De Repub-
lica, I. vii.

war, and likewise that of postliminy, have disappeared, since the necessity for either was removed by the restoration of the force of the relationship which nature has wished to prevail among men.

2. Nevertheless that ancient law of nations could be applied if there should be an affair with a people so barbarous that without declaration or cause it should consider it lawful to treat in a hostile manner all foreigners and their possessions.

While I was writing these words, a judgement to that effect was rendered in the highest chamber at Paris, under the presidency [506] of Nicholas of Verdun. The decision held that goods which had belonged to French citizens, and had been captured by the Algerians, a people accustomed in their maritime depredations to attack all others, had changed ownership by the law of war, and therefore, when recaptured by others, became the property of those who had recovered them. In the same suit this decision was recorded, to which we just now referred, that to-day ships are not among the things which are recovered by postliminy.

CHAPTER X

CAUTIONS IN REGARD TO THINGS WHICH ARE DONE IN AN UNLAWFUL WAR

I.—*With what meaning a sense of honour may be said to forbid what the law permits*

1. I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part also because coercive tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men.

III. iv.

2. In the *Trojan Women* of Seneca, when Pyrrhus says :

No law the captive spares, nor punishment restrains,

Agamemnon makes answer :

What law permits, this sense of shame forbids to do.

In this passage the sense of shame signifies not so much a regard for men and reputation as a regard for what is just and good, or at any rate for that which is more just and better.

[*Inst.* II.
xxiii. § 1.]

So in the *Institutes* of Justinian we read: 'Bequests in trust (*fideicommissa*) were so called, because they rested not upon a legal obligation, but only upon the sense of honour in those who were asked to take charge of them.' In Quintilian the Father, again: 'The creditor goes to the surety, without violating his sense of honour, only in case he is unable to recover from the debtor.' With this meaning you may often see justice associated with the sense of honour.

[*Declama-
tions*,
cclxxiii.]

[Thus Ovid]:

[*Fasti*, I.
249 ff.]

Not yet had justice fled before men's guilt;
Last of divinities she left the earth,
And sense of honour in the place of fear

[509] Ruled o'er the people without force.

Hesiod sang :

[*Works
and Days*,
192 ff.]

Nowhere a sense of honour, nowhere golden Justice;
The base assail the better wantonly.

The sentence of Plato, in the twelfth book of his *Laws*, 'For Justice is called, and truly called, the virgin daughter of Honour' (*παρθένος γὰρ αἰδοῦς Δίκη λέγεται τε καὶ ὄντως εἶρηται*), I would emend by *πάρεδρος*, so that the sense would be: 'Justice is called the councillor of honour, and this has been said with truth.' For in another place Plato also speaks thus: 'The deity, fearing for the human race, lest it should utterly perish, endowed men with a sense of honour and justice, in order that there might be adornments of cities and bonds of friendship.'

[*Laws*, xii.
2 = p. 943
E.]

Protagoras
[xii = p.
322 c].

In like manner Plutarch calls 'justice' a 'house-companion of the sense of honour,' and elsewhere he connects 'sense of honour' and 'justice'. In Dionysius of Halicarnassus, 'sense of honour and justice' are mentioned together. Likewise Josephus also links 'sense of honour and equity'. Paul the jurist, too, associates the law of nature and the sense of honour. Moreover Cicero draws the boundary line between justice and a sense of reverence (*verecundia*) in this way, that it is the function of justice not to do violence to men, that of the sense of reverence not to offend them.

*To an Un-
lettered
Prince*
[iv = p. 78r
B c].
Theseus
[vi = p. 3].
VI [xxxvii].
*Antiquities
of the Jews*,
XIII. xix
[XIII. xi.
3].
Digest,
XXIII. ii.
[14. § 2].
On Duties,
I [xxviii.
99].
On Anger,
I. xxvii [II.
xxviii].

3. The verse which we quoted from Seneca is in complete agreement with a statement in his philosophical works: 'How limited the innocence to be innocent merely according to the letter of the law? ¹ How much more widely extend the rules of duty than the rules of law? How many things are demanded by devotion to gods, country and kin, by kindness, generosity, justice, and good faith? Yet all these requirements are outside the statutes of the law.' Here you see 'law' distinguished from 'justice', because he considers as law that which is in force in external judgements.

*On Cle-
mency*, I.
xviii.

The same writer elsewhere well illustrates this by taking as an example the right of the master over slaves: 'In the case of a slave you must consider, not how much he may be made to suffer with impunity, but how far such treatment is permitted by the nature of justice and goodness, which bids us to spare even captives and those bought for a price.' Then: 'Although all things are permissible against a slave, yet there is something which the common law of living things forbids to be permissible against a human being.' In this passage we must again note the different interpretations of the term 'to be permissible', the one external, the other internal.

¹ Seneca, *On Benefits*, V. xxi, says also: 'Many good things are not covered by any law, and find no form of procedure in court, but yet they are protected by the practice of human society, which is more potent than any law.'

Quintilian, *Institutes of Oratory*, III. viii [III. vi. 84], declares: 'For there are certain things which are not naturally praiseworthy, but are permitted by law, as the provision in the Twelve Tables that the body of a debtor could be divided among his creditors, a law which public practice repudiates.'

Cicero, *On Duties*, III [III. xvii. 68], writes: 'For the laws dispose of sharp practices in one way, and philosophers in another; the laws in so far as they can apply physical force, but philosophers in so far as they can apply reason and intelligence.'

II.—*The principle stated is applied to the things which we said were permitted by the law of nations*

1. Of the same effect is the distinction which was drawn by Marcellus in the Roman Senate: 'What I have done does not enter into the discussion, for the law of war defends me in whatever I did to the enemy, but what they deserved to suffer'; that is, according to the standard of that which is just and good.

Livy,
XXVI
[xxxii. 2].

Politics, I.
vi.

Aristotle approves the same distinction when he is discussing whether the slavery which originates in war ought to be called just: 'Certain people, regarding only a part of what is just (for a law is something just),¹ declare that slavery arising through war is just. But they do not say absolutely just; for it may happen that the cause of war was not just.' Similar is the saying of Thucydides in the speech of the Thebans: 'We do not thus complain regarding those whom you slew in battle; for that fate befell them in accordance with a kind of law.'

III [lxvi].

Digest,
XLIX. xv.
19. pr.
Letters,
xxxii
[xxxii.
11].
XXVIII
[XXIX. i.
16-17].
Orations,
xv [= p.
242].

2. Thus the Roman jurists themselves at times characterize as a wrong what they often define as the right of captivity; and they contrast it with natural right. Seneca, having in mind what often occurs, says that the name of slave has sprung from a wrong. In Livy also the Italians, who retained the things which they had taken in war from the Syracusans, are called stubborn in retaining their wrongful gains. Dio of Prusa, having said that those captured in war recovered their liberty if they returned to their own people, [510] adds, 'just as those who were wrongfully in servitude'.

[Divine
Institutes,
VI. vi].

Lactantius,² in speaking of philosophers, says: 'When they are discussing the duties that belong to the military life their whole argument is adapted not to justice, nor to true virtue, but to this life and to the practice of states.' Shortly after, he says that wrongs have been legally inflicted by the Romans.

III.—*What is done by reason of an unjust war is unjust from the point of view of moral injustice*

In the first place, then, we say that if the cause of a war should be unjust, even if the war should have been undertaken in a lawful

¹ Seneca, *To Helvia*, vi [*On Consolation*, vii], says: 'Some have acquired for themselves by force of arms a right over territory belonging to others.' There seems to be a conflict between 'right' and 'belonging to others'. But they may be reconciled, as the text here shows. Consult what is above in III. iv. 2.

² However, Augustine in his fourth letter, which is addressed to Marcellinus [*Letters*, cxxxviii. 14], writes: 'And therefore, if this earthly commonwealth should observe the teachings of Christ, even wars would not be waged without kindness.' In dealing with the diverse practices of the Church the same writer says [cf. *Decretum*, II. xxiii. 1. 6]: 'Among the true worshippers of God even wars are brought to a state of peace.'

way, all acts which arise therefrom are unjust from the point of view of moral injustice (*interna iniustitia*). In consequence the persons who knowingly perform such acts, or co-operate in them, are to be considered of the number of those who cannot reach the Kingdom of Heaven without repentance. True repentance, again, if time and means are adequate, absolutely requires that he who inflicted the wrong, whether by killing, by destroying property, or by taking booty, should make good the wrong done.¹

1 Cor., vi.
10.

Thus God says He is not pleased with the fasting of those who held prisoners that had been wrongfully captured²; and the king of Nineveh, in proclaiming a public mourning, ordered that men should cleanse their hands of plunder, being led by nature to recognize the fact that, without such restitution, repentance would be false and in vain. We see that this is the opinion not merely of Jews³ and Christians, but also of Mohammedans.⁴

Jonah, ii.
10 [iii. 8].

*Precepts of
the Law,
Precepts
Bidding*,
16.

IV.—*Who are bound to make restitution, and to what extent*

Furthermore, according to the principles which in general terms we have elsewhere set forth, those persons are bound to make restitution who have brought about the war, either by the exercise of their power, or through their advice. Their accountability concerns all those things, of course, which ordinarily follow in the train of war; and even unusual things, if they have ordered or advised any such thing, or have failed to prevent it when they might have done so.

Sylvester,
word
bellum, I,
nos. 10, 11
and 12;
Covarru-
vias, *On
Sext*, V,
ult. 4, pt.
II, § 2, no.
8; Lessius,
II, xiii,
dub. 4.
Add Dig.
XLVII. ii.
21. § 9.

Thus also generals are responsible for the things which have been done while they were in command; and all the soldiers that have participated in some common act, as the burning of a city, are responsible for the total damage. In the case of separate acts each is responsible for the loss of which he was the sole cause, or at any rate was one of the causes.

V.—*Whether things taken in an unjust war are to be restored by him who took them*

I. I should not think that we ought to admit the exception, which some introduce with regard to those who furnish their services

Sylvester,
loc. cit.,
no. 10.

¹ *Numbers*, v. 6 [and 7]. Jerome, *To Rusticus*, says: 'The pronouncement of vengeance is not cancelled unless the whole is restored.' Augustine, in a letter to Macedonius, which is liv [Letters, ciii. 20], writes: 'If the property of another, for the sake of which the sin was committed, can be returned, and it is not returned, repentance is not felt but pretended.' This is cited by Gratian, in the *Decretum*, II. xi. 6 [II. xiv. 6. 1].

² There is a significant passage in *Isaiah*, lviii. 5, 6 and 7. You find it in Greek in Justin Martyr, *Dialogue with Trypho* [xv].

³ See the penitential canons of Moses Maimonides, ii. 2. Also Moses de Kotzi, *Precepts Bidding*, 16.

⁴ See Leunclavius, *Turkish History*, V and XVII.

to others, in case some blame should attach to them. Fault without evil intent is in fact sufficient to warrant restitution. There are some who seem to think that things captured in war, even if there was not a just cause for the war, should not be restored. The reason they allege is that those who fight with one another, in entering upon war, are understood to have given these things to the captors. But no one is presumed to risk his property rashly; and war of itself is far removed from the nature of contracts.

However, in order to give to peoples that were at peace a certain rule to follow, that they might avoid being involved in war against their will, it was sufficient to introduce the idea of legal ownership (*externum dominium*) of which we have spoken, which may exist along with the moral obligation (*interna obligatio*) of restitution. The writers themselves seem to enunciate this in connexion with the law of the captivity of persons. Thus in Livy the Samnites say: 'We have restored the property of the enemy taken in the spoil, which seemed to be ours by the law of war'; 'seemed', he says, because that war had been unjust, as the Samnites had previously acknowledged.

2. A not unlike case is that arising from a contract entered into without fraud, in which there is an inequality. In such a case by universal common law there arises a power of some sort to compel him who has made the contract to fulfil his agreements; nevertheless, in accordance with the duty of an upright and honourable man, he who has contracted for more than is right is none the less bound to reduce the transaction to an equality.

VI.—*Whether things taken in an unjust war are to be restored by him who holds them*

1. But he who has not inflicted the loss himself, or has inflicted loss without any fault of his own, and has in his possession a thing taken from another in an unlawful war, is under obligation to return it, because there is no naturally just reason why the other should go without it [511] —neither his consent, his deserving of evil, nor recompense. In Valerius Maximus there is a story which bears on this point:

After Publius Claudius had sold at auction the people of Camerina, captured under his leadership and auspices (he says), the Roman people, although they saw that the treasury had been enriched with money and their land increased by an accession of territory, nevertheless with the greatest care sought out and redeemed these people, and assigned to them a site on the Aventine to dwell upon, and restored their estates,¹

¹ Antony compelled the Tyrians [512] to restore all that they held belonging to the Jews. He ordered that the men whom they had sold should be set free, and that goods should be restored

Vázquez,
Controversias Illustres, I. ix. 17; Molina, *disp.* 118, § *ut vero*.

IX [i. 5].

VIII [xxxix. 10].

See above, II. xi.

See above, II. ix.

VI. v.

because it seemed that the good faith of the commander in this exploit was not beyond reproach.

In like manner by a decree of the Romans the Phocaeans received back both their freedom as a state and the lands which had been taken from them. Afterward the Ligurians,¹ who had been sold by Marcus Pompilius, recovered their liberty through the return of the purchase price to their buyers, and care was taken to restore their possessions. The Senate passed a similar decree with regard to the people of Abdera, adding as a reason that an unlawful war had been waged against them.

2. Still, in accordance with the principles which have been elsewhere explained, it will be possible, if the person who holds the thing has incurred any expense or labour, to deduct as much as the thing was worth to the owner, to recover the possession of which he had despaired. But if the possessor of the thing has, through no fault of his own, consumed or alienated it, he will not be held responsible except in so far as it may be held that he has been thereby enriched.

Livy,
XXVIII
[XXXVIII.
xxxix. 12].

Livy,
XLII
[viii. 7].
[Livy,]
LXIII
[XLIII. iv.
13].
[II. x. 9.]

to their owners; Josephus, *Antiquities of the Jews*, XIV [XIV. xii. 5]. To the Parthians Macrinus restored the prisoners and booty, because there had been no reason for the Romans breaking the peace; Herodian, Book XIV, end [IV. xv. 6]. The Turk Mahomet ordered the liberation of those who had been in the city of St. Mary in Achaia; Chalcocondylas, Book IX [=p. 479, ed. Bekker].

¹ See Diodorus Siculus, *Excerpta Peiresciana* [p. 298].

CHAPTER XI

MODERATION WITH RESPECT TO THE RIGHT OF KILLING IN A LAWFUL WAR

I.—*In a lawful war certain acts are devoid of moral justice ; a condition which is explained*

I. Not even in a lawful war ought we to admit that which is said in the line,

Lucan
[*Pharsalia*,
I. 349].

He, who refuses what is just, yields all.

On Duties,
I [xi. 33].

Cicero's point of view is better : ' There are certain duties which must be performed even toward those from whom you have received an injury. There is in fact a limit to vengeance and to punishment.'¹ The same writer praises the ancient days of Rome, when the issues of wars were either mild or in accordance with necessity.

On Duties,
II [viii.
26].

On Clemency, II.
iv.

[i = p. 94
A.]

Seneca calls those persons cruel who ' have a reason for punishing, but observe no limit '. Aristides, in his second speech *On Leuctra*, says : ' Men may, men may indeed be unjust in avenging themselves, if they carry vengeance beyond measure. He, who in punishing goes so far as to do what is unjust, becomes a second wrongdoer.' Thus, in the judgement of Ovid, a certain king,

From the Pontus,
IX [I. viii.
19 f.].

Avenging himself to excess,
And slaughtering the guilty, guilty himself became.

[*Plataic*,
viii = p.
298 B.]

2. In a speech of Isocrates the Plataeans ask, ' Whether it is just to exact so severe and unjust penalties for so trivial wrong-

¹ [525] See what has been said above, II. xx. 2 and 28, and the passages of Augustine, which we have just cited [on III. x. 2], on the benevolence of Christians even in warfare. Aristotle, *Politics*, V. vi, relates penalties harsher than was just, which ' as a consequence of partisan zeal ' were exacted at Thebes and Heraclea. Thucydides, III [III. lxxxii], mentions ' punishments greater than was just '.

Tacitus, *Annals*, III [III. xxviii], says : ' Pompey did more harm with his remedies than did the wrongs which he tried to correct.' The same writer in the same book [chap. xxiv] blames Augustus because, in his punishment of adultery, he transgressed ancestral clemency and his own laws. Juvenal [*Satires*, x. 314 ff.] writes :

Sometimes, again, resentment more exacts
Than any law to it concedes.

Quintilian declares [*Declamations*, VI. x] : ' It is only from the extreme parricide that punishment is exacted beyond human measure.' The Emperor Marcus [Aurelius] Antoninus, according to Vulcarius in the *Life of Avidius Cassius* [chap. xi], said : ' I shall write to the senate to prevent any too serious proscription or too cruel punishment.' Ausonius said [*Cupido Cruci Affixus*, II. 93, 94] :

And greater than his crime
His punishment appeared.

Ammianus, XXVI [XXVI. x. 6], writes : ' Vengeance was meted out to many more bitterly than their errors or their crimes demanded.' There is a similar passage in Agathias, Book III [IV. vi].

doings?' The same Aristides, whom we have cited above, in his second oration *On Peace*, says: 'Do not merely consider the causes for which you are going to exact punishment, but also who they are from whom the punishment is to be exacted, [513] who we ourselves are, and what is the just limit of punishments.' Minos is praised in Propertius because,

Although a victor, just to the foe he was;¹

and also by Ovid:

Lawgiver most upright,
He laws imposed upon his conquered foes.

[= p. 77 A.]

[*Elegies*,
III. xix.
27 f.]

[*Metamorphoses*,
VIII. 101
f.]

II.—*Who may be killed in accordance with moral justice*

When it is just to kill—for this must be our starting point—in a lawful war in accordance with moral justice (*iustitia interna*) and when it is not just to do so, may be understood from the explanations which were given by us in the first chapter of this book.

Now a person is killed either intentionally or unintentionally. No one can justly be killed intentionally, except as a just penalty or in case we are able in no other way to protect our life and property; although the killing of a man on account of transitory things, even if it is not at variance with justice in a strict sense, nevertheless is not in harmony with the law of love. However that punishment may be just, it is necessary that he who is killed shall himself have done wrong, and in a matter punishable with the penalty of death on the decision of a fair judge. But we shall here say less on this point, because we think that what needs to be known has been sufficiently set forth in the chapter on punishments.

Victoria,
*On the Law
of War*,
nos. 36
and 45.

III.—*No one may rightly be killed because of his ill-fortune; for example, those who take sides under compulsion*

1. Previously, in discussing suppliants—for there are suppliants in war as well as in peace—we distinguished 'ill-fortune' (*ἀτύχημα*) and 'wrong' (*ἀδίκημα*). Gylippus, in the passage of Diodorus Siculus which we then quoted in part, asks in which class the Athenians should be placed, in that of the unfortunate or that of the unjust. He declares that they cannot be regarded as victims of ill-fortune, seeing that, of their own accord, and unprovoked by any wrong, they had waged war upon the Syracusans. He

[II. xxi.
5. 1.]

[XIII.
xxix.]

¹ Ovid, *Tristia*, I. viii [I. ix. 35]:

Even to the wretch is justice due, and toward a foe
'Tis praised.

concludes that, since of their own initiative they had undertaken the war, they must also in their own persons endure the evils of the war.

An example of the victims of ill-fortune are those who are in the ranks of the enemy without hostile intent, as the Athenians were in the time of Mithridates. Of these Velleius Paterculus speaks thus :

If any one blames the Athenians for this period of rebellion, when Athens was stormed by Sulla, he is indeed ignorant both of the truth and of antiquity. So steadfast was the loyalty of the Athenians to the Romans, that at all times and in every matter the Romans declared that whatever was carried out in good faith was done with Attic loyalty. But at that time, oppressed by the forces of Mithridates, the men of Athens were in a most pitiable condition. While they were in the grasp of the enemy, they were besieged by their friends, and they had their hearts outside the walls while their bodies, by constraint of necessity, were within.

The end of the quotation may seem to have been adapted from Livy; in this author the Spaniard Indibil says that, although his body was with the Carthaginians, his heart was with the Romans.

XXVI
[XXVII.
xvii. 13].

For
Quintius
[ii. 6].

[ii. 5.]

2. 'Beyond doubt', as Cicero says, 'all men whose lives are placed in the power of another more often think what he, under whose authority and sway they are, is able to do, than what he ought to do.' The same author, in his speech *For Ligarius*, declares: 'There is a third time, when he remained in Africa after the arrival of Varus; but if that is criminal, it is a crime of necessity, not of will.' The principle was applied by Julian in the case of the Aquileians, as we learn from Ammianus. This author, after recounting the punishment of a few persons, adds: 'All the rest departed unharmed; necessity, not intention,¹ had driven them into the madness of strife.'

XXI [xii.
20].

¹ Shortly after he adds: 'For so the mild and kindly emperor, considering what was fair, had decided.' Thucydides, Book III [III. xxxix], in the speech of Cleon, says: 'I pardon those who deserted us under pressure from the enemy.' This is called a consideration of extreme necessity by Paul, in his *Sententiae*, V. i [V. i. 1]; for surely, as Synesius says, 'Necessity is something strong and violent.' Juvenal says of the Calagurritani [*Satires*, xv. 103 f.]:

For who of men or gods forgiveness would refuse
To men who had such dire and dreadful sufferings endured?

On the necessity imposed by famine, see Cassiodorus, [*Variarum*,] IX. xiii. Pertinax says of Laetus and others: 'They obeyed Commodus unwillingly, but, when they had the opportunity, they revealed what they had always wished' [Capitolinus, *Life of Pertinax*, v]. Cassius Clemens in Xiphilinus's narrative of Severus [LXXIV. ix] declares: 'I knew neither you nor Niger; but, being left in the region which he had seized, I did what was necessary; I obeyed the actual ruler, not with the intention to make war upon you, but to drive out Julian.' When Aurelian entered Antioch, where many had sided with Zenobia, he issued an edict 'attributing what had transpired rather to the necessity imposed upon unwilling persons than to their real desires' [Zosimus, I. li].

In Procopius, *Vandalic War*, I [I. xx], Belisarius says: 'For all the Africans were subject to the Vandals against their will.' In the same writer, *Gothic War*, III [III. vii], Totila says to the Neapolitans that he knows that they have been unwillingly subject to the enemy. Moreover, Nicetas, or the continuator of his history, in speaking of [526] Henry, the brother of Baldwin, writes [*Urbs Capta*, xii]: 'He gave orders that the inhabitants of the city be slaughtered, as though they were cattle or sheep, and not Christians who were being put to death, and particularly such as had yielded to the Blachi under constraint and not by persuasion, and who had not voluntarily obeyed them.'

On the passage of Thucydides regarding the Corcyraean prisoners who had been sold, an ancient commentator remarks: 'He reveals a clemency worthy of the Greek character; for it is cruel to kill prisoners after a battle, especially slaves, who do not wage war of their own will.' In the speech of Isocrates, already mentioned, the Plataeans assert: [514] 'We served them' (the Lacedaemonians) 'not willingly, but under compulsion.' The same writer says of others of the Greeks: 'These were compelled to follow their side' (that of the Lacedaemonians) 'in body, but in spirit they were with us.' Herodotus had previously said of the Phocians: 'They sided with the Medes, not willingly, but by force of necessity.'

I [lv].

[Plataic,
xii = p. 299
A.]

IX [xvii].

I [xvii].

XIII
[xxvii].XXV
[xxix. 3].Justin,
XXVIII
[iv. 13.]

As Arrian relates, Alexander spared the Zelites 'because they had been compelled to serve on the side of the barbarians'. In Diodorus, Nicolaus of Syracuse says in his speech on behalf of the prisoners: 'The allies are compelled to take the field by the power of those who have authority over them; therefore, as it is fair to punish those who do wrong with intention, so it is right to pardon those who do wrong against their will.' Similarly, in Livy the Syracusans, in clearing themselves before the Romans, say that they had broken the peace because they were confused by fear and treachery. For a like reason Antigonus declared that he had been at war with Cleomenes, not with the Spartans.

IV.—*No one may rightly be killed on account of a fault that is intermediate between ill-fortune and deceit; the nature of such a fault is explained*

1. But it must be observed that between absolute wrong and unmitigated ill-fortune a mean may often intervene which is composed, as it were, of both elements. In such a case the action cannot be called purely that of a man having knowledge and intent, nor purely that of a man not having knowledge or acting against his will.

2. To this class of actions Aristotle applied the term 'fault' (*ἀμάρτημα*), which may be rendered in Latin by *culpa*. Thus, in the fifth book of the *Ethics*, the tenth chapter, he speaks as follows:

[Rhetoric,
I. xiii.]

Of those things which we do of our own accord, some we do deliberately, others without premeditation. Those are said to be done deliberately which are done after a certain previous mental consideration; what is done otherwise is done without premeditation. Since, therefore, in human intercourse the infliction of injury may occur in three ways, that which proceeds from ignorance is called a mistake; as when a person has done something not against him whom he had in mind, or has done what he did not have in mind, or not in the way he thought, or not with the expected result; as if some one thought that he was striking not with this instrument, nor this man, nor for this cause, but there happened what he had not intended. An example would be if a man wished to prick, not to wound, or not to do it to this man, or not in this way.

Now when the hurt is done contrary to expectation it will be a mishap. But if the injury could have been in any way expected, or foreseen, and yet is not inflicted with evil intent, there will still be a degree of fault; for he is very near to a fault who has in himself the origin of the action, while he is unfortunate if the origin is outside of him. Whenever a person acts with full consciousness of what he does, yet not after deliberation, we must admit the presence of wrong, as in the acts which men are wont to commit under the influence of anger and similar natural or unavoidable emotions. For those who inflict injury when stirred by anger, and admit their fault, are not cleared from wrong, but yet they are not said to be unjust or wicked. But if any one commits the same act deliberately he will rightly be styled wicked and unjust.

3. Consequently, what is done under the influence of anger is correctly held not to have been done with premeditation. For it is not he who does something from anger, but he who has caused the anger, that started the trouble. Hence it often happens that in trials of this sort the inquiry is directed not to the facts but to other rights of the parties; for anger arises from that which any one thinks has been wrongfully done to him. Therefore the question under discussion is not whether this or that has been done, as in dealing with contracts—for in the case of a contract, unless there has been forgetfulness, the one of the two parties who has not fulfilled his obligation is clearly in the wrong—but the purpose is to discover whether what has been done has been done justly.

Now a person who first plotted treachery did nothing in ignorance; wherefore it is not strange if the one should think that he has been wronged, and the other should not think so. Nevertheless, it is possible that he who in turn inflicts an injury on such a ground should be considered unjust, particularly if he exceeds the rule of equality and proportion in his reprisal. Therefore he is just who acts justly from deliberate purpose, although any one may act justly [515] if he merely acts voluntarily, without deliberation.

4. But of the things which are not done on the spur of the moment, some are deserving of pardon, and others not. Deserving of pardon are those which are not only done by ignorant persons, but also done in consequence of their ignorance.¹ If something is done by ignorant persons, yet not because of their ignorance, but from such a diseased mental state as goes beyond the common limits of human nature, it is not deserving of your pardon.

This passage, which is truly notable and has been much used, I have rendered into Latin in its entirety, because in most cases it is not correctly translated and therefore not adequately understood.

5. In interpreting this passage Michael of Ephesus gives as an example of that which could not have been expected the case of one who injured his father when opening a door, and of one who wounded somebody when training himself in throwing the javelin in a deserted spot. As an example of what could have been foreseen, but happens without malice, is the case of him who has thrown his javelin on a public road. The same writer gives as an example of what is done under necessity the case of him who is compelled to do something by hunger or thirst; of what is done from natural emotions are cases of love, grief, fear. He says that something is done through

¹ Dionysius of Halicarnassus, I [I. lviii], says: 'Everything that is not done voluntarily is worthy of pardon.' And Procopius, *Gothic War*, III [III. ix]: 'If any persons have caused trouble to others, either because they have been under the domination of ignorance, or by reason of some forgetfulness, it is right that those very persons who have suffered the injuries should grant them forgiveness.'

ignorance when one is ignorant of a fact, as if some one should not know that a woman is married. Something is done by one who is ignorant, but not through ignorance, when one is ignorant of the law. However, to be ignorant of the law is at times pardonable, at times unpardonable; and this agrees very well with the sayings of the jurists.

A passage not unlike this Aristotle himself has in his book on the art of oratory: 'Justice demands that we should not treat alike wrongs and faults, nor faults and misfortunes. Now misfortunes are things which could not have been foreseen, and are not committed with evil intent; faults, things which could have been foreseen, yet are not done with evil intent; wrongs, things done purposely and with evil intent.' The ancients also noted these three things, and in the verse of Homer on Achilles, in the last book of the *Iliad*, we read:

Not ignorant is his mind, nor evil, nor imprudent.

6. Marcianus makes a similar division:

Men do wrong either purposely, or on impulse, or by accident. Robbers, who form a band, do wrong purposely; those who resort to blows or to weapons when intoxicated do wrong on impulse; and when in hunting a missile cast at a wild beast kills a man the wrong is done by accident.

The two former classes of wrongs, those done purposely and those done on impulse, are distinguished by Cicero in the following manner: 'But in every act of injustice it is of the greatest moment whether the wrong is done from some mental excitement, which is usually brief and temporary, or designedly and upon reflection.¹ For what happens from some sudden impulse is less serious than what is inflicted after meditation and preparation.' Philo,² moreover, in his interpretation of the *Special Laws*, speaks thus: 'The crime is lessened by half where it has not been preceded by long deliberation.'

7. In this class are, in particular, those things which necessity, if it does not justify them, at least excuses.³ In fact, as Demosthenes

Digest,
XXII. vi.
Code, I.
viii.

[*Rhetoric*,]
I [xiii.]

[XXIV.
157 and
186.]

Digest,
XLVIII.
xix. 11
[§ 2].

On Duties,
I [viii. 27].

¹ Seneca, *On Anger*, I. xvi [I. xix], says: 'He frequently discharges [the culprits] if he perceives that their wickedness does not dwell in the depths, as they say, of the heart, but on the surface.' And then: 'Sometimes he punishes great crimes more leniently than lesser ones, if the great crimes have been committed from error and not from cruelty, while in the lesser crimes there is ingrained cunning, both secret and open.'

The same author says also: 'A crime will not affect people in the same way in the case of two persons if the one has done wrong through carelessness, and the other has laid plans for his guilty deed.'

² *On Special Laws*, II [III. xviii].

³ Add what is above in II. xx. 29, and in this chapter, III. xi. 3, above. In Thucydides, Book III [III. xxxiii], the Samians said to Alcidas the Lacedaemonian, when he put to death the Chian prisoners, that 'he did not speak the truth in saying that he had come to set Greece free, seeing that he put to death men who did not actively oppose him, and were not hostile in spirit, who were in fact allies of the Athenians, but had been driven to that course by necessity'.

Chrysostom, *On Providence*, V, says: 'Private enemies know how to pardon private enemies, and public enemies public enemies, whenever these commit some wrong, however serious, against them'

[xxiii. 148
= pp. 668-
9.]

says, *Against Aristocrates*: 'Impulses arising from necessity prevent deliberation regarding that which ought or ought not to be done. Wherefore these actions must not be judged with too much strictness by those who would judge fairly.' This view is expressed at even greater length by the same orator in his speech on false testimony, *Against Stephanus*. Thucydides, Book IV, says:

[xliv. 67
= p. 1122].
[IV. xcvi.]

We may well believe that with [516] deity also there is pardon ready¹ for those who do wrong under the constraint of war or some similar necessity. For the altars of the gods are open as a refuge for unintentional faults; and the term injustice is applied to those who are wicked of their own volition, not to those who are driven by extremity to desperate deeds.

VII [xx.
5].

In Livy the people of Caere say to the Romans: 'They should not term counsel what should be called compulsion and necessity.' Justin writes: 'The act of the Phocians, although it was condemned by everybody on the ground of sacrilege, nevertheless aroused greater animosity toward the Thebans, who had reduced them to this extremity, than toward themselves.' Similarly, in the opinion of Isocrates, the person who, to save his life, commits an act of plunder, 'has necessity as a cloak for his wrongdoing'. Aristides, in his second speech *On Leuctra*, says: 'Hard times give some excuse to those who revolt.'

[Porphyry,
On Abstaining,
III. xviii.]
[= p. 145
c.]

Regarding the Messenians who had been accused of not having received the exiles from Athens, Philostratus writes as follows: 'Their defence rests on a request for pardon; their excuse is Alexander, and the fear of him which was felt by every part of Greece.' Such is the man whom Aristotle describes as 'half bad, but not unjust; for he plotted no evil'.²

[*Lives of the Sophists*, II.
xv. 2.]

[*Nic. Eth.*,
VII. xi.]

[*Orations*,
vii = p. 93.]

In his praises of the Emperor Valens, Themistius applies these distinctions to the requirement of our subject as follows:

You have distinguished between wrong, error, and misfortune.³ Although you are not learning the words of Plato, nor perusing Aristotle, nevertheless in fact you are following their precepts.⁴ For you did not hold that equal punishment was deserved

unwillingly and contrary to their own desires.' In Agathias, III [IV. xx], the Misimiani declared that 'they were not altogether unworthy to be spared and pardoned, when, after having suffered a multitude of wrongs, they had consequently been impelled to take revenge with true barbaric vehemence'.

¹ *Deuteronomy*, xxii. 26; Moses Maimonides, *Guide of the Perplexed*, III. xli.

² 'On this charge Cleon attacks the cause of the Mityleneans, in Thucydides, III [III. xl]: 'They did not injure us unwillingly, but they plotted against us purposely. That alone is deserving of pardon which one does against his will.' Philo, in his book *De Constitutione Principis* [xiii], says: 'If he must proceed to take vengeance, he knows how to distinguish between those who lead a life of intrigue and those who are of a far different spirit. For to proceed to slaughter all, even those who have committed the least sins [or none at all], is characteristic of a fierce and savage mind.'

³ [527] Seneca, *Natural Questions*, II. xlv, where he discusses thunderbolts, says: 'They wished to warn those, whose duty it is to thunder against the sins of men, that all things are not to be struck in the same way; some ought to be demolished, some shattered and separated, and some warned.'

⁴ Such a one was Trajan, one of the notable Roman emperors: 'He was not master of that exact learning which is expressed in words, but its content he both knew and practised'; Xiphilinus [LXVIII. vii. 4].

Herodian [I. ii. 4] writes of Marcus Aurelius: 'He was the only one of the emperors to reveal

by those who had advocated war from the first, those who were later caught in the rush to arms, and those who submitted to him who seemed already to be master of the situation; but the first you condemned, the second you reproved, and the last you pitied.

8. The same author, in another connexion, expresses the desire that an emperor in his youth should learn, 'What is the difference between misfortune, error, and wrong; and how a king should pity the first, correct the second, and visit with vengeance the last alone.' Thus, in Josephus, Titus punishes the single leader in a criminal act 'in reality', and his following 'in speech', with mere verbal castigation.

[ix = p.
123.]

*Jewish
War. V*
[iii. 5].

Mere misfortunes neither deserve punishment nor create a liability to restoration of damage. Unjust actions do both. Fault, lying between the two, although it renders the responsible party liable for restitution, yet often does not deserve punishment, especially capital punishment. To this the lines of Valerius Flaccus are applicable:

[III. 391 ff.

If fortune cruel, kin to fault, o'ertakes
Those ill-starred ones whose hands are stained with blood
Against their will, their conscience vexes them
In divers ways, and in their idle hours
Their deeds torment them.

V.—*Those who are responsible for a war are to be distinguished from those who follow them*

The counsel of Themistius, who warns us that we must distinguish between those who were responsible for a war¹ and those who followed the leadership of others, is supported by numerous historical examples. Herodotus relates that the Greeks exacted punishment from those who instigated the Thebans to desert to the Medes. So too, as Livy relates, the leaders of the revolt of Ardea were beheaded. In the same author, Valerius Levinus, 'after the capture of Agrigentum, scourged and executed the leaders, [517] but sold the rest of the people and the booty'. In another passage Livy says: 'The surrender of Atella and Calasia was accepted; and there also those who had been in control were punished.' In still another passage: 'Since those responsible for the revolt have received the punishment they deserved from the immortal gods and from you, conscript Fathers, what do you wish should be done with the innocent populace?' 'At length they were pardoned, and were

IX
[lxxxviii].

IV [x. 6].
XXVI [xl.
13].

[XXVI.
xvi. 5.]

[VIII. xx.
11.]

his wisdom, not by words or the knowledge of doctrines, but by sound morality and a life of moderation.' Of Macrinus, Xiphilinus [LXXVIII. xi. 2] writes: 'His conscientiousness in the execution of the laws surpassed the accuracy of his knowledge of them.' Grant, O Lord, such princes to our time!

¹ See Gail, *De Pace Publica*, II [II. ix], no. 18.

XXVIII
[xxvi. 3].

granted citizenship, with the purpose', no doubt, as he elsewhere says, 'that the punishment might remain where the guilt arose.'

[Sup-
pliants,
878 ff.]

In Euripides, Eteocles the Argive is praised because—

When he was judge, the culprit bore the blame,
And not his native city, which ofttimes
Bears the reproach for misdeeds of the ruler.

III
[xxxvi].

The Athenians, according to Thucydides, repented of their decree against the inhabitants of Mitylene, 'that they should put to death the whole city rather than merely the instigators of the revolt'.

[XXI. x.]

Diodorus relates that Demetrius, after taking Thebes, executed only the ten persons responsible for its defection.

VI.—*With regard to those who are responsible for a war we must distinguish between causes which may be and those which may not be approved*

Victoria,
*On the Law
of War*,
no. 59.

II [xvii.
25].

*On Cle-
mency*, II.
vii.

I. Further, in considering those who are responsible for a war, we must distinguish between the causes of their action; for there are some causes which are not indeed just, but still are such that they may deceive persons who are by no means wicked. The author of the *Ad Herennium* suggests this as a perfectly equitable reason for pardoning: when any one has done wrong not from hatred or cruelty, but moved by a sense of duty and righteous zeal. Seneca's wise man 'will dismiss his enemies safe and sound, at times even with praise, if they have taken the field on honourable grounds, on behalf of loyalty, a treaty obligation, or liberty'.

VII [xx. 2].

[Appian,
*Syrian
Wars*, iv.
21.]

[= p. 135
B C.]

In Livy the people of Caere seek pardon for their error¹ because they gave aid to their kinsmen. The Phocians, Chalcidians, and others, who had supported Antiochus on the ground of a treaty, received pardon from the Romans. Aristides, in his second speech *On Leuctra*, says that the Thebans, who had followed the leadership of the Lacedaemonians against the Athenians, 'had shared in an action unjust indeed, but one which they could cloak with some plea of justice, that of loyalty to the heads of their league'.

[I xi. 35.]

In his first book *On Duties* Cicero says that we must spare those who were not cruel, not inhuman, in war; then, that wars, in which the prize is glory of empire, should be waged with less bitterness. In this sense King Ptolemy informed Demetrius that 'They were fighting not for existence, but for empire and glory'. In Herodian²

[Plutarch,
Demetrius,
v = p. 891
A.]

III [vi. 4].

¹ 'Sometimes one should pardon a ruler who has been conquered, if he did not know what was just.' Copied from Isocrates by Ammianus, Book XXX [XXX. viii. 6].

² The Greek words are these: καὶ Νίγρῳ μὲν πολεμοῦντες οὐχ οὕτως εὐλόγους εἶχομεν αἰτίας ἔχθρας, ὡς ἀναγκαῖας, οὐ γὰρ παρ' ἡμῖν πρῶτοπάρχουσαν ἀρχὴν ὑφαρπάξων μεμίσητο, ἐν μέσῳ δὲ ἔρριμμένην καὶ ἀμφήμιστον οὖσαν, ἐκάτερος ἡμῶν ἐξ Ἰσοτίμου φιλοτιμίας εἰς αὐτὸν ἀνθείκεν. Excellently said.

Severus says: 'When we waged war against Niger, we had not in fact such specious grounds for enmity; for each of us with equal ambition sought to secure for himself the principate, which lay open to all and was still an object of dispute.'

2. Often there occurs what we find stated in Cicero regarding the war between Caesar and Pompey: 'There was some uncertainty; there was a contest between the most eminent generals; many were in doubt as to what it would be best to do.' The same author says elsewhere: 'Even if we are guilty of some fault arising from human error, we are certainly guiltless of crime.' Evidently, as in Thucydides, those acts are said to deserve pardon which are done, 'not from wickedness, but rather from an error of judgement'.

Cicero says also of Deiotarus: 'He did not act from hatred of you, but he went astray through a common error.' Sallust writes in his *Histories*: 'Of the rest of the crowd, after the fashion of a mob rather than prudently, the one followed the other as wiser than himself.' What Brutus wrote with regard to civil wars might, I should think, well be referred to most other wars: 'More zeal should be shown in preventing them than in giving vent to wrath against the vanquished.'¹

For M. Marcellus
[x. 30].

[v. 13.]

[I. xxxii.]

[For King Deiotarus,
iii. 10.]

[To Caesar on Public Administration, I. ii. 4.]
Cicero, *Letters to Brutus,* ii [I. ii a].

VII.—*Punishment may often be remitted justly even to enemies who have deserved death*

1. Even where justice does not demand the remission of punishment, this is nevertheless often in conformity with goodness, [518] with moderation,² with highmindedness. 'The greatness of the Roman people has been augmented by pardoning,' says Sallust. From Tacitus we have: 'We ought to make use of as great kindness towards suppliants as tenacity against an enemy.' Seneca says: 'It is characteristic of wild beasts, though not of the higher types, to bite and worry those that have been struck down. Elephants and lions pass by what they have thrown over.' These words of Virgil are often timely,

[Speech of Philip, vi.]

Annals, XII [xx].
On Clemency, I. v.

[Aeneid, X. 528 f.]

Not here undone the Trojan's victory,
Nor will one life decide so great an issue.

2. On this point there is a notable passage in the fourth book of the *Ad Herennium*:

[IV
xvi. 23.]

Our ancestors did well in establishing this practice, not to put to death any king whom they had made prisoner in war. Why so? Because it was unjust to take advantage

¹ Bembo, IX.

² King Theodoric in Cassiodorus, [*Variae*,] II. xli: 'Those wars have turned out successfully for me which have been terminated without resort to extreme measures; for he conquers effectively who knows how to exercise moderation in all things.'

of the opportunity which fortune had given us for the punishment of those whom that same fortune had but shortly before placed in a most exalted station.

What of the fact that he led an army against us? I cease to recall it. Why so? Because a brave man holds as enemies those who strive for victory, but considers as men those who have been conquered, in order that courage may lessen war, and humaneness enrich peace. But if he had conquered, he would not have done the same, would he? Why then do you spare him? Because I have been accustomed to despise such folly, not to imitate it.

If you take this with reference to the Romans (a point that is uncertain, since this writer uses foreign and imaginary examples), it is in direct opposition to what we find in the panegyric addressed to Constantine, the son of Constantius :

[Eumenius, *Panegyric*, vi. 10.]

He may be more prudent who binds his adversaries to him by pardon, but he is stronger who tramples upon those that are angry. You, Emperor, have received that ancient trust of the Roman Empire, which was wont to exact the vengeance of death from the captured leaders of the enemy. In those days captive kings, after having adorned the chariots of those celebrating triumphs, from the city gates to the forum, as soon as the victorious general began to turn his chariot toward the Capitol were dragged off to prison and put to death. Perseus alone, at the personal intercession of Paulus, who had received his surrender, escaped the severity of this law. The rest, chained in dark dungeons, furnished an object lesson to other kings,¹ that they would find it preferable to cultivate the friendship of the Romans rather than to rouse their sense of justice.

See
Plutarch,
*Aemilius
Paulus*
[xxxvii
= p. 274F].
[*Jewish
War*, VII.
v. 6.]

But this writer also speaks too sweepingly. Josephus, in his account of the death of Simon Barjoras, makes the same point regarding the severity of the Romans, but he is speaking of leaders like Pontius the Samnite, not of those who had the title of king. The substance of his narrative in translation is as follows :

The end of the triumph came after the arrival at the temple of Jupiter on the Capitoline hill ; for the ancient custom of the state required that victorious generals should wait there until the death of the leader of the enemy should be reported to them. This leader was Simon, son of Joras, who was led among the captives in the triumphal procession ; then, with a noose about his neck he was dragged into the forum, being meanwhile scourged by his guards. It is the Roman custom to exact punishment in this place from those who have been condemned of capital offences. When it was reported that Simon was dead, there followed the announcement of favourable omens and then sacrifices.

¹ I should not like to have this custom resurrected. Nevertheless even Joshua put captured kings to death ; Josephus, *Antiquities of the Jews*, V. i [V. i. 19]. Dio Cassius [XLIX. xxii. 6] says of Sossius : ' He crucified Antigonus and scourged him with rods ' ; but he takes pains to add : ' a thing which no other king had suffered at the hands of the victorious Romans.' The same story is in Josephus, Book XV [*Antiquities of the Jews*, XV. i. 2].

Eutropius, Book X [X. iii], says of Maximian Herculeus [rather of Constantine I] : ' When the Franks and Alemanni had been slaughtered, and their kings taken prisoner, he cast the kings to the wild beasts, in a magnificent spectacle which he had prepared as a distinction of his office.' See Annianus, XXVII [XXVII. ii. 9], on the king of the Alemanni who was hung from a gibbet. Theodoric, king of the Visigoths, beheaded Athiulf, king of the Suevi, in Spain, as is recorded by Jordanes, *History of Goths* [xliv].

Verily, these instances furnish proof to kings that they should practise moderation, and that they should reflect that they too are subject to human vicissitudes, if God so wills ; and that, according to the saying of Solon, which Croesus remembered when in like peril, one cannot pass judgement upon a man's good fortune until he is dead.

Cicero gives an almost identical account in the passage on punishments in his speech *Against Verres*.

3. Of commanders who met such a fate we have numerous examples; of kings, a few, as Aristonicus [Aristobulus],¹ Jugurtha, Artabasdus. But yet, besides Perseus, Syphax,² Gentius, Juba, and, in the time of the Caesars, Caractacus, and others, escaped such punishment, so that it appears that the Romans took into account both the causes of war and its manner of conduct, although Cicero and others admit that when victorious they were unjustly severe. So in Diodorus Siculus, Marcus Aemilius Paulus, in the case of Perseus, gives good advice to the Roman senators when he says: 'If they had no fear of men, yet they should fear the divine vengeance which hangs over those that make too insolent a use of victory.' [519] Plutarch records³ that in the wars among the Greeks even the enemies of the Lacedaemonians did no violence to their kings, through respect for the royal dignity.

[V. xxvi. 66.]

[On Duties, I. xi; III. x.]
[Selections [xxxi. 2].

4. An enemy therefore who wishes to observe, not what the laws of men permit, but what his duty requires, what is right from the point of view of religion and morals, will spare the blood of his foes; and he will condemn no one to death, unless to save himself from death or some like evil, or because of personal crimes which have merited capital punishment. Furthermore, from humanitarian instincts, or on other worthy grounds, he will either completely pardon, or free from the penalty of death, those who have deserved such punishment.

The same Diodorus Siculus, whom I have mentioned, has an excellent statement: 'The storming of cities, the winning of battles, and all other successes in war, are more often due to fortune than to valour. But for those in the highest authority to show mercy to the vanquished is the work of wisdom alone.' In Curtius we read: 'Although Alexander could justly have been angry with those who were responsible for the war, still he gave pardon to all.'

XXVII
[XVII.
xxxviii].

[IX. i. 22.]

VIII.—*One must take care, so far as is possible, to prevent the death of innocent persons, even by accident*

Again, with regard to the destruction of those who are killed by accident and without intent, we must hold fast to the principle which we mentioned above. It is the bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the

¹ See Appian, *Mithridatic Wars*, at the end [xvii. 117].

² Historians differ in regard to him. Many relate that he died in the neighbourhood of Rome before the triumph; Polybius [XVI. xxiii], that he was led in the triumph; Appian [*Punic Wars*, v. 28], that he died of disease, while his fate was under consideration.

³ [528] *Agis* [xxi = p. 804 E].

[V. xi.] safety of many, no action should be attempted whereby innocent persons may be threatened with destruction. Polybius is of the same opinion as ourselves, and in his fifth book speaks thus: 'It becomes good men not to wage a war of annihilation even with the wicked, but to proceed only so far that crimes may be remedied and corrected; and not to involve the innocent in the same punishment as the guilty, but even to spare those who are guilty for the sake of the innocent.'

IX.—*Children should always be spared; women, unless they have been guilty of an extremely serious offence; and old men*

1. With these principles recognized, the defining of provisions to cover the more special cases will not be difficult. 'Let the child be excused by his age, the woman by her sex,'¹ says Seneca in the treatise in which he vents his anger upon anger. In the wars of the Jews God himself desired that women and children be spared even after peace had been offered and rejected—apart from a few peoples that were excepted by a special law, and against whom the war was not a war of men, but of God, and was so called. When He desired that the women of the Midianites should be put to death because of their particular crime, he excepted the maidens who were virgin. Indeed when He had sternly threatened the Ninevites with destruc-

[On
Anger.]
III. xxiv.
Deut., xx.
14.

Numbers,
xxx. 18.

Jonah,
iv. 2 [iv.
11].

¹ Pliny, *Natural History*, VIII. xvi: 'When the lion is enraged, he attacks men before women, and children only when very hungry.' On these lines of Horace, *Odes*, IV. vi [IV. vi. 18 ff.], describing Achilles:

Children as yet untaught to speak would he consume
In the Achaeans' fires, even those that lay
In their mother's womb,

the Scholiast comments thus: 'He bitterly inveighs against the cruelty of Achilles, who, if Apollo had permitted him to live, was so cruel that he would have spared neither infants nor babes still unborn.'

Philo, *De Constitutione Principis* [xiii], says: 'But let maidens and women go free,' and gives as the reason: 'It is cruel to make women the accessories of men, who devise wars.' The same author, *On Special Laws*, II [III. xx], writes: 'For against men of ripe age there may be found a thousand reasonable pretexts for differences and quarrels. But against children, who have just come into the light and life of men, not even calumny has anything to say, for they are clearly innocent.'

Josephus, *Antiquities of the Jews*, Book IX [IX. xi.], says of Manahem: 'By not even sparing infants he reached the extreme of cruelty, or rather ferocity. For he committed against his fellow countrymen acts which would not deserve pardon if they had been done to foreigners conquered in war.' Josephus also relates [*Antiquities of the Jews*, XII. viii. 3 and 5] that Judas Maccabeus, upon taking Bosra and Ephron, slew 'all males and those capable of fighting'. And elsewhere [*Antiquities of the Jews*, XIII. xiv. 2] he calls the penalty which Alexander, surnamed the Thracian, exacted from the women and children of the Jews, 'an inhuman vengeance'. Agathias, III [IV. xix], says: 'Since indeed it was impious thus to give vent to anger and to rage against newborn infants ignorant of their fathers' crimes, these deeds of theirs did not go unpunished.'

Nicetas, or the writer who continued his history to the times of King Henry, in speaking of the Scythians, who had taken Athira, says [*Urbs Capta*, xiv]: 'Not even infants still at the breast escaped destruction, but even these were so to speak harvested in their early growth, or withered as a flower, through the deeds of men untouched by pity, and who knew not that he who stretches his anger beyond the conquest and subjugation of his enemies sins against nature and violates the moral law of men.'

Add what Bede has in Book II, chap. xx, on the ferocity of Caraeovella; and the good law of the Swiss in Simler [Book II, p. 302, ed. Elzevir]; and the pious ordinances of Queen Elizabeth, in Camden on the year 1596.

tion for their very heinous crimes He suffered Himself to be diverted by compassion for the many thousands of the age which would be ignorant of the distinctions of right and wrong.

In Seneca there is a point of view which resembles this: 'Does any one become angry with children whose age is not yet able to comprehend distinctions?' Also in Lucan:

For what crime could little ones have deserved death?

If God has so done and so ordained—He who is able to kill justly any persons of whatever age or sex without cause, seeing that He is the Giver and Lord of life—what right have men, to whom He has assigned no right over men, to do anything not necessary for the preservation of human safety and human society?

2. In the first place, with regard to children we have the judgement of those peoples and ages over which moral right has exerted the greatest influence. [520] 'We have arms', says Camillus in Livy, 'not against that age which is spared even when cities are taken, but against men in arms.' He adds that this has a place among the laws of war, that is the natural laws.

In dealing with the same incident Plutarch says: 'Among good men even war has certain laws.' Note here the phrase 'among good men', that you may distinguish this law from the law which is based on custom and impunity. Thus Florus says that a certain course of action was inevitable, if honour was not to be violated. In another passage of Livy we read: 'An age from which even enraged enemies would withhold their hands'; in still another, 'Their cruel rage led them to slay even the infants.'

3. Again, that which is always the rule in respect to children who have not attained to the use of reason is in most cases valid with regard to women. This holds good, that is, unless women have committed a crime which ought to be punished in a special manner, or unless they take the place of men. For they are, as Statius says, 'a sex untrained and inexperienced in war'. When Nero in the tragedy calls Octavia a foe, the prefect replies:

Does a woman receive this name?¹

In Curtius Alexander says: 'I am not accustomed to wage war with prisoners and women; he whom I am to hate must be in arms.' Gryphus, in Justin, declares that 'None of his ancestors, in all their numerous civil and foreign wars, had after a victory ever displayed cruelty to women, whose very sex exempts them from the

On Anger,
II. ix [II.
x].
[II. 108.]

Victoria,
*On the Law
of War*,
no. 36.

[V. xxvii.
7.]

Camillus
[x=p. 134
B].

I [xii].

XXIV
[xxvi. 11].
[XXXVIII.
xx. 6.]

[*Silvae*,
I. vi. 53.]

[Seneca,]
Octavia
[864].

V [IV.
xi. 17].

XXXVIII
[XXXIX.
ii. 7].

¹ And so Tucca and Varus thought that we should delete from the second book of the *Aeneid* the verses [567-88] in which Aeneas deliberates whether he shall kill Helen.

[*Annals*,
I. lix.]

dangers of war and the savagery of the victors.' In Tacitus another says that 'He is not waging war against women, but openly against armed men.'

IX. i
[IX. ii. 4].

4. Valerius Maximus calls the cruelty of Munatius Flaccus against infants and women ferocious, and intolerable even to hear about. In Diodorus it is related that the Carthaginians at Selinus slew old men, women, and children, 'uninfluenced by humane feelings'; elsewhere he calls this conduct 'cruelty'. Latinus Pacatus refers to women as 'the sex which is spared by wars'. Papinius [Stattius] has a similar statement about old men:

XIII
[lvii].
XIV
[XIII.
lvii].
[*Panegyric
of Theo-
dosius*,
xxix.]
[*Thebaid*,
v. 258 f.]

Old men, a throng
Inviolatè in war.

X.—*Those also should be spared whose occupations are solely religious or concerned with letters*

Victoria,
*On the
Law of
War*,
no. 36.
XXVIII
[xxiii. 1].
*Antiquities
of the Jews*,
XII. iii
[1].
Livy, V
[xxi. 13].

I. The same principle is in general to be applied to men whose manner of life is opposed to war. 'By the law of war armed men and those who offer resistance are killed,' as Livy says; that is, by that law which is in harmony with nature. Thus Josephus says that it is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured. When Veii was stormed, Camillus gave orders that the unarmed should be spared.

In this class must be placed first, those who perform religious duties. From ancient times among all nations it has been customary that such men should abstain from the use of arms; and so in turn men refrained from violence toward them. Hence the Philistines, the enemies of the Jews, did not harm the school of the prophets¹ which was at Gaba, as one may see in *1 Samuel*, x. 5 and 10. And so David in company with Samuel fled to another place where there was a similar school, that was removed, as it were, from all harm at the hands of armed forces (*1 Samuel*, xix. 18). The Cretans, Plutarch tells us, when engaged in internal strifes, refrained from doing any harm to priests,² and to those in charge of cremating the dead, whom they called 'cremators'. This explains the force of the Greek proverb, 'Not even a fire-bearer was left.' Strabo notes³ that in

*Greek
Questions*
[xxi = p.
296 B-D].

VIII [iii,
33].

¹ [529] Hyrcanus, while besieging Jerusalem, sent victims to the Temple, as the Jews relate. The Goths are likewise praised by Procopius, *Gothic War*, II [II. iv], because they spared the priests of Peter and Paul outside the walls of Rome. See the supplement of Charles the Great to the *Bavarian Law* [no. 2], and the *Lombard Law*, I. xi. 14.

² Servius, *On the Aeneid*, VII [VII. 442], says: 'For he was excluded from war, if not by his age, at least by the sanctity of his priesthood.'

³ Also Polybius, Book IV [IV. lxxiii], and Diodorus Siculus in the *Excerpta Peiresciana* [p. 225]. In like manner also those who went to compete at the Olympic, Pythian, Nemean, and Isthmian Games in time of war enjoyed 'safe conduct and security'. This we learn from Thucydides, V [V. xlix] and VIII [VIII. x]; and Plutarch, *Aratus* xxviii = p. 1040 B.

olden times, when the whole of Greece was ablaze with war, the Eleans, as sacred to Jupiter, and those enjoying their hospitality, lived in deep peace.

2. In the same class with the priests are deservedly ranked those who have chosen a similar manner of life, as monks and novices, that is, penitents; these the canons, in accordance with natural justice, order men to spare just the same as priests. [521]

To priests and penitents you may properly add those who direct their energies to literary pursuits, which are honourable and useful to the human race.

Decretals
I. xxxiv.
2.

XI.—*Farmers should be spared*

In the second place farmers, whom the canons also include, should be spared. Diodorus Siculus relates with praise of the inhabitants of India that 'in wars indeed enemies kill one another, but they leave the tillers of the soil unharmed, for the reason that these render a common service.' Of the ancient Corinthians and Megarians Plutarch says: 'No one harmed the farmers in any way.' Cyrus ordered that notice be given to the king of the Assyrians 'that he was ready to release those who tilled the soil, and not to harm them'. Of Belisarius Suidas says: 'He spared the tillers of the soil to such a degree, and exercised so great care for them, that when he was in command none of them at any time suffered injury.'

Library,
II [xxxvii].

[*Greek Questions*,
xvii = p.
295 c.]
Xenophon,
Training of Cyrus,
V [iv. 24].
[On the word Βελισάριος.]

XII.—*Merchants and like persons should be spared*

The canon adds merchants; and this provision is to be taken as applicable not only to those who make a temporary sojourn in hostile territory, but also to permanent subjects; for their life also is foreign to arms.

Under this head are included at the same time artisans and other workmen, whose pursuits love peace, not war.

XIII.—*Prisoners of war also should be spared*

I. To come to those who have borne arms, we have already mentioned the remark of Pyrrhus in Seneca, who says that a sense of shame, that is, respect for what is right, forbids us to deprive a prisoner of his life. We have adduced the similar view of Alexander, which included prisoners with women. We may present also this statement of Augustine: 'Let necessity, not inclination, cut off'

[III. x. i.]

[III. xi.
9. 3.]
Letter i,
To Boniface
[*Letters*,
clxxxix.
6].

¹ Gratian suggested *deprimat* (let it crush). Plutarch says in his *Marcellus* [*Comparison of Pelopidas and Marcellus*, i = p. 316 D]: 'Ephialtes and Pelopidas never put any one to death after a victory, nor reduced states to slavery; and it is believed that, if these men had been present, the Thebans would not have acted as they did to the people of Orchomenos.' Marcellus followed the same practice at the

the enemy who is fighting. Just as violence is done to him who fights and resists, so pity is now due to the vanquished or captive, especially in the case of him from whom no disturbance of the peace is feared.'

[*Agesilaus*
i. 21.]

XIII
[xxxiv.]

XVII
[xiii.]

[xci. 6-7.]

Xenophon writes of Agesilaus: 'He instructed his soldiers not to punish prisoners of war as guilty of crime, but to guard them as men.' In Diodorus Siculus we find: 'All [the Greeks] fight those who resist, but spare the vanquished.' In the judgement of the same writer, the Macedonians who were under Alexander 'treated the Thebans more harshly than the law of war allowed'.

V [ix.]

Histories,
IV
[xxxix].

On Peace,
ii [= p.
80 c].

2 Kings,
vi [22].

[line 965.]

2. In his history of the *Jugurthine War* Sallust, having related that youths had been killed after surrendering, says that that was done contrary to the law of war; this is to be interpreted as against the nature of justice and the usage of more civilized peoples. In Lactantius we read: 'The vanquished are spared, and room is found for mercy in the midst of strife.' Tacitus praises Antonius Primus and Varus, the Flavian generals, because they had vented their rage on no one except in battle. Aristides says: 'It befits men of our character to constrain with arms those who resist, but to treat leniently those who have been overthrown.'

In regard to prisoners the prophet Elisha addresses the king of Samaria as follows: 'Wouldst thou smite those whom thou hast taken captive with thy sword and thy bow?' In the *Children of Hercules* by Euripides, when the herald inquires:

Then does your law forbid to slay a foe?

the chorus replies:

Yes, one whom Mars has suffered to survive the fray.

[line 1011.]

[522] In the same play the captive Eurystheus says,

The hands which me shall slay will not be guiltless.

capture of Syracuse, as Plutarch says in the same passage [xix = p. 308 D]. See the same writer in his life of *Cato of Utica* [lviii = p. 787 c D].

'When Cabades, the Persian king, had taken Amida by storm, and had caused a great slaughter, an aged priest told him that it was not befitting for a king to kill those who were already prisoners.' This is told by Procopius, *Persian War*, I [I. vii], who also says in the *Persian War*, II [II. ix]: 'It is contrary to piety to be cruel to prisoners.' In the same writer there is a notable speech of Belisarius to his soldiers at the capture of Naples; *Gothic War*, I [I. ix].

To one who advised him to kill his Scythian prisoners, the Emperor Alexius in Anna Comnena [VIII. vi] replied: 'Even though they are Scythians, still they are men; even though they are enemies, still they are deserving of pity.' Gregoras, Book VI [VI. viii], says: 'Those deeds which are done in battle and actual warfare, whatever they may be, secure pardon for the doer, on the ground that his mind is beset at such a time, and that his hand in a fit of intoxication does not take reason as the guide and controller of its actions. But when the extreme danger is over, when the mind has the time freely to examine and decide everything, surrender of the control of action to the hand indicates a man's base purpose, if anything unseemly occurs.'

Add the other passage from the same Gregoras, which we included in the notes at the end of Chapter VII, of this book, and Chalcocondylas, Book V [= p. 259, ed. Bekker], on a laudable custom of the Poles. Julian, in the second panegyric on Constantius [*Orations*, ii = p. 86 c], in his person describes the good ruler: 'Once victorious in battle he put an end to the work of the sword, thinking it a crime to take the life of a man who has ceased to defend himself.'

In Diodorus Siculus, the Byzantines and Chalcedonians, because they had put to death a large number of prisoners, are branded with this characterization: 'They perpetrated crimes of extraordinary cruelty.' The same writer elsewhere speaks of sparing prisoners¹ as 'a law common to all'; those who do otherwise, he says, beyond question do wrong. To spare prisoners is commanded by the nature of goodness and justice, as we just now heard Seneca say in his philosophical treatises. We see that in history those are praised who, when they might have been burdened or endangered by an excessive number of prisoners, preferred to release all rather than kill them.

XII
[lxxxii].[XIII.
xxvi.]*On Benefits*, V.
xviii
[*On Clemency*, I.
xviii].

XIV.—*The surrender of those who wish to yield upon fair terms should be accepted*

1. For the same reasons the surrender of those who yield upon condition that their lives be spared ought not to be rejected, either in battle or in a siege.² Thus Arrian says that the slaughter by the Thebans of persons who had surrendered was not in accordance with Greek custom, 'not a Hellenic killing'. Likewise Thucydides in his third book says: 'You have taken us into your power willingly and with outstretched hands. It is the Greek custom not to kill such persons.' In Diodorus Siculus, the senators of Syracuse declare: 'It is worthy of a noble mind to spare the suppliant.' Similarly Sopotar: 'It is customary to spare suppliants in times of war.'

Anabasis of Alexander, I. ix.
10.]

[III. lviii.]

[XI. xcii.]

2. In the case of besieged cities the acceptance of surrender was the rule among the Romans before the battering-ram had shaken the wall. Caesar informed the Adratuci that he would save their city if they would surrender before the ram should have touched the wall. The custom even now obtains in the case of unfortified places, before cannon fire is opened; and, in the case of more strongly fortified places, before an assault is made upon the walls. But Cicero, looking not so much to what is done as to what is right according to nature, declares himself upon this point as follows: 'You must both be merciful to those whom you have overcome by force, and accept the surrender of those who lay down their arms and take refuge in the good faith of generals, even though the battering-ram has already battered the wall.'

Gallic War, II
[xxxii].*On Duties*,
I [xi. 35].

The Jewish interpreters note that it was a custom among their

¹ Capitolinus says in his *Marcus [Aurelius] Antoninus* [xxiv]: 'He observed justice, even with regard to prisoners taken from the enemy.'

² [536] In [Procopius.] *Gothic War*, IV [IV. xii], the Romans say to the Persians, who were in the citadel of Petra: 'We, however, pity you who cast the yoke from your necks, and we wish to spare you who seek death, and to save you although you lightly despise life, as becomes Christians and citizens of the Roman Empire.' See De Serres in his *Life of Francis I* and *Life of Henry II*.

ancestors that, when they were besieging a city, they would not completely encircle it, but would leave a sector open for those who wished to escape,¹ in order that the issue might be determined with less bloodshed.

XV.—*Those also who have surrendered unconditionally should be spared*

The same sense of justice bids that those be spared who yield themselves unconditionally to the victor, or who become suppliants. 'To butcher those who have surrendered is savage' is the judgement of Tacitus. Likewise in the case of the Campsani, who had surrendered to Marius, Sallust, after relating that those who had reached the age of puberty were slain, adds that this was a crime against the law of war, that is, the law of nature. The same author says elsewhere: 'Not armed men were slain in battle, according to the law of war, but suppliants, after battle.'

In Livy, as we have said already, 'By the law of war armed men, and those who resist, may be slain'; in another passage we read, 'who, contrary to law and right, had made war upon those that had surrendered.' Effort should be directed to this, that men should rather be driven to surrender through fear, than that they should be slain. Praise is given to the conduct of Brutus, who 'did not permit a charge to be made upon his opponents, but surrounded them with cavalry, ordering that they be spared, on the ground that they would soon be on his side.'

XVI.—*What has been stated is true, provided that no serious crime has preceded; how this is to be understood*

1. Against these precepts of justice and the law of nature frequently exceptions are offered, which are by no means just; as, for example, if retaliation is required, if there is need of inspiring terror, if too determined a resistance has been offered. Yet he who recalls what has previously been said in regard to valid reasons for putting to death will easily perceive that such exceptions do not afford just [523] grounds for an execution.

There is no danger from prisoners and those who have surrendered or desire to do so; therefore in order to warrant their execution it is necessary that a crime shall have been previously committed, such a crime, moreover, as a just judge would hold

¹ So Scipio Aemilianus, when about to destroy Carthage, proclaimed: 'Let those who wish, flee'; Polybius [Appian, *Punic Wars*, xix. 130].

Annals,
XII [xvii].

*Jugurthine
War* [xci.
6-7].
*On Public
Administration*, I
[iv. 1].

[XXVIII.
xxiii. 1.]
XLV
[XLII.
xxi. 3].

[Plutarch,
Brutus,
xxvi = p.
996 A.]

See
Victoria,
*On the Law
of War*,
nos. 49
and 60.

punishable by death. And so we sometimes see anger vented upon prisoners or upon those who have surrendered, or a surrender upon guarantee of life refused, if any who were convinced of the injustice of a war have still remained in arms; if any have injured the good name of their enemies with monstrous slanders; if they have violated their plighted word, or another right of nations, such as that of ambassadors; if they were deserters.

2. But nature does not sanction retaliation except against those who have done wrong. It is not sufficient that by a sort of fiction the enemy may be conceived as forming a single body; this may be understood from our foregoing discussion on the sharing of punishments. In Aristides we read: 'Is it not absurd to wish to imitate, as if they were right, the things which you attack and say it is wicked to do?' Plutarch accuses the Syracusans on this ground, that they slew the wives and children of Hicetas for the sole reason that Hicetas had killed the wife, sister, and son of Dion.

3. Even the advantage, which is anticipated for the future from frightfulness, does not suffice to give the right to kill; but if the right already exists it may be among the reasons for not waiving the right.

4. Furthermore a quite obstinate devotion to one's own party, provided only that the cause is not altogether dishonourable, does not deserve punishment, as the Neapolitans claim in Procopius. Or, if such devotion is punished in any way, the penalty should not be carried so far as death; for no just judge would so decide. When, in a certain town, which had resisted with unusual fierceness, Alexander had ordered that all above the age of puberty should be slain, he seemed to the Hindoos to be waging war after the manner of brigands; and dreading the effect of such a reputation the king began to make a milder use of victory.

The same Alexander did better in wishing to spare certain inhabitants of Miletus, 'because he saw that they were noble and faithful to their cause', to cite the words of Arrian. Phyto, the commander of the people of Rhegium, when hurried to torture and death by Dionysius because of his too obstinate defence of the city, cried out that he was being punished for refusing to betray the city and that the deity would in a short time exact retribution for the mistreatment. Diodorus Siculus calls this punishment wicked, 'lawless punishment'.

I am greatly pleased with the prayer which is found in Lucan:

Be he the conqueror, who sees no need
To draw the ruthless sword against the vanquished,
Who does not think an impious deed was done,
Because his countrymen took arms against him,

II. xxi. 18.

On Peace,
ii [=p.
75 c].
Plutarch,
Timoleon
[xxxiii =
p. 252 c];
Dion [lviii
=p. 983E].

*Gothic
War*, I
[x].

Polyaenus,
IV [iii.
30].

[*Anabasis
of Alex-
ander*, I.
xix. 8.]

[XIV.
cxii.]

[VII.
312 ff.]

provided, nevertheless, that under the name of countrymen we understand not those of this or that district, but fellow-citizens of that common society which embraces all mankind.

5. Much less even is slaughter justified by resentment at some loss that has been sustained, as we read that Achilles, Aeneas, and Alexander avenged their friends with the blood of prisoners or of those who surrendered. Appropriately, therefore, Homer chants this verse :

[*Iliad*,
XXIII.
176.]

An evil deed he pondered in his heart.¹

XVII.—*It is right to spare those who are guilty, if their number is very great*

Even where the crimes are such that they may seem worthy of death, it will be the part of mercy to give up something of one's full right because of the number of those involved. Such clemency, we see, began with God Himself; for He desired that the Canaanites and their neighbours, by far the most wicked of peoples, should have the offer of a peace, [524] which would grant them their lives upon condition of a payment of tribute. Here applies the saying of Seneca: 'The severity of the general is directed against individuals, but pardon is necessary where the whole army has deserted. What takes away a wise man's anger? The crowd of wrongdoers.'² Pertinent also are these verses of Lucan :

[*Deut.*, xx.
10.]

On Anger,
II. x.

[II. 198 ff.]

Famine, the frenzy of the sea, and swift disaster,
Or pestilence of earth and sky, or war's slaughtering,
Have oft laid low so many youths in hateful death,
But never punishment.

'The drawing of lots was devised that an undue number might not suffer punishment,' says Cicero. Sallust says to Caesar: 'Let no one summon you to cruel punishments or harsh judgements, by which the state is more afflicted than remedied.'

For Cluentius [xlvi.
128].

[*On Public Administration*, I.
vi. 4.]

XVIII.—*Hostages should not be put to death unless they have themselves done wrong*

I. What decision according to the law of nature should be rendered in regard to hostages may be gathered from what we have

¹ That to later ages this seemed cruel is noted by Servius, *On the Aeneid*, X [X. 519].

² 'The sin that is committed by many goes unpunished,' says the Scholiast on Juvenal [ii. 46], citing Lucan [V. 260]. In Xiphilinus, who quotes from Dio [LV. xx], Livia says: 'If any one wishes to punish all such deeds rigorously, he does not see that he is thereby led to slay the great majority of men.' Augustine writes in his *Letters*, lxiv [xxii. 5]: 'Rather by admonition than by threats. In this way in fact one must deal with a multitude of sinners; but severity is to be exercised against the crimes of a few.'

Add Gail, *De Pace Publica*, II. ix. 36 [II. ix. 37].

said already. In former times it was commonly believed that each person had over his own life the same right which he had over other things that come under ownership, and that this right, by tacit or expressed consent, passed from individuals to the state. It is, then, not to be wondered at if we read that hostages who were personally guiltless were put to death for a wrong done by their state, either as though done by their individual consent, or by the public consent in which their own was included. But now that a truer knowledge has taught us that lordship over life is reserved for God, it follows that no one by his individual consent can give to another a right over life, either his own life, or that of a fellow-citizen.

Consistently with this point of view Agathias relates that to the good general Narses it seemed atrocious to exact punishment from innocent hostages. Other writers say the same of other generals. They cite also the example of Scipio, who said that he would not be severe with innocent hostages, but with the individuals themselves who had been guilty of defection,¹ and that he would exact punishment not from an unarmed foe, but from a foe in arms.

2. Furthermore some of the modern jurists, men not without standing, say that such agreements are valid if they are confirmed by custom. This I admit, if by right they mean mere freedom from human punishment, which in the discussion of this subject often passes under such a name. If, however, they consider that those who take the life of any one on the justification of an agreement alone are exempt from wrongdoing, I am afraid that they are both deceived themselves and by their dangerous authority deceive others.

It is clear that if he who comes as a hostage is, or previously was, of the number of great criminals, or has subsequently broken his pledge given in an important matter, it may be that his punishment will not be unjust.

3. But when Cloelia, who had come as a hostage, not of her own accord² but by the command of the state, made her escape by swimming the Tiber, her 'courage was not only pardoned, but even honoured by the Etruscan king', to use the words of Livy in his account of the incident.

XIX.—*All useless fighting should be avoided*

This remains to be added, that all engagements, which are of no use for obtaining a right or putting an end to a war, but have as their

¹ Julian says the same in Eunapius, *Selections on Embassies*, ix [= *Fragmenta Historicorum Græcorum*, IV, § 12, p. 18].

² Cf. the story of the hostages who tried to withdraw from this obligation, and were therefore punished, in Nicetas, Book II [*Isaac Angelus*, II. vi].

Victoria,
*On the Law
of War*,
no. 43.

I [xii].

Livy,
XXVIII
[xxxiv. 9].

Menochio,
*De
Arbitrariis
Iudicium
Quæstion-
ibus*, vii.

II [xiii. 9].

Acr. V
[Arrian,
Anabasis,
I. xxii].

[*Jugur-
thine War*,
xcii. 4.]
[*Germany*,
xxx.]

purpose a mere display of strength, that is, as the Greeks say, 'an exhibition of strength rather than a combat against the enemy', are incompatible both with the duty of a Christian and with humanity itself. Consequently rulers, who must render account of the useless shedding of blood to Him in Whose name they bear the sword, should strictly forbid such combats. In fact, Sallust praised the generals who achieved victory without staining their army with blood. Tacitus says of the Chatti, a people of known courage: 'Raids and chance encounters¹ are rare among them.'

¹ Plutarch censures Demetrius [*Demetrius*, xl = p. 908 c], 'because he thrust his soldiers into danger, and exposed them to battles, rather from zeal for fame than for the sake of a real advantage.'

CHAPTER XII

MODERATION IN LAYING WASTE AND SIMILAR THINGS

I.—*What devastation may be lawful, and in what degree*

1. IN order that any one may be able to destroy another's property without doing wrong, it is requisite that one of these three conditions should precede :

A necessity, such as should be understood to have been excepted in the first institution of ownership. An example would be that a person in order to escape imminent danger should cast into a river the sword of a third party, which a madman is about to use. In this case, however, we have elsewhere said that, in accordance with the better view, there remains an obligation to make good the loss.

II. ii. 9.

Or, a debt arising from an inequality, it being understood that the thing destroyed is reckoned as received for that debt, since otherwise the right would not exist.

Or, a deserving of evil, for which such punishment may be an equivalent, or the measure of which is not exceeded by the punishment, [531] for, as a theologian of sound judgement observes, equity does not suffer a whole kingdom to be laid waste because flocks have been driven off or some houses burned. This was recognized also by Polybius, who does not wish punishment in warfare to be carried beyond all bounds, but only so far as necessary that crimes may be expiated in a just way.

Victoria,
*On the Law
of War*,
nos. 52
and 56.
V [i.]

These reasons, which are applicable only within proper limits, cause the absence of wrong in the destruction of another's property.

2. But, unless a motive of utility commends such a course, it would be foolish to injure another without securing any good for oneself. Those, therefore, that are wise are usually influenced by considerations of utility. Of such considerations the most weighty is that which was pointed out by Onesander : ' Let him remember to ruin the enemy's country, to burn and devastate it. For a lack of money and crops causes war to slacken¹ as much as an abundance causes it to flourish.' In accord with this is the saying of Proclus : ' It is the duty of a good general to weaken the resources of the enemy

*Strate-
gicus*, vi.

[*On Plato's
Republic*,
III. iii.]

¹ Philo, *On the Contemplative Life* [ii=p. 891 D] : ' Enemies are accustomed to lay waste hostile territory and to denude it of trees, in order that the enemy may yield the more readily through lack of necessities.' The same writer says in his *On Curses* [i] : ' They bring upon themselves a twofold misfortune, want for their friends, abundance for their foes.'

[IV. ix. 8.]

in every way.' Curtius says of Darius: 'He believed that an enemy, who had nothing except that which he had seized by pillage, could be defeated by lack of supplies.'

Herodotus, I [xvii].
Polybius, IV [xlv].
Frontinus, *Strategemata*, III. iv.
Livy, V [xii. 5]; VII;
XXXIV [xvii]; XL [xxxviii].
Caesar, *Gallie War*, VI [iii and vi].

3. In fact that kind of devastation must be tolerated which compels the enemy to sue for peace in a short time. This method of warfare was employed by Alyattes against the Milesians, by the Thracians against the Byzantines, by the Romans against the Campanians, the Capenates, the Spaniards, the Ligurians, the Nervii, and the Menapii.

Nevertheless, if you examine the matter aright you will find that such depredations are ordinarily committed from motives of hatred rather than from considerations of prudence. It usually happens either that those conditions which justify devastation are lacking, or that there are other more cogent reasons which advise against it.

II.—*Devastation should be refrained from if the area is profitable for us and out of the power of the enemy*

[Deut., xx. 19, 20.]

1. This will happen, first, if our occupation of fruitful ground is such that it cannot yield produce for the enemy. That is the particular point of the divine law, which ordains that wild trees be employed in making walls and military structures, but that fruit-bearing trees be preserved for purposes of food, with the explanation that trees, unlike men, cannot rise up against us in battle; a restriction which Philo,¹ by similar reasoning, extends to fields under cultivation, adding to the law these words:

On the *Creation of Magistrates* [xiii].

Why will you be angry with inanimate things, which are both mild and productive of wholesome fruits? Do trees, like men who are enemies, show signs of hostility, so that they must be uprooted for the things which they are doing or threaten to do? On the contrary, they are of use to the victors, and furnish them with a supply of the things which necessity demands, yes even those things which contribute to their pleasure. It is not man alone that pays tribute, for trees at fixed seasons bear richer tribute, such that without it man cannot live.

¹ Another passage of the same writer, *De Humanitate* [*De Caritate*, xx f.], is also worthy of being transcribed here:

[537] Moses, in dispensing justice even more freely, makes a very ample and liberal use thereof, in descending from persons endowed with reason to dumb animals, and from dumb animals, again, to the things which spring from the ground; and of these we must now speak, since we have already discussed men as being of the most importance, and other creatures which are capable of feeling. Moses wisely forbade the cutting down of cultivated trees, or the ruinous cutting down of crops before they are ripe, or the destruction of any products of the soil whatsoever, to the end that the human race may be supplied with an abundance of food; and not only an abundance of necessities but also of the things which contribute to a more luxurious life. The crops of the field are in fact a necessity, designed for the nourishment of men; while all the varied fruits of the trees contribute to their luxuries, although these often, when other things fail, take the place of nourishing foods.

Proceeding further, Moses refuses to sanction even the devastation of hostile territory; especially does he command enemies to refrain from cutting down trees, because he considers it unjust that the anger which has been aroused against men should be expended upon those things which are the cause of no evil. By this very thing he teaches us not to have regard to the present time only,

Moreover, in discussing the same passage, Josephus says that, if trees could speak, they would cry out that since they are not the cause of war it is wrong for them to bear its penalties. Unless I am mistaken, this is the source of the Pythagorean maxim in Iamblichus: 'Let it be unlawful to injure or cut down a cultivated and fruitful tree.'

[*Ant. of the Jews*, IV. viii. 42.]

[*Life of Pythagoras*, xxi. 99.]

2. Furthermore, in describing the customs of the Jews, in the fourth book of his work *On Abstaining from Animal Food*, Porphyry¹ extends this rule (interpreted, as I think, in the light of custom) even to living things employed in agricultural work. He says that Moses commanded that these too should be spared in war; the writings of the Talmud and the Hebrew interpreters add that this law is to be extended² to anything whatever which may be destroyed without cause, as touching the burning of buildings, or the destruction of supplies which can be eaten or drunk.

In harmony with this law is the wise moderation of the Athenian general Timotheus, who, as Polyænus relates, 'did not permit a house or a homestead to be destroyed, or [532] a fruit-bearing tree to be cut down'. There is also the law of Plato, in the fifth book of the *Republic*: 'Let not the land be ravaged, nor the houses set on fire.'

[III. x. 5.]

[V. xvii = 471 A.]

3. Still more binding will this restriction be after a complete victory. Cicero disapproved of the destruction of Corinth, even

On Duties, I [xi. 35].
On His House [xxiii. 60].

for the reason that nothing remains in the same condition, but all things are subject to vicissitudes and changes; hence it may easily happen that those, who are at present enemies, may again become allies, after they have joined in conferences and treaties. But it is a harsh thing to deprive friends of the necessities of life, when, in view of the uncertainty of the future, those things which may be useful should have been preserved for them.

It has been most truly said by the ancients that friends should be treated as though it were thought that no enmities could arise, and that offences should be so dealt with that friendship may be hoped for; that is, that each one should have in his mind, for his own protection, some measure of reserve, and not be obliged soon to repent of his excessive violence, through having revealed his purposes too openly in words and deeds; [538] and not be obliged to accuse himself, when the matter can no longer be remedied.

This wise saying, furthermore, should be observed by states, that in time of peace they should prepare the things which are necessary for war, but in time of war the things necessary for peace; and that they should neither place excessive confidence in their friends, as if these could not be diverted to the opposite side, nor utterly distrust their enemies, as if these could never be restored to friendship. But even if nothing ought to be done for an enemy in the hope of effecting a reconciliation, certainly none of the things which the soil bears is hostile, but all are friendly, and all are useful; indeed the cultivated plants are particularly necessary, seeing that their fruits are either nutritive or take the place of something nutritive.

War should not be waged on things that have nothing to do with war; one should not cut, nor burn, nor tear up by the roots the things which nature has tenderly reared with its streams of water and its summer skies, that they might bear tribute to men as to kings. For she, as the excellent and common ruler of all things, has taken care to secure undamaged force and vigour not only for animals, but also for the offspring of the soil, especially for cultivated plants, because they require greater care, and are not so prolific as wild plants, but require skilled cultivation to attain a vigorous growth.

¹ His words are [*On Abstaining from Animal Food*, IV. xiv]: 'The law also commands us to spare animals that are man's associates in toil, even on the land of the enemy; so that it is not permitted to kill them.'

² But, on the other hand, they wish to restrict it by adding the exception: unless trees situated in the suburbs should interfere with the javelin-throwers.

though Roman ambassadors had been shamefully treated there; and he also characterizes as horrible, criminal, and steeped in the depths of hatred, a war which is waged against walls, roofs, columns, and doors. Livy praises the leniency of the Romans after the conquest of Capua, because they did not by fire and destruction vent their anger upon innocent buildings and walls.¹ In Seneca, Agamemnon says :

For my part I will confess (thy pardon, Argive land !),
I wished to see the Phrygians brought low and undone ;
But Troy destroyed and razed to earth—such fate
I should have censured.

xxvi
[xvii].

Trojan
Women
[285 ff.].

Joshua, vi.

2 Kings,
iii. 19.

4. It is true that sacred history teaches us that certain cities were doomed to destruction by God, and that even contrary to the general law it was ordered that the trees of the Moabites should be cut down. This, however, was not done out of hatred of the enemy, but to show a just abhorrence of their crimes, which were either publicly recognized as such, or in the judgement of God were worthy of such punishment.

III.—*Devastation should be refrained from if there is good hope for a speedy victory*

1. In the second place, what we have said will hold good even where the possession of land is in doubt, if there is good hope of a speedy victory, of which the prize will be both the land and its fruits. Thus, as Justin relates, Alexander the Great prevented his soldiers from devastating Asia, 'saying that they must spare their

XI [vi. 1].

¹ On this subject there is a notable letter of Belisarius to Totila [in Procopius], *Gothic War*, III [III. xxii]:

Previously it was thought that to construct works of beauty was characteristic of wise men and those versed in civilized life; that to destroy them, after they had been erected, was the act of fools and persons who did not blush to leave to posterity marks of their stupidity. It is agreed that Rome is the greatest and most worthy of admiration of all the cities which the sun beholds. This pitch of greatness and splendour it has not attained by the labour of one man alone, nor in a brief time; but very many kings and emperors, a vast line of eminent men, many centuries, and a marvellous accumulation of wealth, have brought together here, among other conditions, the leading workmen; and so by the gradual construction of so great a city [539] they have left monuments of their worthiness to succeeding generations. To destroy this city, therefore, would be to do a wrong to the human race of all ages, by taking from those who have gone before the memory of the praise that is due to them, and from those who are to come the pleasure of this spectacle.

Since this is so, reflect that one of two things is inevitable, either you will be conquered by the Emperor in this war, or your fortune will be the better. If you are victorious, and the city has been destroyed, you will have lost what is not another's but your own. If it has been saved, you will enjoy the most beautiful of all possessions. If the lot has been cast against you, and Rome, through your efforts, is safe, a feeling of gratitude toward you will remain with the victor; but if Rome shall have been destroyed your lot will lie beyond hope of mercy. Not only will you gain nothing by the act, but the reputation which it deserves from all men will follow you. Such reputation is ready for you, according to your choice; for the repute enjoyed by those in power corresponds with their actions.

See also the law of Frederic I in Conrad, Abbot of Ursperg; and, with regard to Frederic Count Palatine, the *Chronicles* of Melanchthon.

own property,¹ and not destroy the things which they had come to take possession of.' So Quintius, when Philip was traversing Thessaly with a band engaged in plundering, for his part exhorted his troops, as Plutarch says, to pursue their march as though through a district which had been given up and already made their own. When urging Cyrus not to turn Lydia over to his soldiery to lay waste, Croesus said: 'You will not plunder my city, nor my possessions, for in no way do these things now belong to me; they are yours—yours are the things they will destroy.'

Flaminius
[v = 371 D].

Herodotus, I
[lxxxviii].

2. To those who do otherwise, the words of Jocasta to Polynices in Seneca's *Women of Thebes* are not ill suited:

[*Phoenician Women*,
558 ff.]

Seeking to win your country you destroy it;
To make it yours, you wish to make it nothing;
Your cause is harmed by this, with hostile arms
You burn the land, lay low the ripened crops,
And terror spread
Through all the fields. No one so wastes his own.
What you bid ruin with fire, with sword to reap,
You hold to be another's.

There is a similar thought in these words of Curtius: 'Whatever they had not ruined, they confessed belonged to the enemy.' Not far different are the arguments urged by Cicero in his *Letters to Atticus* against Pompey's plan of destroying his own country by starvation. On this ground Alexander the Aetolian censures Philip in the seventeenth book of Polybius, whose words, according to the Latin version of Livy, are as follows:

[IV. xiv.
2.]

IX. vii [4],
ix [2],
x [3].

[XVII. iii.]

XXXII
[xxxiii.
11-13].

In war he (Philip) does not fight in the open field, nor engage in pitched battles, but he burns and plunders cities as he flees, and when vanquished spoils the victor's prizes. Such was not the custom of the ancient kings of Macedon; they were wont to fight on the field of battle, and to spare cities, so far as they could, in order that they might have a wealthier empire. What sort of a policy is it, to destroy the things the possession of which is at stake, and to leave for himself nothing except the war?

[533] IV.—*Devastation should be refrained from if the enemy has means of subsistence from other sources*

1. In the third place, the same thing will happen if the enemy can have means of subsistence from another source, for instance,

¹ When Gelimer and the Vandals were besieging Carthage, they neither plundered nor laid waste the land, but took care of it as of their own; Procopius, in the opening of the second book of the *Vandalic War* [II. i].

I read in Helmold, I. lxvi: 'Is not the land which we lay waste our land, and the people whom we assail our people? Why, therefore, are we found to be our own enemies, and wasters of our own revenues?'

With this agrees what Bembo has in Book IX, fol. 149 verso. See Paruta, again, against the Germans, *History*, Book VI.

[I. lxxx
and lxxxi.]

if the sea, or if other boundaries, shall be open. According to Thucydides, Archidamus, in the speech in which he tried to dissuade his fellow Lacedaemonians from war against the Athenians, asks what hopes they have in waging war: Do they perhaps hope that, because they enjoy military superiority, it is easy for them to lay waste the land of Attica? But, he said, the Athenians have other lands under their sway (meaning Thrace and Ionia) and can obtain what they need through importations by sea.

Under such conditions, therefore, it is best to leave agriculture undisturbed even along the common frontier. This we see in recent times was the arrangement for a considerable period in the war of the Netherlands against the Empire, with the payment of tribute to either party.

2. This is in accord with the ancient custom in India, where, as Diodorus Siculus¹ says: 'The farmers are undisturbed and, as it were, held sacred; in fact even in the vicinity of camps and armies they pursue their tasks secure from danger.' He adds: 'Men neither burn the enemy's fields, nor cut down the trees.' Later: 'No enemy inflicts harm upon any farmer, but this class of men, as being common benefactors, is accorded protection from all wrongdoing.'

[Training
of Cyrus,
V. iv. 24.]

[III. x. 5
and 9.]

Economics,
II [ii. 23].

[*Spanish
Wars*, xi.
64.]

3. Xenophon says that it was agreed also between Cyrus and the Assyrian king that 'there should be peace with the farmers, war with those who bore arms'. So Timotheus² rented the most fertile part of the land to husbandmen, as Polyænus relates; nay more, as Aristotle adds, he even sold the crops to the enemy, and paid his soldiers with the money. Appian bears witness that this was done also by Viriathus in Spain. As we have seen, in the war of the Netherlands and the Empire which we have mentioned, this arrangement was carried out with the highest degree of reason and profit, and evoked the admiration of foreigners.

Decretals,
I. xxxiv. 2.

4. The canons, teachers of humanity, established these practices for the imitation of all Christians, as those who ought to exercise and who profess a greater degree of humaneness than others; and so they seek to protect from the perils of war not merely the farmers, but also the animals which they use in cultivation and the seeds which they keep for sowing. The reason is assuredly the same as that for which the civil laws forbid that things useful for ploughing

Code,
VIII. xvi.
7.

¹ Book II [II. xxxvi].

² Plutarch gives the same information with regard to the Megarians, in his *Greek Questions* [xvii = p. 295 B C.]. Of Totila, when he was besieging Rome, Procopius says, *Gothic War*, III [III. xiii]: 'In the meantime he did no harm to the farmers throughout the whole of Italy, but ordered them to till their lands continuously, without fear, just as they had been accustomed, provided that they paid tribute to him.'

Cassiodorus says, [*Variae*,] XII. v: 'It is the chief glory of the defenders if, while they seem to be protecting the appointed districts, the farmers do not cease to cultivate their inherited possessions.'

be taken as a pledge. In ancient times among the Phrygians and Cyprians, and later among the Athenians and Romans,¹ it was considered a crime to kill a plough-ox.

V.—*Devastation should be refrained from if the thing itself is of no use in furnishing resources for war*

In the fourth place, it happens that certain things are of such a nature that they are of no value for making or waging war. Such things reason wishes us to also spare, during the continuation of the war. Here applies the speech of the Rhodians to Demetrius,² the taker of cities, on behalf of the portrait of Ialysus, at it appears in the Latin translation of Gellius :

What is your reason for wishing to destroy that likeness by setting fire to the temple? If you conquer us all, and take this whole city, by your victory you will obtain that portrait also, safe and intact. But if you prove to be unable to conquer us, we ask you to consider, lest you incur the bad repute of having waged war against the dead Protopogenes because you were unable to conquer the Rhodians.

Polybius says it is a sign of an infuriated mind to destroy those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them; such things are temples, colonnades, statues, and the like. Marcellus, whom Cicero praises, 'spared all the buildings of Syracuse, public and private, sacred and profane, just as if he had come with his army to defend them, not to capture them.' The same author later says: [534] 'Our ancestors left to them the things which seemed agreeable to the vanquished, but of small value to us.'

VI.—*The principle stated is particularly applicable to things that are sacred or connected with things that are sacred*

I. While what has been said holds true of other things of artistic value, for the reason which we have already given, there is a particular reason in the case of those things which have been devoted to sacred uses. Although such things also, as we have said elsewhere, are public in their own way, and so, according to the law of nations, are violated with impunity, nevertheless, if there is no danger from them, reverence for divine things urges³ that such buildings and

Nicholas of Damasus [frag. 19, p. 148, edit. Dindorf].
Aelian, [Var. Hist.,] V. xiv;
Dio Chrysostom, *Orations*, lxiv [=p. 592].

[Attic Nights,] XV. xxxi.

V [xi].

Against Verres, Act II [IV. liv. 120].
IV [lx. 134].

[III. v. 2.]

¹ Also in the Peloponnesus; Varro, *On Farming*, II [II. v. 4]; Columella, VI, beginning. To these add Pliny, [Natural History,] VIII. xlv; Aelian, *History of Animals*, II, last chapter; Porphyry, *On Abstaining*, II [II. xxviii]; Vegetius, *On the Veterinary Art*, III [prolegomena, vi].

² See on this topic Pliny, *Natural History*, VIII. xxxviii [VII. xxxviii], and XXXV. x; and Plutarch, *Demetrius* [xxii = p. 898 E]. The same idea is found in the letter of Belisarius which we have just quoted [III. xii. 2. 3, note].

³ Polybius says in the *Excerpta Peiresciana* [p. 45]: 'It is a mark of supreme folly to act impiously toward the gods because you are angry with men.' Rightly, beyond question; for Severus also, as Lampridius reports [*Life of Alexander Severus*, xlix], declared in a rescript: 'It is better that God

their furnishings be preserved, particularly among those who worship the same God, in accordance with the same law, even if perhaps they disagree in respect to certain doctrines or points of ritual.

2. Thucydides says that it was the law among the Greeks of his time 'that those, who made an attack upon hostile territory, should refrain from doing harm to sacred places'. When Alba was destroyed by the Romans, Livy says that they spared the temples of the gods. Of the Romans at the taking of Capua, Silius, in his thirteenth book, speaks thus :

Lo, through their breasts there creeps a silent feeling
Of sudden awe, and soothes their savage hearts,
That they wish not for fire and torch, nor now
That temples fall in ashes in one pyre.

Livy recounts that it was said in criticism of Quintus Fulvius the censor, 'That he involved the Roman people in irreverence by building temples with the ruins of temples, as though the immortal gods were not everywhere the same, but some were to be worshipped and adorned with the spoils of others.' But Marcius Philippus, upon arriving at Dium, ordered his encampment to be laid out in the shadow of the temple itself, in order that nothing in the sacred place might be profaned. Strabo relates that the Tectosages, who with others had carried off the treasures from Delphi, consecrated these at home with an addition, in order to appease the deity.

3. To come now to Christian peoples, Agathias records that the

should be worshipped there in any way at all, than that the place should be turned over to keepers of cook-shops.'

Pliny, *Natural History*, XVI. xi [XVI. xl], says of Hannibal: 'He was led by a feeling of reverence to spare the temple of Diana of Saguntum.' 'And we have not deprived our foreign foes of their temples,' is a remark found in Appian, *Civil Wars*, II [II. xix. 140].

The Latin author of the life of Agesilaus [Nepos, *Agesilaus*, iv] says of him: 'Not only on Greek soil did he make it a practice to maintain the sanctity of the temples of the gods, but even in the country of the barbarians he preserved the images and altars with the greatest reverence. He used to say that he wondered [540] that those who harmed their suppliants were not included in the number of the sacrilegious, or that those who caused reverence to decline were not punished more heavily than those who plundered temples.'

Regarding the scrupulosity of Agesilaus in this matter see also Plutarch [*Agesilaus*, xix = p. 606 A]. The same writer, in his *Sulla* [xii = p. 459 CD], accords this praise equally to many Romans: 'Some called to mind Flaminius, others Manius Aquilius and Aemilius Paulus; of these the former, when he had driven Antiochus from Greece, and the latter, when they had subdued the kings of Macedon, not merely spared the temples of the Greeks, but enriched them with gifts and increased their reputation and sanctity.'

Add also Vitruvius, Book II [II. viii. 8]; Dio Cassius, XLII [XLII. xlviii]; Plutarch, *Caesar* [xxvi = p. 720 E]; Brodeau, *Miscellanea*, V [V. xxix]. Gabaon, the Moor, although not himself a Christian, wished honour to be shown to the churches of the Christians; this was contrary to the conduct of the Vandals, with whom he hoped that the God of the Christians, whoever He might be, would be angry. This is vouched for by Procopius, *Vandalic War*, I [I. viii], who says also, *Persian War*, II [II. ix], that Chosroes, a Persian and not a Christian, spared the church of the Christians of Antioch.

Even Justinian, as the same author relates, *Vandalic War*, II [II. ix], did not dare to keep in his possession the objects which Vespasian had carried off to Rome from the Temple at Jerusalem, and which Genseric had found in Rome and transported to Africa. Benjamin the Jew, in his *Itinerary*, bears witness to the reverence which was manifested by the Mohammedans for the place in which the bones of Ezechiel and the three companions of Daniel had been interred.

Sylvester,
word
bellum,
III, no. 5.
[IV. xxvii.]

[I. xxix.
6.]
[XIII.
316 ff.]

XLII [iii.
9].

[Livy,]
XLIV [vii.
2].

IV [i. 13].

II [i].

Franks spared the temples, seeing that they were of the same religion as the Greeks. In fact it has been customary also to spare men on account of religious edifices, conduct which (not to mention pagan peoples, which afford many examples, since, in fact, writers call this custom 'a law common to the Greeks') in the case of the Goths who captured Rome¹ is praised by Augustine as follows :

Diodorus,
XIX
[lxxiii].
*City of
God*, I [1].

To this² the places of the martyrs and the basilicas of the Apostles, which in the midst of the sack received the vanquished that fled to them, both Christian and pagan, bear witness. So far the gore-stained enemy raged ; there the madness of butchery was stayed. Thither were led by pitying enemies those whom (for 'those whom (*quibus*)' I should prefer 'who (*qui*)',³ for he distinguishes the milder from the more savage) they had spared outside these places, that they might not be attacked by those who did not have the same feelings of mercy. Nevertheless, after those, who themselves elsewhere were savage and raged in the manner of enemies, came to these places⁴ where that was forbidden which was elsewhere permitted by the law of war, all their savage frenzy was checked, and their desire to take captives was assuaged.

VII.—*The principle is applicable also to consecrated things*

1. What I have said of sacred things must also be understood of consecrated things, also of structures erected in honour of the dead ; for these cannot be violated without contempt for human feeling, even though the law of nations does accord impunity to the venting of anger against them. The jurists say that that is the highest reason which acts in defence of religion. The pious utterance of Euripides in his *Trojan Women* relates as much to consecrated as to sacred things :

Dig. XI.
vii. 43.

[lines
95 ff.]

Mad is the man who cities devastates,
[535] With temples and the Manes' consecrated seats.
For him there waits the doom of like destruction.

Apollonius of Tyana thus interpreted the fable of the giants assaulting the sky⁵ : 'That they did violence to the temples and seats of the gods.' In Statius, Hannibal is termed sacrilegious because 'he set torch to the altars of the gods'.

[Philostratus, *Life of Apollonius*, V. xvi.]
[*Silvae*, IV. vi. 82.]

¹ Under the Arian Alaric. The following notable deed is recorded of him by Cassiodorus, [*Variar.*] XII. xx : 'When King Alaric had received the vessels of the Apostle Peter from his men who brought them, he held an inquiry ; having learned the state of affairs, he ordered that they should be carried back to the sacred portals by the hands of those who had carried them off, that the greed, which from lust of plunder had committed the crime, should expiate its excess by the most lavish devotion.'

² Isidore has quoted this passage in his *Gothic Chronicles*, on the year 447.

³ Orosius, in relating the story, VII. xxviii, shows conclusively that this should be the reading [in which case the English should be : 'Thither they were led by pitying enemies *who* had spared,' &c.].

⁴ These same churches of the Apostles were spared by the Goths under Witiges, when they were besieging Rome, as Procopius testifies, *Gothic War*, II [II. iv]. Even for barbarians and non-Christians flight to such places brought protection ; see Zosimus, IV [IV. xl], on the barbarian Tomitani.

Add the Swiss law in Simler [p. 302, ed. Elzevir] ; Nicetas, *Alexis*, son of Manuel [v] ; and the same author, *Andronicus*, I [I. ix], where he blames the Sicilians for having violated the churches of Antioch.

⁵ As Diodorus Siculus [*Excerpta* from Book VII] also interpreted another fable regarding Epopeus.

Punic Wars
[xx. 133].
XLII
[xlviii].

[IV. iv.
122.]

[*On Divination*, I.
xxxvii
81.]

[XXIX.
xviii. 4.]

XIV
[xiv].

[XXXI.
xxvi. 11 ;
xxx. 4 ;
xxxi. 3.]

[II. vii.]

[V. xi.]

2. Scipio, having taken Carthage, bestowed gifts upon his soldiers, 'excepting', says Appian, 'those who had sinned against the temple of Apollo'. As Dio relates, Caesar 'did not dare to overthrow' the trophy erected by Mithridates, 'because it was consecrated to the gods of war'. Marcus Marcellus, being restrained by religious scruples, did not touch the things which victory had made profane, says Cicero in his fourth *Against Verres*; and he adds in the same passage that there are some enemies who in time of war observe the laws of religion and custom. The same author elsewhere said that the war waged by Brennus against the shrine of Apollo was wicked.

The action of Pyrrhus, who plundered the treasures of Proserpina, is called by Livy disgraceful and insulting to the gods. Diodorus characterizes a similar act of Himilco as 'impiety' and 'a crime against the gods'. Again, Livy calls the war of Philip wicked, as though waged against the gods of the upper and the nether worlds; also madness, and an aggregate of crimes. Of the same war Florus says: 'Philip exceeded the rights of the victor in his violence to temples, altars, and tombs.'¹ Touching the same affair, Polybius adds this judgement: 'Who will deny that, to set to work to destroy what will neither prove useful to us in waging war, nor disadvantageous to the enemy, particularly temples and the statues and similar ornaments which they contain, is the work of a mind that is wicked and maddened with rage?' In the same passage he does not accept the excuse of revenge.

VIII.—*The advantages which follow from such moderation are pointed out*

I. It is, in truth, not strictly a part of our purpose to inquire at this point what is advantageous; we desire rather to restrict the unrestrained licence of war to that which is permitted by nature, or to the choice of the better among the things permitted. Nevertheless virtue itself, in low esteem in the present age, ought to forgive me if, when of itself it is despised, I cause it to be valued on account of its advantages.

In the first place, then, such moderation, by preserving things which do not delay the war, deprives the enemy of a great weapon, despair. There is a saying of Archidamus in Thucydides: 'Think of the enemy's land as nothing else than a hostage, the better the more it is cultivated; therefore it must be spared, so far as is possible, that despair may not make the enemy harder to conquer.' The

[I. lxxxii.]

¹ A similar act of Prusias is censured by Polybius, whose words are preserved by Suidas on the word *Prusias*, and in the *Excerpta Peiresciana* [*De Virtutibus et Vitiis*, I, p. 290].

same policy was followed by Agesilaus¹ when, contrary to the view of the Achaeans, he let the Acarnanians sow their crops in freedom, saying that the more they sowed the more desirous of peace they would be. This is what the satire says: 'For those, who have been plundered of everything, weapons still remain.' Livy, in relating the capture of the city of Rome by the Gauls, says: 'The chiefs of the Gauls had decided that all the houses should not be burned down, in order that what remained of the city might serve them as a pledge to break the morale of the foe.'

Xenophon,
*Affairs of
Greece*, IV
[vi. 13].
[Juvenal,
viii. 124.]
[V. xliii.
1-2.]

2. There is the further consideration that, in the course of a war, such moderation gives the appearance of great assurance of victory, and that clemency is of itself suited to weaken and to conciliate the spirit. According to Livy, Hannibal did no damage in the territory of Tarentum: 'It appeared', he says, 'that this course was pursued not because of the moderation of the soldiers or their general, but [536] in order to conciliate the feelings of the Tarentines.'

XXXIV
[XXIV.
xx. 10].

For a similar cause Augustus Caesar refrained from pillaging the Pannonians. Dio gives the reason: 'He hoped that in this way he would win them over to him without compulsion.' Polybius [Polyaenus] says that Timotheus, with that care of which we have already spoken, above all else 'sought to win great good-will from the enemy themselves'. Regarding Quintius² and those Romans who were under his orders, Plutarch, having narrated what we have said above, adds: 'Not long afterward he received the fruit of this moderation; for, when he arrived in Thessaly, the cities went over to him. Then in fact the Greeks who dwelt within Thermopylae also ardently longed for Quintius; and the Achaeans, renouncing the friendship of Philip, entered with the Romans into an alliance against him.'

XLIX
[xxxvii].
III [x. 5].

[*Flami-
nius*, v =
p. 371 D,
cited
above, III.
xii. 3. 1.]

The state of the Lingones escaped the devastation which they had dreaded in the war waged by the general Cerealis, under the authority of Domitian, against Civilis the Batavian and his allies; regarding it, Frontinus narrates the following: 'Because the state had not lost any of its possessions, owing to the fact that contrary to expectation it had not been laid waste, when brought back to its allegiance it furnished to him seventy thousand armed men.'

V. iii
[*Strate-
mata*, IV.
iii. 14].

3. Opposite results have attended the opposite policy. Livy gives an example in the case of Hannibal: 'His spirit, inclined to avarice and cruelty, was prone to despoil what he could not protect. This policy was destructive both in its inception and in its result. For it alienated the minds not only of those who suffered undeserved

XXVI
[xxxviii.
3-4].

¹ This is recorded also by Plutarch, *Agesilaus* [xxii = p. 608 B].

² Naturally Titus Quintius Flaminius [Flaminius].

wrong, but of others also, since more persons were affected by the example than by the disaster.'

Aegidius
Regius, *De*
Actibus
Superna-
turalibus,
disp. 31,
dub. 7,
no. 127.

4. Moreover, that which has been observed by certain theologians I hold to be true, that it is the duty of the highest authorities and commanders, who wish themselves to be regarded as Christians both by God and by men, to forbid the violent sack of cities and other similar actions. Such actions cannot take place without very serious harm to many innocent persons, and often are of little consequence for the result of the war; so that Christian goodness almost always, and bare justice very often, shrinks from them.

Surely the bond which unites Christians is greater than that which united the Greeks of old, in whose wars a decree of the Amphictyons provided against the blotting out of a Greek city. And the ancients relate that Alexander of Macedon repented of nothing that he had done more than that he had completely destroyed Thebes.

[Plutarch,
Alexander,
xiii = p.
671 B.]

MODERATION IN REGARD TO CAPTURED PROPERTY

I.—*The property of enemy subjects which has been captured in war is to be held, up to the amount of their debt*

1. THE capture of enemy property in a lawful war is not to be thought devoid of wrong, or exempt from the obligation of restitution. In fact, if you consider what may justly be done,¹ it is not permissible to take or to hold property of greater value than the equivalent of the enemy's indebtedness, with this exception, that over and above that amount one may retain things necessary for a guarantee. When the danger is over, however, there should be a restoration, either of the things themselves or of their value, according to our discussion in the second chapter of Book II. What would be permitted in the case of property of persons at peace is much more permissible in regard to the property of enemies. There is, then, a certain right of seizure, without a complete right of ownership.

2. Now since a debt may be due to us either because of an inequality of possessions, or as the result of a punishment,² the property of enemies may be acquired for either reason, but still with a distinction. For we have previously said that by a debt of the former sort not merely the property of the debtor, but also that of his subjects, according to the accepted law of nations, is made liable, as though in the case of surety.

This right of the law of nations, indeed, we hold to be of another kind than that which exists in mere impunity or the external power of courts of law. For just as he with whom we have completed a transaction by our private consent acquires not only a legal but also a moral right to our property, so also a right is acquired by a kind of common consent, which through a certain force contains in itself the consent of individuals, in the sense in which a law is called 'a common agreement of the state'. It is the more credible that such a basis of right was approved by nations in the kind of affair under consideration because the law of nations was introduced not only for the sake of avoiding greater evil but also to secure to each one his right.

Victoria,
*On the Law
of War*,
nos. 55,
56.

Cajetan,
*Summula
Peccato-
rum, words
belli dam-
num*; Co-
varruvias,
On Sext,
V. ult. 4,
previously
cited, pt.
II, no. 11 ;
Victoria,
*On the Law
of War*,
nos. 39
and 41 ;
Molina,
tract. II,
disp. 117.

¹ [543] See the decision of Pope Innocent, in Bembo, I.

² The Romans ordered Prusias both to make restitution to Attalus and to pay a penalty in addition.

II.—*The property of enemy subjects which has been captured in war is not to be held as punishment for the crime of another*

But in the other form of indebtedness, which is penal, I do not see that by the agreement of the nations such a right has been extended to the property of subjects. Such an obligation imposed upon the property of others is hateful, and consequently ought not to be extended further than the practice has clearly been. The advantage, furthermore, is not the same in the latter as in the former kind of indebtedness; for the former consists in goods, but the latter does not, and so its exaction can be omitted without loss.

III. ii [3].

This position is not controverted by what we said above about the Attic law. For according to its provisions men were held liable not in reality because the state could be punished, but rather to compel the state to do what it ought to do, that is, to render judgement against the guilty. This obligation arising from duty is to be referred to the former, not to the latter, sort of indebtedness. For it is one thing to be under an obligation to punish, and another to be subject to or liable to punishment, although the latter condition usually results from failure in respect to the former, but in such a way that one is distinctly the cause and the other the effect. Therefore the property of the subjects of enemies cannot be acquired on the ground of punishment, but only that of those who have themselves done wrong; among these are included also the magistrates who fail to punish the crimes.

III.—*Here we must understand as debt also indebtedness which arises in time of war. Examples*

Moreover the goods of subjects may both be seized and acquired, not only [542] for the exaction of the original debt which gave rise to the war, but also for the exaction of indebtedness which develops subsequently; this is according to what we said at the beginning of this book. In such a sense we must take what certain theologians write, that captures in war are not to be set off against the principal debt; for it is to be understood that such captures are an offset up to the point where, according to a sound judgement, satisfaction has been obtained for the loss occasioned by the war itself.

Thus in the dispute with Antiochus the Romans, as Livy relates, held it to be just that the king should pay all the expense which had been incurred for the war,¹ since it was through fault of his that the

Sylvester,
word *bel-
lum*, no.
10; Vic-
toria, no.
51; Bar-
tolus, *On
Digest*,
XLIX. xv.
28.
XXVII
[XXXVII.
xxxv. 7].

¹ This is mentioned by Polybius, *Selections on Embassies*, xxiii. And the Asiatics were condemned in the same way by Sulla, as Appian records in his *Mithridatic War* [ix. 61 ff.]. The King of Poland

war had arisen. In Justin is the phrase, 'ready, according to a just law, to assume the expenses of the war.' In Thucydides the Samnians are condemned 'to pay the expenses of the war'. And so, frequently, in other instances. However, what is justly imposed upon the conquered may also be justly exacted by a war.

XXXIII
[i. 5].
[I. cxvii.]

IV.—*In this matter it is an obligation of humaneness not to make the fullest use of one's right*

1. But we must keep in mind that which we have recalled elsewhere also, that the rules of love are broader than the rules of law. He who is rich will be guilty of heartlessness if, in order that he himself may exact the last penny, he deprives a needy debtor of all his small possessions; and even much more guilty if the debtor has incurred the debt by his goodness—for instance, if he has gone surety for a friend—and has used none of the money for his own advantage, 'for', as Quintilian the Father says, 'the peril of a bondsman is worthy of commiseration'.¹ Nevertheless so hard a creditor does nothing contrary to his right according to a strict interpretation.

[Declamations,
cclxxiii.]

2. Therefore humanity requires² that we leave to them that do not share in the guilt of the war, and that have incurred no obligation in any other way than as sureties, those things which we can dispense with more easily than they, particularly if it is quite clear that they will not recover from their own state what they have lost in this way. Here applies what Cyrus said to his soldiers after the capture of Babylon: 'What you have, you will hold not unjustly; but if you do not take away anything from the enemy that will be an evidence of your humanity.'

[Xenophon,
Training of Cyrus,
VII. v.
73.]

3. This also is to be observed. The right over the goods of innocent subjects has been introduced as a subsidiary means; and as long as there is hope that we can obtain what is ours with sufficient ease from the original debtors, or from those who by not rendering justice voluntarily make themselves debtors, to come to those who are free from blame, even though it is granted that this is not in conflict with our strict right, nevertheless is to depart from the rule of human conduct.

Aegidius
Regius,
*De Actibus
Supernaturalibus*,
disp. 31,
dub. 7,
no. 117.

4. Instances of such humanity are found everywhere in history,

claimed this custom in his favour, according to De Thou, LXXIII [LXXIII. ix], for the year 1581. So in Homer, *Iliad*, III [III. 286], the word *τιμὴν* is interpreted by the Scholiast as 'an estimation of the war; namely half of the property which was in the city.'

¹ He adds that a creditor can honourably approach a bondsman only in case he cannot recover from the debtor. The 'honourably' is well said; for it seems that there was a certain 'stigma' attached to calling on bondsmen, as Cicero says, *Letters to Atticus*, XVI. xv.

² Ptolemy returned to Demetrius, the son of Antigonus, his tent and other things which served his personal use, and also the money he had captured, saying that they were not fighting with one another for objects of all sorts, but for empire and glory. The story is told by Plutarch, *Demetrius* [v = p. 891 A]. See also the act of Sancho, king of the Basques, in Mariana, XI. xvi.

particularly in the history of Rome. Examples are when lands have been ceded to the conquered enemy on the condition that they should pass to the state, that is, that they should fall to the conquered state; or when a part of the land was left to the ancient possessor¹ as a mark of respect. Thus Livy records that the inhabitants of Veii were penalized by Romulus with the loss of part of their land. Similarly Alexander the Macedonian granted to the Uxii under tribute the lands which they had possessed.

So you may often read that surrendered cities were not sacked; and we have said above that it is praiseworthy, and in accordance with the pious precepts of the canons, to spare not only the persons, but also the property, of the tillers of the soil, subject at any rate to tribute. Upon condition of a similar tribute, immunity from war is usually granted to merchandise also.

¹ Appian, *Civil Wars*, II [II. xix. 140], says: 'Not even from conquered enemies did the ancient Romans take all their territory, but they divided it with them.' The historians inform us that the Vandals in Africa, and the Goths in Italy, did likewise.

Dig. XLI.
i. 16.
Dig. XLI.
i. 16;
Dig. VI.
i. 15. § 2;
Victoria,
*On the Law
of War*,
no. 40;
Sylvester,
word *bel-
lum*, pt. I,
§ x, ¶ 3.
[Livy, I.
xv. 5.]
Arrian,
[*Anabasis*,]
III [xvii].

CHAPTER XIV

MODERATION IN REGARD TO PRISONERS OF WAR

I.—*To what extent, in accordance with moral justice, it is permissible to take men captive*

1. IN those places where custom sanctions the captivity and slavery of men, this ought to be limited primarily, if we have regard to moral justice, in the same way as in the case of property; with the result that, in fact, such acquisition may be permitted so far as the amount of either an original or derivative debt allows, unless perhaps on the part of the men themselves there is some special crime which equity would suffer to be punished with loss of liberty. To this degree, then, and no further, he who wages a lawful war has a right over the captured subjects of the enemy, and this right he may legitimately transfer to others.

2. Furthermore in this case also it will be the task of equity and goodness to employ those [544] distinctions which were noted above, when we discussed the question of killing enemies. Demosthenes, in his letter *For the Children of Lycurgus*, praises Philip of Macedon for not having enslaved all who were among his enemies.¹ 'For', said Demosthenes, 'he did not consider the same punishment for all either fair or right, but, examining the case in the light of what each had deserved, he acted in such matters as a judge.'

II.—*What is permissible against a slave according to the moral power of justice*

1. Now in the first place it must here be noted that that right, which originates in a kind of surety on behalf of the state, can nowhere extend so widely as the right which arises from a crime against those who become slaves as a penalty. Hence a certain Spartan said that he was a prisoner, not a slave²; for, if we regard the question properly, this general right against prisoners captured in a lawful war is equiva-

¹ His son Alexander, after capturing Thebes, exempted from slavery both the priests and those who had not assented to the decrees published against him; so Plutarch records in his *Alexander* [xi = p. 670 E].

² Philo [*That Every Virtuous Man Is Free*, vi] says: 'For both fathers have often paid a ransom for their sons, and sons for their fathers, who had either been violently carried off by brigands or captured according to the custom of war, but whom the laws of nature, more valid than those which are made upon earth, declare free.' In fact, as Helen said in the play of Theodectes [in Aristotle, *Politics*, I. vi]:

Who would dare to call me slave,
Me, child of the gods by either line?

Victoria,
*On the Law
of War*,
no. 41;
Decio
[Lessius],
II. v, dub.
4; Covar-
ruvius, *On
Sext*, V.
ult. 4.
pt. II,
§ 11;
Molina,
disp. 120
and 121;
Valentia,
Disp., iii,
qu. xvi.

[*Letters*,
iii. 12.]

[Plutarch,
*Laconic
Apothegms*,
xl = p. 234
c.]

lent to that right which masters have over those who, under constraint of poverty, have sold themselves into slavery; only the misfortune is even more to be pitied of those who have met this fate not by their own particular act, but through fault of their rulers. 'To be captured by the law of war is a most bitter fate,' as Isocrates bore witness.

2. This servitude, then, is a perpetual obligation of services for maintenance that is likewise perpetual. The definition of Chrysippus well suits this class of slaves: 'A slave is a perpetual mercenary.' The Hebraic Law expressly compares to a mercenary the man who has sold himself under constraint of want (*Deuteronomy*, xv. 18, 40, 53), and in case of his redemption the law wishes his services to be credited to him just as crops gathered from land that has been sold would be credited to the former owner (*Deuteronomy*, xviii. 50).

3. Therefore that which may be done to a slave with impunity according to the law of nations differs widely from that which natural reason permits to be done. From Seneca we previously quoted this: 'Although against a slave all things are permissible, there are some things which the common law of living things forbids to be done against a human being.' This saying of Philemon is to the same effect:

He, Master, who is born a man, though he may serve
In slavery, still ceases not to be a human being.

Elsewhere Seneca says also: 'They are slaves, nay rather men; they are slaves, nay rather comrades; they are slaves, nay, humble friends; they are slaves, nay rather fellow slaves.' What you may read in Macrobius has clearly the same sense as the saying of the Apostle Paul: 'Masters, render unto your servants that which is just and equal, knowing that ye also have a Master in heaven.' In another place the apostle wishes masters not to deal threateningly with their slaves, for the reason which we have just stated, that they also have a Master in heaven, who pays no regard to such differences of status. In the *Constitutions*, which are usually ascribed to Clement of Rome, we read: 'Beware of commanding a slave or a handmaid in bitterness of heart.'¹

Clement of Alexandria wishes us to treat our slaves as second selves, since they are human beings no less than we are. He is following the saying of the wise Jew: 'If you have a slave, treat him as a brother, for he is such as you are.'

¹ So also we read in the *Epistle of Barnabas* [chap. xix]: [549] 'Command not harshly thy slave nor thy handmaid, who hope in Christ, lest thereby thou show that thou dost not fear the Lord who is common to thee and to them.'

*Plataic
Oration*
[xviii =
300 A].
Seneca,
On Benefits, III.
xxii.

On Clemency, I.
xviii.

[Stobaeus,
lxii. 28.]

Letters,
xlvii [1].

[*Saturnalia*, I. xi.]

Colossians,
iv. 1.

Epistles
[*Ephesians*],
vi. 9.

VII. xiv.

The Instructor,
end [III.
xii. 92].
[*Son of Sirach*,
xxxiii. 31.]

III.—*It is not permissible to kill an innocent prisoner*

Therefore the right, which is called the right of life and death over the slave, causes the master to have domestic jurisdiction, which, indeed, is to be exercised with the same conscientiousness as public jurisdiction. This is what Seneca meant when [545] he said: 'In the case of a slave you must consider, not how much he can suffer with impunity, but how much is permitted to you by the nature of justice and goodness, which bids you to spare even prisoners of war and those who have been bought for a price.'

Elsewhere Seneca says: 'What does it matter by what power any one is held, if he is held by a power that is absolute?' In this passage he compares a subject to a slave, and says that on different grounds it is permissible to treat them alike; a statement that is certainly most true in respect to the right of taking away their life, and whatever approximates this. 'Our ancestors', says the same Seneca,¹ 'considered our household to be a diminutive state'; and Pliny writes: 'For slaves the household is a sort of republic, and, as it were, a state.' Cato the Censor, in Plutarch's account, did not inflict punishment upon a slave, who appeared to have committed a capital crime, until after he had been condemned, and that by the judgement of his fellow slaves. With this should be compared the words in *Job*, xxxi. 13, and following.

On Clemency, I. xviii.

On Benefits, III. xviii.

Letters, xliii [xlvii. 14].
[*Letters*, VIII. xvi.]
[Plutarch, *Cato the Elder*, xxi=p. 349 A.]

IV.—*It is not permissible to punish with severity*

But in regard to minor punishments also, as the beating of slaves, we must apply fairness, and further, clemency. 'Thou shalt not oppress him, thou shalt not rule him harshly,'² says the divine law in regard to the Jewish slave—a rule which should now be extended to all slaves, through extension of the force of relationship (*Deuteronomy*, xv. 17, 45, 53). On this passage Philo³ comments thus:

Slaves in respect to fortune, indeed, are inferior, but by nature they are equal to

¹ Seneca, *Letters*, xlvii [xlvii. 14].

² See Moses de Kotzi, *Precepts Bidding*, 147, 175 and 178, and the *Collatio Legum Mosis et Romanorum*, tit. iii. Priscus, in the *Selections on Embassies* [*Fragmenta Historicorum Graecorum*, IV, p. 88], where he puts the Romans above the barbarians, says:

'The Romans treat their slaves in a much better fashion, and act toward them as fathers or teachers; for to turn them from the things which, according to their customs, are forbidden, they punish them when they do wrong, like their own sons. And they have not the right to kill them, as do the Scythians. Moreover there are very many kinds of liberty which the masters bestow upon them, not only when living, but also at the moment of their death; whatever disposition they make of their property when dying has the force of law.'

Add the *Law of the Visigoths*, VI. i. 12.

³ *On Special Laws*, II [III. xxxv].

Cyprian writes *To Demetrianus* [chap. viii]: 'Unless you are served according to your caprice, unless you are obeyed in compliance with your pleasure, imperiously, and with excessive demands for subservience, you scourge, you beat, you afflict with hunger, thirst, nakedness, frequently with fetters and imprisonment, and, wretch that you are, you do not recognize that God is your Lord, since you yourself so exercise your authority over man.'

their masters ; for in the divine law the rule of justice is not that which accords with fortune, but that which accords with nature. Hence masters ought not to use their power over slaves wantonly, nor in consequence of the possession of such power to indulge in pride, insolence, and savage wrath. For these are manifestations of a spirit that is not calm, but is ill-controlled and rages against those subject to it with a sort of tyrannical despotism.

[*On Clemency*, I. xvi. 4.]

[I. xvii. 1.]

Exodus, xxi. 26, 27.

‘Is it in fact right’, asks Seneca, ‘that orders should be given to a man with greater severity and harshness than to dumb animals? Now a groom who is a skilful tamer does not frighten a horse with repeated blows ; for the horse will become timid and balky unless you stroke him with a caressing touch.’ And soon after : ‘What is more foolish than to blush to vent one’s anger upon yoke-animals and dogs, while the worst condition is that of man?’

Whence it comes that by the Hebraic law liberty was owed to a male or female slave not only for the loss of an eye, but also for that of a tooth,¹ wrongfully injured, of course.

V.—*It is not permissible to impose upon slaves tasks that are excessively severe*

1. But services also are to be exacted with moderation² and the health of slaves is to receive humane consideration. Besides other things the Hebraic law aimed to accomplish this result through the institution of the Sabbath, presumably in order that slaves might have some time to rest from their labours. There is also a letter of Gaius Pliny to Paulinus, which begins thus : ‘I see how leniently you handle your slaves, therefore I will the more frankly admit to you with what indulgence I treat mine. I have always in mind that saying of Homer, “But the stepfather was as kind as a father,” and this is our term for the father of the household (*paterfamilias*).’

Exodus, xx. 10 ; xxiii. 12 ; *Deut.*, x. 14 [xvi. 14].

[*Letters*, V. xix.]

[*Odyssey*, II. 47 and 234.]

Letters, xvii [14].

[*Orations*, i=p. 5.]

2. In connexion with the same word Seneca also notices the humanity of the ancients : ‘Do you not even see this, how our ancestors protected masters from all ill-will, and slaves from all insolence? They called the master the father of the household (*paterfamilias*), the slaves members of the household (*familiares*).’³ In describing a most excellent king, Dio of Prusa says : ‘So far is he from usurping the title of master over free men, that he refrains from the use of it even in relation to slaves.’

¹ Philo, in the passage cited [*On Special Laws*, III. xxxv], says : ‘Thus he will pay a twofold penalty for his act, in losing both the services and the value of the slave ; in addition to these there is a third penalty, more severe than these two, that the master is forced to benefit in the highest degree one whom he hates, and whom he had hoped that he could always abuse. But the other will have a twofold solace for the wrong which he has suffered, not only in obtaining his freedom, but also in being freed from so fierce and savage a master.’

² See chap. xiv, in the letter of the bishops to King Louis, which is included in the *Capitulary* of Charles the Bald [*Mon. Germ. Hist., Leges*, II, vol. II, p. 437]. Seneca, *Letters*, xvii [xlvii. 5], says : ‘We abuse them, not as men, but as though they were oxen.’ However, with regard to the leniency of the Athenians towards slaves see [Pseudo-]Xenophon, *On the Constitution of Athens* [I. ix ff.].

³ Epicurus called them friends ; Seneca, *Letters*, cvii [cvii. 1].

In Homer Ulysses¹ says that the slaves whom he found faithful will have in his house the same place as if they were brothers of Telemachus, his own son. Tertullian declares: 'The name of piety is more gracious than that of power²; the heads of households [546] are called fathers rather than masters.' Jerome or Paulinus writes to Celantia: 'So rule and order your household that you may wish to appear the mother rather than the mistress of your slaves, and from these exact respect by kindness rather than by severity.'

Augustine says:

The peace of the household was in olden times so directed by just fathers that with regard to these temporal goods they distinguished the lot of sons from the status of slaves, but in the worship of God they consulted with equal care the interests of all members of their household. This is in accordance with the prescription of the order of nature, so that from this source the name 'father of the household' arose and became so widely current that even those who rule unjustly are glad to be called by this name. However, those who are true fathers of the household aid all in their household just as sons to worship and propitiate God.

3. In commenting on the verse of Virgil, 'Now, boys, close up the rivulets', Servius observed a similar instance of piety in the use of the word 'boys' (*pueri*), which men applied to slaves. In the same spirit the Heracléots called their Mariandynian slaves 'gift-bearers' (*δωροφόροι*),³ thus 'sparing the bitterness of the name', as the ancient interpreter Callistratus remarked in a note on Aristophanes. Tacitus praises the Germans, because their slaves were treated as tenant farmers. Theano says in a letter: 'This is the just way to use slaves; not to let them be worn out with toil, nor be too weak to endure labour because of poverty.'

VI.—*Under what circumstances the savings of a slave belong to the master, and under what circumstances to the slave*

1. As we have said, maintenance is due to the slave⁴ for his work. Cicero says: 'Those make wise suggestions who bid us use slaves just as men who serve for hire, declaring that work is to be

¹ Whose fatherly kindness toward himself Eumæus proclaims, *Odyssey*, XIV [XIV. 138 ff.].

² This is also observed by Cyprian, *Testimonies*, III [III. lxxii], *To Quirinus*: 'Masters should be more gentle to their slaves, when they have embraced the faith'; and he proves this by the words of the Apostle Paul to the Ephesians [vi. 9]. Lactantius, V. xv, writes: 'There is no reason why we mutually apply to one another the name of brothers other than this, that we believe that we are equals. For if we measure all human beings not according to the body, but according to the spirit, although their bodily condition may be different, yet [550] they are not slaves to us; but we both consider them, and call them brothers according to the spirit, fellow slaves in religion.'

Augustine, *On the Customs of the Catholic Church*, X. xxx [I. xxx. 63], says: 'You teach slaves to cleave to their masters, not so much from the necessity imposed by their condition, as from delight in their duty. You make masters easily appeased by their slaves, from regard to the supreme God, who is indeed their common master, and more prone to advise than to coerce.'

Add also Isidore of Pelusium, *Letters*, I. ccclxxi. Refer to what we have just quoted from Priscus [p. 763, n. 2].

³ Athenæus, VI. xviii [VI. lxxxiv].

⁴ *Son of Sirach* [*Ecclesiasticus*], xxxiii. 25, says: 'Bread, discipline and toil, are for the slave.'

Odyssey,
V [XXI.
215 ff.].
[*Apology*,
xxxiv.]

[Jerome,
Letters,
cxlviii.
25.]

*City of
God*, XIX.
xvi.

[*On
Eclogues*,
VI. 14.]

[Germany,
xxv.]

[*Letters*,
iii. pr.]

On Duties,
I [xiii. 41].

required of them, but that they are to be furnished with what they deserve.' Says Aristotle: 'The slave's pay is his maintenance.' And Cato: 'Let him see to it that his slaves fare well, that they are neither cold nor hungry.'

'There are some things', says Seneca,¹ 'which a master should furnish to his slave; as rations and clothing.' The rations included four bushels of grain monthly, which, according to Donatus, were supplied to slaves. Marcianus the jurist says that there are some things which it is necessary for the master to supply to a slave, as tunics and the like. The cruelty of the Sicilians,² who killed the Athenian prisoners by starvation, is condemned by historians.

2. Seneca, moreover, in the passage cited proves that in relation to certain matters the slave is free, and that he has also the means of conferring a benefit, if he does something which exceeds the measure of his duty as a slave, something which is tendered not at a command, but voluntarily, where there is a transition from the obligation of service to the affection of a friend; this Seneca explains at length. It is in harmony with these ideas that if a slave, as in Terence,³ in his leisure hours, has saved something by cheating his own soul, or by his industry, this is in some way his own.

Theophilus does not do badly to define the slave's savings (*peculium*) as 'a natural patrimony',⁴ as you might define 'the union of slaves (*contubernium*)' as 'a natural marriage'. Ulpian also calls the slave's savings a diminutive patrimony. It does not matter that the master can at his discretion take away or lessen the patrimony, for if he does this without cause he will not do what is just. By cause, however, I understand not only punishment, but also the master's necessity; for the advantage of the slave is subordinate to the advantage of his master, even more than the interests of citizens are subordinate to that of their state. On this point

¹ The same author, *On Tranquillity* [viii. 8], writes: 'The slaves ask for clothing and food.' In Procopius, *Gothic War*, III [III. xvii], the Romans say to Bessas: 'At least give us food, since we are your captives, I shall not say sufficient food, such as our need demands, but enough to ward off death.'

Chrysostom comments, *On Ephesians*, v. 21 [*Homily XIX*, v]: 'When he performs his bodily services, you indeed feed him, and see to it that, in addition to his food, he has clothing and shoes, and this, too, is a sort of servitude; for unless you also perform this service of yours, he will not render his, but will be free, and no law will compel him to render his services, if he is not nourished.'

² Also that of Isaac Angelus to the Sicilian prisoners, as is recorded by Nicetas, Book I [*Isaac Angelus*, I. iii], who quotes also the letter of the king of Sicily to the Greek emperor on this subject.

³ *Phormio*, I. i [I. i. 44].

⁴ Eumaeus in the *Odyssey*, XIV [XIV. 63 f.], says:

Such things as a generous master gives to a bondsman,
The ties of wedlock, land, and a habitation.

Ulysses himself, *Odyssey*, XXI [XXI. 214 f.], says to Eumaeus and Philaetius:

To each of you shall I give wives and possessions,
And houses near to my own.

Varro [*On Farming*, I. xvii. 7] says of slaves: 'They are rendered more zealous in their work by more generous treatment, by greater liberality in respect to food or clothing, or by the remission of a task, or by the permission to pasture on the estate some cattle of their own.'

Economics,
I. v.
[*On Farming*,
V. ii.]
On Benefits, III
[xxi. 2].
[*On Terence's*]
Phormio,
I. i [43].
Dig. XV.
i. 40.
Thucydides, VII
[lxxxvii];
Diodorus,
XIII [xix].
[*On Benefits*,
III. xix.]

Institutes,
IV. vii.
Dig. XV.
i. 5. § 1.

Seneca ¹ appositely remarks : ‘ It is not true that the slave has nothing merely because he will have nothing if his master is unwilling that he should have anything.’

On Benefits, VII. iv.

3. Hence it is that a master does not seek to recover anything which was owed to a slave during slavery, and which was paid to the slave after emancipation. The reason, as Tryphoninus says, is that the ground for indebtedness or non-indebtedness is seen naturally in the claim of restitution ; the master may naturally be indebted to his slave. And so we read that, just as clients [547] have made contributions for the use of patrons, and subjects for the use of kings, so slaves have made contributions for the use of their masters, as on the occasion of giving a dowry to a daughter, or ransoming a captive son, or some similar occurrence.

Dig. XII. vi. 64.

Dionysius, II [x].

Pliny, as he himself records in his letters, even allowed his slaves to make wills of a sort, that is to divide, donate, and leave their belongings within the household. We read that among some peoples slaves were allowed an even fuller right of acquiring property, just as we have elsewhere said that there are several degrees of slavery.

Letters, VIII. xvi.

II. iii [II. v. 27 ff.].

4. Among many peoples the laws have reduced even the external right of masters to this moral justice, which we are explaining. For among the Greeks slaves who had been too harshly treated were permitted ‘ to demand their sale ’, and at Rome to take refuge at statues, or to seek the aid of the magistrates against cruelty or starvation or intolerable wrong. Furthermore it will happen, not from a strict interpretation of law, but from humanity and kindness, that at times a slave will be given his freedom, which is due to him on the ground of long or very great services.

Institutes, I. viii. § 2.

5. After slavery was introduced by the law of nations, there followed the benefit of emancipation, says Ulpian. Let us take as an example the lines of Terence :

Dig. I. i. 4.

[*Andria*, I. i. 10 f.]

From a slave I made you my freedman,
Because like a free man you served.²

Salvianus says that it was a frequent custom for slaves to be given their liberty, even when their service had not been of the best, at any rate if it had not been wicked ; he adds, ‘ and they are not forbidden to take from their masters’ house those things which they have acquired when in a servile condition ’. Many instances of this sort of kindness appear in the martyrologies.

[*Against Avarice*, III [vii].

¹ In the same passage of the same author is this : ‘ Is there any doubt that the slave, along with his savings, belongs to his master ? But yet he can give a gift to his master.’

² Thus the manuscripts, correctly. Varro [Servius, *On the Aeneid*, VIII. 564] relates that in the grove of Feronia it was customary to say to slaves : ‘ Let the well-deserving slaves be seated. Let them arise free.’ In certain places it was the custom to set slaves free when they had acquired eight times their purchase price.

Deut., xv.
13.

[*Cato the Elder*, v
= p. 338 E.]

In this respect also we must praise the lenity of the Hebraic law, which ordained that the Jewish slave should be completely emancipated after the lapse of a fixed time, and not without gifts.¹ The prophets bitterly complain of the disregard of this law. Plutarch censures Cato the Elder for selling slaves who were worn out from old age, unmindful of that common nature in which all men share.

VII.—*Whether it is permissible for slaves to attempt to escape*

Sylvester,
word *servitus*, § 3 ;
Fortunius,
On Dig., l.
i. 4 ; Aegidius
Regius, *De Actibus
Supernaturalibus*,
disp. 31,
dub. 7,
no. 119.

The question here arises, whether it is right for a person who has been made a prisoner in a just war to attempt to escape ; we are not dealing with him who has deserved this penalty by his own crime, but with him who has come into such a condition by a public act. The sounder view is that it is not right, because, as we have said, by the common consent of nations such a captive owes his services on behalf of his state.

This view nevertheless is not to be understood as valid in a case where intolerable cruelty imposes the necessity of escape upon the captive. On this subject one may consult the response of Gregory of Neocaesarea, xvi.

VIII.—*Whether the children of slaves are bound to the master, and to what extent*

II. v [29].
Lessius,
II. v,
dub. 5.

1. In another connexion we raised the question, whether and to what extent the offspring of slaves are bound to the master by moral justice. This question should not be passed over here, because it particularly concerns prisoners of war. If the parents had merited death by their own crimes, then for the preservation of their lives the offspring which was expected of them could be bound to slavery, because otherwise these would not be born. As we have said elsewhere, parents may in fact sell their children into slavery if otherwise they would face starvation. Such is the right which God granted to the Jews over the descendants of the Canaanites.

Deut., xv.
13 [xx. 14].

2. However, children that were already born, no less than their parents, as part of the state could have been made liable for a debt of the state ; but with regard to those who have not yet been born this reason does not seem sufficient, and another appears to be required. Either the obligation in question may arise from the express consent of the parents, along with the necessity of supporting the children, and then it may exist without end ; or it may arise from the mere furnishing of sustenance, in which case it exists only up to the time [548] when their services shall have cancelled all that has been expended for them. If any further right over the children is given

¹ Custom interpreted this as requiring a gift of not less than thirty shekels ; see *Precepts Bidding*, 84.

to their master, apparently it arises from the civil law, which to masters is more generous than just.

[Reading *largiente* for *largientibus*.]

IX.—*What is to be done in countries where the enslavement of prisoners of war is not customary*

1. Among those peoples who do not avail themselves of the right of slavery which arises from war, the best course will be to exchange prisoners; the next best, to release them at a price that is not unfair. What that price is cannot be set forth in exact terms; but humanity teaches that it should not be raised to the point where its payment would place the prisoner in want of the necessities of life. Such indulgence is in fact granted by the laws of certain countries to many who have fallen into debt by their own acts.

In some places the price put upon captives is fixed by agreements or by custom; as the sum of a mina among the Greeks of antiquity,¹ and at present among soldiers at a month's pay. Plutarch relates that formerly wars between the Corinthians and Megarians were waged 'humanely and as became peoples of the same race'. If any one were taken prisoner, he was treated by his captor as a guest and, upon his promise to pay his ransom, dismissed to his home; and from this arose the name 'war-guests (*δορύξενοι*)'.

Greek Questions [xvii = p. 295 B].

2. The saying of Pyrrhus, which is praised by Cicero, reveals a nobler spirit:

[*On Duties*, I. xii. 38.]

I ask for myself not gold,² nor shall you pay me a ransom; [. . .]
 With steel, not with gold, on each side fight we for life. [. . .]
 To them whose valour the fortune of war has spared,
 Their liberty I am resolved to grant.

There is no doubt that Pyrrhus believed that he was waging a just war; yet he thought that he ought to spare the liberty of those whom worthy reasons had led into war.

Xenophon lauds a similar act of Cyrus; Polybius, the course taken by Philip of Macedon after his victory at Chaeronea; Curtius, the conduct of Alexander in relation to the Scythians; Plutarch, that of King Ptolemy and Demetrius, who rivalled each other fully as much in their kindness toward prisoners as in military operations. Dromichaetes, king of the Getae,³ made Lysimachus, who had been taken prisoner, his guest, and by causing him to witness at the same time both the poverty and the civility of the Getae he induced Lysimachus to prefer to have the friendship of such people rather than their enmity.

Training of Cyrus, II [III. i. 28 ff.].
 [Polybius, V. x.]
 [Curtius, VII. ix. 18.]
 [Plutarch,] *Demetrius* [v = p. 891 A].
 Strabo, VII [iii. 8].

¹ [551] In the war between the French and Spaniards in Italy, a cavalryman was ransomed for a quarter of a year's pay. But this did not include leaders of detachments or higher officers, nor those who fell into the enemy's power in a pitched battle or in the storming of a city; Mariana, XXVII. xviii.

² Menander Protector [frag. 60, p. 115, edit. Dindorf] praises the like generosity of the Christian Emperor Tiberius toward the Persians; Mariana, that of Sisebut [VI. iii], and also of Sancho, king of Castile, Book XI [XI. v].

³ This is also recorded by Diodorus Siculus, in the *Excerpta Peiresciana* [pp. 257 and 258].

CHAPTER XV

NODERATION IN THE ACQUISITION OF SOVEREIGNTY

I.—*To what extent moral justice permits sovereignty to be acquired*

THE equity which is required, or the humanity which is praised, in respect to individuals, is so much more required and praised in respect to peoples or parts of peoples in the degree that wrong or kindness toward a large number of persons becomes more notable. As other things may be acquired in a lawful war, so there may be acquired both the right of him who rules over a people and the right which the people itself has in the sovereign power; only in so far, however, as is permitted by the measure of the penalty which arises from a crime, or of some other form of debt.

To these reasons should be added the avoidance of extreme danger. But this reason is very often confused with the others, although both in establishing peace and in making use of victory it deserves particular attention for its own sake. It is possible to forgo other things from compassion; but, in case of public danger, a sense of security which exceeds the proper limit is the reverse of compassion. Isocrates wrote to Philip: 'The barbarians must be subjugated to a point which will enable you to make your country perfectly secure.'

II.—*It is praiseworthy to abstain from the exercise of the right to acquire sovereignty over the vanquished*

1. Sallust says of the ancient Romans: 'Our ancestors, being most scrupulous persons, used to deprive the vanquished of nothing save the power to do harm.' This is a view which could worthily have been uttered by a Christian; and with it accords another sentence of the same writer: 'Wise men wage war to secure peace, and endure toil in the hope of ease.' More than once Aristotle said: 'War was originated for the sake of peace, and business for the sake of leisure.' Cicero supports the same idea, and his is this exalted maxim: 'Let war be so undertaken that nothing else than peace may seem to be sought after.' From the same author comes this similar saying: 'So wars are to be undertaken for this reason, that men may live in peace without being wronged.'

2. These views differ in no respect from those which theologians of the true faith set forth to the effect that the end of war is the removal of the things which disturb peace. Before the time of Ninus, as we began to say elsewhere, following Trognus, it was the custom

Victoria,
*On the Law
of War*,
nos. 38
and 59.

[*Letters*,
II. iv =
p. 409.]

*Jugurthine
War* [*Con-
spiracy of
Catiline*,
xii. 4].
[*On Pub.
Ad.*, I. vi. 2.]
Republic
[*Politics*],
VII. xiv
and xv;
Nic. Eth.,
X. vii.
On Duties,
I [xxiii. 80].
[I. xi. 35.]
Thomas,
II. i, qu. 40,
art. 1, ad 3;
Wilhelmus
Matthaei,
De Bello,
§ *requis.*,
qu. 7.
[Justin,
I. i. 3.]

to protect rather than to advance¹ the frontiers of one's empire; each one's realm was limited to his own country; kings sought not empire for themselves but [552] glory for their peoples, and, being content with victory, they abstained from acquiring dominion.

So far as he can, Augustine recalls us to this condition: 'Let them see to it, nevertheless, that it may not concern good men to delight in the extent of their dominion.'² He adds also this: 'It is a greater good fortune to live in harmony with a good neighbour than to subdue a bad neighbour who wages war on us.' Furthermore, the prophet Amos severely reproves in the Ammonites this zeal for extending their borders by armed force.

City of God, IV. xv.

Amos, 1. 13.

III.—*Either by mingling them with the conquerors—*

To this ideal of old-time innocence the closest approach is in the wise moderation of the ancient Romans. 'What would our empire be to-day', says Seneca, 'had not salutary foresight mingled the vanquished with the conquerors?' 'Our founder Romulus', says Claudius in Tacitus, 'displayed so much wisdom that on the same day he had many peoples as enemies, and then as citizens'. He adds that the cause of the downfall of the Lacedaemonians and Athenians was nothing else than the exclusion, as foreigners, of those whom they had conquered. Livy says that the Roman power grew through the admission of enemies into the state. Examples are to be found in the history of the Sabines, Albans, Latins, and other Italian peoples; until, at last,

On Anger, II. xxxiv [4].
Annals, V [XI. xxiv].

I [VIII. xiii. 16].

[Suetonius, *Caesar*, lxxx.]

[*Histories*, IV. lxxiv.]

Caesar in his triumph led the Gauls, and into the Senate, too.

Cerialis, in his speech to the Gauls, which is found in Tacitus, declares: 'You yourselves often command our legions; you yourselves govern these and other provinces; there is nothing shut off from you or closed to you.' And shortly after: 'Then love, then cherish, the peace and life which we, conquerors and conquered, enjoy by the same right.' At length came that most admirable step; in accordance with a constitution of the Emperor Antoninus [Caracalla] all those within the Roman world were made citizens of Rome, as Ulpian says. In consequence, as Modestinus declares, Rome became the common fatherland. And of Rome Claudian wrote:

Dig. I. v. 17.
Dig. L. i. 33.

[*On the Consulship of Stilicho*, III. 154, 159.]

To the peace-promoting customs of this city, . . .
Due it is that we are all one people.

¹ The Emperor Alexander said to Artaxerxes the Persian: 'Each one should remain within his own borders, causing no disturbance, and no one, elated by an uncertain hope, should undertake wars, but each should rest content with his own possessions' [Herodian, VI. ii. 4].

² See Cyril, *Against Julian*, Book V, where he praises the Jewish kings for the reason that they were content with their own frontiers.

IV.—Or by leaving the sovereign power to those who had held it—

I. Another form of moderation in victory is to leave to conquered kings or peoples the sovereign power which they had held. So Hercules with Priam :

Seneca,
Trojan Women
[725 ff.].

Vanquished by his young foe's tears,
'Take up', he said, 'the ruler's reins ;
Sit elevated on your father's throne,
But with better faith the sceptre wield.'

Hercules, also, after conquering Neleus, committed the kingdom to Neleus's son, Nestor. Similarly the Persian kings used to leave the royal authority to conquered kings ; thus Cyrus to the Armenian king. Thus Alexander left royal power to Porus.¹ Seneca² praises this practice of 'taking nothing but glory from a vanquished king'. Polybius celebrates the goodness of Antigonus, who, although he had Sparta in his power, left the Spartans 'their ancestral constitution and their freedom' ; and by this act, it is narrated in the same passage, Antigonus obtained the highest praises throughout Greece.

Aelian,
[*Various History*],
IV. v.
Herodotus, VII
[III. xv].
[Xenophon,
Training of Cyrus,
III. i.
33 ff.]
[Seneca.]
On Clemency, I.
xxi [3].
[Polybius,
V. ix.]

Livy,
XXXII
[XXXVII.
liv. 26].
Mithridatic Wars
[xvii. 114].

[Livy,
XXXIII.
xii. 9.]
Annals,
XII [xix].

2. In the same way the Romans allowed the Cappadocians to use whatever form of constitution they wished, and to many peoples their freedom was left after a war. 'Carthage is free and has its own laws,' say the Rhodians to the Romans after the second Punic War. Pompey, says Appian, 'left some of the conquered peoples free'.³ When the Aetolians declared that there could be no sure peace unless Philip of Macedon were driven from his kingdom, Quintius said that they had stated their opinion without thinking of the Roman custom of sparing the vanquished. [553] He added : 'Whoever is mildest to the conquered has the loftiest mind.' In Tacitus we read : 'From the vanquished Zorsines nothing was taken away.'

V.—Sometimes by the imposition of garrisons—

Sometimes, with the concession of sovereign power, provision is made for the security of the victors. Thus Quintius ordered⁴ that Corinth should be restored to the Achaeans, yet upon the condition that there should be a garrison in Acrocorinthus ; also

¹ And so Pepin to Aistolf the Lombard.

² The whole passage deserves examination. It contains also this notable saying : 'This is to triumph even in accordance with one's victory, and to bear witness that one has found nothing among the vanquished which was worthy of the victor.' Pompey left to Tigranes a part of his realm ; Eutropius, VI [VI. xiii].

³ For a knowledge of their condition see Polybius, *Selections on Embassies*, vi [xix] ; Suetonius, in his life of Caesar, where he discusses Gaul [*Divus Julius*, xxv]. Guilleman has also something worth reading in his history of Switzerland [I. viii].

⁴ Nevertheless this was afterwards remitted ; Polybius, *Selections on Embassies*, xi ; Plutarch, *Flaminius* [*Flaminius*, x = p. 374 C].

that Chalcis and Demetrias should be retained, until the anxiety with regard to Antiochus should be over.

VI.—*Or even by tributes and similar burdens*

Often the levying of tributes also has for an object not so much the restitution of the expenses that have been incurred as the security, in the future, of both victor and vanquished. Cicero says of the Greeks: 'At the same time let Asia reflect on this, that if it were not held by this Empire there is no disaster of foreign war or domestic strife that would fail to assail it; and since, moreover, this Empire can in no way be maintained without taxes, let Asia with a part of its produce contentedly purchase for itself eternal peace and rest.'

Letters to his Brother Quintus, I. i [I. § 34].

In Tacitus Petilius Cerealis speaks to the Lingones and other Gauls on behalf of the Romans in the following words: 'Although we have been so often provoked, this is the only burden we have laid upon you by right of victory, wherewith we might keep the peace; for there is no quiet for the nations without armed forces, and armed forces cannot be had without pay, and pay cannot be had without tribute.'

Histories, IV [lxxiv].

To this same problem apply also the other conditions which we mentioned when discussing unequal treaties—the surrender of arms, of a fleet,¹ of elephants, not to maintain an army ready for battle nor an armed force.

II. xv. 7.

VII.—*The advantage derived from such moderation is pointed out*

I. Moreover to leave to the vanquished their sovereign powers is not only an act of humanity, but often an act of prudence also. Among the institutions of Numa there is praised that which aimed to exclude any shedding of blood from the rites of Terminus, indicating that nothing is more useful in securing quiet and a sure peace than to remain within one's own frontier. Florus well remarks: 'It is more difficult to keep provinces than to win them; they are won by force, they are retained by justice.'

Plutarch, *Roman Questions*, xv [= p. 267 c]. [IV. xii.]

Not unlike this is the comment in Livy: 'It is easier to gain things one by one than to hold all together'; also, the remark of Augustus in Plutarch: 'A greater task . . . than winning a great empire is the governing of an empire already in existence.' The ambassadors of King Darius said to Alexander: 'A foreign empire is a dangerous thing; it is difficult to hold what you may not be able to take. Some things it is easier to conquer than to defend; by Hercules, how much more readily do our hands receive than retain!'

XXXVII [xxxv. 6].

[*Apotheoms*, p. 207 D.] [Curtius, IV. xi. 8.]

¹ Regarding the Persians, see Agathias, Book IV [IV. ix].

[Aristides,
In Praise
of Rome,
p. 353 f.]

Livy,
XXVIII
[XXXVI,
xxxii. 6].

[III. x =
690 E.]

[Preface,
vii.]

Valerius
Maximus,
IV. i [10].

2. This difficulty of holding an empire together is what Calanus of India¹ and, before him, Oebares the friend of Cyrus explained by the comparison of a dried hide, which rises up in one spot as soon as you press another spot with your foot; and Titus Quintius in Livy by comparison with a tortoise,² which is immune to blows when gathered into its shell, but exposed and weak as soon as it has thrust out a part of its body. Plato, *On Laws*, Book III, applies to this situation the saying of Hesiod: 'The half is better than the whole.'

Appian observes that not a few peoples who wished to come under the rule of the Romans were rejected by them; while for other peoples kings were appointed. In the judgement of Scipio Africanus, in his time Rome already possessed so much that it would be greedy to seek for more; and she would be richly fortunate if she lost nothing of what she held. The formula for making the lustral sacrifices, in which the gods were entreated to make the resources of Rome better and greater, he altered in such a way that he prayed that they might preserve Rome's resources in safety forever.³

VIII.—*Examples; with a discussion of a change in the form of government among the vanquished*

Thucy-
dides, I
[xix]; Iso-
crates, *Pan-
athenaic
Oration*
[p. 243].

Demos-
thenes,
*On the
Cherso-
nesus*;
Diodorus,
XIII and
XV.

[Stobaeus,
xliii. 27.]

The Lacedaemonians, and, at first, the Athenians, claimed for themselves no sovereignty over the cities they had captured. They wished merely that these should use a form of government modelled on their own; the Lacedaemonians, in fact, a government under the influence of the aristocrats, the Athenians one subject to the will of the people, as we learn from Thucydides, Isocrates, Demosthenes, and even from Aristotle himself in the fourth book of his *Politics*, [554] chapter xi, and the fifth book, chapter vii. This very thing is indicated in a comedy by Heniochus, a writer of those days, in the following manner:

Then drew near to them two women,
Who turned all things to dire confusion;
The one called Aristocracy, Democracy the other,
Through whose solicitation the cities were driven to madness.

Annals,
VI [xlii].

A similar course is that which, according to Tacitus, was pursued by Artabanus at Seleucia: 'He placed the commons under the aristocracy', he says, 'in accordance with his own interest: for the

¹ Plutarch has this in his *Alexander* [lxv = p. 701 E].

² Plutarch [*Flaminius*, xvii = p. 378 D] relates it thus: 'When he wished to dissuade the Achaeans who were seeking the island of Zacynthus, he said that they would run into danger if, like a tortoise, they extended their heads beyond the Peloponnese.'

³ [556]. The consul Claudianus Julianus makes use of this story in his letter to Pupienus and Balbinus [*Capitolinus, Life of Maximus and Balbinus*, xvii]. It was imitated by Augustus, who, as Dio [LIV. ix] says, 'was praised because he wished to acquire no new territory, but thought that that, which was already held, was enough.'

rule of the people is close to liberty, but the despotism of the few is nearer to the licence of a king.' But the question whether changes of this sort make for the safety of the conqueror does not belong to our investigation.

IX.—*If sovereignty is to be assumed, it is right to leave a part of it to the conquered*

If it is not safe to refrain from assuming any dominion over the conquered, the action may still be limited in such a way that a portion of the sovereign power may be left to them or to their kings. Tacitus calls it the practice of the Roman people 'to have kings also as instruments of subjection'. To the same author it seemed that 'Antiochus was the richest of the subject kings'. 'Kings subject to the Romans' is the phrase in the *Commentaries* of Musonius; also in Strabo, near the end of Book VI. Lucan writes:

And all the royal purple which serves the Latin sword.¹

Thus among the Jews the sceptre remained in the Sanhedrin, even after the confiscation of Archelaus. Evagoras, king of Cyprus, as we read in Diodorus, said that he was willing to be subject to the Persian king, but as one king to another. Alexander at different times offered to the conquered Darius this condition, that Darius should rule over others, but should obey Alexander.²

We have elsewhere spoken of the ways of dividing the sovereign power. To some peoples a part of their governmental power has been left, as to former possessors a part of their lands.

X.—*Or, certainly, some degree of liberty should be left to the conquered*

But when all sovereignty is taken away from the conquered with respect to their private affairs and minor public matters it is still possible to leave to them their own laws,³ customs, and officials. Thus in the pro-consular province of Bithynia the city of Apamea had the privilege of governing itself as it pleased;⁴ we are so in-

¹ See the *Panegyric* addressed to Maximian [Eumenius, chap. x].

² Such were also in Italy, in former times, the kings under the authority of other kings; Servius, *On the Aeneid*, X [X. 655]. So in the *Persians* [24] of Aeschylus there are mentioned:

Kings, subjects of the great king.

So also among the Turks, on the authority of Leunclavius, Book XVIII.

³ Philo, in the *Embassy to Gaius* [xxiii], says: 'Augustus gave no less attention to preserving the laws peculiar to each people than to those of the Romans.'

⁴ See Pliny, *Letters*, xciii, and the following letter of Trajan in Book X [X. xcii and xciii]. Under the Persians Sinope had a democratic form of government; Appian, *Mithridatic Wars* [xii. 83, but referring to Amisus, not Sinope]. Such was the shadow of liberty among the Greeks under Roman rule. See Cicero, *Letters to Atticus*, VI. i; Pliny, *Letters*, VIII. xxiv. The Cypriots could not be summoned out of their island; Cicero, *Letters to Atticus*, V. xxi [V. xxi. 6].

[*Agricola*,
xiv.]

[*Histories*,
II [lxxxii].

[*Stobaeus*,
xlviii. 67.]

[VI. iv. 2.]

[*Pharsalia*,
VII. 228.]

XV [ix].

[*Diodorus*,]
XVII [liv].

I. iii. 17;
III. viii. 3.

Letters, X.
lvi, lxxxiv,
cxi and
cxiii [X.
xlvi, lxxix,
cxii and
cxiv].
Ibid.,
xciii [X.
xcii].

formed by the letters of Pliny, who says also that the Bithynians have their own officials and their own senate. And so in Pontus the state of the Amiseni [Amisus] enjoyed its own laws through the kindness of Lucullus. The Goths left the Roman law to the conquered Romans.

XI.—*Some degree of liberty should be left to the conquered, especially in the matter of religion*

1. A part of this indulgence is not to deprive the conquered of the exercise of their inherited religion,¹ except by persuasion. This Agrippa, in his speech to Gaius, which Philo quotes in his report of his embassy, proves to be as devoid of harm to the victor as it is gratifying to the vanquished. In Josephus, both Josephus himself and the Emperor Titus reproach the rebels of Jerusalem with the fact that, through the generosity of the Romans, the rights they enjoyed in the exercise of their worship were so complete that they could exclude foreigners from the Temple, even upon pain of death.

[*Embassy to Gaius*, xxxvi.]

[*Jewish War*, V. ix. 4; VI. ii. 1.]

2. If, however, a false religion is practised by the vanquished, the victor will do right in taking steps to prevent the oppression of the true faith, as Constantine did, when he crushed the faction of Licinius, and, after him, the Frankish and other kings.

XII.—*At any rate the conquered should be treated with clemency; and why*

1. Last of all is this word of caution. Even under the fullest and, as it were, despotic sovereignty, the conquered should be treated with clemency, and in such a way that their advantage should be combined with that of the conquerors. Cyrus bade the conquered Assyrians be of good cheer, saying that their lot would be the same as it would have been if they had only changed [555] their king; that they would retain their houses, their lands, their rights over their wives and children, which they had had up to that time; indeed, if any one should wrong them, he and his men would be their avengers.

Xenophon,
Training of Cyrus, IV [iv. 10].

In Sallust we read: 'The Roman people thought it better to gain friends than slaves; and held it safer to rule over willing than over compulsory subjects.'² The Britons, in the time of Tacitus,

[*Jugurthine War*, cii. 6.]
Agricola [xiii].

¹ 'It is better that some God should be worshipped there than none,' as we have just said [III. xii. 6. 1, note] in the words of Severus. So the Goths, in Procopius, *Gothic War*, II [II. vi], say that they have constrained no one to join their faith.

² In Thucydides, V [IV. xix], the Lacedaemonians say: 'And so we think that great enmities may thus be transformed into lasting concord, not if any one, in avenging himself and making use of a more favourable situation, imposes upon others the necessity of swearing to unequal terms, but if, when he could do this, he handles the matter as temperately as possible, displaying not less justice than courage in conquering.'

would patiently have endured the levy and tribute and the additional burdens of the Roman domination if they had not been subjected to wrongs; these they bore impatiently, for they were subdued to the point of obedience, but not yet to that of slavery.

2. The ambassador from Privernum, when asked in the Roman senate what sort of a peace the Romans were to expect from his people, said: 'If you should have given to them a good peace, then you may expect it to be reliable and perpetual; if a bad one, brief.' As the reason, there was added: 'Do not believe that any people, or any man, will remain longer than is necessary in a condition with which he is dissatisfied.'

Similarly, Camillus said that that authority was the most secure with which those who obeyed were pleased. The Scythians said to Alexander: 'There is no friendship between master and slave; even in time of peace the rights of war are maintained.' Hermocrates, in Diodorus, declares: 'It is not so glorious to conquer as to make a mild use of victory.' Tacitus has a wholesome opinion regarding the use of victory: 'Wars have noble endings, whenever they are terminated by pardoning.' In a letter of the dictator Caesar are the words: 'Let this be a new method of conquering, to fortify ourselves with mercy and generosity.'

Livy,
VIII
[xxi. 4].

Livy,
VIII [xiii.
16].
Curtius,
VII [viii.
28].
XIII [xix].

[*Annals*,
XII. xix.]

[Cicero,
*Letters to
Atticus*,
IX. vii c.]

CHAPTER XVI

MODERATION IN REGARD TO THOSE THINGS WHICH BY THE LAW OF NATIONS HAVE NOT THE RIGHT OF POSTLIMINY

I.—*Moral justice requires that the things which our enemy has taken from another in an unlawful war shall be restored*

I. WE have explained above to what extent things become the property of the captors by a lawful war. From such things we must deduct those which are recovered by right of postliminy; [557] for these are regarded as not having been captured.

But we said that that which was taken in an unlawful war must be restored, not only by those who took it, but also by others to whom the thing has come in any manner whatsoever. For no one, the authorities of the Roman law declare, can transfer to another more right than he himself has. This Seneca briefly explains thus: 'No man can give what he does not have.' The person who first took the thing did not have moral ownership (*dominium internum*), therefore the person who obtains his right from him will not have it; hence the second or third possessor takes an ownership which, for the sake of explanation, we call legal (*externum*), that is, an ownership which has the advantage of being everywhere protected by the authority and power of the courts. Nevertheless, if the possessor uses this advantage against him from whom the thing was taken by an act of injustice, he will not act rightly.

2. We may here cite as pertinent the opinion which the worthy jurists gave with regard to a slave who had been captured by robbers and had afterward reached the enemy; it was true that he had been stolen, and neither the fact that he had been in the power of the enemy nor that he had returned by postliminy nullified the right of the original owner. On the basis of the law of nature a similar opinion must also be rendered with regard to him who was captured in an unlawful war, and afterward, through an unlawful war, or from other causes, came into the power of another; for in moral justice there is no distinction between an unlawful war and brigandage. Gregory of Neocaesarea¹ gave answer in conformity with this opinion when he was consulted regarding the fact that certain men of Pontus had acquired goods of their fellow citizens which had been captured by barbarians.

¹ [559] He is followed by Petrus, *De Potestate Principis*, chapter iii, qu. 4, and Bruningius, *De Homagiis*, concl. 241.

Dig. IX.
iv. 27, § 1.
Dig. XLI.
i. 20.
On Benefits, V. xii.

Digest,
XLIX. xv.
27.

Aegidius
Regius, *De*
Actibus
Superna-
turalibus,
disp. 31,
dub. 7,
no. 122.
[*Epistola*]
Canonica,
X.

II.—*Examples*

1. Such things, then, must be restored to those from whom they were taken; and we often see that this has been done. Livy, after relating that the Volscians and Aequians were defeated by Lucius Lucretius Tricipitinus, says that the spoil was exposed in the Campus Martius, in order that each might take home what belonged to him within three days. The same author, having told of the rout of the Volscians by the dictator Posthumius, adds: 'Part of the booty was given back to the Latins and Hernicans upon their recognizing what was theirs; part the dictator sold at auction.' Elsewhere he has: 'Two days were allowed to the owners for identifying their property.' Livy, again, after describing the victory of the Samnites over the Campanians, writes: 'What most delighted the victors was the recovery of seven thousand four hundred prisoners of war, and a huge booty belonging to their allies; and the owners were summoned by proclamation to identify and recover their belongings on an appointed day.' Afterward he recounts a similar act on the part of the Romans:

III [x. 1].

[IV. xxix. 4.]

[V. xvi. 7.]

X [xx. 15].

[X. xxxvi. 16 ff.]

The Samnites attempted to seize the Roman colony of Interamna, but did not take the city. After pillaging the fields, they were thence driving off another booty composed of both men and cattle and also the captured colonists, when they fell in with the consul returning from Luceria, and not only lost their spoil, but, owing to being in disorder in a long and encumbered column, they were themselves cut to pieces. The consul by proclamation called together the owners of Interamna to identify and recover their property, and leaving his army there, he set out for Rome because of the meeting of the assembly.

In another passage, dealing with the spoil which Cornelius Scipio had taken at Ilipa, a city in Lusitania, the same writer speaks thus: 'This was all set out outside the town, and owners were given the right to identify what was theirs. The rest was turned over to the quaestor to be sold; what was realized therefrom was divided among the soldiers.' After the battle fought by Tiberius Gracchus near Beneventum, we further read in Livy: 'All the booty, except the prisoners, was given to the soldiery; there were also excepted such cattle as their owners should identify within thirty days.'

[XXXV. i. 12.]

XXIV [xvi. 5].

2. Of Licius Aemilius, who conquered the Gauls, Polybius writes: 'He restored the booty to those from whom it had been seized.' Plutarch and Appian relate that Scipio did likewise,¹ when upon capturing Carthage he found there many temple offerings

Histories, II [xxxii].Plutarch, *Apothegms* [=p. 200 B]. Appian, *Punic Wars* [xx. 133].

¹ Also Diodorus Siculus, in the *Excerpta Peiresciana* [p. 345].

Valerius Maximus, I. i. 6 [V. i. 6]: 'The humanity of the later Africanus also was notably and widely in evidence. For when he had taken Carthage he sent letters around to the cities of Sicily, that they might send representatives to recover the ornaments of their temples which had been carried off by the Carthaginians, and to see that these should be restored to their former places.'

which the Carthaginians had carried thither from the cities of Sicily and other places.

[II. xxxv.
86.]

Cicero in his oration *Against Verres*, dealing with the administration of justice in Sicily, says: 'The Carthaginians had at one time taken the town of Himera, which was a particularly famous and rich city of Sicily. [558] When the war was ended, Scipio, who thought it worthy of the Roman people that our allies, in consequence of our victory, should recover what was theirs, took pains that, so far as possible, what had been taken by Carthage should be restored to all the Sicilians.' The same writer gives a sufficiently lengthy discussion of this act of Scipio when treating of the statues in his oration *Against Verres*.

[IV.
xxxiii. 73.]

Livy,
XXXI
[xv. 5].

The Rhodians restored to the Athenians four of their ships which had been taken by the Macedonians and recaptured. So Phaneas the Aetolian thought it right that what the Aetolians had had before the war should be returned to them; Titus Quintius did not deny that this would be just, if it were a question of cities taken in war,¹ and if the Aetolians had not broken the terms of the alliance. The Romans even restored to their ancient condition the treasures once dedicated at Ephesus, which kings had made their own.

Livy,
XXXIII
[xiii. 11 f.].

Strabo,
XIII
[XIV. i.
26].

III.—*Whether anything may be deducted from that which is restored*

1. If a thing of the sort under consideration has come into any one's hands by way of trade, will he be able to charge the person from whom it was originally taken the price which he has paid?

II. x. 9.

It is consistent with what we have said elsewhere that the possessor may charge as much as the recovery of the thing despaired of would have been worth to him who had lost it. But if such an outlay may be recovered, why not also an evaluation of the labour and danger, just as if by diving some one had recovered another's property which was lost in the sea? Pertinent to this question, it seems to me, is the story of Abraham, when he returned to Sodom as victor over the five kings. 'He brought back all the goods', says Moses; that is, the goods which, as he had previously related, had been captured by the kings.

Genesis,
xiv. 16.

2. Again we are not to attribute to any other cause the arrangement which the king of Sodom proposed to Abraham, that he should restore the prisoners, but keep the other things for himself in return

¹ Pompey restored Paphlagonia to Attalus and Pylaemenes; Eutropius, VI [VI. xi].

In the alliance of the Pope, the Emperor Charles V, and the Venetians against Soliman, it was agreed that each party should recover what had been his; Paruta, VIII [IX=p. 650, ed. 1605]. In consequence, when the Spaniards had taken Cephallenia, they restored it to the Venetians.

Pertinent to this question is also a passage in Anna Comnena [XI. vi], dealing with Godfrey.

for his toil and danger. Abraham, however, being a man not only of a pious but also of a lofty mind,¹ wished to take nothing at all for himself; but from the things that were recovered (for this narrative, as we have said, relates to them) as though by his own right he gave a tenth to God, deducted the necessary expenses, and desired that a share be assigned to his allies.

Verses 20-4
4 [Genesis, xiv. 20-4].

IV.—*Even subject peoples or divisions of peoples are to be restored to those to whom they belonged, if they have been unjustly taken over by the enemy*

Furthermore, just as goods are to be restored to their owner, so peoples also,² and divisions of peoples, are to be restored to those who had the right of dominion over them, or even to themselves, if they had been independent prior to suffering the unjust violence. Thus we learn from Livy that, in the time of Camillus, Sutrium was recovered and restored to the allies of the Romans. The Lacedaemonians restored the Aeginetans and the Melians to their cities. The Greek states, which had been invaded by the Macedonians, were restored to freedom by Flaminius.

Livy,
VI [iii. 10].
Livy,
XXXIII [xxxii].
Xenophon,
Affairs of Greece, III [II. ii. 9].

Flaminius also, in a conference with the ambassadors of Antiochus, declared it was right to set free the cities of Asia, which bore Greek names and which had been captured in war by Seleucus the great-grandfather of Antiochus, which had been lost and recovered by the same Antiochus; 'for', he said, 'the colonies were not sent to Aeolia and Ionia to be subject to a king, but to increase the race, and to spread a very ancient people throughout the world.'

XXXIV [lviii. 13].

V.—*At what time the obligation to make restoration ceases*

Usually the question is raised also regarding the period of time in which the moral obligation to restore a thing may cease. But in

¹ This observation is well made by Iacchiades, *On Daniel*, v. 17. Sulpicius [Sulpicius Severus, *Sacred History*, I. v] says of Abraham: 'He restored the rest to those from whom it had been seized.' Ambrose, on the Patriarchs, I [On Abraham, I. iii], writes: 'And so, since he sought not for himself a reward from men, he received it from God.'

Very similar to this was the conduct of Pittacus and Timoleon. 'Pittacus of Mitylene, when with the consent of all he was offered the half of the territory recovered, turned his mind away from the gift, because he deemed it unworthy to dim the glory of his valour by the greatness of the spoil'; Valerius Maximus, VI. v. i. Of Timoleon Plutarch [*Comparison of Timoleon and Aemilius Paulus*, ii = p. 277 B] says: 'Under such circumstances it is not base to receive, but it is better not to receive; such self-restraint implies a certain superabundance of virtue, which shows that it can do without those things which are permitted.'

Cf. what was previously said, in II. xiv. 6 and III. iv. 1.

² The exiles from Saguntum after six years were restored by the Romans. Antony ordered that all those who had been made slaves in the war with Cassius should be liberated, and that property should be restored to its owners. Likewise Calatrava was restored by the king of Castile and others to the soldiers from whom it had been taken by the Moors; Mariana, XI [XI. xxv]. Cf. what is above in III. x. 6.

II. iv.

the case of citizens under the same government the question is answered according to their laws, provided that these admit a moral right and do not consist in a legal right only; this may be gathered from the language and scope of the laws by a careful examination. In the case of those, however, which are foreign in relation to one another, the question is to be answered in accordance with conjecture as to abandonment, which we have discussed elsewhere, so far as our purpose requires.

VI.—*What is to be done in a doubtful case*

Cicero, *On
Duties*, II
[xxiii. 82].

If, however, the lawfulness of the war is seriously open to question, the best course will be to follow the counsel of Aratus of Sicyon,¹ who on the one side persuaded the new possessors to accept payment and to give up what they held, and on the other persuaded the former owners to consider it more advantageous to have paid to them the value of their property than to recover it.

¹ This was done by King Ferdinand, as Mariana records, XXIX. xiv.

CHAPTER XVII

ON THOSE WHO ARE OF NEITHER SIDE IN WAR

I.—*From those who are at peace nothing should be taken except in case of extreme necessity, and subject to the restoration of its value*

It might seem superfluous for us to speak of those who are not involved in war, since it is quite clear that no right of war is valid against them. But since in time of war on the pretext of necessity many things [560] are done at the expense of those who are at peace, especially if they are neighbours, we must briefly repeat here what we have said elsewhere, that the necessity which gives any right over another's property must be extreme; furthermore, that it is requisite that the owner himself should not be confronted with an equal necessity; that even in case there is no doubt as to the necessity more is not to be taken than the necessity demands; that is, if retention is sufficient, then the use of a thing is not to be assumed; if the use is sufficient, then not the consumption; if consumption is necessary, the value of the thing must then be repaid.

II. ii. 10.

II.—*Examples of self-restraint and precepts*

1. When Moses and his people were pressed by the extreme necessity of passing through the land of the Edomites, he said, first, that he would pass along the royal road, and would not turn off into the ploughed fields or vineyards, and if he should have need of their water he would pay its price. Famous Greek and Roman generals assumed the same obligation. In Xenophon, the Greeks who were with Clearchus promised the Persians that they would march through without causing them any damage; and if they would have supplies for the Greeks to purchase these latter would not seize things to eat or drink from any one.

[Numbers, xx. 17 ff.]

2. Dercyllides, as the same Xenophon relates, 'led his forces through peaceful territory in such a way that his allies suffered no loss.' Livy says of King Perseus: 'He returned to his kingdom through Phthertis, Achaia, and Thessaly, without causing damage or injury to the lands through which he marched.' Of the army of Agis of Sparta, Plutarch says: 'They were a marvel to the cities as they traversed the Peloponnesus quietly, without injury and almost without noise.'¹

[Anabasis, II. iii. 23 ff.]

[Greek History, III. i. 10.]
[XLI. xxii. 6.]

[Agis, xiv. = p. 801 D.]

¹ Plutarch offers the same testimony to Titus Quintius Flamininus [Flamininus, v=p. 371 D].

II [xxv].

Velleius says of Sulla: 'You would think that he had come into Italy not to avenge in war, but to establish peace, with so great quiet did he lead his army through Calabria and Apulia into Campania, showing exceptional care for crops, fields, cities, and men.' Of Pompey the Great Cicero¹ affirms that 'his legions came to Asia in such a way that not only the hands of so vast an army, but even its footprints could be said to have done no harm to any one at peace'. Of Domitian Frontinus thus speaks: 'When he was establishing forts in the lands of the Ubii, he ordered that the value should be paid for the crops of the places which he incorporated in the fortifications; and by the report of this act of justice he bound to himself the allegiance of all.'

For the
Manilian
Law [xiii.
39].

Strategemata,
II. xi [7].

[Alexander
Severus,
1.]

Of the Parthian expedition of Alexander Severus, Lampridius writes: 'He conducted it with so great discipline, demanding so high respect for himself, that not soldiers, but senators, might be said to be passing by; wherever the soldiers were on the march, the tribunes were under arms, the centurions respectful, the soldiers gentle. Himself, however, the provincials received as a god, because of these great and numerous benefits.' Of the Goths,² Huns, and Alans, who were in the service of Theodosius, the Panegyrist says: 'There was no rioting, no disturbance, no plundering, as is usual with barbarians; indeed, whenever there was a shortage of supplies they bore the want with patience, and by their abstinence they augmented the grain which they diminished by their number.'

[Latinus
Pacatus,
Panegyric,
xxxii.]

[On the
Consulship
of Stilicho,
I. 163 ff.]

Claudian attributes the same conduct to Stilicho:

So great the peace, so great the fear, the guardian of right,
'Neath your command, that no plundering of vineyard nor of grain field
Cheated the farmer of his harvest.

Similar conduct is attributed by Suidas to Belisarius.³

¹ Also Plutarch [*Pompey*, x = p. 624 A]: 'When he heard that his soldiers were acting too licentiously on the march he put a seal on their swords; and, if any one broke this, he was punished.'

² With regard to the moderation of this people we find much in Cassiodorus, as in [*Variarum*,] V. x, and II. xiii [V. x, xi and xiii]. Besides, in letter xxv of the same book [V. xxvi] is this: 'Lay waste neither the fields nor the meadows of the landholders, but hasten with all self-restraint, that your coming may cause us delight. Because for this we willingly undergo the expenses imposed by the army, that civilization may be preserved intact by those under arms.' Also in IX. xxv: 'No losses to the owners were occasioned by his arms.'

³ This virtue in Belisarius is often acclaimed by Procopius, the companion and witness of his actions. See his noble speech, which is pertinent here, delivered to his soldiers in Sicily when he was on the way to Africa, and the description of his march through Africa, in the *Vandalic War*, I [I. xii and xvii]. I shall cite in full the following passage from the *Gothic War*, III [III. i]:

He acted with such care and forethought toward the peasants that none of them suffered violence while Belisarius led the army. On the contrary, all became rich wherever he arrived with a large body of troops; [563] for they sold their goods to the soldiers at their own price. And when the crops were ripe he took anxious care that they should not be spoiled by the cavalry; in addition, no one at all was allowed to touch fruit hanging on the trees.

See the similar praise of the Germans in their expedition to the Holy Sepulchre, in Nicetas, *On Manuel Comnenus* [I. iv]. Gregoras also lauds the same conduct in the Venetians, IX [IX. v]: 'There was no one who was not struck with admiration for the discipline of the Venetians, and their

3. This condition was brought about by scrupulous painstaking in providing for necessities¹ by the regular payment of troops, and by vigour in enforcing discipline, a rule of which you hear in Ammianus²: 'The lands of those at peace must not be trampled upon.' In Vopiscus, *Life of Aurelian*, we read: 'Let no one seize another's fowl; let no one touch a sheep; let no one carry off a bunch of grapes, let no one destroy grain, let no one requisition oil, salt, or wood.' Likewise in Cassiodorus: 'Let them live with the provincials under the civil law; [561] let not the spirit of him, who feels that he is armed, become insolent, because our army as a shield should guarantee quiet to the Romans.' These rules may be supplemented by the saying of Xenophon, in Book VI of the *Anabasis*: 'A friendly city should not be compelled to give anything against its will.'

XVIII
[ii. 7].

Aurelian
[vii].

[*Variae*,
VII. iv.]

[VI. ii. 6.]

4. In the light of these sayings you would aptly interpret that admonition of a great Prophet, nay, a greater than a Prophet: 'Extort from no man by violence, neither accuse any one wrongfully;³ and be content with your wages.'⁴ Similar to this is the order of Aurelian in the passage of Vopiscus which has been cited: 'Let each one be satisfied with his allowance, let him live by the spoil of the enemy, not by the tears of the provincials.'

Luke. iii.
14.

[*Aurelian*,
vii.]

No one should think that, while it is fine to say these things, they cannot be carried into effect; for neither would the Divine Man urge them, nor the wise authors of laws prescribe them, if they believed that such rules could not be enforced. In fact, we must grant that that can be done which we see done.⁵ Therefore we have adduced examples, to which may be added the notable example which Frontinus records of Scaurus,⁶ that an apple-tree, which the

IV. i
[*Strategemata*, IV.
iii. 13].

magnanimity combined with justice. For no one of their army wished to go out and take anything without paying the price.'

¹ Pliny, *Natural History*, XXVI. iv: 'Else why have the Roman generals always devoted their first attention to commerce when waging war?'

Cassiodorus, [*Variae*,] IV. xiii: 'Let him have something to buy, that he may not be compelled to think of what he can carry off.' He has something similar in V. x and xiii.

² See also Book XXI [XXI. v. 8].

³ You might translate 'from pillage', in which sense this word is taken in the Greek version in *Job*, xxxv. 9; *Psalms*, cxviii. 121 [cxix. 122]; *Proverbs*, xiv. 33 [xiv. 31], xxii. 16, cxviii. 3 [xxviii. 3]; *Ecclesiastes*, iv. 1; and also *Leviticus*, xix. 11. The Vulgate translator of *Luke*, xix. 8, renders the same Greek word by *defraudare* ('defraud').

⁴ On this passage of *Luke*, Ambrose [*On Luke*, II. lxxvii] says: 'For this purpose pay was instituted for military service, that the soldier, in seeking his subsistence, might not act as a robber.' This is copied by Augustine in his sermon xix, *On the Words of Our Lord according to Matthew* [*Sermones*, lxxxii. 1, really not the work of Augustine; see *Appendices*, V. lxxxvii. 1, Migne].

On this subject there are notable edicts in Gregory of Tours, II. xxxvii; in the *Capitularies* of Charles and his successors, V, tit. clxxxix; in the *Councils of France*, II; in the *Capitularies* of Louis the Pious, II. xiv, and in vol. III; in the *Council of St. Macra*.

Add the *Bavarian Law*, II. v. Gunther [*Ligurinus*, VII. 299 ff.] thus reports a law of Frederic I:

If one has burned the farms or homes of folk
At peace, with shaven head he will be marked,
And after many blows from camp will he be chased.

⁵ And so Guicciardini states, in Book XVI.

⁶ On the severity of Niger, because of the theft of a cock, see Spartianus [*Pescennius Niger*, x].

survey had included in the lines of the camp, was left on the following day, when the army had marched off, with its fruit untouched.

XXVIII
[xxiv. 9].

5. Livy, after relating that the Roman soldiers in the camp at the Sucro had behaved themselves with too great licence, and that some of them had gone at night to pillage in the neutral land about them, adds that everything was done through the greed and licence of the soldiers and nothing according to regulation and discipline. There is another notable passage of the same writer, when he describes the march of Philip through the land of the Densetæ :

XL [xxii.
10-11].

They were allies, but from lack of supplies the Macedonians plundered their territory just like that of the enemy ; for, plundering on all sides, they first devastated homesteads, and then even some villages, to the great shame of the king, when he heard the voices of his allies calling in vain upon the gods, who are the guardians of treaties, and upon his own name.

Annals,
XII [xlix].
Histories,
III [ii].

In Tacitus, the reputation of Pelignus is one of shame, since he plundered allies rather than enemies. The same author observes that the soldiers of Vitellius were in idleness throughout the Italian municipalities, and a source of dread to their hosts alone. Also, in Cicero's passage on the city praetorship, in his *Against Verres*, is this accusation : ' You gave your attention to the plundering and harassing of the peaceful towns of the allies, and of our friends.'

[I. xxi.
56.]

Aegidius
Regius, *De*
Actibus
Superna-
turalibus,
disp. 31,
dub. 7,
no. 95.

6. At this point I cannot pass without mention the opinion of the theologians, which I think is very true, that a king, who has not paid what he owes to his soldiers, is responsible for the losses which in consequence have ensued, not only to the soldiers, but also to his own subjects and their neighbours, whom the soldiers under pressure of want have treated badly.

III.—*What the duty of those at peace is towards belligerents*

III. i.

1. On the other hand it is the duty of those who keep out of a war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered, according to what we have said above. In a doubtful matter, however, those at peace should show themselves impartial to either side in permitting transit, in furnishing supplies to troops,¹ and in not assisting those under siege. In Thucydides the Corcyreans say that it is the duty of the Athenians, if they wish to be impartial, either to prevent the Corinthians from hiring troops on Attic soil, or to allow them the same privilege. Philip, king of Macedon, was charged by the Romans with having violated his treaty in two ways, both in having done injury to the

I [xxxv].

¹ See the noble example in Paruta, Book VIII.

allies of the Roman people, and in having aided the enemy with soldiers and money.

The same points are stressed by Titus Quintius in a conference with Nabis :

‘ Still ’, you say, ‘ I have not, strictly speaking, done violence to you and your friendship and alliance.’ How many times do you wish me to prove that you have done this? I do not wish to do so at greater length, and I shall sum up the gist of the matter. By what things, then, is friendship violated? In very truth by these [562] two things, by treating my allies as enemies, and by allying yourself with the enemy.

2. In Agathias we read that an enemy is one who does what the enemy wishes ; and in Procopius, that he is counted in the ranks of the enemy¹ who supplies a hostile army with what is directly useful for war. Demosthenes long ago said : ‘ He who creates and devises the means whereby I may be captured is my enemy, even if he does not strike me nor hurl a javelin at me.’ Marcus Acilius told the Epirotes, who had not supported Antiochus with troops, but were accused of having sent him money, that he did not know whether he should class them as enemies or those at peace. The praetor Lucius Aemilius censured the people of Teos for having aided the fleet of the enemy with supplies, and for having promised them wine ; adding, that he would treat them as enemies unless they gave the same to the Roman fleet. And there is recorded a saying of Caesar Augustus : ‘ A state, which receives an enemy, loses the right of peace.’

3. It will even be of advantage to make a treaty with either party that is waging war, in order that it may be permissible to abstain from war while retaining the goodwill of either, and to render to each the common duties of humanity. We read in Livy : ‘ Let them desire peace with either side, as befits impartial friends ; let them not intervene in the war.’ Archidamus, king of Sparta, when he saw that the Eleans were leaning to the side of the Arcadians, wrote a letter containing only this : ‘ It is a good thing to remain quiet.’

¹ On the other hand he rightly says that we must call ally and friend not only him who takes his post beside us in battle, but also him who openly supplies all the things necessary for waging war ; this is in the letter of Amalasintha to Justinian [Procopius, *Gothic War*, I. iii].

[Livy, XXXIV. xxxii. 14.]

III [IV. iv].
Gothic War, I [iii].
Philippics, III [ix. 17 = p. 115].
[Livy, XXXVI [xxxv. 9].

XXXVII [xxviii. 2].

Plutarch, *Brutus* [v = p. 1011 D].

XXXV [xlviii. 9].

[Plutarch, *Apoth.*, p. 219 A.]

ON ACTS DONE BY INDIVIDUALS IN A PUBLIC WAR

I.—*The question whether it is permissible for individuals to do harm to a public enemy is discussed with special regard to the law of nature, the law of nations, and municipal law*

1. WHAT I have heretofore said applies chiefly to those who either possess the supreme command in war or are carrying out public orders. We must also consider what is permissible for an individual in war, not only according to natural and divine law, but also according to the law of nations.

[I. xi. 36.]

In his first book *On Duties*, Cicero says that the son of the Censor Cato had served in the army of the general Pompilius, but that the legion in which he was serving was disbanded; nevertheless, since the youth from love of warfare remained in the army, Cato wrote to Pompilius that he ought to oblige the young man to take the military oath a second time, if he wished him to remain in the army. Cato gave as a reason that after the first oath had been cancelled his son could not lawfully fight with the enemy. Cicero adds the very words of Cato from a letter to his son, in which he warns the youth to avoid engaging in battle, for the reason that it is not right for one who is not a soldier to fight with an enemy.

Similarly we read that Chrysantas, a soldier of Cyrus, received praise because, in an attack on the enemy, he drew back his sword as soon as he heard the signal for retreat.¹ Also Seneca said: 'He who disregards the signal for retreat is called a worthless soldier.'

2. But those are deceived who think that the principle thus stated has its origin in the law of nations. This becomes clear if you consider that, just as any one is permitted to seize the property of an enemy, so also, as we have shown above, it is permissible to kill an enemy. For according to the law of nations enemies are held to be entitled to no consideration. The advice of Cato, therefore, comes from Roman military discipline, which, according to Modestinus, contained the provision that one who had not obeyed orders should be punished with death, even if what he had done turned out successfully. But one who had fought an enemy outside the ranks and without the command of the general was understood to have disobeyed orders, as the instructions of Manlius teach us. The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned or, with increase of lawlessness, the

Plutarch,
*Roman
Questions*,
xxxix [=
p. 273 F],
and
Marcellus
[*Comp. of
Pelopidas
and Mar-
cellus*, iii=
p. 317 D].
On Anger,
ix [I.
x. 2].
III. vi.

Digest,
XLIX.
xvi. 3.
§ 15.

Livy, VII
[VIII. vii.
22].

¹ See Xenophon, *Training of Cyrus* [IV. i. 2].

army or a part of it might even become involved in ill-considered battles,¹ a condition which ought absolutely to be avoided.

Consequently Sallust, describing the Roman discipline, says: 'In war punishment is more often inflicted on those who have fought against the enemy contrary to orders than against those who have withdrawn from battle too slowly when recalled.' A certain Spartan, who was on the point of slaying an enemy, heard the signal for retreat and held back his stroke, giving as the reason, 'It is in fact better to obey the commander than to kill an enemy.' The reason why a discharged soldier cannot kill an enemy is thus stated by Plutarch: he is not bound by the military laws, by which those who are going to fight ought to be bound. According to Arrian, Epictetus, referring to the deed of Chrysantas just mentioned, said: 'It seemed to him so much better to obey the will of his commander than his own.'

[*Catiline*, ix. 4.]

[Plutarch, *Apolh.*, lxxi = p. 236 E.]

[*Roman Questions*, xxxix = p. 273 E.]
II. vi [15].

3. If, however, we regard the law of nature and moral justice, it is apparent [565] that in a lawful war any person is allowed to do whatever he trusts will be of advantage to the innocent party, provided he keeps within the proper limits of warfare; nevertheless he is not allowed to make captured property his own, because nothing is due to him, unless indeed he is enforcing a legal penalty according to the common law of mankind. From our previous discussion we can understand how this last right has been restricted by the law of the Gospel.

II. xvii
[II. xx. 10].

4. Now, a command may be either general or particular. A general command is exemplified in the words which the consul was accustomed to utter in the presence of the Romans in case of an uprising: 'Let those who wish the safety of the state follow me.' Individual subjects, moreover, in addition to the right of self-protection, are sometimes given the right to kill in case this is to the advantage of the state.

Servius, *On the Aeneid*, VIII [line 1].
Code, III. xxvii. 1 and 2.

II.—*What in respect to the enemy is permitted by moral justice to those who are serving in the army, or fitting out ships, at their own expense*

1. A special command may be given not only to those who receive pay, but also to those who serve at their own charges; and—a more important consideration—to those who support a part of the war with their own expenditures, such as those who fit out and maintain ships at private cost. Such contributors, in lieu of pay, are generally allowed to hold captured property as their own, as we have said elsewhere. How far this practice may be extended without

III. vi [24].

¹ Thus Avidius Cassius gave, as a reason for the sentence he imposed, 'that there might have been an ambuscade'; so Vulcarius [*Avidius Cassius*, iv].

the violation of moral justice and love, is a proper question for discussion.

2. Justice has regard either for the enemy or for the state itself with which an agreement is made. We have said that possession of all things, which can support war, may be taken from the enemy for the sake of security, but under the condition of making restitution. Indeed absolute ownership may be acquired in compensation for that which is due to a state waging a lawful war, either from the beginning of the war or from a later act, whether the property belongs to the hostile state or to individuals, even though the individuals themselves be guiltless; the property of the guilty may be taken away and acquired by the captors as a means of imposing a penalty. Enemy goods will therefore become the property of those who are conducting at their own expense a part of the war, so far as this affects the enemy, provided that the limit which I have mentioned be not exceeded; whether the limit has been reached ought to be decided by a fair-minded judgement.

III.—*What in respect to their own state is lawful for those who are serving in the army, or fitting out ships, at their own expense.*

As regards their own state the arrangement with such contributors will be just, according to the standard of moral justice, if there shall be equality in the contract, that is, if the expenses and dangers shall be as great as the chance of booty. For if the expectation of booty shall be much greater, whatever shall be acquired in excess ought to be restored to the state. The case is like that of a man who has bought at a very low price a cast of the net, which is, indeed, of uncertain value, but is easy to make and warrants the expectation of a great catch of fish.

IV.—*What the rule of Christian love demands of such persons*

Even when justice, strictly speaking, is not violated, one may sin against the duty which consists of loving others, especially the duty prescribed by the Christian law. A case of this character might arise if it should be apparent that plundering by such persons would not be especially harmful to the enemy as a whole, nor to the king, nor to those who are in fact guilty, but would harm innocent persons, and in fact to such an extent that it would plunge them into the greatest misfortunes, into which it would be the negation of mercy to cast those who are privately indebted to us. Now if to this is added the consideration that such plundering will have no notable effect in ending the war, or in weakening the public strength of the enemy, then gain acquired solely in consequence of the unhappy

condition of the times¹ ought to be considered unworthy of a just man, and especially of a Christian.

V.—*How a private war may be mingled with a public war*

Sometimes it happens that a private war arises in connexion with a public war; as, for example, if a person has fallen among enemies and his life or property is endangered. In such cases the rules should be observed which we have elsewhere stated in regard to the limit permissible in self-defence.

II. i [3].

Public authority, again, is wont to be joined with private advantage; a case would be if a person who had suffered a great loss at the hands of the enemy [566] should obtain the right of collecting damage from the enemy's property. The right in that case must be defined in accordance with the principles stated above in regard to the taking of security.

III. ii [2].

VI.—*The obligation resting upon a person, who has done harm to the enemy without orders, is set forth with a distinction*

But if a soldier or any other person, even in a just war, has burned houses belonging to the enemy, has devastated fields, and caused losses of this character without orders, when, furthermore, there was no necessity or just cause, the theologians rightly hold that he is bound to make good the losses. I am, however, justified in adding, what was omitted by them, 'when there was no just cause'; for if there is such a cause he will perhaps be answerable to his own state, whose laws he has transgressed, but not likewise to the enemy, to whom he has done no legal wrong.

Sylvester,
word
bellum,
pt. i.

This is not unlike the reply made by a certain Carthaginian to the Romans who were demanding the surrender of Hannibal:

[Livy,
XXI.
xviii. 6.]

I consider that the question at issue is not whether Saguntum was attacked in accordance with a decision of an individual or of the state, but whether it was attacked rightfully or wrongfully. For the question whether our citizen acted in accordance with our decision, or his own, is our business, and to us belongs the punishment of a citizen of ours. The subject of discussion between you and us is merely, whether under our treaty the attack was permissible.

¹ Plutarch accuses Crassus also on this account [*Crassus*, ii=p. 543 B]: 'Most of this property he amassed through fire and war, taking advantage of the common misfortunes as his greatest means of gain.'

CHAPTER XIX

ON GOOD FAITH BETWEEN ENEMIES

I.—*Good faith is to be kept with enemies of every description*

1. WE have said that, in respect to character and extent, what is permissible in war is considered either absolutely or with reference to a previous promise. The first part of the subject has now been finished ; there remains the latter part, which concerns the good faith of enemies with one another.

Silius Italicus, a Roman consul, has well said :

[567] And best is he
In military service, who from first to last
Maintains good faith in wars.¹

XXV
[XIV.
169 ff.].

[iii. 5.] Xenophon in his oration *On Agesilaus* says : ‘ So great and excellent a thing it is in all men, to be sure, but especially in the case of generals, to be and to be considered respecters of good faith.’

[=p.
184 c.] In his fourth speech *On Leuctra* Aristides says : ‘ Those who are devoted to justice are especially revealed in the maintenance of peace and other public agreements.’ As Cicero, in fact, rightly declared in his *On Ends*, there is no one who does not approve and praise the quality of mind by which not only is no advantage sought but good faith is kept even to one’s disadvantage.

[V. xxii.
63.]

[*Declama-
tions*,
cclxvii.]
[cccxlvi.]

[*On
Duties*,]
II. xxix
[I. xxix.
140].
Letters, ccv
[clxxxix.
6], *To
Boniface*.

2. Public faith, as Quintilian the father remarks, makes truces between armed foes and preserves the rights of states that have surrendered. In another passage the same author says : ‘ Good faith is the strongest bond in human affairs ; good faith is held in sacred esteem between enemies.’ Similarly Ambrose also : ‘ Therefore it is clear that even in war good faith and justice ought to be preserved.’ Again, Augustine² declares : ‘ When faith is pledged, it must be kept even with an enemy against whom war is being waged.’

[V. xxvii.
6.]

Those who are enemies do not in fact cease to be men. But all men who have attained to the use of reason are capable of possessing a right which has its origin in a promise. In Livy Camillus says that he had such an alliance with the Faliscans as nature had produced.

¹ According to Appian, *Civil Wars*, IV [IV. ix. 68], Archelaus the philosopher said : ‘ You have sworn to the treaties and have given the pledge of your right hands, which even enemies hold inviolate.’ Diodorus Siculus, in the *Excerpta Peiresciana* [p. 342=XXXII. vii], praises Africanus the Younger on account of this virtue.

² He treats extensively of the same subject in *Letters*, ccxxv [cxxvi].

3. From the association of reason and speech arises that binding force of a promise with which we are dealing. Because we have previously said that, in the opinion of many, lying to an enemy is either permissible, or free from wrong, it must not be thought that this view can be extended with like reason to pledged faith. For the obligation to speak the truth comes from a cause which was valid before the war, and may, perhaps, in some degree, be removed by the war; but a promise in itself confers a new right.

[III. i. 18.]

Aristotle recognized this distinction when, treating of veracity, he said: 'We are not speaking of the person who is truthful in agreements and in those matters which have to do with justice and injustice. For these belong to a different virtue.'

Nicomachean Ethics,
IV. xix
[IV. xiii].

4. Of Philip of Macedon Pausanias says: 'No one would rightly call him a good general who habitually disregarded oaths, broke treaties at every opportunity, and dishonoured good faith more than all other men.' Valerius Maximus has this characterization of Hannibal: 'He declared war openly on the Roman people and Italy, but he waged war more bitterly against good faith herself, having delight in lies and deception as if in noble virtues. For this reason it has come to pass that, though otherwise he might have left the memory of a noble name, it is doubtful whether he ought to be considered an extraordinarily great or extraordinarily bad man.' According to Homer the Trojans, troubled in conscience, thus accuse themselves:

[VIII. vii. 5.]

[IX. vi. ext. 2.]

Iliad, X
[VII. 351 ff.].

Now breaking sacred pledges
And sworn good faith we fight; for us a crime is war.

II.—*Refutation of the view that faith ought not to be kept with pirates and tyrants*

1. Already in our previous discussion we have said that we ought not to accept the principles laid down by Cicero: 'We should have no relations with tyrants, but rather the most absolute separation'; again, 'A pirate [568] is not classed in the number of regular enemies; with him there is no bond of good faith, and he does not respect a common oath.' Seneca, too, said of a tyrant: 'When the relationship of human rights was broken off, every bond, that bound him to me, was severed.'

II. xiii. 15
[*On Duties*,
III. vi. 32
xxix. 107.]

On Benefits, VII
[xix. 8].

From such a source arose the error of Michael of Ephesus, who in his commentary on the *Nicomachean Ethics* said that the violation of the wife of a tyrant did not constitute adultery.¹ By a like error

[V. x.]

¹ Seneca in the *Excerpts [Controversies]*, IV. vii, says: 'Not thinking it adultery to debauch the wife of a tyrant, as it is not murder to kill a tyrant.' Julius Clarus in the section *Homicidium*, no. 56, believes that adultery could with impunity be committed with a banished woman.

certain teachers of the Jews ¹ have made a similar statement about foreigners, whose marriages they considered void.

2. Nevertheless Gnaeus Pompey finished the war with the Pirates in great part by means of treaties, ² promising to them their lives, and places in which they might live without plundering. Sometimes also tyrants have restored liberty after having agreed to immunity. In the third book of the *Civil War* Caesar writes that the Roman commanders made an agreement with the brigands and deserters who were in the Pyrenees mountains. Who will say that, if an agreement of any sort had been made, no obligation would have arisen from it?

Such agreements do not in fact share in that special community of legal obligations which the law of nations has introduced between enemies engaged in a formal and complete war. But because their authors are human beings they have a common share in the law of nature, as Porphyry has rightly maintained in his work *On Abstaining from Animal Food*. From this follows the consequence that the agreements must be kept. Thus Diodorus relates that Lucullus kept faith with Apollonius, a leader of runaway slaves, and Dio writes that Augustus, in order not to violate good faith, paid to the brigand Corocotta, who had delivered himself up, the reward placed on his head.

III.—*Answer to the argument drawn from the fact that such persons deserve punishment, and the proof that this is not taken into account when they have been treated with*

1. But let us see if a more plausible view can be presented than that expressed by Cicero.

The first consideration is that, as we have elsewhere explained, if we take into account the law of nature, atrocious criminals, who do not belong to any state, can be punished by any person whatsoever. But those who can be punished with the loss of life can also be deprived of their property and rights, as the same Cicero rightly said: 'It is not contrary to nature to despoil, if you can, the person whom it is lawful to kill.' Among the rights of such a person is the right arising from a promise. This right, therefore, can also be taken from him as a penalty.

I answer that the reasoning would hold good if one had not treated with the person in question as a malefactor; but if at any time we have treated with such a person as such ³ we ought to consider

¹ Rabbi Levi Ben Gerson and Rabbi Salomon, *On Leviticus*, xx. 10.

² So there was disapproval of the faithlessness of Didius towards the Celtiberians, who lived by plunder [Appian, *Spanish Wars*, xvi. 100].

³ Terence, *Adelphi* [II. i. 34 f.], says:

I own I am a pander, a common bane of youths,
A perjured wretch, a pest; yet you I have not wronged.

On this subject refer to the author, who has written on the terms of peace between the princes and orders of the [Holy Roman] Empire.

[Plutarch,
Pompey,
xxvii = p.
633.]

[III. xix.
2.]

[III. xxv
= p. 322.]

[XXXVI.
i.]

LVI [xlili].

[Above,
III. xix.
2, 1.]
[II. xx. 8.]

On Duties,
III [vi.
32.]

that we have been treating in regard to the remission of the punishment belonging to his condition. The fact is, as we have said elsewhere, that that explanation must always be assumed which prevents an act from becoming without effect.

[II. xvi.
6.]

2. According to Livy, Nabis made an apt reply when Quintus Flamini[n]us reproached him with being a tyrant: 'As regards this title, I can reply that, whatever I am, I am the same that I was when you yourself, Titus Quintus, made the alliance with me.' Later he says: 'I had already done these deeds, whatever they are, when you made the alliance with me.' He adds: 'If I had changed in anything, then I ought to offer an explanation of my lack of consistency; but since you are changing, you ought to offer an explanation of your inconstancy.'

[XXXIV.
xxxi. 12,
13, 15.]

In an address of Pericles to his fellow-citizens, according to Thucydides, there is a passage of similar purport: 'We shall permit the allied states to be free, if they were so at the time when the treaty was made.'

[I. cxliv.]

IV.—*The fact that a promise has been extorted through fear presents no obstacle, if the fear was not felt as a personal fear by him who made the promise*

Next, the objection, which I mentioned elsewhere, may be brought forward, that the person who has caused a promise to be made through fear is bound to free the promisor, for the reason that he has caused the loss unjustly; that is, by means of an action opposed to the nature both of human liberty and of an act which ought to be free.

II. xxi
[II. xi. 7.]

Though we admit that this is sometimes the case, yet it does not cover all promises made to brigands. For in order that the person, to whom a promise has been made, should be bound to free [569] the promisor, it is necessary that he himself should have caused the promise by an unjust fear. If therefore any one has promised a ransom in order to release a friend from captivity, he will be bound to pay; for the fear did not affect the person who came of his own free will to make the agreement.

V.—*Or, if an oath has been given, the fact that a promise has been extorted through fear presents no obstacle, although in the case of a brigand such an oath is violated with impunity so far as men are concerned*

There is the further consideration that a person who has made a promise under the compulsion of an unjust fear can be obligated

if the sanction of an oath has been added. For, as we have said elsewhere, a man is thereby bound not only to man but also to God, and in relation to Him fear makes no exception. Nevertheless it is true that the heir of the promisor is not held by such a bond alone, because, according to the primitive law of ownership, those things which belong to the commercial relations of life pass to the heir, but these do not include a right sought from God, as such.

This, again, must be repeated from an earlier statement, that if any one violates a sworn or unsworn pledge given to a brigand he will not on that account be liable to punishment among other nations. For because of the hatred of brigands the nations have decided to overlook illegal acts committed against them.

VI.—*The same rules are applicable in relation to rebellious subjects*

What shall we say regarding wars of subjects against their kings and other sovereign authorities?

That subjects do not have the right to employ force, even though they have a cause which in itself is not unjust, we have shown elsewhere. Sometimes even the injustice of their cause, or the baseness of their resistance, may be so great that they may be punished severely. Nevertheless, if they have been treated with as one would treat deserters or rebels, punishment cannot be inflicted contrary to a promise, as we have just stated.

In their scrupulousness the ancients held that faith must be kept even with slaves; in fact it was believed that the Lacedaemonians had drawn down upon themselves divine anger because they had killed the Taenarians, their slaves, contrary to agreement. Also Diodorus Siculus notes that the faith pledged to slaves at the shrine of the Palici had never been violated by any master. Moreover it will be possible to nullify here also the exception allowed in case a promise was made by reason of fear, if the promise has been confirmed by an oath; so the plebeian tribune, Marcus Pomponius,¹ kept the promise which had been made to Lucius Manlius under the influence of fear, because he was bound by an oath.

VII.—*The special difficulty presented by promises made to subjects under the right of eminent domain*

At this point, in addition to the difficulties previously met with, a special difficulty is presented by the right of passing laws and the right of eminent domain over the property of subjects; this right

¹ The tribune took the oath and did not practise deception, but gave to the assembly this reason for dropping the accusation [action]. No one else has been permitted to restrain a tribune with impunity; Seneca, *On Benefits*, III. xxxvii.

III. iv. 10
[II. xiii.
15].

I. iv.

Aelian,
[*Various
History*,]
VI. vii
[4]. XI
[lxxxix].

belongs to the state, and is exercised in its name by the one who holds supreme authority. If in fact this right covers all the possessions of subjects, why does it not cover also the right arising from a promise in war? If this be conceded, it appears that all such agreements will be void, and therefore there will be no hope of ending a war excepting through victory.

But, on the contrary, we must note that recourse is had to the right of eminent domain, not indiscriminately, but only in so far as this is to the common advantage in a civil government, which, even when regal, is not despotic. But in most cases it is to the common advantage that such agreements be kept; and what we have said elsewhere about the preservation of the existing government applies here also. An additional point is that, when circumstances demand the enforcement of this right, compensation ought to be given, as will be explained later.

VIII.—*It is shown also that such promises may be confirmed by an oath of the state*

1. Moreover treaties may be sanctioned by an oath taken not only by a king or a senate, but also by the state itself. Thus Lycurgus made the Lacedaemonians take oath to his laws, and Solon the Athenians; and in order that the oath might not become invalid on account of the change of persons it was repeated annually.

[Plutarch, *Lycurgus*, xxix=p. 57 B; *Solon*, xxv=p. 92 B.]

If such repetition is in fact kept up, there will be no necessity of withdrawal from the promise, even for the sake of the public advantage; for not only may a state yield its own right, but [570] words can be made so clear as to admit of no exception. Valerius Maximus thus addresses Athens: 'Read the law which holds you bound by oath.' This kind of laws, by which the Roman people was itself in conscience bound, as Cicero explains in the speech *For Balbus*, the Romans called 'sacred'.¹

V. iii
[ext. 3].

2. A rather obscure discussion bearing upon this subject is found in the third book of Livy, where he says that in the opinion of many interpreters of the law the tribunes were inviolable, but not likewise the ediles, judges, and decemvirs; yet, if harm should be done to any of the latter, an unlawful act was committed. The reason for the distinction is that the ediles and the others were protected by the law alone; moreover, what the people had voted last prevailed, and so long as the effect of the law lasted no one could lawfully act in opposition to it. The tribunes, on the contrary, were protected by a public religious obligation of the Roman people; for an oath had been taken which could not be annulled by those

[xv. 35.]

[III. iv.
6-7.]

¹ See Manutius, *De Legibus*.

[VI.
lxxxix. 2.]

who had sworn it, without violating religious scruple. Dionysius of Halicarnassus says: 'Brutus summoned an assembly and advised the citizens to make this magistracy inviolable, not only by law but also by an oath, and all so voted.' That is the reason why the law is called sacred.

In consequence good men disapproved of the act of Tiberius Gracchus¹ when he removed Octavius from the tribuneship, though he declared that the tribunician power received its inviolability from the people and not against the people. Therefore, as I have said, both a state and a king can be bound by an oath, even in the case of subjects.

IX.—*Or, promises are binding if a third person, to whom the promise is made, enters into the case*

Livy,
XXXIX
[xxiii. 6].

But also a promise will be made with binding force to a third person, who has not inspired fear. We shall not investigate how or to what extent he may be interested in the promise; these are subtle distinctions belonging to the Roman law. By nature, in fact, it is important for all men to have regard for other men. Thus we read that by the peace made with the Romans Philip was deprived of the right of visiting cruelty upon those Macedonians who had revolted from him in war.²

X.—*How the political character of a state may be changed*

I. iii.
17 ff.

Further, we have shown elsewhere that states of mixed character sometimes exist; and just as by agreement states may pass from one pure form into another, so they may pass also into a mixed form. Similarly those who had been subjects may begin to hold sovereign power, or at any rate some part of it, together with the free right to defend that part by force.

XI.—*Fear does not justify an exception in respect to a war that is formal according to the law of nations*

I. A formal war, that is a war publicly declared on both sides, has not only other characteristics in respect to legal right but also this characteristic in particular, that all promises made in the course of the war, or for the purpose of terminating it, are valid to the extent that they cannot be made void by reason of a fear unjustly inspired, except with the consent of the party to whom the promise has been made. For just as many other things, though they may not be devoid of

¹ See Plutarch, in his life [*Tiberius Gracchus*, xv-xvi=p. 831 D], for this story in full.

² There is a similar example in Paruta, Book VI.

fault in some degree, are considered lawful according to the law of nations, so also the fear which in such a war¹ is inspired on both sides.

Unless this rule had been adopted, no limit nor termination could have been fixed for such wars, which are extremely frequent. Yet it is to the interest of mankind that such bounds be set. This may be understood to be that law of war which Cicero says must be observed with an enemy. Elsewhere Cicero declared that an enemy retains rights in war, obviously referring not only to rights arising from the law of nature, but also to certain rights which have arisen from the general consent of nations.

2. From this nevertheless it does not follow that the party who has extorted some such promise by an unlawful war can retain what he has received without violating the honour and duty of a good man, or even can compel the other to hold to the agreement, whether sworn to or not. For essentially and in its [571] nature the transaction remains unjust. This essential injustice of the action cannot be removed except through a new and absolutely free consent.

XII.—*What is to be understood regarding such a fear as the law of nations recognizes*

But my statement that the fear inspired by a formally declared war is considered lawful ought to be understood of such a fear as is not disapproved by the law of nations.² For if anything has been extorted by the fear of rape, or by terrorizing of any other sort which involves violation of pledged faith, it will be nearer the truth to say that the case has been brought within the scope of the law of nature; the force of the law of nations does not extend to such a fear.

XIII.—*Faith must be kept even with the faithless*

1. I have previously said, in the general treatment of promises, that faith must be kept even with the faithless. Ambrose, too, holds the same opinion; he thinks that beyond question the maintenance of good faith should be extended even to treacherous enemies, such as the Carthaginians, with whom the Romans kept faith inviolably. On this point Valerius Maximus remarks: 'The Senate did not take into consideration those to whom the obligation was being discharged.' Sallust, again, says: 'In all the Punic wars, although the Carthaginians both in time of peace and in periods of truce had

On Duties,
III [xxix.
107].
Against
Verres, IV
[lv. 122].

II. xiii. 16.
[*On*
Duties,
I. xxix.]

VI. vi [3].

[*Catiline,*
li. 6.]

¹ See the writer as referred to above, on the treaty of peace.

² So a promise extorted from a captured ambassador is of no value to the one extorting it; Mariana, XXX [XXX. xii and xix].

committed many atrocious wrongs, the Romans themselves never took advantage of an opportunity to do such deeds.'

2. Of the treaty-breaking Lusitanians, whom Sergius Galba had deceived by a new treaty and then slaughtered, Appian says: 'In avenging perfidy with perfidy he imitated the barbarians in a manner inconsistent with the dignity of Rome.' On this charge the same Galba was afterward accused by the plebeian tribune Libo. In giving an account of the matter, Valerius Maximus says: 'Pity and not justice ruled¹ that trial, since the acquittal, which could not have been granted to innocence, was given out of regard for his children.' Cato had written in the *Origins* that Galba 'would have been punished if he had not made use of his children and his tears'.

[Spanish Wars, x. 60.]

VIII. ii
[VIII. i. 2].

Cicero,
On the Oration, I
[*On the Orator*, I. liii. 228],
and
Brutus
[xx. 80].

XIV.—*Faith does not have to be kept if the condition changes; and this takes place if the other does not keep his part of the agreement*

At the same time the fact should be recognized that in two ways one may be free from breach of faith and yet not do what was promised—if the condition ceases, and if compensation is given. The cessation of the condition does not in reality free the promisor, but the result shows that there is no obligation, since this was entered into only under the condition.

To this principle we must refer the case which arises if the other party has not fulfilled what he on his part was bound to carry out. For the individual items of one and the same agreement seem to be related in respect to the two sides after the manner of a condition, as if it had been stated in this way: I will do thus and so if the other does what he has promised. Thus Tullus, replying to the Albans, 'calls the gods to witness, which of the two peoples first rejected and dismissed the envoys demanding restitution, in order that they may visit on that people all the losses of the war'. Ulpian says: 'He will not be liable as a partner who has renounced a partnership for the reason that a certain condition, on which the partnership was formed, is not complied with in relation to him.' For this reason, whenever the intent is different, it is usually expressly stated that if anything is done contrary to this or that provision the others nevertheless will remain valid.

[Livy, I. xxii. 7.]

Digest,
XVII.
ii. 14.

XV.—*Faith does not have to be kept in case a just compensation is tendered in return*

The origin of compensation I indicated elsewhere,² when I said that if anything is ours or is due to us, and we cannot otherwise obtain

I. vii. 2
[II. vii. 2].

¹ *Texit* (covered) is a typographical error for *rexit* (ruled).

² II. vii. 2. Tertullian, *Scorpiace* [vi], says: 'No one should object to compensation, in which regard is had alike for favour and for injury.'

it from him who has it or owes it to us, we can accept an equivalent amount in something else. From this it follows the more clearly that we may keep what is in our possession, whether it be corporeal or incorporeal. Therefore what we have promised will not have to be fulfilled if the value involved is no greater than that of our property which is wrongfully in the possession of the other.

In the sixth book *On Benefits* Seneca says :¹

So a creditor often loses his suit to his debtor when on another account he has taken more than he tries to secure from the debt. For the judge sits between the creditor and the debtor to say, 'You have loaned him money; what then? . . . You have possession of a field which [572] you did not buy; after an adjustment of values, you, who came as a creditor, depart as a debtor.'

XVI.—*Faith does not have to be kept in case a just compensation is tendered in return, even if this is on another contract*

The same principle will hold if the party with whom I have dealings owes as much or more under another agreement, and I am not able otherwise to secure what is due to me. In the law courts, as the same Seneca says,² different actions are separated, and the causes of action are not mixed. But, as noted in the same passage, those cases are guarded by definite statutes which it is necessary to observe: a law must not be mixed with a law; we must go whither we are led. The law of nations does not recognize those distinctions; in the cases which fall within its scope there is no other hope of acquiring one's right.

XVII.—*Faith does not have to be kept in case damage has been done*

The same principle will have to be applied if the party who insists on the fulfilment of a promise has not carried out his part of the agreement, but has inflicted damage. In the passage just cited Seneca says :³ 'A landowner who has trampled down the crop or cut down the trees of his tenant has no legal right over the tenant, even though the lease is uncanceled, not because he has received what had been agreed upon, but because he himself was the cause of his not receiving it.' Presently Seneca adds other examples: 'You have driven away his cattle and killed his slave.' And again :⁴ 'It is permissible for me to compare how much each one has assisted me, how much he has injured me, and then to declare whether he is more indebted to me or I to him.'

¹ Seneca, *On Benefits*, VI. iv. 4.

² *Ibid.*, vi, vii [v. 6, 7].

³ *Ibid.*, iv.

⁴ *Ibid.*, vi.

XVIII.—*Furthermore, faith does not have to be kept when something is due as a penalty*

[On Benefits, VI. v.]

Finally, what is due as a penalty can be taken in lieu of what has been promised. This is explained at length in the passage already quoted: ‘On the one hand favour is due for a benefit, on the other vengeance for an injury. Gratitude is not due to him from me, nor punishment to me from him; the indebtedness on both sides is cancelled.’ Presently Seneca adds: ¹ ‘After a comparison has been made between the favours and the injuries, I shall see whether anything more is due to me.’

XIX.—*How these principles become applicable in war*

1. Just as in case an agreement has been made between contesting parties, while the suit is in progress, neither the action which gave rise to the suit, nor the losses and damages of the suit, can be used as an offset for what was promised, so, while a war lasts, compensation cannot be given for what originally caused the war, nor for what is customarily arranged in accordance with the laws of war among nations. For the nature of the business, that it be not void of effect, shows that the agreement was made without consideration of the controversies which led to the war. Otherwise, in fact, there would be no agreement which could not be lightly set aside.

To this conclusion I may not inaptly apply the observation of the same Seneca,² whom I have several times quoted: ‘Our ancestors accepted no excuse, in order that men might know that good faith must by all means be preserved. It was in fact better that even a just excuse from a few should not be accepted, than that any sort of an excuse should be tried by all.’

2. What, then, can be used as an offset to that which was promised? Undoubtedly whatever the other party owes, even under the terms of another agreement entered into during the war; or, it may be reckoned as an offset if he has caused damage during a truce, or has failed to respect the inviolability of ambassadors, or has done anything else which the law of nations condemns between enemies.

3. Nevertheless the observation should be made that the adjustment is arranged between the same parties, and in such a way that the right of a third party is not infringed; yet so that the goods of subjects, as we have said elsewhere, are held by the law of nations to be liable for the debt which the state owes.

4. We add this also, that it is characteristic of a noble mind to abide by treaties even after an injury has been suffered. For this

¹ *Ibid.*, vi.

² *Ibid.*, VII. xv [VII. xvi. 2].

reason the wise Hindu Iarchas praised the king who, although wronged by an allied neighbour, 'did not withdraw from his sworn pledge, saying that he had sworn in so holy a manner that he would not harm the other even after suffering wrong'.

5. Almost all the questions which are wont to arise concerning the faith accorded to an enemy can be settled if we follow the rules already laid down in our discussion not only of the force of promises of all kinds, or of a special oath, or of a treaty and sponsions, but also of the rights and obligations of kings, and the interpretation of ambiguous statements. Nevertheless, in order that the application of the foregoing principles may be more plain, and that our discussion may be extended to cover whatever else is in dispute, [573] I shall not hesitate to touch on the special questions which are more common and which more generally demand attention.

Philostratus,
III. vi
[*Life of Apollonius of Tyana*,
III. xx].

II. xi ff.

ON THE GOOD FAITH OF STATES, BY WHICH WAR IS ENDED ; ALSO
ON THE WORKING OF PEACE TREATIES, ON DECISION BY
LOT, ON COMBAT BY AGREEMENT ; ON ARBITRATION,
SURRENDER, HOSTAGES, AND PLEDGES

I.—*Division of good faith between enemies, according to the order of what follows*

[575] UNDERSTANDINGS between enemies rest upon a promise expressed or implied.

An express promise is either public or private. If public it is imputed either to the supreme authority or to subordinate powers. That which is imputed to the supreme authority either puts an end to war or maintains its force while the war lasts.

Among the factors which terminate a war some are looked upon as principal, others as accessory. Those are principal which themselves end the war by their own action, as treaties, or by the consent to refer to something else, such as the drawing of lots, the issue of combat, or the decision of an arbitrator. Of the last three the first rests on pure chance, while the other two combine chance with strength of mind or body, or with capacity of judgement.

II.—*In a monarchy the right to make peace belongs to the king*

See II.
xv. 3.

Those who have the right of initiative in conducting a war have the right to enter into treaties for the purpose of ending it. Each, in fact, is the manager of his own affairs. From this it follows that in a war which is public on both sides the right to end it belongs to those who have the right to exercise supreme power. In a true monarchy, therefore, this will belong to the king,¹ provided also the king has unrestricted power.

III.—*What if the king is an infant, insane, a captive, or in exile ?*

See I.
iii. 24.

1. A king who is of such an age that he does not possess maturity of judgement (in some kingdoms such an age is defined by law, elsewhere it will have to be determined by a more probable estimate) or a feeble-minded king cannot make peace.

The same principle will apply to a king in captivity,² provided he possesses a kingly authority which had its origin in the consent

¹ Mariana, XXI. i.

² See Guicciardini, Books XVI and XVIII ; more than a single reference.

of the people. It is, in fact, not credible that sovereignty was conferred by a people on such terms that it could be exercised by one who is not free. Therefore in this case also not the undivided sovereignty indeed,¹ but the exercise, and, as it were, the guardianship of it, will belong to the people, or to the one to whom the people has entrusted it.

2. Nevertheless, if a king even in captivity has pledged anything of his own private possessions, the pledge will be valid, in accordance with the principle set forth in what we shall state concerning private agreements.

But if a king shall be in exile,² will he be able to make peace? Surely so, if it be established that he is not living under constraint; otherwise his condition will differ too little from that of a captive, for there are captives also who are loosely guarded. Regulus refused to give his opinion in the senate, saying that he was not a senator so long as he was bound by an oath to the enemy.

Cicero,
On Duties,
II [III.
xxvii. 100].

IV.—*In an aristocracy or a democracy the right of making peace belongs to the majority*

In accordance with what we have said elsewhere, in aristocratic or democratic governments the right of making treaties will belong to the majority; in the former case, the majority of the public council, in the latter, the majority of the citizens who according to custom have the right to vote.

II. v. 17.

Accordingly, treaties so made will be binding even on those who have voted against them. Livy says: 'When a treaty has once been voted it will have to be defended as a good and advantageous treaty by all, even by those who were previously opposed to it.' Dionysius of Halicarnassus states the case thus: 'What the majority has voted must be obeyed.' Appian says: 'All, without admitting any excuse, are bound to obey the decree.' Says Pliny: 'All had to observe what the majority had approved.' Peace, moreover, is of advantage also to those whom it obligates, if they so wish.

XXXII
[xx. 6].

XI [lvi].

VI [Poly-
bius, V.
xliv. 7].
Letters,
VI. xliii [4].

V.—*Now the sovereignty, or a part of the sovereignty, or the property of the realm may be validly alienated for the sake of peace*

1. Let us now see what the things are which may be made subject of a treaty.

Vázquez,
Cont. III.,
I. iv, cites
many,
and v.
See above,
II. vi. 3 ff.

¹ Arumæus in his *Discourses on the Golden Bull* says: 'Rudolph of the Palatinate had fled to England in fear, and Henry of Mayence had been expelled by force from Trèves; yet they did not lose their votes as Electors.'

² Lucan says [V. 28 f.]:

And while Camillus dwelt in Veii's walls,
There too was Rome.

See Chassanaeus in the *Catalogus Gloria Mundi*, pt. v, consid. 89 [49].

Kings, such as the majority now are, are not able to alienate by treaty either the whole sovereignty or a part of it, since they hold their royal authority not as a patrimony, but as if in usufruct. [576] Even before they receive the kingship, while the people are still superior to them, such acts can be rendered entirely void for the future by a public statute, so that they cannot give rise to any obligation in the king's interest. And it is to be believed that the people have so willed; for otherwise, if the act were binding on the contracting party to his interest, the goods of subjects might be taken for the king's debts, and it would follow that the provision against the alienation of the sovereignty would be in vain.

2. In order, therefore, that the undivided sovereignty may be transferred in a valid manner, the consent of the whole people is necessary. This may be effected by the representatives of the parts which are called the estates.

In order to validly alienate any part of the sovereignty there is need of a twofold consent, that of the whole body, and in particular the consent of that part of which the sovereignty is at stake, since without its consent it cannot be separated from the body to which it has belonged. Yet in case of extreme and in other respects unavoidable necessity the part itself will probably transfer the sovereignty over itself in a valid manner without the consent of the whole people, because it is to be believed that that power was reserved when the body politic was formed.

3. In patrimonial kingdoms, however, there is nothing to prevent a king from alienating his crown. Yet it may happen that such a king would not be able to alienate a part of the sovereignty, if indeed he has received the kingdom as his property on the condition of not dividing it. But the property described as royal may be included in the patrimony of the king in two ways, either separately, or indivisibly united with the kingdom itself. If included in the latter way, it may be transferred, but only with the transfer of the crown itself; if separately, it may be transferred separately.

4. But kings who do not hold their kingship in patrimony seem hardly to have been granted the right of alienating the property of the realm, unless this right plainly appears as arising from some early law, or has never been considered contrary to custom.

VI.—*How far the people, or his successors, are bound by a peace made by a king*

We have elsewhere stated how far the people, and at the same time also the successors of the king, are bound by his promise, to wit: so far as the power of creating binding obligations was included in his sovereignty. This ought neither to be given unlimited range,

II. xiii
[II. vi. 13].

II. xiv.
10 ff.
Vázquez,
aforemen-
tioned,
I. v. no. 9.

nor to be confined within too narrow limits,¹ but ought to be so understood that what is based on good reason may be accepted as valid.

The case will plainly be different if a king is at the same time the absolute master of his subjects, and has received a sovereignty akin to that of a household rather than to that of a state. Such are kings who have reduced to slavery people conquered in war; or a king who does not indeed have ownership of persons but of their property, as Pharaoh in the land of Egypt, in consequence of purchase; and others, who have taken strangers into their private possession. For here the right added to the royal power establishes the validity of that which could not be maintained as valid by the right of the king alone.

Above,
III. viii. 2.

VII.—*In arranging peace the property of subjects can be given up for the sake of the public advantage, but with the obligation of making good the loss*

1. This question also is frequently discussed: in the effort to secure peace, what conclusion regarding the property of subjects may be adopted by kings who have no other right over the property of their subjects² than that inhering in the royal power?

I have said elsewhere that the property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in case of direct need, which grants even to private citizens a measure of right over others' property, but also for the sake of the public advantage; and to the public advantage those very persons who formed the body politic should be considered as desiring that private advantage should yield.

2. But, we must add, when this happens, the state is bound to make good at public expense the damage to those who lose their property; and to this public levy the person himself who suffered the loss will contribute, if there is need.

The state, furthermore, will not be relieved of this burden if perchance it is not equal to the payment at the time; but whenever the means shall be at hand the obligation will reassert itself as if merely held in suspense.

Vázquez,
I. v [15].
Romanus,
Consilia,
310.
Sylvester,
word
bellum,
I. 43.

[577] VIII.—*What in regard to property already lost in war?*

I do not admit without modification the statement of Fernando Vázquez, that the state ought not to take upon itself the loss already

Cont. III.,
III. iii.
end
[I. iv. end].

¹ See Reinkingk, Book I, class III, chap. v, no. 30 [I. v. iii. 19]. See also above, II. xiv. 7 and 12.

² Gail, II, obs. 57.

III. vi.
2 and
x. 5.

Digest,
XVII. ii.
52. § 4.

caused by a war, for the reason that the law of war permits such damages. For that law of war has reference to other peoples, as I have explained elsewhere, and in part applies to the relationships of enemies but not to those of citizens with one another. Since citizens of a state are associates, it is right that they should share the common losses which are suffered by reason of their association. Obviously, also, the municipal law may expressly provide that there shall be no right of action against the state for property lost in war, to the end that each individual shall defend his property with greater energy.

IX.—*No distinction is here made between property acquired under the law of nations and under the municipal law*

Some make a broad distinction between property which belongs to citizens by the law of nations and that which belongs to the same persons by municipal law; in consequence they grant to the king a more unrestricted right over property owned under the law of nations, even to the extent of taking it away without cause and without compensation, while they admit no such right in the case of property held by the law of nature.

This distinction is wholly erroneous, for ownership, no matter from what cause it has arisen, always has effects originating in the law of nature; consequently it cannot be taken away except as the result of causes which are inherent in ownership by its very nature, or arise from an act of the owner.

X.—*From the point of view of foreigners public advantage is presumed*

III. ii.

Now this doctrine, that the property of individuals should not be given up except for the public advantage, has reference to the king and his subjects, just as the other doctrine regarding compensation for loss has reference to the state and individuals. The act of the king is in fact sufficient for foreigners, who make agreements with him, not only by reason of the presumption established by the dignity of his person, but also in accordance with the law of nations, which permits the property of subjects to be made liable by the act of the king.

XI.—*General rule for the interpretation of peace covenants*

II. xv. 12
[II. xvi.
12].

I. In the interpretation of peace covenants the observation should be made that, as we have previously stated, the more favourable a condition is, the more broadly it is to be construed, while the

further a condition is removed from a favourable point of view the more narrow is the construction to be placed upon it.

If we have in view the law of nature, the most favourable condition seems to rest on this principle, that each shall obtain what belongs to him, which the Greeks have expressed by *ἕκαστον ἔχειν τὰ ἑαυτοῦ*; hence the interpretation of ambiguous clauses ought to be directed to the end that the party who had a just cause of war should obtain that for which he took up arms, and should likewise recover for damages and costs, but that he should not also recover anything by way of penalty, for that would arouse more hatred.

2. Since, however, it is not customary for the parties to arrive at peace by a confession of wrong, in treaties that interpretation should be assumed which puts the parties as far as possible on an equality with regard to the justice of the war.

This is usually accomplished in one of two ways; either the possession of property, which has been disturbed by war, is adjusted in accordance with the former right of ownership¹ [*status quo ante bellum*], the expression used in the speech of Menippus where he discusses the different kinds of treaties; or, things remain as they are [*uti possidetis*], and this the Greeks call 'holding what they have'.

Livy,
XXXIV
[vii. 8].

XII.—*In doubtful cases it is believed that the understanding is that things remain as they are; how this ought to be interpreted*

1. Of the two ways mentioned, in case of doubt the presumption is in favour of the second, because it is easier and does not introduce a change. Hence the rule laid down by Tryphoninus, that in peace the right of postliminy applies only to those captives who have been expressly mentioned in the treaty, as we have stated above, where it was shown by sound arguments that Faber's emendation of the text was correct. So also deserters will not be surrendered unless that is in the agreement. For we receive deserters by the law of war;² that is, according to the law of war we are allowed to admit and enrol on our side the one who changes allegiance. Under such an agreement the other things remain in the hands of the possessor.

Digest,
XLIX.
xv. 12.
Above,
III. ix [4].

Dig. XLI.
i. 51.

2. In such cases, however, the word possession is understood not according to municipal law but according to the law of nature. For in wars the fact of possession suffices, and nothing else is considered. Moreover we have said that lands are so held if they have been enclosed by fortifications; for temporary possession, as in the

Above,
III. vi. 4.
Decio,
Consilia,
III. lxxiv.

¹ See Paruta, Book V.

² See above, III. i. 22. In peace this agreement is generally made, that deserters shall not be received; see the peace of Justinian with Chosroes in Menander Protector [frag. 11, p. 10, edit. Dindorf].

[On the
Crown,
xviii. 26 =
p. 234.]

Above,
III. vii. 4.

case of a stationary camp, is here not to be taken into account. [578] In his speech for Ctesiphon Demosthenes says that Philip hastened to seize what places he could, knowing that, as matters stood, after the conclusion of peace he would retain what he held.

Incorporeal possessions are not retained except through the things to which they belong, as the servitudes of lands, or through the persons who possess them, provided that the rights do not run with land which formerly belonged to the enemy.

XIII.—*What if an agreement has been made, that all things are to be restored to the condition in which they were before the war?*

In the first kind of agreement, in which possession disturbed by the war is restored, we must note that the last possession, which existed before the war, is meant; nevertheless with the understanding that private persons who have been dispossessed may institute legal proceedings either by possessory action or by a claim for damages.

XIV.—*In such cases those who previously were free and of their own accord became subject to another are not restored*

But if any free people has of its own will yielded to one of the belligerents, restitution will not be applicable to it; for restitution applies only to those things which are accomplished by force, or fear, or in other ways through deceit permissible only against an enemy. So when peace was made among the Greeks the Thebans retained Plataea,¹ saying 'that they held that place not by force, nor by betrayal, but by the free choice of those to whom it belonged'. With equal right Nisaea remained in the possession of the Athenians. Titus Quinctius made use of the same distinction in relation to the Aetolians, saying 'That is the rule for captured cities; of their own accord the cities of Thessaly came under our sway'.

Livy,
XXXIII
[xiii. 12].

XV.—*In case of doubt damages caused by war are considered as remitted*

If no other agreement has been made, in every peace it ought to be considered settled that there shall be no liability on account of the damages which have been caused by the war. This is to be understood also as to damages suffered by private persons; for such damages also are the result of war. In case of doubt it is presumed that the belligerents intended to make such an agreement that neither would be condemned as guilty of injustice.

¹ This passage is from Thucydides, V [V. xvii]; a similar one had preceded in III [III. lii]; 'That Plataea ought not to be given back, since the men of that city had yielded of their own accord.'

XVI.—*The principle stated does not apply to what was owed to individuals before the war*

Nevertheless we ought not to consider that debts, which were owed to individuals at the outbreak of war, have been cancelled. For cancellations of debts are not obtained by the law of war, but their collection has only been hindered by the war. When, therefore, the hindrance has been removed, they retain their full force. Although we should consider that no one ought easily to be deprived of the rights which he possessed before the war (for, as Cicero rightly says, commonwealths and states were established especially on this account, that individuals might be secure in holding what belonged to them), yet this must be understood in the case of those rights which arise from the inequality of things.

Decio,
Cons., lxi.

On Duties,
II [xxi.
73].

XVII.—*In case of doubt also punishments, which were publicly due before the war, are considered as remitted*

The same principle does not apply to the right to inflict punishment.¹ For this right, in so far as it concerns kings or peoples, ought to be considered as held in abeyance, from fear that the peace will not be a perfect peace if it leaves the old causes for war.

Wherefore acts not known will also here be included under the general terms, as the case of the Roman traders who, as Appian relates, were drowned by the Carthaginians without the knowledge of the Romans. Dionysius of Halicarnassus declares that the best reconciliations are those which do away with the anger and the remembrance of the injuries. In his *Plataic Oration* Isocrates says: 'In peace it is not fitting to follow up former wrongs.'

[Punic
Wars, i. 5.]

[III. viii.
4.]

[xiv = p.
299 B.]

XVIII.—*What of the right of private persons to inflict punishments?*

As to the right of private persons to inflict punishment, the reason is not so strong for thinking that it should be held in abeyance, because it can be enforced through the courts without war. Nevertheless, since this right is not so clearly ours as that which arises from inequality, and punishments always cause hatred, a slight extension of the scope of the words will suffice to suggest that this right also may be understood to have been given up.

XIX.—*A right, which was publicly alleged before the war, but was in dispute, is easily understood to be in abeyance*

What I have said, that a right which existed before the war ought not easily to be considered annulled, should be firmly main-

¹ Gail, *De Arrestis*, chap. xiv, no. 7.

tained with respect to the rights of individuals; [579] but as to rights of kings and peoples it is easier to understand that some condonation has occurred, if only statements, or not improbable inferences, are in evidence. This is above all the case if the right in question was not clear, but had been in dispute. It is, in fact, the part of kindness to believe that the right was suffered to fall into abeyance in order that the seeds of war might be eradicated.

III [ix. 3].

The same Dionysius of Halicarnassus, whom I quoted above, says: 'We ought not so much to consider the renewing of our friendship for the present, as to take care that we may not be involved in war a second time; for we have come together for the purpose not of putting off the evils but of putting an end to them.' The latter part of this statement was taken almost word for word from the oration of Isocrates *On Peace*.

[xxv = p.
164 c.]

XX.—*Things captured after the making of peace must be restored*

It is well established that things which have been captured after the conclusion of a treaty of peace must be restored. The right of war had, in fact, already expired.

XXI.—*Some rules bearing upon the agreement to restore things captured in war*

Alicia,
Responsa,
V. xvii.

In treaties which deal with the restitution of things captured in war, first, those provisions which apply equally to both sides ought to be interpreted more broadly than those which are one-sided. Again, the provisions that are concerned with persons are construed more favourably than those that treat of things. Among provisions treating of things those that deal with land are construed more favourably than those dealing with movables, and those dealing with public property more favourably than those that treat of private property. Also among provisions treating of private possessions those which order the return of things possessed under a saleable title allow greater latitude than those possessed under a burdensome title, as property held under bills of sale or as dowry.

Cicero,
On Duties,
II [xxiii.
81].

XXII.—*Regarding income*

A person to whom a grant of property is made on the conclusion of a peace is entitled to receive the income of it also from the time of the grant, but not before that time. This principle was rightly maintained by Caesar Augustus against Sextus Pompey who, after the Peloponnesus had been granted to him, at the same time claimed also the taxes which were due for the previous years.

Appian,
Civil Wars, V
[ix. 77].

XXIII.—*On the names of regions*

The names of regions must be accepted according to the usage of the present time,¹ and according to the usage of experts rather than of the common people; for such matters are usually treated by experts.

XXIV.—*Concerning reference to a former treaty; and concerning him through whom the failure to perform has come*

The following rules also are of frequent application. As often as reference is made to a former or ancient treaty, the qualifications or conditions of the former agreement are in each case considered as repeated. Also the party, who was willing to do an act, must be considered as having done it, if he was hindered from doing it by the other party with whom the dispute occurred.

Quintilian,
Declamations,
ccxlvi
[cccxlvi].

XXV.—*Concerning delay*

However, the statement of some writers, that delay for a brief period is excusable, is not true unless an unforeseen necessity has proved a hindrance.² It is, in fact, not strange that some canons favour the excusing of such delay, since it is their duty to influence Christians to that view which is consistent with love for one another. But in this investigation concerning the interpretation of treaties we are not now inquiring what is the better course nor what religion and honour demand of each, but to what limit the application of a principle, based wholly on that right, which we have called legal, can be carried.

XXVI.—*In case of doubt that interpretation should be adopted which is contrary to the interest of the party that made the terms*

In case the meaning is doubtful, an interpretation is preferably to be adopted contrary to the interest of him who dictated the conditions,³ because ordinarily he belongs to the stronger party. Hannibal says that the dictation of the terms of peace belongs to the

[Livy,
XXX.
xxx. 24.]

¹ See Guicciardini, Book V [on the contest for Capitanata between the French and Spaniards; the former insisted it was a part of the Abruzzi, the latter, of Apulia].

² See Albert of Strassburg.

³ Plautus, *The Persian* [line 586]:

The merchandise is yours, so you must price it.

In a matter of this sort the one who is more powerful generally speaks first; but when terms are being sought the one who is weaker is wont to speak first. Plutarch, *Sulla* [xxiv=p. 467 c], says: 'It is their part to speak first who have need of peace; it is sufficient for the victor to be silent.'

Dig. II.
xiv. 39.

man who grants peace and not to the one who asks for it. So likewise an interpretation is adopted against the seller; for he has himself to blame for not speaking more plainly.

[Nico-
machean
Ethics,
VIII. xv.]

The other party, however, could rightly accept, to his own advantage, a condition which admitted of several interpretations. [580] This is in harmony with what Aristotle said: 'Where friendship exists for the sake of advantage, there the advantage of the one who receives is the measure of what is due.'

XXVII.—*Distinctions are drawn between furnishing a new cause for war and breaking a treaty*

Of daily occurrence is the discussion of the question, when should a treaty of peace be considered broken? This the Greeks call a 'breach of faith'. It is, in fact, not the same thing to furnish a new cause for war and to break a treaty; but there is a great difference as regards both the penalty incurred by the one at fault and the relieving of the innocent party from his pledge in other matters.

A treaty of peace is broken in three ways: by acting either contrary to what is involved in every peace, or against what was expressly stated in the treaty of peace, or against what ought to be understood from the nature of every peace.

XXVIII.—*How a treaty of peace may be broken by acting contrary to what is contained in every peace*

[I. cxxiii.]

A violation of what is involved in every peace will take place if a warlike attack is made, especially when no new cause is presented. If the fact can be alleged with probability, it is better to believe that the wrong was committed without faithlessness than with it. This statement of Thucydides hardly needs mention: 'Not those who ward off force with force break the peace, but those who are the first to make the attack.'¹

Having established this point, we must see by whom, and against whom, the armed attack which breaks the peace is made.

¹ See Ammianus Marcellinus, beginning of Book XXIX [XXIX. i. 3]. He speaks thus of the Romans: 'Intentionally retreating, that they might not be the first to do hurt to any one of the enemy with the sword and be judged guilty of having broken the treaty, they joined combat only under the stress of absolute necessity.'

According to Procopius, *Persian War*, Book II [II. iii=p. 94 B], the Armenians said in their speech to Chosroes: 'They do not destroy peace who are first in arms, but they who, in time of peace, are first detected plotting against the others.' In the same author, *Vandalic War*, Book II [II. xi=p. 259 C], the Moors say: [590] 'They do not break treaties of peace who have been oppressed by injuries and after making complaint openly transfer their allegiance to others, but they who do violence to those that wish to live as allies. If under such conditions any take their possessions and go over to the other side, they do not make God their enemy; but those do who seize the property of others and force the owners into the perils of war.'

XXIX.—*What if allies have made an attack?*

I see that there are some who think that if those, who have been allies, make such an attack, the treaty of peace is broken. And I do not deny that an agreement can be made on such terms, not, to be sure, that one people should be subject to punishment for another's act, but that peace should not seem to have been finally made, but should remain subject to a condition depending partly on intention, partly on chance.

We ought not, however, to believe that a peace has been made in this way, unless the fact is perfectly clear. Such an arrangement is irregular, and not in harmony with the common desire of those who are making peace. Therefore those who made the attack without the aid of others will be responsible for breaking the treaty, and the right to wage war will exist against them and not against the others. In opposition to this view the Thebans formerly spoke against the allies of the Spartans.

Pausanias,
IX [i. 5].

XXX.—*What if subjects have so acted? How their action should be considered as approved*

If subjects do anything by armed attack without public orders, it will be necessary to see whether the act of individuals can be said to have been publicly approved.

From what we have said above, it can easily be understood that to show public approval three requisites are necessary: knowledge of the act, power to punish, and neglect to punish. Knowledge is shown by the fact that the acts are manifest, or have been made subject of complaint. Power is assumed, unless the lack of it is apparent. Neglect is evidenced by the expiration of the period of time ordinarily taken for the punishment of crimes in each state. Such neglect is equivalent to a decree; and in this sense the statement of Agrippa in Josephus should be taken, 'that the king of the Parthians would consider the peace broken if his subjects should take up arms against the Romans'.

II. xxi.
2 ff.

[*Jewish War*,
II. xvi. 4.

XXXI.—*What if subjects should engage in warfare under the command of others?*

The question is frequently raised, whether the rule just given holds if subjects do not take up arms on their own account but serve under others who are carrying on war. Certainly according to Livy the people of Caere, in offering an excuse for themselves, say that their citizens did not serve with the public consent. Also the Rhodians had the same defence.

VII [xx.
5].

Gellius,
VII. iii
[VI. iii. 5].

XVII [iv.
5].

[XXXII.
xxxiv. 5.]

Livy,
V [xvii. 9].

It is nearer the truth to consider that such service ought not to be permitted, unless it is made apparent, by plausible arguments, that a different point of view has been adopted. This sometimes happens now in accordance with the ancient example of the Aetolians, who held it right to take plunder from a plunderer.¹ Polybius² says that the force of this custom was that, though they were not themselves at war, but others, their friends or allies, were warring, it was nevertheless [581] lawful for Aetolians without a public decree³ to serve on both sides and to take plunder from both. Of the same people Livy says: 'They permit their young men to serve against their own allies, omitting merely the public authorization; and often opposing armies have Aetolian auxiliary troops on both sides. Formerly the Etruscans, though refusing aid to the Veientes, did not hinder any of their youth from going as volunteers to that war.'

XXXII.—*What if harm has been done to subjects? Herein a distinction is made*

Digest,
XLIII.
xvi. 1. § 17.

1. Again, a treaty of peace ought to be considered broken, not only if an armed attack is made on the whole body of the state, but also if such an attack is made on its subjects, of course without a new cause. For peace is made in order that all subjects may be safe. Peace, in fact, is an act of the state on behalf of the whole body and on behalf of its parts. Even more, if a new cause arises, by the peace it will be permissible for them to defend themselves and their property. For, as Cassius says, it is natural to repel arms with arms. Consequently among equals it is not to be thought easy to give up this right. But it is not permissible to punish, or to recover stolen property, by force, except after judgement has been refused; for these matters admit of delay, while self-defence does not.

2. But if subjects commit wrongs so continuously,⁴ and in a manner so contrary to the law of nature, as to warrant the belief that they are acting wholly without the approval of their rulers, and if they cannot be brought into court, as in the case of pirates, it will be lawful both to recover property from them and to take vengeance on them, as if on persons who had been surrendered to us. But it is in truth contrary to the conditions of peace on that account to attack others who are innocent.

¹ Plautus, *Truculentus* [line 567]:

Plunder from plunder I take.

² See the same author in the *Excerpta* [*Excerpta de Virtutibus et Vitiis*, 6=IV. iii. 1-2].

³ Agathias, Book IV [IV. xiii], tells the same of the Sabirian Huns in his own time.

⁴ So Augustus decided on behalf of Herod against Syllaeus; Josephus, [*Antiquities of the Jews*], XVI. xvi [XVI. x. 8].

XXXIII.—*What if harm has been done to allies? Herein likewise a distinction is made*

1. Also an armed attack made upon allies breaks a treaty of peace,¹ but only an attack upon those allies who have been included in the terms of peace; as I showed in examining the controversy over Saguntum. On this principle the Corinthians insisted in the speech which is found in the sixth book of Xenophon's *Affairs of Greece*: 'We have all taken oath to all of you.'

II. xvi. 13.

[VI. v. 37.]

Further, if the allies themselves have not made the compact, but others for them, the same rule will nevertheless have to be applied, after it is fully settled that those allies have ratified the treaty of peace. For so long as it is still uncertain whether they wish to ratify it they are to be considered as enemies.

2. The case is different with other allies, such as those united by ties of blood and marriage, who are neither subjects nor named in the treaty of peace. Yet it does not follow, as I have said above, that war cannot be undertaken on that account, but it will be a war from a new cause.

Caepolla,
Consilia,
dcxc.
Decio,
Consilia,
dxxxii.

XXXIV.—*How a treaty of peace may be broken by acting contrary to what has been stated in the peace terms*

As I have said, a treaty of peace is broken also by acting contrary to what has been stated in the peace terms. Under action, moreover, is included the failure to do what one should, and when one should.

XXXV.—*Whether a discrimination ought to be made between the articles of the treaty of peace*

I shall not here admit a differentiation of the terms of peace into those that are of greater and those that are of less importance. For everything that has been included in the treaty of peace ought to seem important enough to be kept. Goodness, nevertheless, and especially Christian goodness, will more easily pardon lighter faults, especially if repentance is added, so that the following is in point:

Who sin regrets, is almost innocent.

Seneca,
Agamemnon [243].

But in order that peace may be still more securely safeguarded it will be wise to add to the topics of minor importance² the provision that the treaty of peace is not to be broken by anything done in violation of these, or that arbitration should be tried before it is permissible to take up arms, as was provided, according to Thucydides, in the Peloponnesian treaty.

See above,
II. xv. 15.

VII [V.
lxxxix].

¹ De Thou, Book LXV, year 1578. There is also something pertaining to this in Haracus, in his history of Brabant, vol. II, for the year 1556.

² See an excellent example in the peace treaty of Justinian, between Justinian and Chosroes. Menander Protector has it [frag. 11, p. 10, edit. Dindorf].

XXXVI.—*What if a penalty has been added ?*

And I am fully of the opinion that this seems to have been the intention, if any special penalty [582] has been added;¹ not because I do not know that a contract can be so made that the one, to whom the injury has been done, may have a choice, whether he prefers the penalty or withdrawal from the agreement, but because the nature of the business requires what I have said. This principle indeed is agreed upon, and has both been stated by us above and approved by the authority of history, that a treaty of peace is not broken by the party who fails to stand by it after the other has broken it; for he was only bound conditionally.

III. xix.
13-14.

XXXVII.—*What if necessity has hindered fulfilment ?*

But if necessity is the cause why one party has not fulfilled his promise, as, for example, if the thing has been destroyed or lost, or the act rendered impossible by some chance, the treaty of peace will not be considered as broken; for, as I have said, a treaty is usually not dependent on a chance condition. But the other party will have his choice, whether he prefers to wait, if there is any hope that the promise may be carried out later, or to receive an equivalent in estimated value, or to be freed from mutual engagements corresponding with that item or of equal value.

XXXVIII.—*Peace continues, if the one injured so desires*

Certainly even after a broken agreement it is within the power of the injured party to preserve peace, as Scipio did after many treacherous acts of the Carthaginians; no one frees himself from an obligation by acting contrary to it. And if the provision has been added, that the treaty of peace should be considered broken by such an act, this provision ought to be considered as added merely for the benefit of the innocent party, in case he wishes to take advantage of it.

See above,
III. xix
[13 ff.].

XXXIX.—*How peace may be broken by acting contrary to what belongs to the special nature of every peace*

Lastly we said that a treaty of peace is broken by doing what is contrary to the special nature of the peace.

XL.—*What falls under the term friendship ?*

1. Accordingly, acts that are contrary to friendship break a treaty of peace which was entered into under the terms of friendship.

¹ As in the treaty of the Goths with the Franks; see Procopius, *Gothic War*, I [I. xii=p. 342 B].

For whatever the duty of friendship by itself demands of other men ought by the right of the agreement to be performed in such a case as this also. To treaties of friendship (since Pomponius teaches us that there is also a kind of treaty not made for the sake of friendship), and not to every kind of treaty, I refer many matters arising out of injuries inflicted without force of arms, and insults, which are frequently discussed by legal experts; and to such treaties I refer the statement of Cicero: 'If any wrong has been committed after a return to friendly relations, it should be thought not due to neglect but a violation, and imputed not to imprudence but to faithlessness.' But in such cases also the motive of ill-will should as far as possible be eliminated from the act.

Digest,
XLIX,
xv. 5.

For
Gabinus
[see
Jerome,
Apology
against
Ruf., I. i].

2. Consequently, if a wrong has been done to a person intimately connected with the party with whom the peace was made, or to a subject, it will not be considered as done to the party himself unless the wrong was done openly as an affront to him.

This principle of natural justice is followed by the Roman laws in cases of cruelty in the treatment of slaves. Adultery, also, and violation of chastity, will be referred rather to lust than to rupture of friendly relations, and the seizure of another's property will make the aggressor guilty of a new act of greed rather than of the breaking of faith.

Digest,
XLVII.
x. 15
§ 35.
Inst., IV.
iv. § 3.
Alexander,
Consilia,
II, no. 3.

3. When no new cause is presented, threats that are truly savage are inconsistent with friendly relations. To this head I shall refer also the building of fortresses on the boundaries, not for defence but for the purpose of inflicting harm; and an unwonted levying of troops, if it shall be apparent, from satisfactory indications, that these are being levied against no one else than the party with whom the peace has been made.

XLI.—*Whether it is contrary to friendship to receive subjects and exiles*

1. It is not contrary to friendship to admit individual subjects¹ who wish to migrate from one government to another. Such liberty in fact, as I have said elsewhere, is not only natural but also advantageous.

II. v. 24.

¹ Solon says [Plutarch, *Solon*, xxiv = p. 91 F]: 'He did not allow any strangers to be enrolled in the list of citizens except those who had been banished for ever from their own country, or had moved to Athens with their entire household in order to practise some trade.' According to Appian, *Selections on Embassies*, no. xxv [= *Macedonian Affairs*, xi. 6], Perseus said: 'I have done this in accordance with the common right of mankind, as you also receive those who have been expelled from other places.' This common right is usually confirmed and strengthened by treaties.

See the peace of Antiochus in Polybius, *Selections on Embassies*, no. xxxv [= XXI. xlii. 18], and in Livy [XXXVIII. xxxviii]; the peace between the Romans and Persians in Menander Protector [frag. 11, p. 10, edit. Dindorf]; and Simler concerning the treaties among the Swiss. Strabo, Book XVI [XVI. ii. 14], bears witness: 'While the kings of Syria were fighting with each other, the Aradians obtained the right to admit fugitives, but not to permit their departure.'

[II. v. 25.]
XLII
[xli. 7].

[i=p.
105 c.]

Under the same principle I include the granting of asylum to exiles. For over exiles the state has no right, as I have noted elsewhere, quoting Euripides. In Livy Perseus rightly inquires: 'What is accomplished by sending any one into exile, if there is not going to be a place anywhere for the person exiled?' In the second speech *On Leuctra*, Aristides says: [583] 'It is a common right of mankind to admit exiles.'

[III. vii.
8.]

II. xxi.
3 ff.

2. As I have said elsewhere,¹ it is clearly not permissible to admit towns or large aggregations, which constitute an integral part of a state. It is equally unpermissible to admit those who, by reason of an oath or in some other way, are under an obligation of service or of slavery. Moreover we have previously stated that among certain peoples the same rule has been introduced by the law of nations concerning those who are slaves by fortune of war. But also we have treated elsewhere of the surrender of those who, though not driven into exile, are seeking to escape a justly deserved penalty.

XLII.—*How war may be ended by drawing lots*

The result of a war cannot in all cases be made subject to the chance of drawing lots, but only in those cases in which the issue is one over which we have full power. For the obligation of the state to protect the life, chastity, and other rights of its subjects, and of the king to protect the welfare of the state, is too great to permit the disregard of those considerations which stand in the most natural relation to the defence of themselves and others. Nevertheless, if on a careful estimate the party attacked in an unjust war is so far inferior that there is no hope of resistance, it is apparent that a decision by lot can be offered, in order that a certain peril may be avoided by recourse to an uncertain one. This, in fact, is the least of the evils.

XLIII.—*How war may be ended by a set combat; and whether this is lawful*

[Pausanias,
V [iv. 2].
[Livy,
I. xxiv.]
[Stobaeus,
Florilegium, vii.
67.]

1. There follows a much disputed question concerning combats which are agreed upon with definite numbers, for the sake of ending a war; such combats, for example, with one on each side, as that of Aeneas and Turnus, or Menelaus and Paris; with two on each side, as that between the Aetolians and the Eleans; with three on each side, as that between the Horatii, who were Romans, and the Curatii, who were Albans; or with thirty on each side, as that between the Lacedaemonians and the Argives.

¹ II. v. 24. See also Bizarri, Book XII.

2. If we consider only the law of nations, in a strict sense, there should be no doubt that, according to it alone, such contests are lawful; for this law permits the killing of enemies without distinction. If, again, the opinion of the ancient Greeks and Romans, and of other nations, were true, that each man is the master of his own life without restriction, then such combats would not lack moral justice also. But I have already several times said that this opinion is in conflict with true reason and the precepts of God. Elsewhere I have shown, both by reason and by the authority of the Sacred Writings, that whoever kills a man on account of things which we can do without sins against the law of love for his neighbour.

II. xix. 5
and xxi. 1
[xxi. 11].
II. i. 12 ff.

3. Let us now add that a man sins also against himself, and against God, who values so cheaply the life which was granted to him by God as a great favour. If the issue at stake, such as the safety of many innocent persons, is worthy of war, we must strive with all our strength to win. To use a set combat as an evidence of a good cause, or as an instrument of divine judgement, is unmeaning, and inconsistent with the true sense of duty.

Thomas,
II. ii. qu.
95, art. 8,
and Ca-
jetan
thereon.

4. There is only one condition which can render such a combat just and patriotic, from the point of view of one side merely; that is, if otherwise the expectation is in all respects warranted that the party supporting the unjust cause is going to be the victor with great slaughter of innocent persons. He, in fact, should be subject to no censure who prefers to fight in the way that will give to him the greatest probability of success. But this also is true, that some acts, which are not done rightly, are not approved as right by others, but are held permissible for the avoidance of more serious evils which cannot otherwise be escaped; as in many places base usurers and prostitutes are tolerated.

Cajetan,
as cited
above.

5. Therefore, as I previously said, when it is a question of avoiding war, if two persons, who are striving for the sovereignty, have prepared to contend with arms against each other, the people can allow such a combat in order that a greater calamity, otherwise imminent, may be avoided; so the same thing will have to be said when it is a question of ending a war. Thus [584] Cyrus challenged the Assyrian king;¹ and, according to Dionysius of Halicarnassus, Mettius said that it would not have been an unfair thing for the leaders themselves of the peoples² to decide the question

II. xxiii
[10].

Aegidius
Regius,
disp. 32,
dub. 2,
no. 18.
[Xen.,
On the
Training
of Cyrus,
V. iii. 5.]

III [xii. 3].

¹ Long before that time Hyllus challenged Eurystheus. See Euripides, *Children of Hercules* [800 ff.].

² Such is the reply which the inhabitants of Adrianople made to Mahomet, referring to him and to Musa Zeleb; Leunclavius, Book XI. So Cunibert, king of the Lombards, challenges Alachus; Paul Warnefrid, V [V. xl]. Thus Pharnacus wished to fight with the leader of the Sauromatae for the fortress of Cherso, in order that the populace might not be subjected to peril on account of their dispute, as Constantine Porphyrogenitus relates in the chapter on the fortress Cherso [*De Administrando Imperio*, liii, p. 150].

See Pontanus, *Danish History* [Book V, p. 151], for an example of a single combat [591]

by fighting with each other, if the contest had been for their own power or rank and not for that of their peoples. So we read that the Emperor Heraclius¹ fought in single combat with Chosroes, the son of the Persian king.

XLIV.—*Whether the act of kings in such cases binds their peoples*

On the other hand, those who thus refer a controversy to the outcome of a combat can indeed deprive themselves of whatever right they themselves possess, but in those kingdoms which are not patrimonial they cannot also give a right to another who does not possess it. In such cases, therefore, in order that a treaty may be valid, it is necessary to add the consent both of the people and of those persons, already born, who have the right to the succession. In fiefs which are not free the consent of the lord or seigneur of the fief also is required.

XLV.—*In such combats who is to be judged the victor?*

1. Often in such combats the question is raised, which of the two should be considered the victor.² Only those can be considered vanquished on whose side all have either fallen or taken to flight. So, according to Livy, withdrawal to one's own territory or towns is a sign of defeat.³

III [ii. 3].

2. In three famous historians, Herodotus, Thucydides, and Polybius, three disputes about victory are presented, and of these the first refers to a set combat. But if any one views the evidence correctly he will find that in all these contests the parties separated without a true victory. For the Argives were not put to flight by Othryades, but had gone away at the coming of night, thinking that they were victors, and intending to report the victory to their people. Neither had the Corcyraeans put to flight the Corinthians, who, after having fought successfully, had perceived a strong Athenian fleet and had gone away in good order without making any test of strength with the Athenians. Philip of Macedon had indeed captured a ship belonging to Attalus, after it had been deserted by its men, but he had completely failed to put the fleet to flight; and so, as Polybius remarks, he conducted himself, rather than considered himself, as a victor.

Herodotus, I [lxxxii].

Thucydides, I [li and liv].

XVI [i].

for the kingdom. See also what the historians relate concerning the challenges between the Emperor Charles V and Francis I, king of France.

¹ See Aimoin, IV. xxi, and Fredegarius, lxiv.

² Ennius [frag. 330, in Servius, *On the Aeneid*, XI. 307].

Who conquers is not victor, if the vanquished owns it not.

See Scaliger on the words of Festus, *herbam do*.

³ And in Guicciardini, Book II.

3. The other evidences—the collecting of spoils, the giving up of dead for burial,¹ and challenging to battle a second time, which in the passage cited and in Livy you sometimes find mentioned as signs of victory—prove nothing in themselves, excepting in so far as, in connexion with other signs, they bear witness to the flight of the enemy. Surely in case of doubt the one who has retired from the field of battle may be presumed to have fled. When, however, there are no sure proofs of victory, the issue remains in the same condition as before the battle, and must be referred either to battle or to new agreements.

XXIX
and XL.

XLVI.—*How war may be ended by arbitration ; and here arbitration is understood to be without appeal*

1. Proculus teaches us that there are two kinds of arbitrators. One is of such a sort that we ought to render obedience, whether he is just or unjust ; and this kind of arbitration, he says, is found when the parties resort to an arbitrator under mutual promises to abide by his decision. The other deals with matters of such a kind that they ought to be referred to the decision of a just man ; and of this type we have an example in the reply of Celsus : ‘ If a freedman ’, he says, ‘ has sworn to give as many services as the patron has judged proper, the decision of the patron will not be valid, unless the freedman has thought it fair.’

Digest,
XVII.
ii. 76.Digest,
XXXVIII.
i. 30.

While it was possible for this interpretation of an oath to be introduced by the Roman law, it is not in harmony with the simple meaning of the words viewed by themselves. Nevertheless this remains true, that an arbitrator can be chosen in either of two ways. Either he is charged with the task of reconciliation only, as we read that the Athenians were when selected as arbitrators between the Rhodians and Demetrius ; or he serves as one whose decision must be absolutely obeyed. It is the latter class with which we are here dealing, and of which we said something above, when we spoke of the methods of avoiding war.

II. xxii
[II. xxiii.
8].

2. Although municipal law may make provision for arbitrators to whom resort is had under promises on both sides, [585] and in some places has provided that it shall be lawful to appeal from them and to make complaint of injustice, nevertheless such a procedure cannot become applicable in relation to kings and peoples.²

¹ Plutarch, *Agessilaus* [xix=p. 606 B], says : ‘ But after the enemy had sent to ask permission to bury their dead he granted it, and having in that manner obtained a testimony of victory he went away to Delphi.’ Likewise in the *Nicias* [vi=p. 527 AB] : ‘ And yet according to established and accepted custom those who had received permission to bury their dead were thought to have given up all claim to the victory, and those who had obtained such a request did not have the right to set up a trophy.’

² Mariana, XXIX. xv ; Bembo, IV [fol. 62]. There are many examples of peace made by arbitration in Kromer's *Poland*, Books X, XVI, XVIII, XXI, XXIV, XXVII, XXVIII. There is one also in the second book of the *Danish History* by Pontanus. Cf. also above, II. xxiii. 18 [II. xxiii. 8].

For here there is no higher power, which can either hold fast or loosen the bond of the promise. Under such conditions, therefore, the decision of arbitrators, whether just or unjust, must stand absolutely, so that one may rightly apply here the saying of Pliny: 'Each makes the man whom he chooses the supreme judge of his case.' It is, in fact, one thing to make inquiry concerning the duty of the arbitrator, and another to inquire concerning the obligation of those who promise.

Natural History,
preface
[19].

XLVII.—*In case of doubt it is understood that arbitrators are bound to decide according to law*

1. In respect to the duty of an arbitrator, the point must be considered, whether he has been chosen in the place of a judge, or with somewhat larger powers. Seneca seems to think the latter characteristic of an arbitrator, when he says:

On Benefits,
II. vii
[III. vii.
5].

The condition of a good case seems to be better if it is referred to a judge rather than to an arbitrator; for the rules of law apply to the former and set certain limits, which he may not pass. In the case of the arbitrator, a religious scrupulousness, free and unchecked by restraints, can both take away and add to, and direct the decision not as the law or justice advises, but as humanity and pity move.

Aristotle also says that 'it is the part of a fair and kindly man to prefer to have recourse to an arbitrator rather than to go to law'; and he adds as the reason, 'For the arbitrator has regard to what is fair, but the judge follows the law. Indeed the arbitrator was brought into existence for this very purpose, that equity might prevail.'

Rhetoric,
I. xix
[I. xiii.
19].

2. In the passage just quoted equity does not properly mean, as elsewhere, that division of justice which interprets more narrowly the general import of law according to the intention of the lawgiver, for such interpretation has been committed to the judge also; rather it means everything which is better done than left undone, even outside of the rules of justice properly so called.

Such arbitrators, however, as are common between private persons and citizens of the same country are especially recommended also to Christians by the Apostle Paul (*1 Corinthians*, vi). Yet in a case of doubt it ought not to be understood that so great power has been granted; in doubtful cases, in fact, we follow the narrowest interpretation. But this statement is especially in point in respect to those who hold sovereign power; for since they have no common judge, we must consider that they have restricted the arbitrator by those rules by which the office of a judge is usually restricted.

XLVIII.—*Arbitrators ought not to decide concerning possession*

Nevertheless this observation should be made, that arbitrators chosen by peoples or by sovereigns¹ ought to render a decision regarding the main point at issue, but not in regard to possession. For decisions regarding possessions belong to municipal law ; by the law of nations the right of possession follows ownership. Consequently, while the case is under advisement, no change ought to be made, not only to avoid prejudice, but also because recovery is difficult. In his account of those who served as arbitrators between Carthage and Masinissa, Livy says : ‘ The commissioners made no change in the right of possession.’

[XL. xvii.
6.]XLIX.—*What is the force of surrender pure and simple ?*

I. The acceptance of an arbitrator is of a different sort when any one entrusts the decision regarding himself to an enemy ; for this is pure surrender, which makes the one who surrenders a subject, and confers the sovereign power on him to whom the surrender is made. The Greeks call this ‘ yielding the power over oneself ’. So we read that the Aetolians were asked in the senate, whether they would leave the decision regarding themselves to the Roman people. According to Appian the advice of Publius Cornelius Lentulus in regard to the Carthaginian state at the end of the Second Punic war was as follows :

Livy,
XXXVII
[xliv. 4].
XIV
[Appian,
Punic
Wars,
XIV.
ix. 64].

Let the Carthaginians entrust themselves to our decision, as conquered peoples are accustomed to do, and as many have done heretofore. We shall then look into the matter, and if we shall have granted anything to them they will be grateful to us ; [586] for they will not be able to call it a treaty.

That, furthermore, makes a very great difference. So long as we make treaties with them they will always be finding pretexts, as if wronged in respect to some point of the treaty, in order that they may break it. For openings for controversy always remained, since many points are of doubtful interpretation. But when we have taken away their arms from them as having surrendered, and have brought their very persons under our power, then at length they will understand that they have nothing that is their own ; then they will lose heart, and whatever they may have received from us they will gladly accept as if bestowed from another’s bounty.

2. But here we ought also to distinguish what the conquered ought to endure ; again, what the victor can do lawfully, what even in conformity with the full discharge of duty, and finally, what it is most fitting for him to do.

After the surrender there is nothing that the vanquished may not have to suffer. He is, in truth, already a subject ; and, if we consider only the strictly legal rights of war, he is in such a position that

¹ The Duke of Savoy said this in the contest about Saluzzo. See de Serres [or rather, his continuator] on Henry IV.

everything can be taken from him—his life, his personal liberty, and the property not only of the state but also of individuals.

XXXVII
[vii. 1].

III. viii. 4.

VI, II
[XXVIII.
xxxiv. 7].

In another passage Livy says: 'The Aetolians, having surrendered at discretion, were afraid that vengeance would be wreaked upon their persons.' Elsewhere I have cited the following: 'When all things have been surrendered to him who is the more powerful in arms, it is for the victor to judge, and to decide, what he wishes the conquered to have, what he wishes them to give up by way of punishment.' The following statement of Livy bears upon the same point:

It was an ancient custom of the Romans not to assume sovereignty over a people as conquered—a people with which they were not united in friendship either by treaty or by common laws—until all things, divine and human, had been surrendered, hostages had been accepted, arms taken away, and garrisons placed in the cities.

III. xi.
18 [16].

Also we have shown that the putting to death of those who had surrendered was sometimes lawful.

L.—*What is the duty of the victor toward those who make an unconditional surrender?*

1. But in order that the victor may not do anything unjustly he ought first to see to it that he kill no one, unless this fate is deserved by the prisoner's own act; again, that he take nothing from any one except as a lawful penalty. Moreover within this limit,¹ so far as one's own safety allows, it is always the part of honour to incline to clemency and generosity; sometimes, in consideration of the circumstances, such a course is even made necessary by the rule of custom.

III. xv. 12.
XIII
[xxi. 6].

[XIII.
xxiii. 5.]

2. As I have said elsewhere, wars are well ended when they terminate with pardoning. According to Diodorus, Nicolaus of Syracuse says: 'They surrendered themselves with their arms, relying on the clemency of the victor. Therefore it would be shameful for them to be deceived in their expectation of humane treatment on our part.' Afterward he adds: 'Who of the Greeks ever thought that those ought to be punished relentlessly who entrusted themselves to the clemency of the victor?'

[Civil
Wars, V.
v. 45.]

In Appian Octavius Caesar, addressing Lucius Antony, who had come in order to surrender, says:

If you had come to make a treaty, you would have found me both a conqueror and a man incensed by wrong-doing. Now, since you yield yourself, your friends, and your army to my decision, you take away my anger, you take away also that power which you would have been forced to yield to me in a treaty. For now I am obliged to take into

¹ See the famous example of Ferdinand, king of Leon, in Mariana, XI. xv. Also recall what I have said above, III. xi. 14-15.

account, along with what you ought to suffer, also a second consideration, what it is right for me to do; and I shall give preference to the latter.

3. In the Roman histories the expression 'to surrender oneself to the good faith', or 'to surrender oneself to the good faith and clemency', is often found. So in Livy, Book XXXVII: 'In a kindly manner he listened to the embassies from neighbouring peoples surrendering their states to his good faith.' Also in Book XLIV, where the narrative concerns [587] King Perseus, we read: 'Since Paulus was insisting that he should surrender himself and his possessions to the good faith and clemency of the Roman people.' Still the fact should be recognized that by these words nothing else is understood than absolute surrender; and the word translated good faith¹ in these passages does not suggest anything else than the probity of the victor, to which the vanquished commits himself.

[ix. 7.]

[iv. 7.]

4. In Polybius and Livy there is a famous story² about Phanaeas, the ambassador of the Aetolians, who in his speech to the consul Manius yielded as far as to say: 'Therefore the Aetolians have resolved to surrender themselves and their possessions', as Livy states, 'to the good faith of the Roman people.' In response to a question of the consul, he affirmed this a second time; then the consul demanded that certain persons who had stirred up the war should be surrendered to him without delay. Phanaeas took exception to this and said: 'We have surrendered ourselves to your good faith, and not to slavery,' adding that what was ordered was not consistent with Greek custom. The consul replied that he did not care what the custom of the Greeks was; that according to Roman custom he had power over those who had surrendered to his discretion; and he gave orders that the ambassadors be put in chains. In the Greek author is the question: 'Are you here discussing duty and propriety, when you have already surrendered yourselves to our good faith?'

Livy,
XXXVI
[xxviii. 1.]

From these words it is clear with how great impunity, and without violating the law of nations, he can act to whose good faith a people has surrendered. Yet the Roman consul did not take advantage of this power, but both dismissed the ambassadors and gave to the council of the Aetolians an opportunity of deliberating anew.

Similarly the Romans are said to have replied to the Faliscans, that they had been given to understand that the Faliscans had surrendered themselves not to the power, but to the good faith of the

Valerius
Maximus,
VI. iv
[VI. v 1.]

¹ Polybius says [*Selections on Embassies*, xiii=XX. ix]: 'Among the Romans the same force is found in the expressions "to entrust oneself to another's faith" and "to give to the victor unrestricted power of deciding concerning oneself".'

The Greeks say, 'to surrender themselves to justice', as in Thucydides, Book III [III. lxxvii], or 'to yield the power over themselves', as in Diodorus Siculus, Book XIV [XIV. cxi].

² *Selections on Embassies*, no. xiii [=XX. x].

Livy,
VIII
[ii. 13].

Romans. We read also of the Campanians, that they had come into the good faith of the Romans not by treaty, but by surrender.

On
Clemency,
II. vii [4].

5. You would, in truth, not ineptly apply to the duty of him to whom a surrender has been made this passage of Seneca: 'Clemency possesses unlimited right of decision. It judges not according to the letter of the law, but according to what is just and good; and it may acquit, or assign a penalty as great as it will.' And I do not think that it makes any difference whether the one who surrenders says that he surrenders himself to the wisdom, or to the moderation, or to the mercifulness of the victor. All these words are merely gracious expressions. The fact remains, that the victor becomes absolute master.

LI.—*Concerning conditional surrender*

I iii. 17.

Nevertheless there are also conditional surrenders. These either safeguard the interests of individuals, that the safety of their lives, or the freedom of their persons, or even certain property may be reserved; or they make provision for the whole body of the people. Such surrenders in some cases may even introduce a sort of mixed sovereignty, as I have explained elsewhere.

LII.—*Who can, and should, be given as hostages?*

Hostages and pledges are accessories of treaties. I have said that hostages are given¹ either of their own will, or by him who holds the power and authority. For in the supreme civil authority is included the right over the acts as well as over the property of the subjects. But the state or its ruler will be obligated to compensate the person who suffers, or his relatives, for the inconvenience.

If there should be several persons, and it should make no difference to the state which of these should go as a hostage, it seems clear that pains should be taken to have the choice settled by lot.

The lord of a fief does not possess the right to select a vassal as a hostage unless the vassal is also a subject. For the fealty and duty, which the vassal owes, do not go so far.

LIII.—*What the right over hostages is*

I have said that according to the strict law of nations a hostage can be put to death; but that is not also in accord with moral justice, unless there is a fault on the part of the hostage meriting such punishment. Hostages, moreover, do not become slaves. Furthermore, by the law of nations they can both hold property and leave it to their

¹ In this work, III. iv. 14; see also III. xi. 18.

heirs ; although the Roman law provided that their property should go to the state treasury.

Digest,
XLIX.
xiv. 3r.

LIV.—*Whether a hostage may lawfully escape*

Is the question raised whether a hostage may lawfully make his escape? It is agreed that he may not, if [588] at the beginning, or afterward, he gave a pledge, in order that he might have more liberty. Under other conditions it seems to have been the intention of the state not to bind its citizen not to try to escape, but to give to the enemy the power to guard him as it might wish.

Thus the deed of Cloelia can be defended. But, although she had not herself done wrong, yet the state could not receive and retain the hostage.¹ So Porsenna said: 'If the hostage is not surrendered, the treaty will be considered as broken'; then we read: 'The Romans restored the pledge of peace in accordance with the treaty.'

Livy,
II [xiii.
6 ff.].

LV.—*Whether a hostage may be lawfully detained for any other reason*

The obligation arising from the use of hostages, moreover, is distasteful, not only because it infringes liberty, but also because it arises from the act of another. Consequently, a narrow interpretation is here in point. Hence it follows that hostages given on one account cannot be detained on another. This is to be understood as applying in case some other promise has been made without the addition of hostages.

If, however, good faith has already been violated in another matter, or a debt contracted, the hostage can then be retained, not as a hostage, but in accordance with the law of nations, according to which subjects can be detained 'by reprisal' (*κατ' ἀνδροληψίαν*) on account of an act of their rulers. Nevertheless provision may be made that this should not happen, by adding an agreement regarding the return of the hostages when the matter on account of which they were given has been closed up.

See
above,
I, v. III
[III. ii. 3].

LVI.—*A hostage is set free at the death of the one for whom he came as hostage*

One who has been given as a hostage, merely to take the place of a captive or hostage, is set free at the death of the latter. For Ulpian says that at the moment the latter dies the right of pledge

¹ See Plutarch, *Publicola* [xix=p. 107 A] on this matter. To the verse of Virgil [*Aeneid*, VIII. 651]:
And Cloelia broke her bonds and swam,

Servius adds, 'bonds of the treaty'.

Digest,
XLIX.
xv. 15.

is destroyed, as in the case of a ransomed captive. Therefore, as in Ulpian's inquiry the ransom, which was to take the place of the person, is not due, so here the person who was made the substitute of another will not remain bound.

Syrian
Wars
[viii. 47].

XXXIV
[iii. 6].

Thus according to Appian Demetrius not unjustly demanded that he be released by the Roman senate, since he had been given as a hostage in the place of Antiochus, and Antiochus had died. Justin, following Trogus, says: 'Demetrius, a hostage at Rome, having learned of the death of his brother Antiochus, came before the senate saying¹ 'that he had come as a hostage when his brother was living, but, now that his brother was dead, he did not know for whom he was a hostage.'

LVII.—*Whether a hostage may be retained after the death of the king who gave him*

II. xvi. 18
[II. xvi.
16].

The decision whether a hostage may still be held after the death of the king who made the treaty is dependent on the question treated by us elsewhere, whether the treaty should be considered personal or real. For accessories cannot cause us to withdraw from the rule in the interpretation of the main articles, the nature of which the accessories themselves ought to follow.

LVIII.—*Sometimes hostages are under obligation as principals, and one is not bound for the act of the other*

II. xv. 18
[II. xv. 16].

Alberico
Gentili, *De
Iure Belli*,
II. xix.

It should be added, in passing, that sometimes hostages are not mere accessories to the obligation, but are in fact the principal party. This would be the case, for example, when any one has promised under contract to perform an act not his own, and because he is bound for the resulting damage, if the act is not performed, his hostages are bound in his place; and I have said elsewhere that this seems to have been the decision regarding the Caudine treaty-compact. On the other hand the opinion of those who hold that hostages without their consent can be mutually bound for each other's acts is not only severe but also unjust.

LIX.—*Of what sort is the obligation arising from pledges of property?*

Pledges of property have certain points in common with hostages, and certain points peculiar to themselves. It is a characteristic common to both, that they are retained even on account of another debt, unless faith has been pledged to the contrary. It is a characteristic peculiar to pledges of property that an agreement made

¹ This word needs to be restored in the text to make the sentence grammatical.

concerning them is not taken as strictly as one concerning hostages. For the matter is not equally distasteful, since things are made to be held, but men are not.

LX.—*When the right of redemption is lost*

This also I have mentioned elsewhere, that no length of time can bring it about that a pledge of property should not be redeemable, if that is performed for which the pledge was given. For an act, which has an old and familiar cause, is not supposed to arise from a new cause. Thus the patience of the debtor should be ascribed to the old contract, and not to the abandonment of ownership, [589] unless inferences that are warranted suggest another interpretation; as if a person, prevented at the time when he wished to redeem a pledge, had allowed the matter to pass without mention for so long a time that it might warrant the presumption of consent.

II. iv.
17 [II. iv.
15].

ON GOOD FAITH DURING WAR; HEREIN ALSO CONCERNING
A TRUCE, THE RIGHT OF SAFE-CONDUCT,
AND THE RANSOM OF PRISONERS

I.—*What a truce is, and whether this interval is to be considered as peace or war*

I. EVEN during a war the sovereign authorities are accustomed to grant certain rights, which, with Virgil and Tacitus, I may call 'intercourse of war', or with Homer, 'solemn agreements'. Among these are included the truce, the right of safe-conduct, and the ransom of prisoners.

A truce is an agreement by which warlike acts are for a time abstained from, though the state of war continues. I say, 'though the state of war continues', for, as Cicero says in the eighth *Philippic*, there is no middle ground between war and peace. War, furthermore, is the name of a condition which can exist even when it does not carry forward its operations.

Aristotle says: 'It may happen that a man may be endowed with virtue, and either sleep or pass his life in inactivity.' Elsewhere the same author says: 'Distance between places does not destroy friendship, but hinders the exercise of it.' Andronicus of Rhodes remarks: 'An accomplishment may so exist that it accomplishes nothing.' Eustratius comments thus on the sixth book of the *Nicomachean Ethics*: 'Skill considered in relation to power simply is spoken of as potentiality; but if compared with the action itself or its exercise it is called a power, as the surveyor's art in a sleeping surveyor.'

Just as Hermogenes, though silent,¹ yet remains
A singer and the best of players; and Alphene,
Sly fellow, when his tools of trade were cast
Aside, and closed his shop, was still a cobbler.²

2. In like manner, then, as Gellius also says: 'A truce is not peace, for, though [593] fighting ceases, the war continues.' Also in the *Panegyric* of Latinus Pacatus we read: 'A truce suspends the acts of war.' This I say that we may know that, if an agreement has been made which is to be valid in time of war, this will be valid also in a truce, unless it is clearly apparent that the agreement applies not to the state of war but to its acts.

¹ [599] Seneca, *On Benefits*, V. xxi [IV. xxi. 4]: 'He is even eloquent who is silent.'

² In the passage just cited, Seneca says: 'He also is an artisan who is not supplied with the tools for practising his trade.'

On the contrary, if anything has been said in regard to peace, this will not be applicable in time of truce; although Virgil spoke of a truce as a mediatrix of peace, and Servius, on the same passage, as a temporary peace. So the Scholiast on Thucydides calls a truce 'an ephemeral peace in travail of war'; and Varro, a respite of military operations, lasting a few days. All these are not definitions but descriptions, and that, too, figurative. In the same class also is the characterization of Varro, when he called a truce the vacation of war; he might likewise have called it a slumber of war. Thus Papinius Statius called the holidays, which were free from lawsuits, peace. Aristotle called sleep the chain of the senses, and following his example you may rightly call a truce a chain of war.

3. Gellius rightly criticizes the explanation of Marcus Varro, which Donatus also follows, because Varro added the words 'lasting for a few days'; he shows that truces are frequently given also for hours, and I may add likewise for twenty, thirty, forty, and even for one hundred years. There are examples of such truces in Livy, and they disprove the following definition of Paul the jurist also: 'A truce exists when, for a brief period and for the present time, an agreement is made that the two sides refrain from attacking each other.'

4. Nevertheless, if it shall be apparent that the sole and only determining cause of an agreement was the cessation of warlike acts, it may happen that what has been said of a time of peace will in that case apply during the truce, not from the force of the word, but from a sure inference as to the intention, regarding which we have spoken elsewhere.

II.—*The derivation of the word*

Moreover, it seems clear that the word *induciae* (truce) is not, as Gellius thinks, derived from *inde uti iam* (then as now); nor from *endoitu*, that is, *introgressu* (an entering in), as Opilius proposes, but [from *inde otium*] because *inde*, that is, 'from a certain time', there may be *otium* (rest), just as the Greeks call a truce *ἐκχειρία* (a holding of hands).

It is, in fact, apparent, even from Gellius and Opilius, that the ancients wrote this word with the letter *t* and not *c*; and, though now used as a plural, it was formerly without doubt also a singular. The old spelling was *indoitia*, for then they pronounced *otium* as *oitium*, from the verb *oiti*, which we now spell *uti*, just as from *poina* (now written *poena*) *punio*¹ is derived, and from *Poinus* (now *Poenus*) *Punicus* comes.

[*Aeneid*,
XI. 133.]

[I. xl.]
[Aulus
Gellius, I.
xxv. 1.]

[*Silvae*,
IV. iv. 40.]

[*On Sleep
and Vigil*,
i, iii.]

I. xxi
[I. xxv].
*On Ter-
rence's
Eunuch*,
I. i. [line
60].

Digest,
XLIX.
xv. 19. § 1.

III. xvi.
20 [II.
xvi. 20].

Gellius,
XIX. viii
[13].

¹ See Servius, *On the Aeneid*, X [X. 24], on the word *moerorum*.

Just as from the plural *ostia*, *ostiorum* has been derived the singular *Ostia*, *Ostiae*,¹ so from *indoitia*, *indoitiorum* has come *indoitia*, *indoitiae*; hence *indutia*, the plural of which, as I have said, is now in use. Formerly, as Gellius notes, it was also used in the singular number. Donatus was not far out of the way when he wished to explain *induciae* from the fact that a truce furnished a rest for some days.

XIX. viii.
On Te-
rence's
Eunuch
[line 60].

Livy [X.
xvi. 14],
Plutarch,
Justin.

A truce, then, is a period of rest in war, not a peace. And so the historians use the term properly in saying, as they frequently do, that a peace was refused, a truce was granted.

III.—*A new declaration of war after a truce is not necessary*

In consequence, after a truce there will be no need of a new declaration of war. For when the temporary obstacle is removed the state of war, which was not dead but sleeping, asserts itself, just as the right of ownership and the power of the father assert themselves in a man who has recovered from insanity.

Angelus,
On Dig.,
II. xiv.
27. § 1.
Martinus
Laudensis,
[De Bello,]
qu. 29.

Nevertheless, we read in Livy that, in accordance with the decision of the treaty priests, war was declared upon the termination of a truce. The fact is, however, that the ancient Romans wished by those unnecessary precautions to show how much they loved peace, and how just the causes were by which they were drawn into war. This is implied by Livy himself:

IV [xxx.
14].

They had fought recently near Nomentum and Fidenae with the Veientes. [594] A truce, not a peace, had been made, the limit of which had expired, but before that date of expiration the Veientes had again taken up arms. Nevertheless heralds were sent, but when on oath they demanded restitution, in the manner of our ancestors, their words were not listened to.

IV.—*How the period of time fixed for a truce ought to be reckoned*

1. The duration of a truce is commonly made either a continuous period, as for one hundred days, or with the designation of a fixed limit, as up to the first of March. In the former case the calculation must be made exact to the minute. This, in fact, is in accord with nature; for the reckoning of time by civil days arises from the laws and customs of peoples. In the other case doubt is generally raised, whether the day, the month, or the year, which has been fixed for the duration of the truce, should be understood as reckoned inclusively or exclusively.

Dig. L.
xvi. 134.

2. By nature, at any rate, there are two kinds of boundaries, one within the thing, as the skin is the boundary of the body, and

And *ostrea*, *ostreae*, was formed from *ostrea*, *ostreorum*.

the second outside of the thing, as a river is the boundary of a country. Boundaries which are fixed according to choice can be established by both methods. But it seems more natural that the boundary, which is a part of the thing,¹ should be assumed. Aristotle says: 'That is called the boundary which is the extreme part of each thing.'

*Meta-
physics,*
V. xvii [IV.
xvii].

Such an assumption, furthermore, is not inconsistent with practice. 'If any one has said that something will happen before the day of his death, that day also, on which he has died, is counted.' Spurina warned Caesar of a danger which would not be delayed after the fifteenth of March. When accosted on the fifteenth, he said that the day had come, but had not yet passed.² This interpretation, then, is all the more to be adopted when the extension of time contains an advantage in itself, as in the case of a truce, which spares human bloodshed.

Dig. L.
xvi. 133.

Suetonius,
Caesar, v
[lxxx].

3. But the day 'from' which a certain measure of time is said to begin will not be included in the measure, for the force of that preposition is to separate, not to unite.

V.—*When a truce begins to be binding*

Incidentally I may add this, that a truce, and everything else of the kind, is binding on the contracting parties immediately after the agreement is completed. The subjects on both sides, however, begin to be bound as soon as the truce has taken the form of a law, and this requires some sort of publication abroad. As soon as the publication has been made, it begins to have a binding force on the subjects. Nevertheless, if the publication has been made in one place only, that force does not manifest itself at the same moment throughout the whole area under governmental control, but only after a sufficient time for carrying the news to the different places. Therefore if in the meantime subjects have done anything contrary to the truce, while they will not be liable to punishment, the contracting parties will, nevertheless, be bound to make good the loss.³

Bartolus,
On Dig.,
I. i. 9,
Panorm.,
On Decretals, I.
ii. 2 (?),
and there-
on, Felinus,
no. 7.

VI.—*What is lawful during a truce*

1. What is lawful, what is not lawful in a period of truce, may be understood from the very definition. For all acts of war are unlawful, whether against persons or against property, that is, what-

¹ Baldus, *De Statutis*, on the word *usque*; Bartolus, *On Digest*, XXXII. iii. 35, and *On Digest*, I. ix. 12. Archidiaconus, *On Decretum*, II. xiii. 1. 1; Hieronymus de Monte, in his book *De Finibus*, chap. xxiii.

² Dio Cassius [XLIV. xviii] quotes the saying: 'It is here, but has not yet passed.' Appian [*Civil Wars*, II. xxi. 149]: 'The Ides are here, but have not yet passed.'

³ As in the case of Scion in Thucydides, IV [IV. cxxii]. Therefore what Mariana (XXVIII. vii) relates was done by the Spaniards in Italy cannot be defended.

ever is done by force against the enemy. In a period of truce, in fact, all such acts are contrary to the law of nations; it was thus, according to Livy, that Lucius Aemilius explained the matter in a speech to his soldiers.

[XL.
xxvii. 9.]

2. Even property of the enemy, which has come into our hands by chance, will have to be restored, although it had been ours before. For as regards the legal right, according to which such matters have to be judged, the property in question has become theirs.

[Digest,
XLIX. xv.
19. § 1.]

This is what Paul the jurist had in mind when he said that in a time of truce the right of postliminy does not exist; for postliminy requires, as antecedent, the right of capture in war, but this right does not exist in a truce.

3. On both sides it is lawful to go and to return, but with such equipment only as does not suggest peril. This was noted by Servius on the verse of Virgil,¹

And with impunity the Latins mingled.

There Servius also relates that when Rome was besieged by Tarquin a truce was made between Porsenna and the Romans; and during the celebration of the Circensian games in the city [595] the leaders of the enemy entered and contended in the chariot race, and were crowned as victors.

VII.—*Whether during a truce it is lawful to retreat and repair walls, and the like*

It is not inconsistent with a truce to withdraw with the army further inland, as we read in Livy that Philip did. Again, a truce does not prevent the rebuilding of walls, nor the enrolment of soldiers, unless some special agreement has been made.²

XXXI
[xxxviii.
10].
Frontinus,
[Strategemata,] II.
xiii [8].

VIII.—*A distinction regarding the seizure of places in time of truce*

1. Without doubt it is a violation of a truce to bribe garrisons of the enemy and seize places which they were holding. Such an acquisition, in fact, cannot be lawful except by right of war. The same principle must be applied in case subjects wish to revolt to the enemy. There is an example in Livy, Book XLII:

[XLII.
xlvi. 9.]

The people of Corona and Haliartus, who had a kind of natural predilection for kings, sent envoys into Macedonia asking for a garrison with which they might be able to defend themselves against the unrestrained arrogance of the Thebans. To this embassy the king made answer, that he could not send a garrison to them on account of his truce with the Romans.

¹ Servius, *On the Aeneid*, XI [XI. 134].

² As in Paruta, Book III.

According to Thucydides, Brasidas in time of truce received the city of Mende, which revolted from Athens to Sparta; but the excuse is added, that he in turn had charges to make against the Athenians.

[IV.
cxiii.]

2. It is indeed lawful to take possession of ownerless property, provided this has been really abandoned, that is, with the intention that it should no longer belong to those to whom it had belonged; but it is not lawful if the property is merely unguarded, whether the guard was removed before the truce was made, or afterward. Continuance of ownership in one renders possession by another unlawful. And by this rule the quibble of Belisarius against the Goths is refuted; for under such a pretext he had seized places which had been stripped of their garrisons¹ in time of truce.

Procopius,
Gothic War, II
[vii].

IX.—*Whether, at the end of the truce, one can return who has been detained by force majeure*

1. The question is raised, whether a person, who has been hindered by *force majeure* from returning, and is arrested within the territory of the enemy after the expiration of the truce, has the right to return.

If we consider the strict law of nations, I do not doubt that this person is in the same position as one who, although he had come in time of peace, by his own misfortune is caught among the enemy by a sudden outbreak of war. We have noted above, that such a person remains a captive until the conclusion of peace. Nor is moral justice opposed to this, since the property and acts of the enemy are liable for the debt of the state and are taken in payment. The case in question does not in reality furnish more ground for complaint than that of so many other innocent persons upon whom the misfortunes of war fall.

III. ix [4].

2. In this connexion, moreover, no comparison can be made with merchandise in a case of confiscation, nor with the illustration given by Cicero in the second book *On Invention*; he there speaks of a war vessel as having been driven into port by a storm, which the quaestor wished to confiscate according to law. In such cases *force majeure* frees from the penalty. But in the case of the person forcibly detained after a truce it is not, properly speaking, a question of penalty, but of a right, which was suspended during a certain time only. Nevertheless, there is no doubt that the releasing of such a person is a more kindly, yes, also a nobler, act.

Digest,
XXXIX.
iv. 15 and
16. § 8.
[II. xxxii.
98.]

¹ Portus, Centumcellae, Albanum.

X.—*Of special agreements in truces and the questions wont to arise therefrom*

Certain acts are unlawful during a truce on account of the special nature of the agreement; for example, if a truce has been granted only for the purpose of burying the dead, no deviation from that condition ought to be made. So if a truce has been given to those who are besieged, with the provision merely that they are not to be attacked,¹ it will not be lawful to admit auxiliary forces and supplies. For, while such a truce is advantageous to the one side, it ought not to make the situation harder for the other side which granted it.

Sometimes also the agreement is made, that it shall not be lawful to go back and forth. Sometimes, again, provision is made for persons and not for things.² In the latter case, if persons are injured while property is being defended, the truce will not be violated. For since it is permissible to defend property, then personal safety must be referred to the main provisions, and not to what is derived from the consequences of some one provision.

XI.—*When the terms of a truce have been violated by the one side, the other may begin war*

If the good faith of the truce has been violated by the one party, it should not be doubted that the party injured [596] is free to take up arms even without declaring war. For the main points of the agreement are implied in the manner of a condition in the agreement, as I have said a little above.

In the histories you may indeed find examples of those who have endured wrongs till the end of the truce. But you may also read that war was declared against the Etruscans and others, because they had acted contrary to the truce. This difference is proof that the law is as I say, but that it is at the option of the injured party to use, or not to use, the right which he has.

XII.—*What if a penalty, in case of violation of the truce, has been added?*

This is established, that if the penalty agreed upon is demanded, and is paid by the one who has done the wrong, the right to make war no longer remains. The penalty, in fact, is paid with this in view, that all else may remain in safety. On the contrary, if war is begun, it is necessary to consider that, since the choice was given, the idea of paying the penalty has been abandoned.

¹ Such as was given to the people of Naples by Totila, in Procopius [*Gothic War*, III. viii].

² See *Decretals*, V. vi. 11. There are examples of truces with exception of places in Procopius and Menander Protector.

III. xix.
19 [xix. 1
14] and
xx. 36.

Livy, IX
[xli. 7]
and XI
[X. xxxvii
ff.].

XIII.—*When the acts of private citizens break the truce*

Private acts do not break a truce unless in addition there is a public act, that is, through command or approval.

Private acts are understood to be in accordance with public command or approval if the guilty parties are neither punished nor surrendered, and if restitution is not made.

XIV.—*What interpretation ought to be put on the right of safe-conduct outside of the period of truce*

The right of safe-conduct outside of the time of truce is a kind of privilege. In its interpretation, therefore, the rules which are laid down in regard to privileges ought to be followed. This privilege, however, is neither harmful to a third party nor very burdensome to the one who grants it. Consequently, within the natural meaning of the words a loose rather than a strict interpretation ought to be admitted, and so much the more in case the favour has not been granted in response to a request, but has been offered voluntarily; so much the more, also, if a public advantage of some sort is connected with the business outside of private gain. A strict interpretation, therefore, even according to the meaning of the words, ought to be rejected, unless otherwise some absurdity would ensue, or very probable inferences as to intention seem to require it.

On the other hand, a freer interpretation than is afforded by the natural meaning of the words will be in point, in order that a like absurdity may be avoided, or because of very cogent inferences.

XV.—*Who may be classed under the term combatants*

From what has been said we draw the inference that the right of safe-conduct granted to combatants extends not only to inferior officers but also to officers of the highest rank; for the natural meaning of the word admits of this interpretation, although there is another interpretation that is narrower. Similarly a bishop is included under the term clergy.

Sailors also, who are serving in fleets, are understood to be combatants, and in fact all are who have taken the military oath.

XVI.—*How, in this connexion, we are to understand the terms go, come, and depart*

A provision in regard to going is considered to cover also the return, not from the meaning of the word, but to avoid an absurdity; for a favour ought not to be void of use. And a safe departure should be understood to hold good until the person has reached a place

See
above, II.
xvi. 12.

Canon in
Decretals,
I. vi. 7. § 1.
Digest,
XXXVII.
xiii. 1. § 1.

Diodorus
Siculus,
XVII
[lxxxiv].

where he is in safety. For this reason the good faith of Alexander¹ was under accusation; for he had ordered that those to whom he had granted the right to depart should be killed on the way.

However, a person to whom permission has been granted to depart cannot also return. Again, a person who has received permission to come himself will not be able to send another; and the reverse of this also holds. Such, in fact, are different matters, and in such cases reason does not compel us to go beyond the meaning of the words. Nevertheless, this principle is applicable with the understanding that, though an error confers no right, it at any rate relieves from the penalty, if a penalty formed a part of the agreement.

Also the person who has received permission to come will come only once, and not a second time unless the allocation of time supplies a different interpretation.

XVII.—*On the extension of this to persons*

The son does not follow his father, nor the wife her husband, otherwise than in accordance with the right of residence. For we are accustomed to live with our family, but to travel abroad without it. Nevertheless it will be understood, even if not expressly stated, that one or two servants are included in the case of a person for whom it would be unbecoming to travel without such attendance. For he who grants a favour grants that which of necessity follows. However, in such cases, necessity must be understood in a moral sense.

Digest,
XLIII.
xxvi. 21.

Abbas,
On
Decretals,
V. vi. 10.

[597] XVIII.—*On the extension of safe-conduct to baggage*

Similarly, not all kinds of goods will be included in the safe-conduct, but only such as are ordinarily taken on a journey.

XIX.—*Who are included under the terms attendants and nationality*

If the term attendants is used, those ought not to be understood whose case is more provocative of hatred than that of the one for whom the safe-conduct is arranged. Such are pirates, brigands, deserters, and fugitives. The designated nationality of the attendants indicates clearly enough that the right is not extended to others.

¹ Plutarch, *Alexander* [lix=p. 698 c]: 'This remained as a blot upon the warlike exploits of the king, who in other warlike deeds was accustomed to act both justly and in a manner befitting a king.' You find in Leunclavius, Book VI, a similar deed of Bayezid against the Vidynenses in Servia.

XX.—*Whether a right of safe-conduct is annulled by the death of the grantor*

Since the right of safe-conduct is derived from the force of authority, in case of doubt it is not annulled by the death of the one who granted it. This is in accordance with the rules which I have stated elsewhere in regard to favours granted by kings and other rulers.

II. xiii
[II. xiv.
11-12].

XXI.—*What if a right of safe-conduct has been granted subject to the pleasure of the grantor?*

There is usually a discussion regarding a safe-conduct granted with the restriction, 'so long as I wish'.

The opinion of those is nearer the truth who think that a favour of this kind continues even if no new act of will occurs; in case of doubt the presumption is that that remains in force which is sufficient for the validity of the right. But the force of the safe-conduct does not continue when the one who granted it has ceased to be able to wish it,¹ a condition brought about by death. When in fact the person is removed, the assumption of continuance also will cease, just as the accident ends with the destruction of the substance.

Canon in
Sext.
I. iii. 5.

XXII.—*Whether security outside of the territory also is due*

Moreover, safe-conduct is due to the person to whom it has been granted even outside of the territory of the grantor. For it is granted in derogation of the right of war, which in itself is not confined to a territory, as we have said elsewhere.

III. iv [8].

XXIII.—*The favour of ransoming captives*

The ransoming of captives is in large measure an act of favour, especially among Christians, to whom the divine law especially commends this kind of compassion. 'The ransoming of captives is a great and glorious function of justice,' says Lactantius. The ransoming of captives, especially from a barbarous enemy, is called by Ambrose a characteristic and supreme generosity. Likewise he defends his own act and that of the Church, because they had broken up even the consecrated vessels of the Church² in order to redeem

Matthew,
xxv. 36,
39.
VI [xii].
On Duties,
II. xxviii
[II. xv. 71].
On Duties,
II. xviii
[II. xxviii]

¹ *Digest*, XXXIX. v. 32, as corrected by the eminent scholar Antoine Favre, substituting *voluero* for *volueris* [*Conject. Jur. Civ.*, Book II. xix].

Add *Digest*, XIX. ii. 4; see Cardinal Toschi, *Practicae Conclusiones*, 751, lit. p; Reinkingk, Book II, class II, viii. 30.

² Augustine imitated this act of Ambrose, as Possidius relates [*Life of Augustine*, xxiv]; he says that this was done against the worldliness on the part of some persons. Deogratias, a bishop in the same Africa, also imitated the act of Ambrose, as Victor of Utica relates, I [Victor Vitensis, I. viii].

Hincmar, in the *Life of Remigius* [chap. v], relates that a consecrated vessel, which had belonged

captives. 'The ransom of captives is the adornment of sacraments,' he says, and he uses many other expressions to the same effect.

XXIV.—*Whether ransom may be forbidden by law is explained with the help of a distinction*

1. These considerations lead me not to venture to approve without discrimination the laws which forbid the ransom of captives, such as existed, we read, among the ancient Romans. Some one said in the Roman Senate, 'In no state are captives rated more cheaply than in our own.' The same state is said by Livy to have had the least consideration for captives, even from early times. There is a familiar ode of Horace which touches on this subject, in which he calls the ransoming of captives disgraceful terms and a precedent dragging ruin with it, a loss added to disgrace.

What Aristotle criticizes in the institutions of Sparta is likewise ordinarily held to be faulty in those of the Romans. As a matter of fact all their energies were directed to matters of war, as if on these alone the safety of the state depended. But if we should only have regard for considerations of humanity it would in many cases be better that a right which is sought in war should be lost, than that a great many men,¹ our relatives, in fact, or fellow countrymen, should be left in the most pitiable condition.

2. Such a law, therefore, does not seem just, unless the need of such severity is plain, with the purpose in view that greater evils, or the largest possible number of evils, which are otherwise with moral certainty inevitable, may be avoided. In case of such necessity, since the captives themselves, in accordance with the law of love, ought to bear their lot with resignation, the injunction not to set themselves in opposition can be laid upon them and upon others in accordance with the principles which we have laid down elsewhere in regard to the surrender of a citizen for the public good.

XXV.—*Can the right to a captive be transferred?*

According to our customs, it is true, those who are captured in war are not slaves. Yet I do not doubt that the right to collect the price of ransom from [598] a captive can be transferred from the party who holds the captive to another. For nature allows a transfer of ownership, even in things which do not have corporeal existence.

to Remigius, was given to ransom captives from the Norsemen. A similar act of Rimbart, archbishop of Bremen, is praised by Mark Adam of Bremen in his *Ecclesiastical History*, chap. xxxii. The sixth General Council of the Church approved this in a decree inserted in *Decretum*, II. xii. 2. This ought to be added to what I have said above, III. v. 2.

¹ [500] See Zonaras [XIV. xiii. 77-8] on the very late repentance of the Emperor Mauritius for such a deed.

Livy,
XXII
[lix. 1-2].
Livy,
XXII
[xi. 1].
[Odes, III.
v. 14-16.]

[Politics,
II. ix;
VII. xiv.]

I. xxv. 3.

XXVI.—*A ransom can be owed to several by one person*

Further, the same person can owe a ransom to more than one person if he has been let go by the first and captured by another before the first ransom has been paid. Such, in fact, are different debts, arising from different causes.

XXVII.—*Whether an agreement can be annulled on the ground that the wealth of the captive was unknown*

An agreement in regard to the amount of ransom cannot be annulled on the ground that the captive is understood to be richer than was believed. By the strict law of nations, which we are investigating, no one is compelled to make good what he has promised in a contract at less than a fair price, if there has been no deception. This can be understood from the explanations previously made concerning contracts.

II. 26 [II.
xii. 26].

XXVIII.—*What goods of the captive belong to the captor*

From what we have said, that captives are not our slaves, it follows that there is no room for the complete acquisition which, as we have said elsewhere, is the essential condition of ownership over the person. No other property, therefore, will be gained by the captor than what he has actually taken.

III. vii. 4.

In consequence, if the captive has something concealed on his person, it will not be acquired, since it has not been taken. Just so Paul the jurist made answer, in opposition to Brutus and Manlius, that a man, who has taken possession of a farm, has not taken into his possession a treasure which he does not know is on the farm; for a person cannot possess what he does not know of. The conclusion from this is that property concealed on the person of a captive can be used in paying the price of the ransom, since ownership has in effect been retained.

Dig. XLI.
ii. 3. § 3.

XXIX.—*Whether the heir owes the price of ransom is explained, with the help of a distinction*

I. This question is also commonly raised, whether a ransom agreed upon, but not paid before death, is due from the heir.

The answer seems to me void of difficulty. The ransom is not due if the captive died in prison. There was, in fact, a condition attached to the promise, that the captive should be set free; but a dead man is not set free. On the contrary, if the captive died when at liberty, the ransom is due; for he had already gained that in return for which the ransom had been promised.

2. I admit that obviously the agreement can be made also with different conditions, so that the ransom may be unreservedly due from the very moment of the contract, the captive being retained no longer as a prisoner of war, but as security for himself. On the contrary, the contract can be so drawn up that the payment of the price shall only be made if on the appointed day the captive is alive and free. But these conditions, as being less natural, are not to be assumed without clear proofs.

XXX.—*Whether a person, who has been released in order to free another, ought to return if the other has died*

Again, the question is proposed for discussion, whether a return to prison is obligatory for a man who has been released under the agreement that he should cause another to be freed, where the other has anticipated release by dying.

I have said elsewhere that the act of a third party, if fairly promised, is satisfactorily performed if nothing on the part of the promisor is omitted, but that in the case of burdensome promises the promisor is obligated only to an equivalent amount. So, in the question under discussion, the one who has been released will not be bound to restore himself to custody; for this was not the agreement, and the presumption in favour of liberty does not allow a tacit agreement to be understood. But the person who has been released ought not to get his freedom as clear profit; he will pay the estimated value of what he cannot furnish.¹ For this is more in accord with natural simplicity than what the interpreters of the Roman law set forth in an action according to prescribed formulas and on a formal claim for restitution of a thing given for a cause, when the cause did not follow.

¹ Paul Balioni did not do this, when released on the condition that he restore to liberty Carvajal, since Carvajal died before being set free. On this account he is criticized by Mariana, Book XXX [XXX. xxi]. But Paruta, Book II, relates the circumstances of the deed somewhat differently.

II. xi. 22
and xv. 16.
III. xx.
58.

Dig. XIX.
v. 5. § 1.
Dig. XII.
iv. 16.

CHAPTER XXII

ON THE GOOD FAITH OF SUBORDINATE POWERS IN WAR

I.—*The kinds of military leaders*

As ONE form of public agreement, Ulpian reckons this: 'Whenever the leaders of the war make agreements with each other.'

I have said that after considering the good faith pledged by the highest authorities I must treat of that which subordinate officials pledge to one another, or to others. Either the subordinate officials are next to the highest authority, such as have properly been called generals, to whom this expression of Livy must be applied, 'And we recognize as a general only the officer under whose auspices the war is waged'; or they are officers of lower rank, whom Caesar distinguishes as follows: 'A lieutenant-general (*legatus*) has one set of duties, a commander-in-chief (*imperator*) another. The one ought to carry out orders; the other, to deliberate freely on the conduct of the whole campaign.'

Dig. II.
xiv. 5.

IV [xx. 6].

Com-
mentary,
III [*Civil*
War, III.
ii. 4].

II.—*How far an agreement made by military leaders is binding on the supreme authority*

In dealing with the promises of military leaders the subject must be viewed under two aspects; for the question is raised whether such promises impose a binding obligation on the supreme authority, or only on the leaders themselves.

The first point should be settled in accordance with the principle which I have elsewhere stated,¹ that an obligation is imposed on us also by the person whom we have chosen as agent to execute our wishes, whether our wishes have been stated in express terms or are inferred from the nature of the responsibility. For the one who grants a power grants the means necessary for the exercise of that power, so far as he possesses them; and this ought to be understood morally in matters pertaining to morals. In two ways, therefore, subordinate authorities will be able to bind the supreme authority by their actions, either by doing that which is thought on probable grounds to lie within their field of duty, or even outside their field of duty, in accordance with a special responsibility, known to the public, or to those whose interest in the matter is at stake.

II. xi. 12.

¹ See Camden [p. 630], on the year 1594, relative to the sentence of Count Miranda in the case of Hawkins.

III.—*How far such an agreement furnishes occasion for an obligation*

There are also other ways in which the supreme authority is obligated by a previous act of its agents, but not in such a way that this act should be, properly speaking, a cause, but rather an occasion, of obligation. This may happen in two ways, either by consent, or by reason of the act itself. Consent is revealed by ratification, not only express but also implied, that is, when the supreme authority knew what had been done and permitted the accomplishment of the acts, which cannot with probability be referred to another cause. We have explained elsewhere how this matter proceeds.

II. iv. 5
and xv. 17.

By reason of the thing itself states are bound to this extent, that they should not become richer through another's loss, that [601] is, that they should either carry out the agreement, from which they wish to acquire gain, or renounce the gain. In regard to this principle of equity, also, I have spoken elsewhere. And to this extent, and not beyond, can we accept the maxim, that whatever has been done to our advantage is valid. On the contrary those cannot be acquitted of injustice who disapprove of the agreement and yet retain what they would not have had without the agreement. Such a case arose when, as Valerius Maximus relates, the Roman senate was unable to approve of the act of Gnaeus Domitius, and yet was not willing to disavow it. Many such instances occur in history.

II. x. 2.

IX. xvi
[IX. vi.
3].

IV.—*What, if anything, has been done contrary to instructions? Herein distinctions are presented*

I. Also we must repeat what has been said above, that whoever has appointed an agent is bound, even if the agent, while yet within the limits of his public function, has acted contrary to secret instructions.

II. xi. 12
and 13.

This rule of equity was rightly followed by the Roman praetor in an action relating to agents, that not everything done by an agent is, in fact, binding on the one who appointed him, but only that which, within the limits of his responsibility, was done in the interest of the principal. If now public notice has been given, that agreements should not be made with him, then he will not be considered as an agent. If, however, the notice has been given, but is not generally known, the one who appointed the agent is bound.

Dig. XIV.
iii. 5. § 11;
iii. 11.
§§ 2, 3, 4.

Also the conditions of the appointment must be observed. For if any one has wished that an agreement be made under a certain condition, or with the intervention of a certain person, it will be most fair that the conditions under which the agent received his appointment shall be observed.

2. The consequence of this is, that some kings or peoples are put under greater obligation by the agreements of their military leaders, others under less, in case their laws and customs are adequately known. But if there is doubt on these points we must follow the line of inference, in such a way as to understand that that is conceded without which there can be no proper discharge of responsibility on the part of the official.

3. If a lesser official has exceeded the limit of his instructions, in case he is unable to make good what he has promised, he will himself be liable for the equivalent of the loss, unless such recovery is precluded by some law sufficiently well known. But if in addition there is deceit, that is, if the official pretended to have greater power than he did have, he will then both be liable for the loss caused by his fault and also, on account of his criminal conduct, he will be subject to a penalty commensurate with the crime. In the former case his property is liable, and, if that is not sufficient, also his work, or the liberty of his person. In the second case his person, or his property, or both are liable, according to the magnitude of the crime.

Moreover, what we have said regarding deceit will be in point, even if any one has declared beforehand that he is unwilling to make himself liable, because the debt due both for the loss occasioned and as a just penalty is associated with the offence by a natural and not by a voluntary connexion.

V.—*Whether in such a case the other party will be under obligation*

But since either the supreme authority, or its agent, is always bound, this also is certain, that the other party to the agreement is under obligation, and it cannot be said that the agreement is one-sided.

We are done with the relation of lesser officials to their superiors.

VI.—*What generals or magistrates are able to do with regard to those of lower rank, or on behalf of them*

Let us see also what higher officials are able to do with regard to those of lower rank.

We ought not, I think, to doubt that a general may place a binding obligation on his soldiers, or magistrates on their fellow townsmen, within the limits of those powers which they are accustomed to exercise; beyond those limits, consent would be necessary.

On the other hand, a compact of a commander or of a magistrate will, in general, be advantageous to those of lower rank in respect to matters merely expedient; such arrangements, in fact, are suffi-

Alciati,
Consilia,
VIII. xl.

ciently understood as in their power. In respect to conditions which have a burden attached, the obligation is absolute within those rights which they are accustomed to exercise, but, beyond those, only if accepted.

These provisions are in accord with the principles which we have elsewhere discussed, growing out of the law of nature regarding a stipulation in behalf of a third party. The general statements will now be made clearer by the presentation of particular instances.

II. x. 11
[II. xi. 14].

VII.—*Generals do not have the power to make peace*

It does not fall within the province of the general to conduct negotiations with regard to the causes or the consequences of a war;¹ [602] the terminating of war is, in fact, not a part of the waging of it. Even though the general has been placed in command with absolute power, that must be understood to apply only to the conduct of the war. The reply of Agesilaus to the Persians was: 'The right of decision regarding peace belongs to the state.' Sallust says that the senate rescinded the peace which Aulus Albinus had made with king Jugurtha, because he had made it without the authority of the senate.

[Plutarch,
Agesilaus,
x=p. 601
B.]

Jugurtha
[xxxix. 3].

XXXVII
[ix. 2].

Also we find in Livy: 'How will that peace be valid which we shall have concluded without the authority of the senate, without the decree of the Roman people?' For that reason the Caudine agreement and the agreement in regard to Numantia did not bind the Roman people, as I have explained elsewhere. And up to this point the statement of Posthumius is correct: 'If there is anything which can be made a binding obligation on the people, all things can'; that is to say, things which do not belong to the conduct of warfare. That this is the meaning is shown by the preceding statements concerning surrender, concerning an agreement to abandon or to burn a city, and concerning a change in the form of government.

[II. xv.
16-17].
[Livy, IX.
ix. 7.]

VIII.—*Whether generals may make a truce; herein a distinction*

Not only generals in command but also officers of lower rank have the power to make a truce,² but only with those against whom they are fighting, or whom they are holding in a state of siege. This applies only to themselves and to their troops; for other officers of equal rank are not bound by such a truce, as is clear from the story of Fabius and Marcellus in Livy.

XXIV
[xix].

¹ Belisarius said to the Goths [Procopius, *Gothic War*, II. vi=p. 403 A]: 'For I do not have the right to manage the affairs of the Emperor.'

² See Paruta, Book V.

IX.—*What security of persons, and what property, can be given by generals*

1. Likewise it is not within the province of generals to dispose of men, dominions, and territories taken in war.

In accordance with this law Syria was taken away from Tigranes, although Lucullus had given it to him. In regard to Sophonisba, who had been captured in war, Scipio said that the judgement and will of the senate and the Roman people would decide; and so freedom could not be given to her by Masinissa, the general by whom she had been captured. Over other matters, which fall under the head of booty, we see that some rights are granted to commanders, not so much by reason of the strength of their authority as by the customs of each people. But in regard to that subject we have said enough previously.

Justin,
XL [ii. 3].

Livy,
XXX
[xiv. 10].

Castrensis,
De Inst.
et Iure,
I. i.

III. vi. 15.

2. However, it is quite within the power of generals to grant things which have not yet been taken, because in many cases towns and men surrender in war on the condition of preserving their lives, or of keeping also their liberty or even their property. In such matters circumstances generally do not afford opportunity to request the decision of the sovereign authority.

For a like reason this right ought to be granted also to commanders not of the highest rank, within the limits of the matters entrusted to their administration. When Hannibal was far away, Maharbal had promised to certain Romans, who had escaped from the battle near Trasimenus, not only their lives—‘their safety’, as Polybius too concisely remarks—but also, if they should have given up their weapons, the privilege of departing with one suit of clothes each. But Hannibal detained them, alleging that ‘it was not in the power of Maharbal, without consulting him, to give to those who surrendered his pledge that he would leave them uninjured and unharmed’.¹ The judgement of Livy on this act is, ‘The pledge was kept by Hannibal with Punic faith.’

[III.
lxxxiv.
14.]

[XXII.
vi. 12.]

3. Consequently, in the case of Rabirius we ought to consider Cicero as a lawyer and not as a judge. He maintains that Rabirius had rightly killed Saturninus, whom the consul Gaius Marius had persuaded to leave the Capitol by giving a pledge to him. ‘How could a pledge be given’, says Cicero, ‘without a decree of the senate?’ And so he treats the matter as if that pledge bound Marius only. But Gaius Marius had received authority by a decree of the senate to see to it that the sovereignty and majesty of the Roman people should be preserved. In this power, which according to

[*For Ra-*
birius, x.
28.]

¹ No more plausible was the evasion used in a similar case by Bayezid against the Servians of Crattovo, as Leunclavius relates, Book VI.

Roman custom was the highest,¹ who would deny that the right of granting immunity was included, if in that way every peril might be warded off from the state ?

X.—*Such agreements should be interpreted narrowly ; and why*

For the rest, in dealing with the agreements made by generals, because these are concerned with a matter outside their field, the interpretation must be restricted so far as the nature of the agreement allows, lest indeed [603] by their act either the sovereign power be obligated to a greater degree than it wishes, or they themselves suffer injury in the discharge of their duty.

XI.—*How a surrender accepted by a general is to be interpreted*

In consequence, one who is received in unconditional surrender by a general is considered to have been received on such terms that the decision in regard to him belongs to the victorious people or king. There is an example of this in the case of Genthius, king of Illyria, and in that of Perseus, king of Macedonia ; the former surrendered to Anicius, the latter to Paulus.

[Appian,
Illyrian Wars,
ii. 9.]

[Livy,
XLV. vi.
10.]

XII.—*How to understand the proviso, 'if the king or the people has approved'*

Thus the added proviso, 'Let this be valid, in case the Roman people shall have ratified it', which is often found in treaty compacts, will have the effect that, if the ratification does not follow, the general will himself in no respect be bound, unless in some way he has thereby been made richer.

XIII.—*How to understand the promise to surrender a town*

Also those who have promised to surrender a town can allow the garrison to withdraw, as we read that the Locrians did.

Livy,
XXIV.
iv [i.].

¹ See Sallust, *Catilinarian War* [xxix. 3]. Not unlike this Ciceronian sophistry is that of Gonsalvo against the Duke of Valentinois ; Guicciardini, Book VI [p. 339, edit. Genev., 1645].

CHAPTER XXIII

ON GOOD FAITH OF PRIVATE PERSONS IN WAR

I.—*Refutation of the opinion, which holds that private persons are not bound by a pledge given to the enemy*

SUFFICIENTLY well known is this statement of Cicero: 'Also if, under the pressure of circumstances, individuals have promised anything to the enemy, faith must be kept in that very matter.' Whether the individuals are combatants or civilians—it matters not as regards keeping faith.

[*On Duties*, I. xiii. 39.]

It is strange that legal authorities have been found who would teach that the obligation was binding when an agreement was made publicly with the enemy, but that agreements made by private persons were not binding in like manner. For since private citizens have private rights, which they can place under obligation, and enemies [604] are capable of acquiring right, what can stand in the way of the obligation? Add that, unless this rule is established, opportunity is given for slaughter, an impediment is set to liberty. For captives in many cases will not be able to guard against the former, or to obtain the latter, if the good faith of private persons has been done away with.

Bartolus, *On Dig.*, II. xiv. 5; Zasius, *Apology against Eck.*

III. xix. 2.

II.—*It is shown that private persons are bound even to a pirate and a brigand; and to what extent*

Still further, not only is a pledge, which has been given to an enemy, recognized by the law of nations, but also a pledge to a brigand or to a pirate, just as we have said above in regard to public faith. There is this difference, that if an unjust fear inspired by the other has induced the promise the promisor can demand restitution, or if the other party is unwilling to make restitution he can take it; such a procedure has no place in case of a fear arising from a public war, according to the law of nations.

II. xi. 7 and III. xix. 5.

If an oath also has been added to the promise, then what has been promised will have to be made good by the promisor, if he wishes to avoid the crime of perjury. If such a perjury has been committed against a public enemy, men are accustomed to punish it; but if against brigands or pirates, it is overlooked, because of the hatred of those whose interest is at stake.

Oldradus, *Cons.*, vii. Covarruvius, *De Matrimonio*, II. iii. 4, no. 21.

III.—*No exception is here made for a minor*

Also in this aspect of the good faith of private persons we shall make no exception for a minor who has sufficient intelligence to

understand his act. For the privileges which favour minors arise from municipal law, but we are treating of the law of nations.

IV—*Whether an error gives release*

II. xi. 6.

Also as regards an error, we have said elsewhere that it gives the right to withdraw from an agreement only if that which was erroneously believed had the force of a condition in the mind of the promisor.

V.—*Answer to the objection raised from the point of view of public advantage*

[III] xxii.

7.

1. It is more difficult to decide how far the power of individuals may extend in making an agreement. That public property cannot be alienated by an individual is well established. For if this right is not permitted even to generals in war, as I have just shown, still less will it be permitted to private citizens. But in regard to their own acts and property the question can be raised because it is evident that these also cannot be put at the service of the enemy without some degree of damage. For this reason such agreements on the part of citizens may seem unlawful on account of the state's right of eminent domain, and on the part of enrolled soldiers on account of their military oath.

Punic Wars
[xiii. 94].

2. It must be understood, however, that agreements which avoid a greater or more certain evil ought to be considered advantageous rather than harmful to the public interest, because a lesser evil assumes the appearance of an advantage. 'Of evils one ought to choose the lesser', a certain speaker says in Appian. In fact neither an act of sincere good faith, by which one does not yield absolute power over himself and his possessions, nor the public advantage without the authority of law, can render void and deprive of all legal effect that which has been done, even if it is granted that this was done contrary to duty.

I. iv. 7, 21

[I. iv. 7, 2-3]; II.

xiv. 12.

3. A law may indeed deprive either permanent or temporary subjects of such power. But the law does not always do this, because it spares the citizens; and it cannot do this in all cases, for the reason that human laws, as I have said elsewhere, have the power of imposing obligation only if they have been passed in a humane manner, and not if they impose a burden which is plainly inconsistent with reason and nature. And so special ordinances and orders, which openly claim some such right, ought not to be considered as laws. Moreover, general laws ought to be received with so benevolent an interpretation as to exclude misfortunes arising from extreme necessity.

4. But if the act of the private person, which had been forbidden by law or by an order and prevented from becoming valid, could rightly have been forbidden, then the act of the individual would be void. Nevertheless he could be punished on this account, because he promised what was not within his right; and especially, if he promised it on oath.

[605] ¹VI.—*The previous statements are applied to a pledge given of return to prison*

The promise of a captive to return to prison is properly allowable; for it does not render the condition of the captive worse. Therefore Marcus Atilius Regulus did not merely act nobly, as some think, but also as his duty required. Cicero says: 'It was the duty of Regulus not to disturb by perjury the conditions and agreements of war.' And no obstacle to his return was presented by this consideration:

But yet he knew what tortures
The barbarous executioner was making ready;

for he had known when he made the promise that this might happen. Likewise, also, of the ten captives, as Gellius tells the story from ancient authors, 'Eight replied that they had no right to postliminy, since they were bound by oath.'²

On Duties,
III [xxix.
108].

Horace
[Odes, III.
v. 49-50].

VII. xviii
[VI. xviii.
8].

VII.—*The pledge not to return to a certain place; the pledge not to serve as a soldier*

1. It is also customary for prisoners to promise not to return to a certain place, and not to take up arms against the one who had them in his power. An example of the former kind of pledge is found in Thucydides, where the people of Ithome promise the Lacedaemonians that they will leave the Peloponnesus never to return.

[I. ciii.]

Instances of the second kind of pledge are now frequent. An ancient example is to be found in Polybius, where the Numidians are released by Hamilcar on the condition that none of them will bear hostile arms against the Carthaginians. Procopius³ in the *Gothic War* records a similar agreement.

I [lxxviii.
14].

III [xxxvi
= p. 552
c].

2. Some writers declare such an agreement void, because it is contrary to the duty due to the country of allegiance. But whatever is contrary to duty is not at once also void, as I have said just above and elsewhere. Then, too, it is not contrary to duty to obtain

¹ [In the 1646 edition, sections 6, 7, 8, 9, 10 and 11 are numbered 7, 8, 9, 10, 11 and 12, and section 12 is run in in the last of those here enumerated.]

² That is, lacking civil rights, as Horace [Odes, III. v. 42] says of Regulus.

³ *Gothic War*, II [II. xiv], about the Herulians.

liberty for oneself by promising what is already in the hands of the enemy. The cause of one's country is, in fact, none the worse thereby, since he who has been captured must be considered as having already perished, unless he is set free.

VIII.—*The pledge not to run away*

Some prisoners also promise not to run away. Contrary to the opinion of certain writers, such a pledge is binding on them, even though they made the promise when in chains. For in this way either lives are ordinarily saved, or milder captivity secured. If, however, the prisoner shall be put in chains afterward, then he will be released from the promise, if it was made on the condition that he should not be put in chains.

IX.—*One who has been captured cannot surrender to another*

Rather foolishly the question is raised, whether one who has been captured can surrender to another.

It is quite certain that no one by his own agreement can take away a right gained by another. But the captor has gained a right, either by the law of war alone, or partly by the law of war and partly by the consent of him who is waging the war, as I have explained above.

III. vi.
23 ff.

X.—*Whether private persons should be compelled by their rulers to carry out what they have promised*

Regarding the effect of agreements an important question is, whether private persons, in case they are negligent, ought to be compelled by their rulers to fulfil their promises.

It is nearer the truth to say that they should be compelled to do so only in regular warfare, on account of the law of nations by which those who wage war are bound to render justice to each other, even in regard to the acts of individuals; a case in point would be if envoys of the enemy should be injured by private citizens.

Thus, according to the statement of Gellius, Cornelius Nepos wrote that many in the senate voted¹ that those of the ten captives who were unwilling to return should be put under guard and taken back to Hannibal.

VIII. viii
[VI. xviii.
11].

¹ In like manner already earlier the senate had obliged those to return whom Pyrrhus had released conditionally; Appian, *Selections on Embassies*, vi [= *Sammite History*, x. 5].

XI.—*What kind of an interpretation ought to be applied in agreements of this sort*

In the matter of interpretation, the rules should be observed which have already been mentioned several times, to wit: that we should not depart from the natural meanings of the words except in order to avoid an absurdity, or from some quite satisfactory surmise as to the intention; and that in case of doubt we should be more inclined to interpret the words against the one who made the condition.

II. xvi. 2;
III. xx.
26.

XII.—*In what way we are to interpret the terms life, clothing, and the arrival of aid*

One who has made an agreement regarding his life does not have the right to liberty also.

Arms are not included under the term clothing; for these are different things.

Aid is rightly said to have arrived if it is in [606] sight, although it is doing nothing; for its very presence has an influence.

XIII.—*Who ought to be said to have returned to the enemy*

One who has returned secretly, so as to depart immediately, will not be said to have returned to the enemy. For returning ought to be understood as coming a second time under the power of the enemy.

Cicero held the opposite interpretation to be disingenuous and foolishly crafty, since it involves deceit and perjury. Gellius called it fraudulent cleverness, branded with disgrace by the censor; and he characterizes those who had practised it as odious and detestable.

On Duties,
III [xxxii.
113].
VIII. xix.
[VI. xviii.
10].

XIV.—*What are adequate reinforcements in the case of a surrender made conditionally?*

In the case of an agreement to surrender,¹ which shall not hold if adequate reinforcements have arrived, the reinforcements ought to be understood to be such as will cause the danger to cease.

¹ There are four examples of a treaty of this kind in the *Gothic War* of Procopius, III [III. vii, xii, xxx, xxxvii]. There is another in Agathias, I [I. xii = p. 23 A], concerning Luca. Another concerning a castle in Corsica is in Bizarri, *History of Genoa*, Book X; others in Book XVIII and in the war against the Moors. Kromer, Book XI, also has a similar instance.

XV.—*Whatever pertains to the execution of an agreement does not constitute a condition*

This also must be noted, that if any covenant has been made regarding the method of execution this adds no condition to the agreement. The case is as if they said that payment is to be made in a certain place, which afterward changed ownership.

XVI.—*Regarding hostages given for such agreements*

In regard to hostages the position must be maintained which we stated above, that in most cases they are merely accessory to the principal act. Nevertheless the agreement can be so made that the obligation shall present an alternative, that is, either that something shall be done, or that the hostage shall be retained. But in case of doubt we must maintain what is most natural, that is, that the hostages shall be believed to be only accessory.

CHAPTER XXIV

ON IMPLIED GOOD FAITH

I.—*How good faith may be tacitly interposed*

It was well said by Javolenus, that certain things are agreed to by silence; and this is found to be the case in public agreements, in private agreements, and in mixed agreements.

Digest,
XIX. ii.
51.

The reason is that consent, no matter how indicated and accepted, has the power of transferring a right. But there are also other signs of consent besides spoken and written words, as we have already more than once indicated. And certain signs by nature form a part of the act.

II. iv. 4;
III. ii. 8
[III. i. 8].

II.—*An example, in the case of a person who desires to be received under the protection of a people or a king*

An example may be found in the case of the person who comes either from the enemy or from a foreign country and entrusts himself to the good faith of another people or king. For there ought to be no doubt that such a person tacitly binds himself to do nothing against that government under which he seeks protection.

[607] Consequently we ought not to follow those who say that the act of Zopyrus was free from blame; for his faithfulness toward his king did not excuse his treachery toward those to whom he had fled. The same should be said of Sextus, the son of Tarquin, who fled to Gabii. About Sinon Virgil says:

[Herodotus, III. cliv.]
[Justin, I. x. 15.]
Livy, I [liii. 5].
Aeneid, II [65-6].

Hear now the plots of Greeks, and from the crime of one
Learn to know all Greeks.

III.—*An example, in the case of one who asks or grants a parley*

Likewise the person who asks or grants a parley tacitly promises¹ that it will be without hurt to those who take part in it.

Livy declares that the law of nations is violated by doing harm to the enemy under the pretence of a parley; he adds, that the good faith of a parley was treacherously violated (for the reading 'through faith' (*per fidem*) in that passage is faulty), because Gnaeus Domitius placed in chains Bituitus, king of the Averni, after Domitius had invited him to a pretended conference and had received him

XXXVIII
[xxv. 8].

¹ [608] Deservedly Agathias, Book II [II. xiv=p. 50 c], censures the Hun Ragnaris, because he tried to kill Narses with a spear as Narses was going away from a conference.

X. vi [IX.
vi. 3].

in hospitality. This judgement is passed on Domitius by Valerius Maximus: 'His excessive desire for fame made him treacherous.'

[VIII.
xxiii. 3.]

Wherefore one must wonder why the writer of the eighth book of Caesar's *Gallic War*, whether Hirtius or Oppius, in referring to a similar deed of Titus Labienus adds, 'He judged that the faithlessness of this man', that is, Commius, 'could be suppressed without any act of treachery,' unless the explanation is that this is the opinion of Labienus rather than of the writer.

IV.—*Nevertheless he who asks or grants a parley is not hindered from promoting his own interests, provided that he does not harm the other party to the conference*

But that implied consent must not be extended beyond what I have said. For, provided that the parties to the conference suffer no harm, it is not treacherous, but reckoned among honourable artifices, to divert the enemy from warlike plans by the pretext of a parley, and in the meantime to promote one's own advantage.

Livy,
XLII
[xlvii. 1 ff.]

III. ii. 6 ff.
[III. i.
6 ff.]

Livy,
XXVI
[xvii] and
XXX
[iv].
I. v [17].

Those, therefore, who maintained that King Perseus was deceived by the hope of peace, took into consideration not so much right and good faith as highmindedness and warlike glory; and this can be well understood from what we have said concerning stratagems in war. Of the same general character was the ruse by which Hasdrubal saved his army from the Ausetanian defiles, and that by which Scipio Africanus the Elder learned the location of the camp of Syphax; both of these instances are related by Livy. Their example was followed by Lucius Sulla¹ also in the Social War, near Esernia, as we read in Frontinus.

V.—*Of mute signs which by custom have some meaning*

There are also certain mute signs which have a significance arising from custom. Such were in ancient times the use of fillets and olive branches; among the Macedonians the raising of spears, among the Romans the placing of shields over the heads,² all signs of a suppliant surrender,³ which in consequence imposed the obligation to lay down arms. But whether one who indicates that he

¹ Also the Dictator Caesar against the Tencteri and Usipetes; Appian, *Selections on Embassies*, xvi [= *Gallic History*, xviii].

² Appian, *Civil Wars*, II [vi. 42].

³ Among the Persians the hands were clasped behind the back; Ammianus Marcellinus, Book XVIII [XVIII. viii. 4]; see also the notes of Lindenbrog on this passage. The same Ammianus, Book XXVI [XXVI. ix. 7], notes that the shields and standards were reversed among the Romans. Latinus Pacatus, *Panegyric* [xxxvi], says that they lowered the flags.

The ancient Germans and others, following their example, offered grass, as Pliny states, Book XXII [XXII. iv. 8]. Servius, *On the Aeneid*, I [I. 487], says that those who surrender themselves as conquered lay down their arms as suppliants.

accepts such a surrender is under obligation, and how far, should be inferred from what I have said above.

At the present time white flags¹ are the implied sign of a request for a parley; they will, therefore, be no less binding than if the parley had been requested by word of mouth.

III. iv. 12
and xi. 15.

VI.—*On the implied approval of a treaty compact*

How far a treaty compact made by generals ought to be considered as impliedly approved by the people or king, I have already stated above, to wit: when both the action was known and something was done or not done for which no other cause could be assigned except the wish to ratify the treaty.

II. xv. 17
and III.
xxii. 3.

VII.—*When a punishment is impliedly remitted*

The remission of a penalty² cannot be inferred from the sole fact of its being disregarded. There is need, besides, of some such act as either in itself may show friendship, as a treaty of friendship, or such as will express so high an opinion of the virtue of the party subject to punishment that his previous deeds ought deservedly to be pardoned; whether that opinion is expressed in words, or through acts, which customarily have such significance.

¹ Among the northern peoples the lighting of a fire was a sign that a parley was requested, as Johan Magnus and others state. Pliny, in Book XV. xxx [XV. xxx. 133], says of the laurel: 'It is itself the bringer of peace, so that, when it is presented, it becomes also a sign of cessation of hostilities between armed foes.'

² Polybius, in a passage preserved in the *Selections on Embassies*, xxii [=XXIII. vi], discusses the question whether punishment is remitted to those who committed the act at the same time that it is remitted to the instigators. I do not think that it is, for individuals are answerable for their own misdeeds.

CHAPTER XXV

CONCLUSION, WITH ADMONITIONS ON BEHALF OF GOOD FAITH AND PEACE

I.—*Admonitions to preserve peace*

At this point I think that I can bring my work to an end, not because all has been said that could be said, but because sufficient has been said to lay the foundations. Whoever may wish to build on these foundations a more imposing structure will not only find me free from envy, but will have my sincere gratitude.

Yet before I dismiss the reader I shall add a few admonitions which may be of value in war, and after war, for the preservation of good faith and of peace; just as in treating of the commencement of war I added certain admonitions regarding the avoidance of wars, so far as this can be accomplished.

And good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with. For not only is every state sustained by good faith, as Cicero declares, but also that greater society of states. Aristotle truly says that, if good faith has been taken away, 'all intercourse among men ceases to exist'.

Rightly the same Cicero says that 'it is an impious act to destroy the good faith which holds life together'. To use Seneca's phrase, it is 'the most exalted good of the human heart'. And this good faith the supreme rulers of men ought so much the more earnestly than others to maintain as they violate it with greater impunity; [609] if good faith shall be done away with, they will be like wild beasts,¹ whose violence all men fear. Justice, it is true, in its other aspects often contains elements of obscurity; but the bond of good faith is in itself plain to see, nay more, it is brought into use to so great an extent that it removes all obscurity from business transactions.

It is, then, all the more the duty of kings to cherish good faith scrupulously, first for conscience's sake, and then also for the sake of

¹ According to Procopius, *Persian War*, II [II. x], the ambassadors of Justinian thus address Chosroes:

Unless, O king, this address were being made to you in person, we should never have believed that Chosroes, son of Cabades, would have entered Roman territory in arms after first scorning the sworn oaths, which are believed to be the highest and strongest pledge of truth and good faith among men; and besides, after breaking the treaty, in which rests the only hope left for those who are not living in safety on account of the evils of war.

What else should we say that this is, than to exchange the life of men for the life of wild beasts? For when treaties have been done away with it will follow that all peoples will wage unending wars with one another. But unending wars have the effect, that they keep men continuously estranged from their own nature.

the reputation by which the authority of the royal power is supported. Therefore let them not doubt that those who instil in them the arts of deception are doing the very thing which they teach. For that teaching cannot long prosper which makes a man anti-social with his kind and also hateful in the sight of God.

II.—*In war peace should always be kept in view*

Again, during the entire period of administration of a war the soul cannot be kept serene and trusting in God unless it is always looking forward to peace. Sallust most truly said, 'The wise wage war for the sake of peace.' With this the opinion of Augustine agrees: 'Peace is not sought that war may be followed, but war is waged that peace may be secured.' Aristotle himself more than once condemns those nations which made warlike pursuits, as it were, their end and aim. Violence is characteristic of wild beasts, and violence is most manifest in war; wherefore the more diligently effort should be put forth that it be tempered with humanity, lest by imitating wild beasts too much we forget to be human.

To Caesar
On Pub.
Admin.
[I. vi. 2].
Letters, i
[clxxxix.
6],
To
Boniface.
Politics,
VII. ii [9]
and xiv
[11].

III.—*And peace should also be accepted even at a loss, especially by Christians*

If, then, it is possible to have peace with sufficient safety, it is well established by condonation of offences, damages, and expenses; this holds especially among Christians, on whom the Lord has bestowed His peace. And His best interpreter wishes us, so far as it is possible and within our power, to seek peace with all men. It is characteristic of a good man, as we read in Sallust, to be unwilling to begin war, not gladly to pursue it to the bitter end.

Romans,
xii. 18.

[= Cicero,
Letters to
Friends,
IV. vii. 2.]

IV.—*The consideration stated is useful to the conquered*

This one consideration ought to be sufficient. However, human advantage also often draws in the same direction, first, those who are weaker, because a long contest with a stronger opponent is dangerous, and, just as on a ship, a greater misfortune must be avoided at some loss, with complete disregard of anger and hope which, as Livy has rightly said, are deceitful advisers. The thought is expressed by Aristotle thus: ¹ 'It is better to relinquish something of one's possessions to those who are stronger, than to be conquered in war and perish with the property.'

[VII. xl.
19.]

[Rhetoric
to Alexander,
ii.]

¹ Philo, *De Constitutione Principis* [On Justice, xiii], says: 'Peace, even though with great loss, is better than war.'

V.—*The consideration stated is also useful to the conqueror*[XXX.
xxx. 18.][Rhetoric
to Alex-
ander, ii.][XIII.
liii.]

Again, human advantage draws in the same direction also the stronger. The reason is, as the same Livy no less truly says, that peace is bounteous and creditable to those who grant it while their affairs are prosperous; and it is better and safer than a victory that is hoped for. It must be kept in mind that Mars is on both sides. As Aristotle says, 'In war men ought to consider how many and how unexpected changes are wont to occur.' In a certain oration for peace in Diodorus Siculus those are censured who magnify the greatness of their exploits, as if it were not evidently customary for the fortune of war to bestow favours alternately. And especially must the boldness of the desperate be feared;¹ wild beasts bite most fiercely when dying.

VI.—*The consideration stated is useful likewise to those whose fortunes are in doubt*Civil War,
I [III. x].

But, if both sides seem to be equal to each other, this in truth, as Caesar says, is the best time to treat of peace, while each has confidence in himself.

VII.—*Peace, when made, must be kept with the utmost scruple*[For
Gabinius,
frag., in
Jerome,
Apology
against
Rufinus,
I. i.]

Moreover peace, whatever the terms on which it is made, ought to be preserved absolutely, on account of the sacredness of good faith, which I have mentioned; and not [610] only should treachery be anxiously avoided, but everything else that may arouse anger. What Cicero said about private friendships you may apply to public friendships no less correctly: not only should all friendships be safeguarded with the greatest devotion and good faith, but especially those which have been restored to goodwill after enmity.

VIII.—*A prayer, and the end of the work*

May God, who alone hath the power, inscribe these teachings on the hearts of those who hold sway over the Christian world. May He grant to them a mind possessing knowledge of divine and human law, and having ever before it the reflection that it hath been chosen as a servant for the rule of man,² the living thing most dear to God.

¹ [Plutarch, *Marius*, xlv = p. 432 C.]

We even have to fear the dying lion's den.

² So Chrysostom in his sermon *On Alms* [beginning]: 'Man is the being dearest to God.'

APPENDIX

FROM THE LIFE OF ST. LOUIS, KING OF FRANCE, BY JOINVILLE, CHAPTER LXXXIX

THOSE who were in the Great Council of the king would often reprove him because he expended so much labour upon the restoration of peace among those outside his realm, saying that he was making a mistake in not permitting them to wage war, and that later this would result in their being dealt with more easily.

The king would reply that they were wrong. 'If', he said, 'the princes and rulers, who are my neighbours, should see that I readily allowed them to wage wars with one another, they would say to one another, "The king of France allows us to wage war with evil intent", and in consequence they would conceive a hatred of me and at some time would attack me; and from this source misfortune would result for my kingdom. Besides, it could happen that I should bring upon myself the wrath of God, since God says that those are blessed who strive to recall the hostile to peace and harmony.'

I am able to affirm that the Burgundians and Lotharingians, perceiving the goodness and justice of the king, were so devoted to him and so respected him, that they settled in his presence the causes of controversy which arose between them. I saw them often coming, now to Paris, now to Rheims, now to Melun, and again to other places, where the king was.

FROM THE LIFE OF THE SAME, IN CONNEXION WITH THE INJUNCTIONS OF ST. LOUIS THE KING GIVEN TO HIS SON

From the records of the Collegium Rationalium in the city of Paris

If any suit or action at law is commenced against you, inquire as fully into the truth against you as for you.

If you perceive that you have anything belonging to another, which it is established that you or your ancestors have taken, cause it to be restored immediately.

Do not wage war against any Christian except on the advice

of many, and only if you cannot avoid war. But if you are at war, refrain from injuring the clergy and those who have done you no harm.

If war or quarrellings arise among your subjects, bring them back to harmony, as soon as this can be done.

Examine often, what your bailiffs, prefects, and other officials are doing, and inquire into their acts, in order that you may correct whatever ought to be corrected. See to it that no disgraceful sin hold sway in your kingdom.

COMMENTARY
OF
HUGO GROTIUS
ON
THE EPISTLE OF PAUL THE APOSTLE
TO PHILEMON

[612] THE PRINTER TO THE READER

SINCE about this time there came into our hands the commentary of the same author on the Epistle of Paul to Philemon, we thought best to give it a place here, not only that it might be preserved along with the larger work, but also because it contains some matter not foreign to the subjects which are treated in that work, in Book I, chapter ii, and Book III, chapters vii and xiv.

[NOTES

ON

THE EPISTLE OF PAUL TO PHILEMON]

1. Παῦλος δέσμιος Χριστοῦ Ἰησοῦ, 'Paul, a prisoner of Jesus Christ'.—At Rome, living under guard of a soldier, who was bound with the same chain; *Acts*, xxviii. 16. The genitive here indicates cause; so also below, verse 9, *Ephesians*, iii. 1, and *2 Timothy*, i. 8. In *Ephesians*, iv. 1, δέσμιος ἐν Κυρίῳ, 'prisoner in the Lord', instead.

καὶ Τιμόθεος ὁ ἀδελφός, 'and brother Timothy'.—The Christians called one another 'brother' because of a common regeneration. Timothy—almost always a companion of Paul, as may be seen in *2 Timothy*, iii. 10—was with him also in Rome; *Ephesians* [*Philippians*], i. 1, *Colossians*, i. 1.

Φιλήμονι τῷ ἀγαπητῷ, 'to Philemon dearly beloved'.—The name Philemon is Greek. This was the name also of a poet of merit, and of a writer on natural history who is mentioned by Pliny. Philemon seems to have lived at Ephesus, where Onesimus afterward held the office of bishop, as Ignatius in his *Letters* and other writers bear witness. Paul calls him 'dearly beloved', or 'most dear', because he considered Philemon, as an exceedingly devout man, in a relation of more intimate friendship.

καὶ συνεργῷ ἡμῶν, 'and our fellow-worker'.—That is, as one of the presbyters, of whom there were several at Ephesus; *Acts*, xx. 17. The Apostles applied the term 'fellow-workers' to all the presbyters (πρεσβύτεροι) and also to the elderly women (πρεσβύτιδες) who sought to bring women to Christ; *Romans*, xvi. 3, 9, *Philippians*, ii. 25, *Colossians*, iv. 11.

2. καὶ Ἀπφία τῇ ἀγαπητῇ, 'and to Appia dearly beloved'.—The name Appia is Roman, π being changed to φ according to Hebrew usage.

καὶ Ἀρχίππῳ τῷ συστρατιώτῃ ἡμῶν, 'and to Archippus our fellow-soldier'.—He seems to have served as an evangelist, now at Ephesus, now at Colossae [613]; *Colossians*, iv. 17. The testimony of Ambrose indicates that Archippus afterward took up his residence at Colossae, and so was made a bishop. Paul was wont to call his helpers 'fellow-soldiers' on account of the burdensomeness of the task, as may be seen by referring to *Philippians*, ii. 25.

καὶ τῇ κατ' οἶκόν σου ἐκκλησίᾳ, 'and to the church which is in thine house'.—The reference must be to Philemon, to whom

this epistle is chiefly addressed. In his house there were several Christians. According to Tertullian even three Christians constitute a church. Similarly, those who were in the house of Aquila and Priscilla are called a church, *Romans*, xv. 15 [xvi. 5], and *1 Corinthians*, xvi. 19; also, those who were in the house of Nymphas, *Colossians*, iv. 15.

3. χάρις ὑμῖν, καὶ εἰρήνη ἀπὸ Θεοῦ πατρὸς ἡμῶν, καὶ Κυρίου Ἰησοῦ Χριστοῦ, 'grace to you and peace from God our father, and the Lord Jesus Christ'.—He prays for the favour of God and of Christ on their behalf, and for prosperity in all things, which the Jews are accustomed to designate by the word 'peace'. Paul frequently uses this prayer, as *1 Corinthians*, i. 3, *2 Corinthians*, i. 2, *Galatians*, i. 3, *Ephesians*, i. 2, *Colossians*, i. 2, *1 Thessalonians*, i. 1.

4. Εὐχαριστῶ τῷ Θεῷ μου, 'I thank my God'.—We ought to give thanks to God for gifts conferred not only on ourselves but also on others; *Romans*, i. 8, *1 Corinthians*, i. 4, *Ephesians*, i. 16.

πάντοτε μνείαν σου ποιούμενος ἐπὶ τῶν προσευχῶν μου, 'always making mention of thee in my prayers'.—We find the same words in the verse last referred to, *Ephesians*, i. 16; whence we may learn that under προσευχαί, 'prayers', here are included all utterances addressed to God, even those in which no petition is offered but thanks are given.

5. ἀκούων σου τὴν ἀγάπην καὶ τὴν πίστιν, 'hearing of thy love and faith'.—He states the reason for the giving of thanks, such as you will find also in the verses already referred to: *Romans*, i. 8; *1 Corinthians*, i. 4; *Ephesians*, i. 16. Here a noble pair is named, love and faith. See *1 Corinthians*, xiii; *Galatians*, v. 6; *Ephesians*, vi. 23; *1 Thessalonians*, iii. 6; *1 Timothy*, i. 14 and vi. 11; *2 Timothy*, i. 13 and ii. 22.

ἣν ἔχεις πρὸς τὸν Κύριον Ἰησοῦν, 'which thou hast toward the Lord Jesus'.—This has reference to faith.

καὶ εἰς πάντας τοὺς ἁγίους, 'and toward all the saints'.—This has reference to love. All Christians are called 'saints', as *Ephesians*, i. 1, and frequently elsewhere.

6. ὅπως ἡ κοινωνία τῆς πίστεως σου ἐνεργῆς γένηται ἐν ἐπιγνώσει παντὸς ἔργου ἀγαθοῦ τοῦ ἐν ὑμῖν εἰς Χριστὸν Ἰησοῦν, 'that the fellowship of thy faith may become effectual in the knowledge of every good work which is in you unto Christ Jesus'.—First, there is a transposition here. For the words εἰς Χριστὸν Ἰησοῦν, 'unto Christ Jesus', relate to the preceding words τῆς πίστεως σου, 'of thy faith'. Then, κοινωνία τῆς πίστεως, 'the fellowship of faith', was put in place of 'the faith which was common' to Philemon and the other Christians. And ἐν ἐπιγνώσει, 'in the knowledge', is here to be taken παθητικῶ[s], 'in a passive sense', and carries the

signification of becoming known. The meaning, then, is: Thy love had this in view, that the faith, which thou hast in common with the other saints, should become effectual, and thus should be made known through the good works which proceed from thee and from others. Ἐνεργῆς γένηται, 'should become effectual', is here used with the same implication as πίστις δι' ἀγάπης ἐνεργουμένη, 'faith working through love', *Galatians*, v. 6. Thence follows ἐπίγνωσις, that is, the making known of the same faith; for faith is shown through works, *James*, ii. 18.

7. Χαρὰν γὰρ ἔχομεν πολλὴν καὶ παράκλησιν, 'For we have great joy and comfort'.—Justly, he says, we thank God for those virtues of yours, because from that source come to us our greatest joy and [614] a solace in the evils which we endure for the sake of the Gospel. So also 2 *Corinthians*, vii. 4, 13; 1 *Thessalonians*, iii. 7.

ὅτι τὰ σπλάγχνα τῶν ἁγίων ἀναπέπνυται διὰ σοῦ, ἀδελφέ, 'because the bowels of the saints have been refreshed through thee, brother'.—Σπλάγχνα, 'bowels', is here used instead of the word for 'soul', as *Sirach* [*Ecclesiasticus*], xxx. 7, xxxiii. 5. Consequently, ἀναπέπνυται τὰ σπλάγχνα, 'the bowels have been refreshed', and ἀνάπνυσόν μου τὰ σπλάγχνα, 'refresh my bowels', in verse 20 below, have a meaning similar to ἀνέπνυσαν τὸ ἔμὸν πνεῦμα, 'they refreshed my spirit', in 1 *Corinthians*, xvi. 18. The poor, he says, are of tranquil mind, because they have learned by experience that in thy riches a resource has been provided against their necessities.

8. Διὸ πολλὴν ἐν Χριστῷ παρρησίαν ἔχων ἐπιτάσσει σοι τὸ ἀνῆκον, 'Wherefore, though I have much boldness in Christ to enjoin that which is thy duty.'—The calling of an Apostle laid upon me by Christ gives me this right, to be able to enjoin upon thee and other Christians the things that it is your duty to do. The word παρρησία, 'boldness', went over from Greek speech to Syrian with a broader meaning, so that it often signifies 'right', 'authority'.

9. διὰ τὴν ἀγάπην μᾶλλον παρακαλῶ, 'on the ground of love rather I beseech'.—I prefer to entreat as a friend, by reason of the close relation of our friendship.

τοιοῦτος ὢν, 'since I am such'.—That is, I have recourse to entreaty, since I am such as you know me to be.

ὡς Παῦλος, 'Paul, to be sure'.—Founder of so many churches.

πρεσβύτης, 'an old man'.—One already advanced in years, to whom even strangers concede many things.

νῦν δὲ καὶ δέσμιος Ἰησοῦ Χριστοῦ, 'and now moreover a prisoner of Jesus Christ'—that is, a prisoner on account of Christ, as we said above [note on verse 1]. Great consideration is due to those who suffer hardships for very honourable causes; *Colossians*, iv. 18; *Ephesians*, iv. 1.

10. παρακαλῶ σε, 'I beseech thee'.—Παρακαλῶ σε here has the connotation of entreating, or rather of interceding. If slaves had committed any fault they were wont to arrange for an intercessor on their behalf, as Donatus suggests in a note to Terence [*On Terence's Phormio*, line 140]. Similar to this intercession is that of Pliny on behalf of a freedman of Sabinianus; *Letters*, IX. xxi.

περὶ τοῦ ἐμοῦ τέκνον, ὃν ἐγέννησα ἐν τοῖς δεσμοῖς μου, 'on behalf of my child, whom I have begotten in my bonds'.—Whom here at Rome, while I was a prisoner, I made a Christian. The rebirth of a man is the work of God. But so great is His goodness that He admits His servants to a participation in His name; *1 Corinthians*, iv. 15; *Galatians*, iv. 19. So likewise the Apostles are said 'to save', σώζειν, *Romans*, xi. 14, and elsewhere, and *1 Corinthians*, vii. 16.

[II.] τὸν ποτέ σοι ἄχρηστον, 'who once was of no use to thee'.—It is the practice of intercessors to soften the harshness of the offence by words. Onesimus had not merely been 'of no use' to Philemon, he had also caused a loss to him. Flight and theft are commonly associated. Thus in the *Code* of Justinian the title *On runaway slaves* [VI. i] is followed by that *On thefts* [VI. ii]. Says Martial [*Epigrams*, XI. liv. 5–6]:

The froward hands from feet have learned to sin;
No marvel is the thief who was a runaway.

And those who were offering a slave for sale were accustomed to give assurance that he was not a thief nor a runaway; [615] *Digest*,¹ XVIII. i. 13 and 34. 3; XLVII. vi. 1 and 3; XIX. i. 11. 7 and 13. 1; Varro, *On Farming*, Book II [II. x. 5]; Seneca, *Controversies*, III. xxi [VII. vi. 23].

12. νυνὶ δέ σοι, καὶ ἐμοὶ εὐχρηστον, 'but now useful to thee and to me'.—Because he was useful to Paul, he was useful also to Philemon. For 'the possessions of friends', τὰ τῶν φίλων, are in common. There is a word-play on the name Onesimus [the Greek name Ὀνήσιμος means 'profitable', 'helpful'].

ὃν ἀνέπεμψα, 'whom I have sent back'.—Doubtless with this Epistle.

σὺ δὲ αὐτόν, τουτέστι τὰ ἐμὰ σπλάγχνα, προσλαβοῦ, 'do thou, then, receive him that is mine own bowels'.—Προσλαμβάνεσθαι has various meanings, all of which refer to kindly feeling and acts of kindness, as is clear from *Acts*, xviii. 26, *Romans*, xiv. 1, 3, and xv. 7. Here I should take it in the sense to receive kindly into one's house, as in *Acts*, xxviii. 2. Τὰ ἐμὰ σπλάγχνα, 'mine own bowels', that is, as dear to me as my own bowels. So in Plautus [*Casina*, line 837], 'my little heart'.

¹ [Grotius gives eight references to the *Digest*; two are correct, but the others appear to be mistakes. The references given above are to the passages he evidently had in mind.]

13. ὃν ἐγὼ ἐβουλόμην πρὸς ἑμαυτὸν κατέχειν, 'whom I was wishing to keep with me'.—The indicative mood is here used in place of the subjunctive, in accordance with Greek usage. I should have wished to keep him with me, if indeed other considerations, which will now follow, had not opposed. In regard to this manner of speaking, see what I have said *On Matthew*, xxvi. 39.

ἵνα ὑπὲρ σου διακονῇ μοι, 'in order that he might minister to me in thy place'.—That he might render to me in all things the service which thou wouldst be rendering if thou wert here.

ἐν τοῖς δεσμοῖς τοῦ Εὐαγγελίου, 'in the bonds of the Gospel'.—In these bonds, which I bear for the sake of the Gospel. The manner of speaking is the same that we found above in verse 9.

14. χωρὶς δὲ τῆς σῆς γνώμης οὐδὲν ἠθέλησα ποιῆσαι, 'but I wished to do nothing without thy consent'.—I was unwilling to make use of him except with thy full approval.

ἵνα μὴ ὡς κατὰ ἀνάγκην τὸ ἀγαθόν σου, ἀλλὰ κατὰ ἐκούσιον, 'that thy goodness might not be as it were from constraint, but from free will'.—If Paul should have kept him, the desire of Philemon would not have become so apparent as it would be if he should have been sent to Philemon, and Philemon should send him back to Paul; Seneca, *On Benefits*, II. iv: 'If you wish to know whether I am willing, make it possible for me to be unwilling'. 'Εκούσιον, 'of free will', and ἀναγκαῖον, 'necessary', or, τὸ κατ' ἀνάγκην, 'that which is from constraint', are used in contrast, as in *1 Peter*, v. 2. So Paul the jurist sets over against each other performance from free will and from constraint, *Digest*, III. v. 18. 2. Praise, moreover, is not due except to free actions.

15. Τάχα γὰρ διὰ τοῦτο, 'For perhaps on this account'.—As if he were to say, 'Perchance that was the plan of God, when He permitted him to run away'. Compare *Genesis*, xlv. 5.

ἔχωρισθη, 'he went away'.—Here also you see what we said above, that a thing harsh in reality is softened in statement; he said 'went away', ἔχωρισθη, instead of 'ran away'. Such expressions the Greeks call εὐφημισμοί, 'euphemisms'.

πρὸς ὥραν, 'for a time'.—That is, for a short time. The same type of expression is found in *2 Corinthians*, vii. 8; *Galatians*, ii. 5; and *1 Thessalonians*, ii. 17.

ἵνα αἰώνιον αὐτὸν ἔχῃς, 'that thou mayest have him back forever'.—That, reformed by me, he may be permanently useful to thee. Αἰώνιον, 'forever', is here used as in Horace, 'will serve forever' [*Epistles*, I. x. 41].

Evangelical teaching does not remove differences of status and the authority of masters over slaves, as is clear from *1 Timothy*, vi. 1, 2; *Titus*, ii. 9; *1 Peter*, ii. 10 [ii. 18]; *Ephesians*, vi. 5, 6; *Colossians*,

iii. 22. [616] There is therefore no reason why a Christian, who as a master is able to have full authority over slaves, may not as a ruler have full authority over subjects. Similar are the master in his house, the king in his kingdom. Says Seneca, *On Benefits*, III. xviii: 'If a slave is hindered from attaining merit [as a benefactor of his master] by necessity, and the fear of suffering to the utmost, the same obstacles will hinder both him who is subject to a king and him who is under a commander, since, although under different names, they are similarly subject to authority.' And so Peter places on an equality the authority of kings and that of masters. For without having recourse to a magistrate masters were able to torture slaves who had misbehaved, and even to put them to death; *Digest*, I. vi. 1; *Institutes*, I. viii. 1. This, moreover, was the law not only at Rome but also in Greece; see Seneca, *Controversies*, V. xxxv [X. xxxv]. This in fact came from the law of nations, as we learn from the texts of law just cited.

In what way masters ought to apply this law, from the time that they became Christians, Paul taught them; and he would have said the same things to kings if at that time kings had been Christian, as many of the masters were. Both Nicodemus and Joseph of Arimathea were councillors, possessing authority and power to punish. For the public council of the people as well as that of the city of Jerusalem had the right of scourging, as is clear from *Matthew*, x. 17; *Acts*, v. 48 [v. 40]; *2 Corinthians*, xi. 24. Furthermore, it had also the right of punishing with death, if the Romans at any time should permit this, as the Jews had a general permission to kill a foreigner who should enter the enclosure of the Temple. Nevertheless, Christ never bade these councillors, His disciples, to withdraw from that office. If He had done so, He would undoubtedly have broken a law by which those that had been in a lawful manner called to this office were ordered to discharge its duties. But such procedure was far from Him. While He passed the life of a mortal, He was 'under the law', *Galatians*, iv; and He did not break the law in any particular Himself, nor instigate others to break it.

16. οὐκ ἔτι ὡς δούλον, 'not now as a slave'.—Supply 'merely', as is indicated by what follows. Frequently in the speech of all peoples, but especially in Hebrew, this particle is understood. Again, προσλαβοῦ, 'receive', is to be repeated from what has gone before.

ἀλλ' ὑπὲρ δούλον, 'but as more than a slave'.—Belonging to thee not by the law of the master alone, but etc.

ἀδελφὸν ἀγαπητόν, 'a beloved brother'.—Assuredly to all Christians.

μάλιστα ἐμοί, 'especially to me'.—To me who have made trial of his faithful service.

πόσω δὲ μᾶλλον σοί, 'but how much more to thee'.—He ought to be much more dear to thee than to me, because he will be always in thy service, so long as thou shalt desire.

καὶ ἐν σαρκί, 'both in the flesh'.—The body of Onesimus belongs not so much to himself as to thee, κτήσει καὶ χρήσει, 'in respect to possession and use'. In Aristophanes, Cario says [*Plutus*, 6-7]:

Mastery of the body Fortune gives not to the master,
But to him who by a purchase makes it his.

Σάρξ, 'flesh', and σῶμα, 'body', are often used one for the other, as is clear from the Hebrew; *Zephaniah* [*Sophoniah*], i. 17; *Ezekiel*, x. 12; and other passages, with comparison of the Greek and Latin translations.

[617] 17. εἰ οὖν ἐμὲ ἔχεις κοινωνόν, 'if, then, thou countest me a partner'.—If thou countest me a friend, and as such sharing in thy concerns.

προσλαβοῦ αὐτόν, 'receive him'.—Not only refrain from the punishment which by thine own right thou wert able to inflict, but also receive him kindly. 'You received into your house, unto your heart', said Pliny in regard to a matter quite similar; *Letters*, IX. xxiv.

ὡς ἐμέ, 'as myself'.—For since Onesimus was a friend of Paul, whatever was done for him seemed to be done for Paul himself.

18. Εἰ δέ τι ἠδίκησέ σε, 'Moreover if he hath wronged thee in any respect'.—If he carried off something when he ran away.

ἢ ὀφείλει, 'or owes [thee]'.—Or if according to thy accounts he was a defaulter. A general term is here used instead of the particular term.

τοῦτο ἐμοὶ ἐλλόγει, 'charge this to me'.—Charge that to my account. Make me instead of him thy surety.

19. Ἐγὼ Παῦλος ἔγραψα τῇ ἐμῇ χειρί, 'I Paul have written with my own hand'.—That thou mayest be certain, thou hast here my handwriting. Thou wilt be able to bring action against me at any time by reason of the autograph. This is what the Scholiast on the *Digest*, XX. iii. 4, calls 'to write a note of hand'. Add *Digest* [*Code*], IV. ii, and *Digest*, XXXIV. iii. 3.

ἐγὼ ἀποτίσω, 'I will repay'.—This, in Latin, is said to constitute a pecuniary obligation, and there is a title on the subject in the *Digest* [XIII. v]. The formula itself is contained in the words ἐγὼ ἀποτίσω, or *satisfaciam tibi*, 'I will satisfy you', as *Novels*, cxv. 6, has it; this is ordinarily inserted in the *Code*, under the title 'On constituting a pecuniary obligation' [IV. xviii]. Similarly in *Digest*, XIII. v. 5. 3, this formula is found: 'I have written in accordance with the commission of Seius, that if any debt to you has been approved I will guarantee it to you and will pay it without controversy.' And there is another formula in the same title, *Digest*,

XIII. v. 26: 'The ten [pieces of money] which Lucius Titius had received as a loan from your money-chest you have, Sir, in my possession, with full reckoning of interest.'

Moreover, an obligation can be created even in respect to money which is owed only according to the law of nature (*Digest*, XIII. v. 1. § 7). Slaves can owe their masters, not indeed by municipal law, but by natural law (*Digest*, XLV. iii. 1). So also a surety is rightly accepted for an obligation arising by nature (*Digest*, XLVI. i. 8. § 3).

ἵνα μὴ λέγω σοι ὅτι καὶ σεαυτὸν μοι προσοφείλεις, 'not to say to thee, that thou owest to me thy very self'.—It is a 'figure', σχῆμα, of 'passing over in silence', παρασιώπησις, or of 'keeping silent', when we say that we wish to omit that which we are saying with the utmost emphasis. I could say, Paul remarks, that thou art in debt to me not only for what thou hast but also for thy very self; with reason, for without Paul Philemon would have been, and would have remained, in dense darkness and in sin, far from the hope of salvation.

20. Ναί, ἀδελφέ, 'Yes, brother'.—Ναί is here the utterance of one entreating, as in Hebrew.

ἐγὼ σου ὀναίμην ἐν Κυρίῳ, 'Let me have joy of thee in the Lord'.—That is, may it be permitted to me to rejoice by reason of thy progress in Christ. Compare *Sirach* [*Ecclesiasticus*], xxx. 2, ὁ παιδεύων τὸν υἱὸν αὐτοῦ, ὀνήσεται ἐπὶ αὐτῷ, 'whoso teacheth his son shall have joy in him'. Ignatius, *To the Magnesians* [ii], says: διακόνου Σωτίου, οὐ ἐγὼ ὀναίμην, 'of the deacon Sotion, in whom may I have joy'; and *To the Ephesians* [ii. 2]: ὀναίμην ὑμῶν διὰ παντός, 'May I have joy of you always'.

ἀνάπαυσόν μου τὰ σπλάγχχνα ἐν Κυρίῳ, 'refresh my bowels in the Lord'.—That is, for Christ's sake cause me to be at peace in regard to this matter.

21. Πεποιθὼς τῇ ὑπακοῇ σου ἔγραψά σοι, 'Having confidence in thine obedience I have written unto thee'.—My confidence has been inspired by the knowledge of that obedience of thine which thou renderest to the Gospel. [618] So ὑπακοή, 'obedience', is taken in *Romans*, i. 5, xv. 18, xvi. 19 and 26; *2 Corinthians*, vii. 15, x. 5 and 6; *1 Peter*, i. 14 and 22.

εἰδὼς ὅτι καὶ ὑπὲρ ὃ λέγω ποιήσεις, 'knowing that thou wilt do even beyond what I say'.—I count it certain that thou wilt do more than I should dare to demand.

22. Ἄμα δὲ καὶ ἐτοίμαζέ μοι ξενίαν, 'At the same time moreover prepare me also a lodging'.—Prepare a lodging; so ξενία, 'lodging', is used in *Acts*, viii. 23 [xxviii. 23], and by Josephus and others.

ἐλπίζω γὰρ ὅτι διὰ τῶν προσευχῶν ὑμῶν χαρισθήσομαι ὑμῖν, 'for I hope that through your prayers I shall be granted to you'.—I hope

that in answer to your prayers God will vouchsafe me to you, that is my coming to you. Some think that this hope of Paul was fulfilled and that, freed from his bonds, he went to Asia; that he returned to Rome.

23. Ἀσπάζονται σε Ἐπαφρᾶς, 'There salute thee Epaphras . . .'—The full name is Ἐπαφρόδιτος (Epaphroditus); *Philippians*, ii. 25; iv. 18. The contracted form Ἐπαφρᾶς is found in *Colossians*, i. 7; iv. 12. Many contracted names of this sort, in ᾶς, we have brought together at the beginning of *Luke*.

ὁ συναιχμάλωτός μου, 'my fellow-prisoner'.—One of those of whom mention is made in *Acts*, xxvii.

ἐν Χριστῷ Ἰησοῦ, 'in Christ Jesus'.—That is, on account of Jesus Christ, as in verse 20 above.

Μάρκος, 'Mark'.—He of whom mention is made in *Acts*, xii. 12 and 25; xv. 37 and 39; *Colossians*, iv. 10.

24. Δημᾶς, 'Demas'.—Whose full name was Demetrius. He is mentioned in *Colossians*, iv. 14; *2 Timothy*, iv. 10.

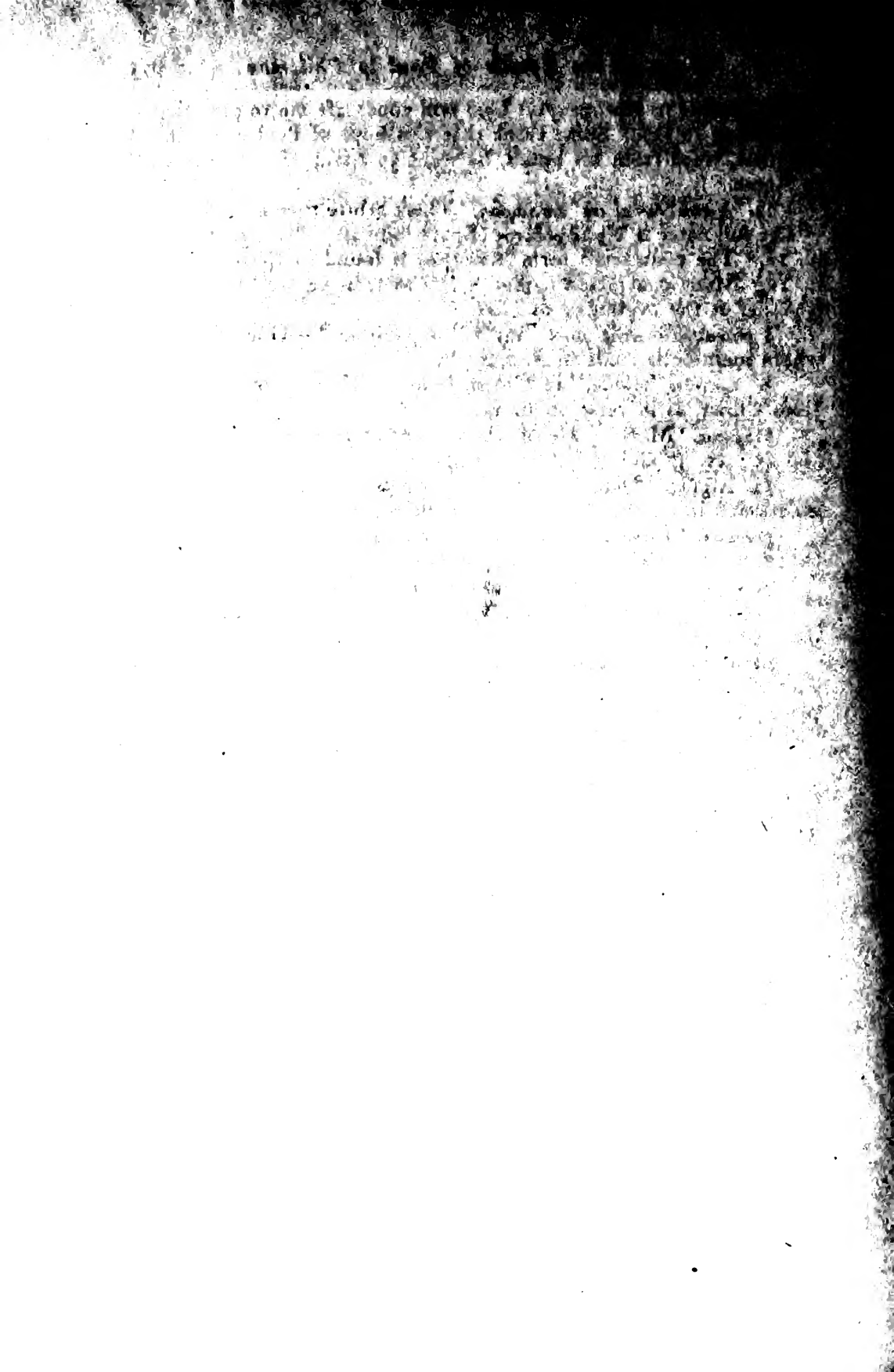
Λουκᾶς, 'Luke'.—A physician who gave to us the *Gospel* and the *Acts*. See *Colossians*, iv. 14; *2 Timothy*, iv. 11.

οἱ συνεργοί μου, 'my fellow-workers'.—See on verse 1 above.

[25.] Ἡ χάρις τοῦ Κυρίου ἡμῶν Ἰησοῦ Χριστοῦ, 'the grace of our Lord Jesus Christ'.—The favour of Christ.

μετὰ τοῦ πνεύματος ὑμῶν, 'with your spirit'.—That is, be with you. The same phrase is used in *Galatians*, vi. 18. Elsewhere in place of this phrase he said: μεθ' ὑμῶν, καὶ μετὰ πάντων ὑμῶν, 'with you', 'and with you all'.

Ἀμήν, 'Amen'.—This is the word with which the Church made response after the reading of the Epistles. In consequence it began to be added to all the Epistles of Paul. See what I have said On *Matthew*, vi. 13.



LIST OF EDITIONS AND TRANSLATIONS OF THE DE JURE BELLI AC PACIS¹

1. Hvgonis Grotii de ivre Belli ac Pacis libri tres. In quibus Paris 1625.
ius naturæ & Gentium : item iuris publici præcipua explicantur.
Parisiis ; Apud Nicolavm Bvon, in via Iacobæa, sub signis
S. Claudij, & Homini Siluestris. M. DC. XXV. Cvm Privilegio
Regis. 4°. [Not all the copies of this edition are alike, in
consequence of changes made by Grotius during printing.]
2. Hvgonis Grotii . . . explicantur. Moeno-Francofvrti, Frankfort-on-
Typis & Sumptibus Wechelianorum, Danielis & Daudidis Aubrio- the-Main
rum & Clementis Schleichii. Anno M. DC. XXVI. 8°. 1626.
3. Hvgonis Grotii . . . explicantur. Editio secunda emen- Amsterdam
dator, & multis locis auctior. Amsterdami, Apud Gvilielmvm 1631.
Blævw. CIO IOC XXXI. Cum privilegiis S. Cæsareæ Maj. &
Christianissimi Galliarum Regis. fol.
4. Hugonis Grotii . . . explicantur. Editio tertia emen- Amsterdam
dator, & multis locis auctior. Amsterdami, Apud Ioannem 1632.
Iansonium. CIO IOC XXXII. 8°.
5. Hvgonis Grotii . . . explicantur. Editio nova ab Auctore Amsterdam
ipso recognita & correcta : de qua vide pagina sequenti. Amster- 1632.
dami, apud Gvilielmvm Blæv. CIO IOC XXXII. Cum privi-
legiis S. Cæsareæ Majestatis, & Christianissimi Galliarum Regis.
8°.
6. Hvgonis Grotii . . . explicantur. Editio nova cum Amsterdam
Annotatis Auctoris. Accesserunt et Annotata in Epistolam 1642.
Pauli ad Philemonem. Amsterdami, apud Ioh. & Cornelivm
Blæv. CIO IO C XLII. 8°.
7. Hvgonis Grotii . . . explicantur. Editio nova cum Amsterdam
Annotatis Auctoris, Ex postrema ejus ante obitum cura multo 1646.
nunc auctior. Accesserunt & Annotata in Epistolam Pauli ad
Philemonem. Amsterdami, apud Iohannem Blæv. M D C
XLVI. 8°.
8. Hugonis Grotii . . . Philemonem. Amsterdami, sumpti- Amsterdam
bus Henrici Laurentii. M D C XLVII. fol. 1647.

¹ Reprinted in summary form, by permission of Jacob ter Meulen, Librarian of the Peace Palace at The Hague, from his elaborate bibliographic list in the *Bibliotheca Visseriana*, volume v (Leyden, 1925), pages 159-99. No. 34a was discovered by Dr. ter Meulen after the publication of his list.

- Amsterdam 1650. 9. Hvgonis Grotii . . . Philemonem. Amstelædami, apud Ioannem Blæv. MDCL. 8°.
- Amsterdam 1651. 10. Hvgonis Grotii . . . Philemonem. Amstelædami, apud Ioannem Blæv. MDCLI. 8°.
- Amsterdam 1651. 11. Hugonis Grotii . . . Philemonem. Amstelodami, Apud Ioannem Janssonium. CIO IOC LI. 8°.
- Amsterdam 1660. 12. Hvgonis Grotii . . . Philemonem. Amstelædami, Apud Ioannem Blaev. M DC LX. 8°.
- Amsterdam 1663. 13. Hvgonis Grotii . . . Philemonem. Amstelædami, Apud Ioannem Blaev. MDCLXIII. 8°.
- Amsterdam 1667. 14. Hvgonis Grotii . . . Philemonem, et Dissertatio de Mari libero. Amstelædami Apud Ioannem Blaev. M D C LXVII. 8°.
- Amsterdam 1670. 15. Hvgonis Grotii . . . Mari libero. Amstelædami, Apud Joannem Blaev. M DC LXX. 8°.
- Jena 1673. 16. Hugonis Grotii . . . explicantur, Cum ejusdem I. Annotatis ex postremâ ante obitum curâ, II. Commentatione in Epistolam Pauli ad Philemon et III. Dissertatione de Mari Libero Publicè ad Disputandum propositi, novis Animadversionibus illustrati, Indiceque Rerum ac Verborum locupletissimo adornati, Dirigente Johanne Georgio Simone, . . . Jenæ Apud Johann. Theodor. Fleischern. Typis Samuelis Adolphi Mülleri. M.DC. LXXIII. 4°.
- Amsterdam 1680. 17. Hugonis Grotii . . . explicantur. Editio novissima cum Annotatis Auctoris, ex postrema ejus ante obitum cura. Acceserunt Annotata in Epistolam Pauli ad Philemonem, Dissertatio de Mari libero, & Libellus singularis de Aequitate, Indulgentia & Facilitate, quem Nicolaus Blancardus Belga Leidensis è codice Autoris descripsit & vulgavit. Nec non Joann. Frid. Gronovii V. C. notæ in totum opus de Jure Belli ac Pacis. Amstelædami, Apud Janssonio-Wæsbergios, M DC LXXX. 8°.
- The Hague 1680. 18. Hugonis Grotii . . . explicantur. Editio novissima . . . vulgavit. Nec non Joann. Frid. Gronovii V. C. notæ in totum opus de Jure Belli ac Pacis. Hagæ Comitum, Apud Arnoldum Leers, M DC LXXX. 8°.
- Jena 1680. 19. Hugonis Grotii . . . explicantur. Cum ejusdem I. Annotatis ex postremâ ante obitum curâ, II. Commentatione in Epistolam Pauli ad Philemonem. III. Dissertatione de Mari Libero, IV. Epistola de Studiis instituendis, ad Benjaminum Maurerium, Legatum Regis Galliæ &, V. Excerpto ex alia de juris studio. Publicè olim ad Disputandum propositi, nunc vero

novis Animadversionibus & adjectionibus locorum concordantium illustrati, allegatione Scriptorum distinctiori, Indicæque pariter Rerum ac Verborum locupletissimo adornati, Dirigente Johanne Georgio Simone, . . . Jenæ, Sumtibus Johannis Theodori Fleischeri; Bibliopol. Rudolphstadii, Literis Christophori Fleischeri, Anno MDC LXXX. 8°.

20. Hugonis Grotii . . . explicantur. Cum Annotatis Auctoris, ex postrema ejus ante obitum cura. Accesserunt Annotata in Epistolam Pauli ad Philemonem, Dissertatio de Mari Libero, & Libellus singularis de Aequitate, Indulgentia & Facilitate quem Nicolaus Blancardus Belga-Leidensis è codice Auctoris descripsit & vulgavit. Nec non Joann. Frid. Gronovii V. C. Notæ in totum opus de Jure Belli ac Pacis. Amstelodami. Sumptibus Janssonio-Wæsbergiorum, M DC LXXXIX. 8°. Amsterdam 1689.

21. Hugonis Grotii . . . explicantur. Cum Annotatis . . . vulgavit. Nec non Joann. Frid. Gronovii V. C. Notæ in totum opus de Jure Belli ac Pacis. Amstelodami. Sumptibus Abrahami à Someren, M DC LXXXIX. 8°. Amsterdam 1689.

22. Hugonis Grotii . . . explicantur, cum Annotatis Autoris ex postrema ejus ante Obitum cura: Accesserunt Excerpta Annotationum Variorum Virorum Insignium in totum Opus, edente Joh. Christoph. Becmano. . . . Francofurti ad Viadrum, Impensis Jeremiæ Schrey / M.DC.XCI. 4°. Frankfort-on-the-Oder 1691.

23. Hugonis Grotii de Jure belli et pacis libri tres, cum annotatis Ipsius Autoris, & clarissimi Gronovii; tum noviter accuratis commentariis perpetuis Joh. Tesmari Jcti Celeberrimi. Opus vt multorum annorum, ita Academiis, Aulis, Dicasteriis, diu multumque desideratum; Theologis, Jure-Consultis, Philosophis, Oratoribus, omnibusque adeo solidæ eruditionis studiosis perquam utile & necessarium; quippe in quo textus Grotianus fideliter exhibetur, obscuriora perspicuè illustrantur, dubia rationibus & auctoritatibus tam veterum quam recentium Scriptorum solide confirmantur, Paradoxa modestè diluuntur, omnia sedulò suppleantur, aliorumque interpretationes sollicitè perpenduntur & inter se conferuntur. Ad calcem operis accessere Ulrici Obrechtii, Jcti Excellentissimi, Observationes ad eosdem Libros, cum Indicibus plenissimis. Francofurti ad Moenum Sumptibus Joan. Davidis Zunneri, Typis Joannis Baueri, M DC XCVI. fol. Frankfort-on-the-Oder 1696.

24. Hugo Grotius de Jure belli ac pacis In quibus Jus Naturæ & Gentium, item Juris publici præcipua explicantur. Cum annotationibus Auctoris, & Notis eruditissimis Variorum. Ex accuratissima recensione & cum animadversionibus vii Leyden 1696.

desideratissimi Gothofredi Spinaei, In Academia Lugd. Batava, (dum viveret) Professoris ordinarii. Editio plane nova. Lugduni Batavorum, Ex Officina Johannis du Vivié, Bibliopolae 1696. 4°.

Utrecht 1696-
1703.

25. Hugonis Grotii . . . explicantur, Cum commentariis Gulielmi vander Muelen . . . Accedunt Et Authoris Annotata, ex postrema ejus ante obitum cura nec non Joann. Frid. Gronovii V. C. Notæ in totum opus. Ultra Jecti, Prostant apud Gulielmum vande Water [Gulielmum Broedelet], Bibliopol. CIO IO C XCVI [MDCC] [MCDCLIII]. 3 v. fol.

Frankfort-on-
the-Oder
1699.

26. Hugonis Grotii . . . explicantur, Cum Annotatis Autoris ex postrema ejus ante obitum cura: Accesserunt Excerpta Annotationum variorum Virorum Insignium in totum Opus, edente Joh. Christoph. Becmano. Editio secunda correctior . . . Francofurti ad Viadrum, Impensis Jeremiæ Schrey / & Joh. Christoph. Hartmann / M.DC.IC. 4°.

Amsterdam
1701.

27. Hugonis Grotii . . . cura. Accesserunt Annotata in Epistolam Pauli ad Philemonem, Dissertatio de Mari Libero, & Libellus singularis de Aequitate, Indulgentia, & Facilitate, quem Nicolaus Blancardus Belga-Leidensis e codice Auctoris descripsit & vulgavit. Nec non Joann. Frid. Gronovii V. C. Notæ in totum opus de Jure Belli ac Pacis. Editio novissima, . . . Amstelodami, Apud Janssonio-Waesbergios. MDCCI. 8°.

Amsterdam
1701.

28. Hugonis Grotii . . . ostendit. Amstelodami, Apud Viduam Abrahami à Someren. MDCCI. 8°.

Amsterdam
1702.

29. Hugonis Grotii . . . ostendit. Amstelædami, Apud Henricum Wetstenium, ut & Rodolfum & Gerhardum Wetstenios, H. FF. CIO IO CC II. 8°.

Amsterdam
1704.

30. Hugonis Grotii . . . explicantur. Cum Commentariis Gulielmi vander Muelen, Domini d'Oudt-Brouckhuysen, Decani D. Mariæ, Aggerum, qui inferiorem Leccæ partem coërcent, Præfecti; &c Accedunt Et Auctoris Annotata, ex postrema ejus ante obitum cura; & Joan. Fred. Gronovii Notæ in totum opus. Amstelædami, Apud Janssonio-Waesbergios & Wetstenios. CIO IO CCIV. . . . 3 v. fol.

Amsterdam
1712.

31. Hugonis Grotii . . . explicantur. Cum Annotatis Auctoris, ex postrema ejus ante obitum cura. Accesserunt ejusdem Dissertatio de Mari libero, & Libellus singularis de æquitate, indulgentia, & facilitate, Nec non Joann. Frid. Gronovii V. C. Notæ in totum opus de Jure Belli ac Pacis. Editio novissima, . . . Amstelædami, Ex Officina Wetsteniana. CIO IO CCXII . . . 8°.

32. Hugonis Grotii . . . ostendit. Amstelædami, Apud Janssonio-Waesbergios. CIO IO CCXII. . . . 8°.
- Amsterdam
1712.
33. Hugonis Grotii . . . cura. Accesserunt Excerpta Annotationum variorum virorum insignium in totum opus edente Joh. Christoph. Becmano. Editio Secvnda Correctior. . . . Francofurti ad Viadrum Apvd Jeremiam Schrey. MDCCLXVIII. 4°.
- Frankfort-on-the-Oder
1718.
34. Hugonis Grotii . . . cura. Accesserunt ejusdem Dissertatio de mari libero, & Libellus singularis de æquitate, indulgentia, & facilitate, Nec non Joann. Frid. Gronovii V. C. Notæ in totum opus de Jure Belli ac Pacis. Editio novissima [n.p.]. Anno CIO IO CCXIX. . . . 2 v. 4°.
- Place unknown 1719.
- 34a. Hugonis Grotii . . . cura. Accesserunt ejusdem dissertatio de mari libero, et libellus singularis de æquitate, indulgentia, et felicitate, nec non Joann. Frid. Gronovii V. C. notæ in totum opus de jure belli ac pacis. Editio novissima. Augustae 1719-1723. 2 v. 4°.
- Place ?
1719-23.
35. Hugonis Grotii . . . explicantur. Cum Annotatis Auctoris, ejusdemque Dissertatione de Mari libero, ac Libello singulari de Aequitate, Indulgentia, & Facilitate: Nec non Joann. Frid. Gronovii V. C. Notis in totum opus de Jure Belli ac Pacis. Editionem omnium, quæ hactenus prodierunt, emendatissimam, ad fidem priorum & optimarum recensuit; . . . Notulas denique addidit Joannes Barbeyrac, . . . Amstelædami, Ex Officina Wetsteniana CIO IO CCXX. . . . 8°.
- Amsterdam
1720.
36. Hugonis Grotii . . . addidit Joannes Barbeyrac, JC. & Publici Privatique Juris Antecessor Groninganus. Amstelædami, Apud Janssonio-Waesbergios. CIO IO CCXX. . . . 8°.
- Amsterdam
1720.
37. Hugonis Grotii . . . cura, et Præfatione Christiani Wolfii. Marburgi Cattorum, Apud Phil. Casimir. Müllerum. M DCC XXXIV. 8°.
- Marburg
1734.
38. Hugonis Grotii . . . explicantur. Cum Annotatis Auctoris, ejusdemque Dissertatione de Mari libero; Ac Libello singulari de Aequitate, Indulgentia, & Facilitate; Nec non Joann. Frid. Gronovii V. C. Notis in totum opus de Jure Belli ac Pacis. Ex altera recensione Joannis Barbeyracii, . . . Cum Notulis ejusdem nunc auctioribus, pluriumque locorum, ex Auctoribus quibusvis laudatorum, adcuratori indicatione. Amstelædami, Apud Janssonio-Waesbergios. CIO IO CCXXXV. 2 v. 8°.
- Amsterdam
1735.

- Amsterdam
1735. 39. Hugonis Grotii . . . indicatione. . . . Amstelædami, Sumptibus Gasparis Fritsch. CIO IO CCXXXV. 2 v. 8°.
- Breslau 1744,
1746, 1747,
1752. 40. Henrici de Cocceji Sacræ Regiæ Majestati Borussicæ quondam a consiliis secretioribus Grotius illustratus seu Commentarii ad Hugonis Grotii de Jure belli et pacis libros tres in quibus Jus Naturæ & Gentium, item Juris Publici præcipua explicantur. Adduntur Annotata Authoris ex postrema ejus ante obitum cura. In commentario id præcipue agitur, ut Grotius ex ipso Grotio illustretur, defectus circa principia Grotiana notentur; et vera juris naturæ principia, inprimis quatenus ad interpretationem juris romani pertinent, proponantur. Accedunt Observationes S. d. C. H. F. . . . Wratislaviæ sumtibus Johannis Jacobi Korn. Bibliopol. Anno 1744, (1746), (1747), (1752). 4 v. fol. [The title-page of the fourth volume enumerates other writings of Grotius.]
- Lausanne
1751-2. 41. Hugonis Grotii de Jure belli ac pacis libri tres, Cum Annotatis Auctoris, nec non J. F. Gronovii Notis, & J. Barbeyracii Animadversionibus; commentariis insuper locupletissimis Henr. L. B. de Cocceii . . . insertis quoque observationibus Samuelis L. B. de Cocceii Henrici filii . . . Adduntur tandem ipsius Grotii Dissertatio de Mari libero, ac Libellus singularis de Aequitate, Indulgentia et Facilitate. Lausannæ, Sumptibus Marci-Michaelis Bousquet, & Sociorum. MDCCLI, [MDCCLI] [MDCCLII] [MDCLII]. 5 v. 4°.
- Lausanne
1758, 1759. 42. Hugonis Grotii . . . Facilitate. Cum quibusdam notis criticis. Lausannæ. Sumptibus Marci-Michaelis Bousquet, & Sociorum. MDCCLVIII. [MDCCLVIII] [MDCCLIX] [MDCCLIX] [MDCCLIX]. 5 v. 4°.
- Leipzig 1758. 43. Hugonis Grotii . . . explicantur. Cum Annotatis Auctoris eiusdemque Dissertatione de Mari libero; Ac Libello singulari de Aequitate, Indulgentia, et Facilitate; Nec non Jo. Fr. Gronovii v. c. Notis in totum opus de Jure belli ac pacis. Ex altera recensione Joannis Barbeyracii. . . . Cum Notulis ejusdem nunc Auctioribus, pluriumq. locor. ex Auctorib. quib. laudat. adcuratori indicatione. . . . Lipsiæ Impensis Ioannis Pauli Krausii bibliop. Vienn. MDCCLVIII. 2 v. 8°.
- Utrecht 1773. 44. Hvgonis Grotii de Ivre belli ac pacis libri tres, cum adnotationibus selectis Joann. Frid. Gronovii, & auctioribus Ioannis Barbeyracii. Accedit H. Grotii Dissertatio de Mari libero; Et Libellus singularis de Aequitate, Indvlgentia, & Facilitate. Edidit atque præfatus est Meinardvs Tydeman.

Traiecti ad Rhenvm. Ex officina Ioannis a Schoonhoven & Soc.
CIC IO CC LXXIII. 2 v. 8°.

45. Hugonis Grotii de jure belli et pacis libri tres accom- Cambridge
panied by an abridged translation by William Whewell . . . 1853.
Edited for the Syndics of the University Press. Cambridge :
M. DCCC. LIII. John W. Parker, London. 3 v. 8°.

46. Hugonis Grotii . . . Philemonem. Volume one. Re- Washington
production of the Edition of 1646, Carnegie Institution of 1913.
Washington, 1913. 4°. [For Volume Two see No. 76, *post.*]

47. Hugonis Grotii . . . explicantur. Cum annotatis auctoris Leyden 1919.
edidit P. C. Molhuysen. Præfatus est C. van Vollenhoven.
Lugduni Batavorum Apud A. W. Sijthoff. MCMXIX. 4°.

Translations

Dutch

48. Drie boecken Van Hvggo de Groot, Nopende het Recht Haarlem
des Oorloghs Ende des Vredes. In dewelcke het Recht der 1635.
Natuere, der Volckeren, mitsgaders de principaelste stucken van
't Burgelijcke Recht verklaert werden. Eerst in 't Latijn uyt-
gegeven, Ende nu ten dienste van alle Bedienaers vande Bancken
der Justitie / ende andere weet-suchtige Lief-hebbers onses
Vaderlands / In 't Neder-duyts vertaelt Door H. V. Ghedruckt
te Haerlem, by Adriaen Roman / Boeckdrucker, woonende inde
Groote Houtstraat, inde Vergulde Parsze. Anno 1635. 4°.

49. Drie Boecken Van 't Recht des Oorloghs en Vredes. . . . Amsterdam
overgheset Door B. D. Seer . . . t' Amsterdam, Gedrukt by 1651.
Iacob Colom, Boeckverkooper op het Water, in de vyerighe
Colom, Anno 1651. 4°.

50. Drie Boecken Van 't Recht des Oorloghs en Vredes . . . Amsterdam
overgheset Door B. D. Den tweeden Druck. Seer . . . t' 1657.
Amsterdam, By Ian Hendricksz En Willem van Beaumont,
Boeck-verkoopers. 1657. 4°.

51. Hugo de Groot Van 't Regt des Oorlogs en Vredes, . . . Amsterdam
met de beste verklaringen en tegenwerpingen van de Hr. Joh. 1705.
Frid. Gronovius, en anderen : nooit op die wijze in onze spraake
aan 't ligt gebracht. Door Jan van Gaveren. Met een zeer
wijdloopig register. t' Amsterdam, By François van-der Plaats,
Boekverkoper in de Gaper-steeg, by de Beurs. 1705. 4°.

Amsterdam
1732.

52. Hugo de Groot van 't Regt des Oorlogs en Vredes, . . . Tweeden druk. t' Amsteldam, By Salomon Schouten, Boekverkooper in de St. Luciesteeg. 1732. 4°.

French

Paris 1687.

53. Le Droit de la guerre et de la paix, par M. Grotius : divisé en trois livres, Où il explique le Droit de Nature, le Droit des Gens, & les principaux Points du Droit public, ou qui concerne le gouvernement public d'un Etat. Traduit du Latin en François, par Monsieur de Courtin. . . . A Paris, Chez Arnould Seneuze, . . . M. DC. LXXXVII. . . . 2 v. 4°.

Amsterdam
The Hague
1688.

54. Le Droit de la guerre et de la paix, . . . Traduit du Latin en François, par Monsieur De Courtin. . . . A Amsterdam, Chez Abraham Wolfgang ; et à la Haye, Chez Adrian Moetjens. M. DC. LXXXVIII. 3 v. 12°.

The Hague
1703.

55. Le Droit de la guerre et de la paix, . . . Traduit du Latin en François, par Monsieur De Courtin. Augmenté dans cette Edition de la Dissertation de la Liberté de la mer, &c. A La Haye, Chez Adrian Moetjens. M. DCCIII. 3 v. 12°.

Amsterdam
1724.

56. Le Droit de la guerre et de la paix. Par Hugues Grotius. Nouvelle traduction, par Jean Barbeyrac, . . . Avec les Notes de l'Auteur même, qui n'avoient point encore paru en François ; & de nouvelles Notes du Traducteur. A Amsterdam, Chez Pierre de Coup. MDCCXXIV. 2 v. 4°.

Amsterdam
1729.

57. Le Droit de la guerre et de la paix ; par Hugues Grotius. Nouvelle traduction ; Par Jean Barbeyrac, . . . A Amsterdam, Chez Pierre de Coup. M. DCCXXIX. 2 v. 4°.

Basel 1746.

58. Le Droit de la guerre et de la paix. . . . A Basle, Chez Emanuel Thourneisen, MDCCXLVI. 2 v. 4°.

Leyden 1759.

59. Le Droit de la guerre et de la paix par Hugues Grotius. . . . A Leide, Aux Dépens de la Compagnie. MDCCCLIX 2 v. 4°.

Basel 1768.

60. Le Droit de la guerre et de la paix par Hugues Grotius. Nouvelle traduction, Par Jean Barbeyrac, . . . A Basle, Chez Emanuel Tourneisen, MDCCCLXVIII. 2 v. 4°.

Leyden-Lyons
1768.

61. Le Droit de la guerre et de la paix, . . . A Leyde, chez J. de Wetstein : Et se trouve, A Lyon, Chez Jean-Marie Bruyset, Imprimeur-Libraire. MDCCCLXVIII. 2 v. 4°.

Paris 1865-7.

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NOTE

An attempt has been made to give the full name, date of birth and death or *floruit*, nationality, and field of labour of each author and the title of each work referred to by Grotius. The translated title is given first where the English translation helps to disclose the subject-matter of the work, in which case it is followed by the original title in parentheses. If the original title is in some other language than Latin, it is omitted or the Latin title under which it is commonly cited is substituted. The Loeb Classical Library and the Oxford Classical Texts have been used to verify the references where available. Otherwise a place and date is added inside the parentheses to indicate the edition used to verify Grotius's citations. Where the former were not available and no other edition has been specified, the reference has not been verified in the original. References to the authors and works contained in the *Corpus Iuris Civilis* or the *Corpus Iuris Canonici* are listed only under the particular part of the *Corpus* unless mentioned specifically by Grotius under their own name. Grotius almost invariably cites examples in support of his statements; references to these will be found under the subject which they exemplify. In the verification of the references and in the preparation of the indexes, invaluable assistance has been rendered by Mr. Walter H. Zeydel of the Division of International Law of the Carnegie Endowment.—H. F. W.

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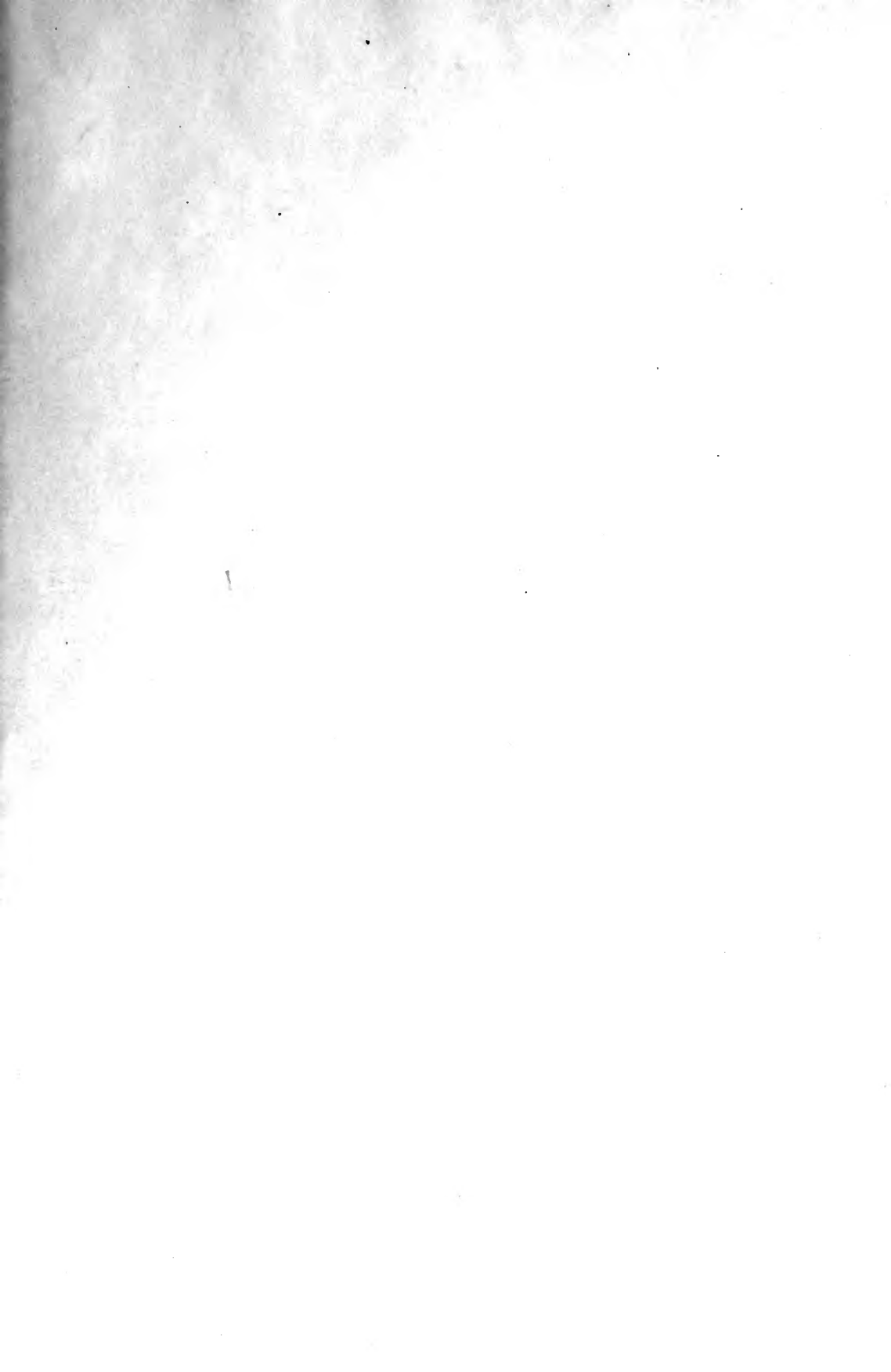
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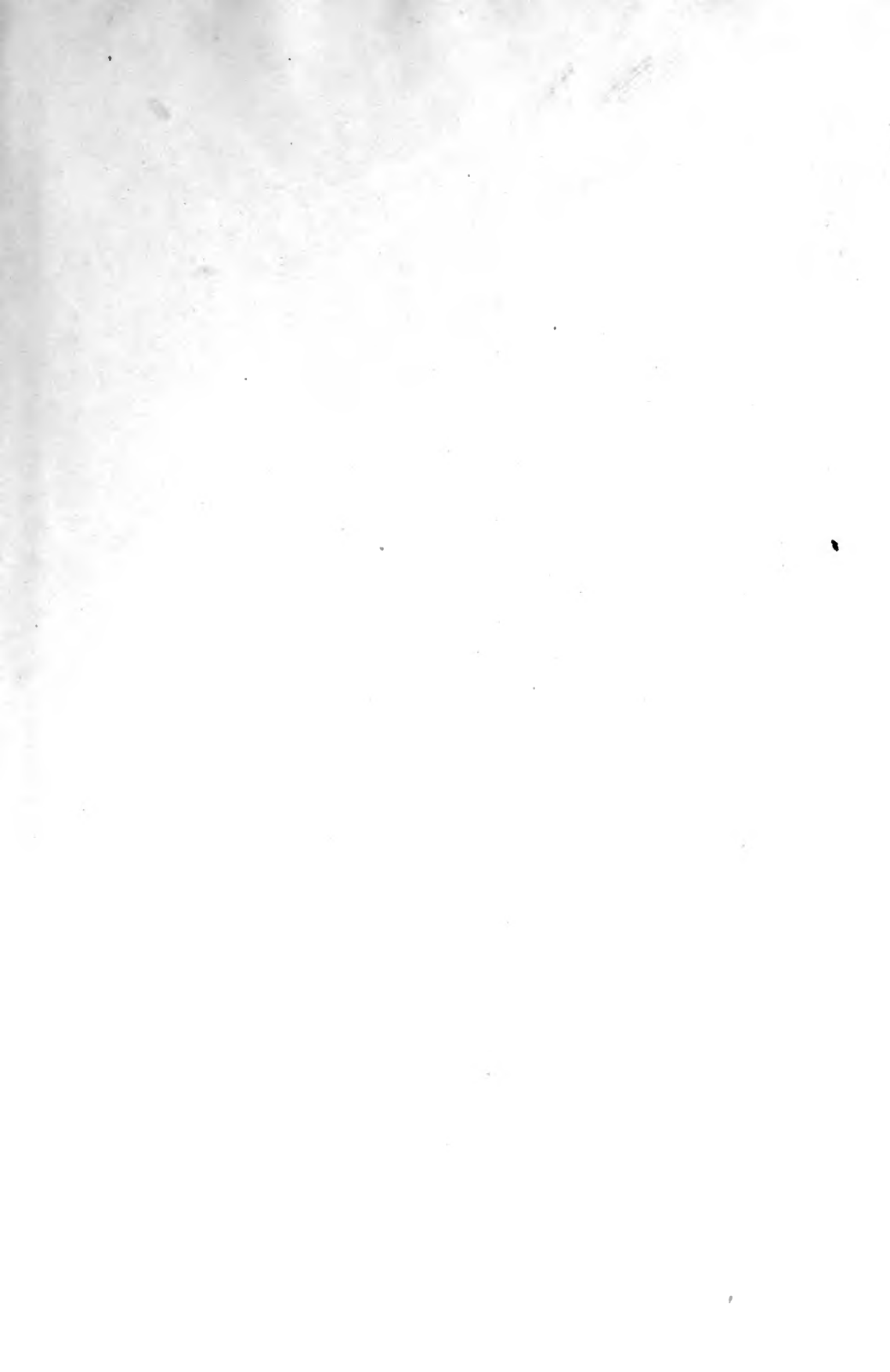
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