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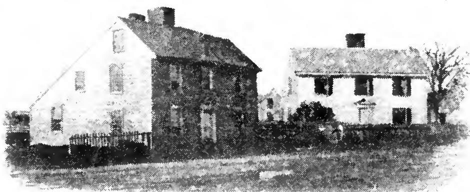

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A METHODICAL SYSTEM OF Universal Law:

OR, THE LAWS of NATURE and NATIONS DEDUCED From CERTAIN PRINCIPLES, and applied to PROPER CASES.

Written in *Latin* by the CELEBRATED

JO. GOT. HEINECCIUS,

Counsellor of State to the King of PRUSSIA, and Professor of PHILOSOPHY at *Hall*.

TRANSLATED, and illustrated with NOTES and SUPPLEMENTS,

By *GEORGE TURNBULL*, LL. D.

To which is added,

A DISCOURSE upon the NATURE and ORIGINE of MORAL and CIVIL LAWS; in which they are deduced, by an Analysis of the Human Mind in the experimental Way, from our internal Principles and Dispositions.

Natura enim juris ab hominis repetenda natura est. CIC.

VOL. I.

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Printed for J. NOON, at the *White-Hart*, near *Mercer's Chapel*, *Cheapside*. MDCCXLI.

TO

His ROYAL HIGHNESS,

WILLIAM

Duke of *Cumberland*,

This TRANSLATION of

A SYSTEM of the LAW of NATURE and NATIONS, Written in *Latin* by the celebrated *Jo. Got. Heineccius*, Counſellor of State to the late King of *Pruſſia*, and Profeſſor of Philoſophy at *Hall*: With the Supplements and Diſcourſes added to it,

Is moſt humbly dedicated,

In Veneration of His ROYAL HIGHNESS's many great and amiable Qualities, ſo becoming His high Birth and exalted Rank, the ſuitable Care beſtowed upon His Education, and the Royal Example He has daily before His Eyes, of true Greatneſs, and the beſt Uſe of Power,

By His ROYAL HIGHNESS's

moſt devoted and

moſt obedient Servant,

GEORGE TURNBULL.

PREFACE.

THE author of this system of the law of nature and nations is so well known, and in so high esteem in the republic of letters, that it would be arrogance in me to say any thing in recommendation of his works. Nor need I make any apology for translating into our language so excellent a book upon a subject of such universal importance. For the knowledge of justice and equity must be owned to be necessary in some degree to every one; but to those, in a particular manner, whose birth and fortunes afford them time and means, and call upon them to qualify themselves for the higher stations in civil society. Man, and the rights and duties of man, are certainly the most proper objects of human study in general. And surely Socrates *had reason to say, "That if no man can be fit to undertake a trade, how mean and mechanical soever, without having been educated to it, and bestowed some considerable time upon the learning of it, it must be absurd to think one can be qualified for discharging public trusts and duties, without having taken great pains to instruct themselves in the principles of equity, the ends and interests of civil society, and the nature, spirit, and intention of laws." I shall only add, that every science hath its elements; and this treatise at least well deserves to be called an excellent introduction to the science of laws. As for the notes and supplements I have added, how far they are necessary, I must leave it to the reader to judge. The greater part of them relates to one question,* viz. *The origine of civil government, which hath not been set in its true light by any other writer besides him from whom the illustration of this point is here borrowed. The discourse upon the origine and nature of laws, is an attempt to introduce the*

experimental way of reasoning into morals, or to deduce human duties from internal principles and dispositions in the human mind. And hence certainly must the virtues belonging to man be deduced: hence certainly must the laws relating to the human nature and state be inferred, as Cicero in his excellent treatise of laws, has long ago told us.—Quid sit homini tributum natura, quantam vim rerum optimarum contineat; cujus muneris colendi, efficiendique causa nati, & in lucem editi simus, quæ sit conjunctio hominum, & quæ naturalis societas inter ipsos; — his enim explicatis fons legum & juris inveniri potest. *i. e. 'Tis by discovering the qualities and powers with which men are endued by nature; and the best ends within human reach; the purposes or offices for which we are fitted and made; and the various bonds by which mankind are knit and united together, and thus prompted to, and formed for society.—'Tis only by discovering and unfolding these important matters, that the source of human rights and duties can be laid open." I have not translated our author's preface; because it is principally designed to shew that the Roman law can now have no other authority in deciding controversies between independent nations or states, than as it is founded upon principles of natural equity; and it is filled up with an enumeration of the titles in the civil law, some have vainly thought sufficient to determine all questions of this kind, which it would have been of very little use to have attempted to english.*

OCTOBER 28.
1740.

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THE

THE LAWS OF NATURE *and* NATIONS *deduced*, &c.

BOOK I.
Of the LAW *of* NATURE.

CHAP. I.
Concerning the origine and foundation of the LAW *of* NATURE *and* NATIONS.

Sect. I.

What conſtitutes a good, and what a bad action?

WHATEVER tends to preſerve and perfect man is called *good* with reſpect to man: whatever hath a contrary tendency is called *ill* with regard to him *: every action therefore which contributes to human preſervation and perfection is a *good action*; and every action is *evil* which tends to hurt and deſtroy man, or to hinder his advancement to the perfection of which his nature is capable.

Sect. II.

What preſervation and perfection mean, and what deſtruction and imperfection?

Whatever conduces in any manner or degree towards our duration, or the continuance of our preſent ſtate, is ſaid to be *preſervative* of man: whatever promotes and augments thoſe properties, which belonging to human nature, and conſtituting our ſtate and rank, admits of degrees, is called *perfective* of man *. Whence it is eaſy to underſtand

ſtand

ſtand what may be ſaid to hurt, wrong, or degrade us.

* This is the true idea of perfection according to *Simplicius*, who upon *Epictetus Enchir.* cap. 34. obſerves, to have not only a beginning and a middle, but likewiſe an end, is the characteriſtick of *perfection.* So *Ariſtotle* likewiſe, in Meta. c. 4. 16. where having examined the meaning of ſeveral different terms, he reduces them all to the ſame idea.

Sect. III.

Men have power to act well or ill.

Such being the nature of human will, that it always deſires *good*, and abhors *ill* *; it cannot but like thoſe actions which tend to our *preſervation and perfection*, and it cannot but diſlike thoſe actions which tend to our *hurt and imperfection:* But becauſe *good and ill* may be really what they appear to be, and on the other hand, a ſeeming *good* may be a real *evil*, and a ſeeming *evil* may be a real *good* *; it very often happens, that like *Ixion* in the fable, we embrace an empty cloud inſtead of *Juno*; *i. e.* we are deceived by appearances, and miſtake ſeeming for ſolid good, and a falſe ſemblance of *ill* for real *ill*; and thus we may make a bad or a good choice, be right or wrong in our elections, and conſequently in our actions *.

* This is obſerved by *Simplicius* upon *Epictet.* Enchir. cap. 34. where he greatly exalts human liberty, and defines it to be that free conſtitution of the human mind, in conſequence of which it voluntarily, and without any conſtraint, ſometimes purſues true, and ſometimes imaginary good.

Sect. IV.

Wherefore men ſtand in need of ſome rule by which they may direct their actions,

Now the power of preferring one or other of two poſſibles, and by conſequence of acting well or ill, is called *liberty:* this power we experience; wherefore it cannot be denied that there are, with regard to us, free actions which are good, and free actions which are bad. But ſince all things, which may be rightly

rightly directed or perverted, ſtand in need of a rule by which they may be rightly directed, it follows that our free actions ought to be directed by ſome rule *.

* Thus *Epictetus* reaſons in *Arrian*, l. 2. c. xi. Do you think all things are right which appear to be ſuch to any one? but how can things, which are directly repugnant to one another, be both right? it is not therefore enough to make a thing right that it appears to ſome one to be ſuch, ſince in weighing or meaſuring things we do not truſt to appearances, but apply a ſtandard. For ſhall there be a certain meaſure with regard to theſe things, and none other with reſpect to our actions beſides fancy or appearance? How can it be that there ſhould be no rule, or none which can be aſcertained with reſpect to human conduct, than which nothing is ſo neceſſary?

Sect. V.

And this rule muſt be right or juſt, ſure and immutable.

By a rule here we underſtand an evident *criterion* by which *good and ill* may be certainly diſtinguiſhed. And in order to anſwer that end, a rule muſt be true, right or juſt, clear, certain and conſtant. For ſuppoſe the rule not to be juſt, and that which is ruled by it will not be juſt or right. Suppoſe it not to be clear and certain, and it cannot be a ſure *criterion* of good and evil. Finally, if we ſuppoſe it to be uncertain and variable, an action regulated by it will ſometimes be good and ſometimes be bad: and therefore in none of theſe caſes would it deſerve the name of a rule *.

* So true is that of *Lucret. de rerum nat. l. 4. v. 515.*

Si prava eſt regula prima,
Normaque ſi fallax rectis regionibus exit,
Et libella aliqua ſi ex parte claudicat hilum:
Omnia mendoſe fieri atque obſtipa, neceſſum eſt,
Prava, cubantia, prona, ſupina atque abſona tecta,
Jam ruere ut quædam videantur velle, ruantque,
Prodita judiciis fallacibus omnia primis.

Sect. VI.

It muſt likewiſe be obligatory.

Further, a rule of action would be but of little advantage to mankind, if it were not of ſuch a kind, that

that it carried with it ſome *motive* (as it is called) by which human will might be impelled to make uſe of it, and apply it. Becauſe man never acts without ſomething preſent to his mind, by which he is excited or impelled to act; he will therefore not apply a rule, or at leaſt he will be very indifferent whether he applies it or no, unleſs he be ſtimulated by ſome motive to apply it. But ſince we call the connection between a motive and a free action *obligation*, that a rule for the direction of human actions may anſwer its end, it muſt be *obligatory*.

Sect. VII.

What is obligation, and how many kinds of it are there?

Obligation is a connection between motives and free actions, (§ 6.) and motives muſt conſiſt either in the intrinſic goodneſs and pravity of actions themſelves, or ariſe from the will of ſome Being whoſe authority we acknowledge, commanding and forbidding certain actions under a penalty. And therefore the former ſpecies of *obligation* is called *internal*; the latter is called *external**. The firſt excites to *good actions*, the other to *juſt actions*. But right is the correlate (as it is called in the ſchools) to both. For if one perſon be under an *obligation*, ſome other perſon hath a right or title to exact ſomething from him.

Sect. VIII.

Internal obligation is not ſufficient.

Hence it is manifeſt, that a rule which carries only an *internal obligation* with it, is not ſufficient with reſpect to mankind: for ſince this obligation ſolely ariſes from the goodneſs of the action, (§ 7), and therefore only excites a perſon to act by this motive, *viz.* that his action may be good; but man is ſo framed by nature, that he often embraces a falſe appearance of good for what is really ſuch *: (§ 3) Such a rule muſt be uncertain, and for that reaſon it is not deſerving of being called a rule (§ 5).

* We

* We don't deny that the internal is the nobler ſpecies of obligation, being that which influences all wiſe and good men, according to the noted maxim:

Oderunt peccare boni virtutis amore.

It is true the ancients praiſe the primitive race of mankind in the early ages of the world chiefly on this account, that they acted well, and did good and right, without any law compelling them to ſuch conduct, from a virtuous diſpoſition, and with free choice. (*Seneca*, *Ep.* 90. "The firſt of mankind, and their progeny, followed the dictates of pure uncorrupted nature as their law and guide." So *Ovid* likewiſe, Metam. l. 1. v. 90. So *Tacitus* Ann. 3. 26. and *Saluſt*. Catil. cap. 9.) But we deny it to be ſufficient to conſtitute a rule, becauſe we are enquiring after one founded in nature, and common to the good and bad, wiſe and fooliſh, in ſuch a manner, that when reaſon is not able to keep them to their duty, an external obligation, or which comes to the ſame thing, the fear of ſuffering may reſtrain them.

Ne vaga proſiliat frænis natura remotis.
Horat. l. 2. Serm. ſat. 7. v. 74.

Sect. IX.

An external obligation either perfect or imperfect is therefore wanting.

But if a *rule* only carrying an *internal obligation* with it, would be uncertain, there is need of one which may produce an *external obligation* ariſing from the will of ſome Being whoſe authority we acknowledge. Since therefore that Being may oblige us to the practice of virtue and honeſty, either without co-action, or may command and forbid certain actions with penalties and rewards, the former ſpecies of external obligation is properly denominated *imperfect*, and the latter *perfect*. Now the will of a ſuperior commanding and forbidding under penalty is called a *law*: and therefore a rule for the direction of our free actions, to conform to which we are under *perfect obligation*, muſt conſiſt of *laws*, and a ſyſtem of ſuch is termed by way of eminence *law* *.

* (*Jus*) *Law*, when it is uſed to ſignify a rule of human action, is a ſyſtem of all the laws of one and the ſame kind,

kind. (Elem. Inst. § 33.) (*Jus*) *Law* therefore, 'tis plain from the origine of the word itself, cannot be conceived, without referring it to the will of a superior, and supposing an external obligation. For it is not derived from Δέον, as *Menage* would have it, Amœn. Juris. cap. 39. p. 295; nor from *Jove*, as *Scipio*, Gent. Orig. p. 270 has asserted, and after him *Grotius*, Proleg. Jur. belli & pacis, § 12; but from the Word *jubendo*. For instead of *Jura*, the ancients used *jusa* or *jussa*. Festus, jusa, jura. So Hieron. Magii, var. lect. 4. 1. In like manner, the German word *Recht* is shewn by Jo. Geo. Wachter. Gloss. p. 1251, to include in it *the idea of* law, or the will of a superior directing human actions.

Sect. X.

Of this law there can be no other author but God.

Now, since that Being may be justly denominated our superior, upon whom our being and happiness absolutely depend, and whose authority we are obliged to acknowledge, because he has a just title to exact obedience from us, and hath power to propose penalties to us in case of our refusing to obey him; and, it appears by many most evident arguments, that he never hath renounced, nor never can renounce his authority to rule and command us*: That superior Being whose authority we are obliged to acknowledge, can be no other than the most great and good God; and he therefore is the sole author of that law, which ought, as we have said, to be the rule of action to all mankind.

* Not only is the *perfection and goodness* of a Being a just title to exact obedience, as is affirmed by *Mos. Amyraldus* Differ. de jure Dei in res creatas, agreeably to that well known saying of Democritus: φύσει τὸ ἄρχειν οἰκήϊον τῷ κρείσσονι. Authority falls by nature to the share of what is best. Stob. Serm. 37. But *dependence* is also such. For who will deny that he hath a just claim to our obedience to whom we owe our existence and preservation? God therefore hath a right to command our submission and obedience: *He in whom we live, move, and have our being*, Acts 17. 28. Besides, that he can inflict punishments on the disobedient and rebellious, his omnipotence and justice leave no

no room to doubt. (Elem. phil. mor. § 185 & ſeq.) Finally, if he had, or ſhould ever renounce his authority over men, and all created beings, that would be unworthy of his wiſdom and goodneſs; becauſe, being infinitely wiſe, he muſt know that we would be moſt miſerable without his government and rule, and being infinitely good, he cannot abandon his creature, which cannot guide itſelf, and ſo expoſe it to the greateſt miſery. But what is repugnant to his wiſdom and goodneſs, that he can neither will nor do, it is allowed. Wherefore, he neither will nor can renounce his ſupreme juriſdiction over men and all creatures. It is proper to obſerve this in oppoſition to the celebrated Leibnitz, who, the illuſtrious Sam. a Cocceis, Diſſer. de principio juris naturalis unico vero adæquato, publiſhed at Francf. 1699, having by ſolid arguments demonſtrated that there can be no other principle of natural law but the will of God, in the 1700, Ephemeridibus Hanoveranis for the month of July, objected againſt that hypotheſis, among other things, "That according to it, if we ſuppoſe a creature to have ſo much power, that being once produced by its creator, it could not be compelled by him; ſuch a creature muſt be conſidered as manumitted by its creator, in the ſame manner as children, when they come to ſuch a degree of power, that they cannot be compelled by their parents." For to ſuppoſe ſuch a caſe, is the wildeſt extravagance, ſince it implies a manifeſt contradiction, to imagine a finite Creature arrived to ſuch power that it can no longer be compelled by its Creator, an infinitely powerful Being. And no leſs abſurd are all the other fictions he puts, in order to invalidate that learned man's doctrine, as this for inſtance, "That if we ſuppoſe an evil genius to have ſupreme uncontroulable power, ſuch an evil genius would not, becauſe irreſiſtible, ceaſe to be wicked, unjuſt and tyranical." For we cannot ſuppoſe an evil genius to have ſupreme power, if we believe the divine exiſtence. And if we deny the exiſtence of God, it is abſurd to ſuppoſe an evil genius, or indeed any created thing to exiſt. It is a ſtrong argument of truth, when a propoſition cannot be overturned but by ſuppoſitions which include a manifeſt contradiction.

Sect. XI.

This law is made known to

Becauſe we are enquiring, as appears from what hath been ſaid, for no other rule of right but what

mankind in no other way but by reason.

God hath given to the whole human race for the rule of their conduct, (§ 10) hence it follows that this rule muſt be intelligible to all mankind. But ſince what is intelligible to, or may be known by all mankind, muſt be diſcovered to them either by a divine revelation, which all men acknowledge and receive as ſuch, or muſt be diſcoverable by the uſe of natural reaſon; becauſe ſuch a revelation as hath been mentioned never exiſted: it is obvious that the law of nature muſt mean laws within the diſcovery of all mankind by the uſe of reaſon common to all mankind, and which therefore are by nature promulgated to all mankind *.

* Hence Cicero in his oration for Milo, c. 4. calls it Jus non ſcriptum ſed natum. "Law, or a rule of rectitude not written but cogenial; a rule which we have not learned, read, received by tradition, but which nature itſelf hath impreſſed upon us, and which we imbibe and draw from it; to the knowledge of which we are not formed and trained by education or example, but we are originally tinctured and ſtamped with it." So the apoſtle likewiſe ſays, "The Gentiles, which have not the law, are a law unto themſelves, which ſhew the works of the law written in their hearts." This cannot be otherwiſe than by reaſoning; and therefore by the right uſe of reaſon: this is the unanimous doctrine of all, who have, as it were, by compact, placed the law of nature in the *dictates of right reaſon*; a few only excepted, who have maintained there is nothing juſt or right by nature, as *Archelaus* in *Laertius*, 2. 16. Ariſtippus, according to the ſame writer, 2. 93. *Carneades* in *Lactantius*, Inſtit. divin. c. 14. & 19; *Pyrrho* in *Sextus Empyricus*, Hypot. 3. 24. and to thoſe *Ariſtotle* may be added, who, as Menage has proved at the 7. 128. p. 311. of Laertius, was not far from that opinion.

A definition of the law of nature and of juriſprudence, natural or divine.

Sect. XII.

The law of nature, or the natural rule of rectitude, is a ſyſtem of laws promulgated by the eternal God to the whole human race by reaſon. But if you would rather conſider it as a ſcience, natural

tural morality will be rightly defined the practical habit of discovering the will of the supreme legislator by reason, and of applying it as a rule to every particular case that occurs. Now, because it consists in deducing and applying a rule coming from God, it may be justly called *divine jurisprudence*.

Sect. XIII.

The law of nature may be divided into preceptive and permissive.

Since the law of nature is a system of laws (§ 12) whatever properly belongs to laws may be ascribed to the law of nature, as to prohibit, permit, punish *. It may be divided as a body of laws is by the *Roman* lawyers into the permissive part, which obliges all men not to disturb any person in the use and exercise of his right and liberty; and the preceptive, which obliges all men to do good actions, and to abstain from bad ones; and it is also evident, that with respect to the preceptive part, there is no liberty left to mankind; whereas, with regard to the permissive, any one may renounce his right to what is permitted to him *.

* The permissive part of the law of nature constitutes therefore a rule: The preceptive makes an exception. For God leaves all to human liberty, which he hath neither commanded nor forbid. Thus, *e. g.* God having only prohibited our first parents the tree of knowledge of good and evil, they had good reason to infer that they were permitted to eat of all the other fruits, Gen. iii. 2, 3. Where no obligation of law takes place, there liberty is entire. But hence it must not be concluded, that a permissive law carries no obligation with it. For it obliges all mankind not to disturb any one in the use of his liberty. Thus, *e. g.* because God has permitted every one to appropriate to his use whatever is not yet appropriated by any person, or belongs to none, and thus to constitute dominion and property, theft, rapine, fraud, depredation, *&c.* cannot but be unlawful and unjust.

Sect. XIV.

Whether would there be a law of nature if there were no God?

Now ſeeing the law of nature comes from God (§ 12) as the ſupreme legiſlator, it follows by conſequence, that tho' a perſon may do a good action, without any regard to the law of nature as ſuch, being excited to it by the internal goodneſs or obligation of the action, and by his good diſpoſition; tho' even an atheiſt, who hath no ſenſe of religion, may do a good action thro' the influence and guidance of his reaſon, becauſe he knows it to be good in itſelf, and advantageous to him; yet ſuch a perſon cannot on that account be ſaid to act *juſtly*, *i. e.* conformably to the law of nature conſidered as ſuch; much leſs then can it be ſaid, that there would ſtill be a law of nature *, tho' it ſhould be granted, which cannot be done without impiety, that there were no God, or that God did not take any care of human affairs. See *Grotius* proleg. jur. belli & pacis, § xi.

* They cut the nerves, ſo to ſpeak, of the law of nature, who conceive or define it independently of all regard to God, and thus feign a law to themſelves without a lawgiver. All who have philoſophized about it with accuracy as well as religiouſly, have acknowledged, that it proceeds from God as its founder and author, and that if the divine exiſtence be denied, there remains no difference between juſt and unjuſt. God, in order to incite Abraham to the love and practice of juſtice, ſays to him, " I am the Almighty God, walk before me, and be thou perfect, *Gen.* xvii. 1. And the Apoſtle, *Heb.* xi. 6. ſays, " He that cometh to God muſt believe that he is, and that he is a rewarder of them that diligently ſeek him." Yea Cicero, de Nat. Deorum, l. 2. ſays, " I don't know whether piety towards God being removed, all ſociality and fidelity among men, and juſtice, the moſt excellent of virtues, would not likewiſe be deſtroyed."

Sect. XV.

Why it is ſaid to be inſcribed on our hearts.

Since the rule of rectitude we are now ſpeaking of ſignifies laws promulgated by right reaſon, and

(§ 12) and reaſon is nothing elſe but the faculty of reaſoning, or of inferring one truth from others by neceſſary conſequence *, it is therefore plain why the apoſtle affirms that the knowledge of this rule is *engraved on our hearts*, Rom. ii. 15. For he attributes to man the power or faculty of reaſoning concerning juſt and unjuſt; which power, ſince it does not neceſſarily include in it actual exerciſe, why ſome ſhould aſcribe even to infants a certain innate ſenſe of juſt and unjuſt, is not difficult to be comprehended.

* Grotius inſiſts much on the emphaſis of this phraſe, Grot. upon the Epiſtle to the *Romans*, ii. 15. and Joan. Clericus Art. Crit. part. 2. ſect. 1. cap. 4. §. 10. who maintain that it means no more than that the law of nature may be eaſily diſcovered and retained without the aſſiſtance of a teacher, and they have accumulated ſeveral paſſages of ancient authors in which ἐγγράφειν ſignifies nothing elſe. But this ſubject has been fully treated by Jo. Franc. Bud. Inſt. Theo. mor. part. 2. c. 2. § 5. where he has alſo examined Mr. Locke's opinion with great accuracy.

Sect. XVI.

Whether the knowledge of it is derived from the ſacred writings or tradition?

Hence it follows that the law of nature is not derived from the ſacred writings, nor from any divine poſitive laws, ſuch as the ſeven precepts given to *Noah*, of which the *Jews* boaſt ſo much *; tho' at the ſame time we readily grant, that the author of reaſon and revelation being the ſame, not only many things which reaſon dictates are to be found in the ſacred writings, but there is every where a perfect harmony between them; nor can there indeed be any thing forbidden or commanded in the ſacred oracles which is repugnant to the rule of right diſcoverable by reaſon.

* How the Hebrews derive the law of nature and nations from the ſeven precepts given to Noah, is ſhewn by Jo. Selden, de jure nat. & gent. ſecundum diſcipl. Hebræorum. But tho' the learned Budæus Introd. ad philoſoph. Heb.

Heb. p. 14. and 15, thinks that tradition concerning the ſeven precepts given to Noah, does not want ſome foundation; yet it cannot be now proved, that ever any ſuch precepts were given to Noah, and tho' ſome things that were commanded or forbidden by theſe precepts be now known to the poſterity of Noah; they are known to them not by tradition but by reaſon, and therefore they are not poſitive laws, but laws promulgated by right reaſon.

Sect. XVII.

The law of nature is immutable.

Further, from the ſame principle it is evident that the law of nature is no leſs immutable than right reaſon it ſelf, which cannot but remain unchangeably the ſame: and therefore God, who cannot do any thing contrary to his will, cannot give any indulgence repugnant to that eternal law in any reſpect; and much leſs can any among mortals arrogate to himſelf any power over that law *.

* *Cicero* ſays elegantly, The law of nature cannot be altered, nothing can be derogated from it, much leſs can it be totally abrogated. We cannot be diſcharged from it by the ſenate or by the people; neither are we to look out for any explainer or interpreter of this law, beſides reaſon itſelf. There is not one law of equity for *Rome*, another for *Athens*; one for former and another for preſent times, but the ſame law binds all nations at all times. All men have one common univerſal Lord, Ruler, and Lawgiver, God the founder, the eſtabliſher of reaſon, and the judge of all reaſonable Beings. To this *Ulpian* conſents as we have ſhewn elſewhere. *L. 6. pr. D. de juſt. & jure.*

Sect. XVIII.

The difference between the law of nature and civil law.

Nor will it now be difficult to find out the difference between the law of nature and civil law. For the former is diſcovered by right reaſon, the latter is promulgated and made known either *viva voce* or by writing. The former extends as far as right reaſon: the other is the law of a particular ſtate: The former hath for its object all actions internal as well as external, which are by nature good or evil; The other reſpects indifferent and external

ternal actions, so far only as the good of any people or state requires their regulation and adjustment *.

* *Cicero de Invent. l.* 38. "All laws ought to be referred to the publick interest of the state, and to be interpreted not according to the letter, but as the end of laws, publick good, requires. Such was the wisdom and virtue of our ancestors, that they proposed no other end to themselves in making laws but the safety and happiness of the state: they either never enacted into laws what was hurtful, or if they happened to do so, such a law was no sooner known to be hurtful than it was abolished. No person desires the observation of laws for their own sake, but for the good of the republick." They are therefore much mistaken who will have what they call *natural law* to be founded merely on interest, according to that saying of *Epicurus*,

Non natura potest justo secernere iniquum,
Sola est utilitas justi prope mater & æqui. Hor. Ser. l. 3.

It is true God being infinitely wise and good commands nothing by the law of nature, but what is useful; but he does not command it because it is useful, but because it is agreeable to his nature and will. An action is not just because it is advantageous, but it is advantageous because it is just. For, as was nobly said by *Mar.Ant.Imp.l.*7.74. "Every action agreeable to nature is advantage or interest." But this error hath been sufficiently refuted by *Grotius, Prolog. jur. bell. & pac.* § 16. *Puffendorff de jur. nat. & gent. L.* 2, 3, 10, 11. and the illustrious *Sam. de Coccei, de princip. jur. nat. & gent.* § 2, 9.

Sect. XIX.

The knowledge of it is of great utility with respect to civil law.

But notwithstanding this difference, it is beyond all doubt, that the knowledge of the law of nature must be of the greatest use to all who apply themselves to the study of the civil law; because many of its precepts are adopted by civil law, and by it are fortified with additional penalties *; several conclusions are drawn from the law of nature by civil law; and natural equity must never be severed from civil law, lest according to the ancient saying, *Strict law become severe injustice.* Summum jus summa injuria.

Sect.

Sect. XX.

The brutes are not governed by the law of nature.

Moreover from the ſame principle it is viſible, that no other creatures beſides men are ſubject to this law; ſince God hath dignified man alone with the prerogative of reaſon; and therefore that definition of *Ulpian* is falſe. Natural law is a law which nature hath taught all animals. *L.* 1. § 3. *Dig. de juſt. & jure* *.

* This is obſerved by *Heſiod* in that celebrated paſſage of his book, *Oper. & Dier.* v. 274. Τόνδε γαρ, &c. The meaning of which is, Brute animals devour one another, becauſe they have no idea of juſtice, but to men nature hath given a ſenſe of juſtice, which far exalts them above the brute creation. *Jac. Cujacius* hath not removed the difficulty in his notes *ad Inſt. p.*8. *tom.* 1. by ſaying, "What "the brutes do by a natural impulſe, if men do the ſame "by reaſon, they act according to the law of nations." For thus an action will not be agreeable to the law of nature and nations merely becauſe brute animals do the ſame, but becauſe it is acting by the direction of right reaſon.

Sect. XXI.

What is called the law of nations?

Further, ſince the law of nature comprehends all the laws promulgated to mankind by right reaſon; and men may be conſidered either as particulars ſingly, or as they are united in certain political bodies or ſocieties; we call that *law*, by which the actions of particulars ought to be governed, *the law of nature*, and we call that *the law of nations*, which determines what is juſt and unjuſt in ſociety or between ſocieties. And therefore the precepts, the laws of both are the ſame; nay, the *law of nations* is the law of nature it ſelf, reſpecting or applied to ſocial life and the affairs of ſocieties and independent ſtates *.

* The law of nature is therefore of a larger extent than the law of nations; for there is nothing dictated or preſcribed by right reaſon, to which every particular is not obliged

obliged in ſome manner to conform himſelf. But there are certain parts of the law of nature, which cannot ſo properly be applied to whole ſocieties, *e. g.* The laws and rights belonging to matrimony, paternal power, *&c.*

Sect. XXII.

Whether it be different from the law of nature?

Hence we may infer, that the law of nature doth not differ from the law of nations, neither in reſpect of its foundation and firſt principles, nor of its rules, but ſolely with regard to its object. Wherefore their opinion is groundleſs, who ſpeak of, I know not what, law of nations diſtinct from the law of nature. The poſitive or ſecondary law of nations deviſed by certain ancients, does not properly belong to that law of nations we are now to treat of, becauſe it is neither eſtabliſhed by God, nor promulgated by right reaſon; it is neither common to all mankind nor unchangeable *.

* Many things which are referred to the poſitive law of nations, ariſe either from the law of nature itſelf, or from cuſtoms, or from ſome certain law common to many nations. Thus the rights of ambaſſadors, for the greater part, are deducible from the law of nature. Many things were obſerved among the *Greeks*, which barbarous nations payed no regard to, *v. g.* giving a truce to the vanquiſhed to carry off their killed. The manners and cuſtoms of the *Germans* became afterwards common almoſt to all nations, as *Grotius* has obſerved, *de jure belli & pacis*, 2. 8. 1. 2. In fine, even among chriſtian cuſtoms, ſome have ſo far fallen into deſuetude, that there is no remaining veſtige of them. *Leibnitz*, *præfat. Cod. jure gent. dipl.* *p.* 8. who obſerves, that many things eſtabliſhed by the pope of *Rome* as head of the chriſtian ſtate, are held for the common law of chriſtian nations. This *Hertius & Puffend. de jure nat. & gentium*, *l.* 2. *c.* 3. § 23. illuſtrates by an example, from the uſe of croſs-bows againſt chriſtians.

Sect. XXIII.

This work divided into two parts.

It will not therefore be an uſeleſs attempt to treat of both theſe laws, which have the ſame foundation in

in the ſame work, in ſuch a manner however, as carefully to diſtinguiſh the one from the other, ſince they differ from one another in reſpect of their objects and application. We ſhall therefore handle them ſeparately in this order; in the firſt book, we ſhall enquire into the law of nature; and in the ſecond, into the law of nations.

REMARKS on this chapter.

Tho' our Author proceeds more diſtinctly and methodically than moſt other writers on the law of nature and nations, yet ſome ſteps of the reaſoning of this chapter do not intirely ſatisfy me. For § 8. he reaſons thus, " A rule carrying along with it no more than *internal obligation* would be uncertain, and ſo would not deſerve the name of a rule; becauſe internal obligation only means the intrinſic goodneſs of an action, but man is ſo framed that he may miſtake ſeeming for real good."— Whence he concludes § 9. " That no rule can be certain, and thus ſufficient for our direction, but that which carries along with it " an external obligation, *i. e.* according to his definition, the " command of a ſuperior inveſted with ſufficient power to enforce " his commands." Now it is plain, that the command of God to do, or to forbear an action can only be inferred from the intrinſic goodneſs or pravity of that action, *i. e.* in our author's language, the external obligation of an action can only be inferred from its internal obligation. Our author acknowledges this § 5, and afterwards § 60, and § 77, *& ſeq.* But this being true, it evidently follows, That we cannot be more certain about the external obligation of an action, than we are about its internal obligation: whatever uncertainty our apprehenſions of the latter are liable to, our apprehenſions of the former muſt be liable to the ſame uncertainty. It appears to me very odd reaſoning to ſay, That conſidering how obnoxious men are to miſtakes about good and evil, there muſt be a more certain rule for human conduct than the intrinſic goodneſs of actions, even the divine will; when at the ſame time we are told, that we cannot come at the knowledge of the divine will with reſpect to our conduct, otherwiſe than by firſt knowing what an action is in itſelf; or that we can only infer the divine will concerning an action from its intrinſic nature, its intrinſic goodneſs or pravity. In order to cut off many verbal diſputes, with which the moral ſcience hath been hitherto perplexed in its very firſt ſteps, it ought in my opinion to ſet out in this manner. 1. If there be ſuch a thing as good or evil belonging to, or ariſing from actions, there is an internal obligation or a ſufficient reaſon to chooſe the one and to abhor the other. But that ſome actions are good and others evil, muſt be true if preſervation and deſtruction, pain and

and pleaſure, happineſs and miſery, perfection and imperfection, be not words without meaning, which will not be ſaid. This is the ſubſtance of what our author ſays in his firſt ſection, and thus the better antients deduced and explained the eſſential differences of actions, or the natural difference betwixt virtue and vice. See my *Principles of moral and chriſtian philoſophy*. T. 1. c. 5. t. 2 § 3. introduction. In other words, if there be any ſuch thing as natural good and evil, there muſt be moral good and evil; for actions tending to good muſt be good, and actions tending to evil muſt be evil; or if there be any ſuch thing as perfection and imperfection with reſpect to any quality, any being, as a vine, a horſe, *&c.* there muſt likewiſe be ſuch a thing as perfection and imperfection with reſpect to moral powers and moral agents and their acts or exertions. 2. If there be a God, he muſt will that we ſhould regulate our actions by, and act conformably to the internal obligation of actions. But that there is a God is the univerſal plain language of nature. 3. Wherefore wherever there is internal obligation to act in ſuch or ſuch a manner, there is likewiſe an external obligation to act in the ſame manner, *i. e.* there is an extrinſic reaſon for acting ſo, ariſing from the will of God, who is infinitely perfect, and upon whom all our intereſts here and hereafter abſolutely depend. 4. Whatever therefore in reſpect of its internal obligation may be called a proper rule of conduct, is at the ſame time a *law*, in the proper and ſtrict ſenſe of the word, *i. e.* it is the will, the command of a ſuperior who hath right to command, and power to enforce the obedience of his commands, being the will of God the creator. 5. A ſyſtem of rules or of directions for our conduct, having internal obligation, may be properly called a ſyſtem of laws, of natural laws, of divine laws, becauſe it is a ſyſtem of precepts diſcoverable from their natural fitneſs, or internal obligation to be the will or laws of God concerning our conduct. And therefore the whole enquiry into rules of moral conduct, may be called an enquiry into the natural laws of God concerning our conduct.

It is not properly the buſineſs of ſuch an enquiry to prove the being of a God, and that where there is internal obligation to an action, there muſt alſo be external obligation to it. It ſuppoſes that done, and proceeds to enquire into internal obligations; or to unfold the goodneſs and pravity of actions, and from hence to deduce general rules or laws of conduct. Now if the preceding propoſitions be attended to, and the difference between a rule and a law, or between internal and external obligation, according to our author's definition, be kept in mind; it may be aſſerted without any ambiguity, that abſtractly from all conſideration of the will of the ſupreme Being, there is no law for our conduct; there is a rule, but that rule is not a law, in the ſtrict ſenſe of that word. It would have prevented much jangling about the foundations of morality, if writers had carefully diſtinguiſhed, with a late excellent writer, *Dr. Sykes*, in his

Essay on the Connexion of Natural with Revealed Religion, between the law and the sanction of the law. cap. 2.

Our author's reasoning will proceed very clearly, if we understand the meaning of his 8 § to be to this purpose. "A rule of conduct while it is merely apprehended under the notion of reasonable, will not be sufficient to influence men; in order to have due influence upon them, it must be considered as having external, as well as internal obligation, arising from the will of God which never changes." See how Puffendorf reasons, b. 2. of the law of nature and nations, ch. 3. § 20. "But to make these "dictates of reason obtain the dignity and power of laws, it is "necessary to call into our consideration a much higher principle, &c."

With respect to what is said, § 22. of the law of nations, 'tis well worth while to add an excellent remark of the author of the *Persian Letters*, 94 and 95. "As the law of nature and nations "is commonly doctored, one would imagine there were two "sorts of justice; one to regulate the affairs of private persons, "which prevails in the civil law; the other to compose the "differences that arise between people and people, which plays "the tyrant in the law of nations: as if the law of nations were "not itself a civil law, not indeed of a particular country, but "of the world. The magistrate ought to do justice between "citizen and citizen; every nation ought to do the same between themselves and another nation. This second distribution of justice, requires no maxims but what are used in the "first. Between nation and nation, there is seldom any want "of a third to be umpire; because the grounds of dispute are "almost always clear and easy to be determined. The interests "of two nations are generally so far separated, that it requires "nothing but to be a lover of justice to find it out: it is not "the same with regard to the differences that arise between private persons as they live in society, their interests are so mingled and confounded, and there are so many different sorts of "them, that it is necessary for a third person to untangle what "the covetousness of the parties strives to tie knots in, &c."

CHAP. II.

Concerning the nature and distinguishing qualities or characteristics of human actions.

Sect. XXIV.

Transition to treat of human actions.

FROM what hath been said of the foundation and origine of the law of nature and nations, it is obvious, that it hath for its object and scope

ſcope the direction of human conduct; and therefore order makes it neceſſary to enquire accurately into the qualities and characteriſtics of human actions.

Sect. XXV.

What is meant by action and what by paſſion? What by external and what by internal action?

Experience, the fountain of all knowledge, teaches us, that various motions and changes happen in the human mind; but ſince no motion can be produced or conceived without a ſufficient moving cauſe, the motions which happen in the mind of man muſt have ſome ſufficient cauſe, which muſt either be *within* or *without* man. And therefore motions, the ſufficient cauſe of which is in man himſelf, are called *actions*; and thoſe the cauſe of which muſt be ſought after without man, are termed *paſſions*. But becauſe the motion called *action*, either produces nothing without the mind, but reſts there, or produces by will ſome effect in the body, the former are denominated *internal*, the latter *external actions*.

Sect. XXVI.

Paſſions of what kinds are they?

Paſſions not proceeding from us, but from ſome external cauſe, are ſo far without our power, and therefore are not unfrequently excited in us againſt our will or inclination; yet they may ſometimes be as it were repulſed and prevented, if we are provided with ſufficient force to reſiſt the external exciting cauſe; and on the other hand, in certain circumſtances we can aſſiſt the external mover, ſo as that the motion it tends to produce may be more eaſily excited in us. Whence it follows that ſome paſſions are within our power, and others are not *.

* All this may be illuſtrated by clear examples. To be warmed is a paſſion; ſometimes we cannot avoid it, as when we are making a journey in very warm air: ſometimes we can, as when in winter we remove farther from the fire: and ſometimes we can as it were aſſiſt the cauſe,

as by drawing nearer to a fire that we may become warmer. To be warmed is therefore ſometimes in our power, and ſometimes without our power.

Sect. XXVII.

Whether they are ſubject to our direction or not?

Becauſe the law of nature hath only free actions for its object, (§ 4.) it cannot have for its object, in order to be directed by it, paſſions which are not within our power. Tho' it may lay down ſome rules relative to our paſſions, ſo far as they are in our power, yet, properly ſpeaking, theſe rules are not directions to our paſſions, but to thoſe free actions, by which we can reſiſt or aſſiſt theſe paſſions, ſhewing what we ought to do with regard to hindering or forwarding them *.

* Thus laws cannot be preſcribed to the paſſion of anger, but reaſon can give rules to our free actions, and directs us not to give looſe reins to anger, but to reſiſt its firſt motions, leaſt it ſhould become impetuous and ungovernable, and to forbear acting while the mind is in too great a ferment and perturbation, &c. Who will deny that he acts contrary to the law of reaſon who does not obſerve theſe rules? Nothing can be more true than what Cicero ſays, Tuſc. qu. l. 3. "All the diſeaſes and diſturbances of the mind proceed from the neglect or deſpight of reaſon, i. e. from not obſerving thoſe preſcriptions which reaſon dictates to us for hindering the mind from being overpowered by violent commotions."

Sect. XXVIII.

Whether the law of nature extends to them?

The law of nature therefore only extends to our actions; but let it be obſerved, that tho' the ſufficient cauſe of all theſe be in man himſelf, (§ 25.) yet experience teaches us, that of ſome actions we are conſcious and are abſolute maſters; others are of ſuch a nature that they proceed from ſome mechanical diſpoſition, in ſuch a manner that we are not always conſcious of them, nor have them not wholly in our power *.

* Thus

* Thus it is in our power to ſit, ſtand, or walk; to be ſilent or ſpeak, to give or not give, &c. as we will. And of all theſe actions we are conſcious when we perform them; but, on the other hand, the playing of the lungs, the periſtaltic motion of the inteſtines, the circulation of the blood, &c. do not depend on us; they are motions which we often neither feel nor know to be performed in us. The Stoicks uſe that diſtinction ſomewhat differently when they aſſert that ſome things are τὰ ἐφ' ἡμῖν, within our power; and others are τὰ ὀκ ἐφ' ὑμῖν, without our power. To the former claſs they refer opinion, appetite, deſire, averſion, in one word, all our actions; to the other they refer bodily goods, poſſeſſions, glory, power, and whatever in fine is not our own acquiſition or work. Epict. Enchirid. c. 1. Their diviſion is therefore a diſtribution of things, and not of actions only.

Sect. XXIX.

Actions are either human or natural. Whether the latter are the object of the law of nature?

Actions of which we are conſcious, and which are within our power, and ſubject to our direction, are properly termed *human* or *moral* actions; thoſe of which we are not conſcious, or not maſters, are called *phyſical* or *natural* actions; whence it is plain, that the former are *free*, the latter *neceſſary*; and therefore that *human* or *moral* actions alone can be directed by the law of nature (§ 4.), and not natural ones, except ſo far as it is in our power to aſſiſt and promote, or contrariwiſe to avoid and prevent them *.

* Tho', as we have juſt now obſerved, we have no command over the circulation of our blood, the motion of the heart, &c. yet it is plain from experience that we can aſſiſt thoſe motions by temperance and medicines; and that we can diſturb them by intemperance, or put a period to them by poiſon, the ſword, and other methods. Who therefore can doubt, but the law of nature may prohibit whatever tends to diſturb or deſtroy theſe natural motions, and with them life itſelf? The ancient philoſophers have agreed to this truth. For tho' ſome have commended ſelf-murder as noble and heroic; yet *Democritus* elegantly ſays in *Plutarch de ſanitate tuenda*, p. 135. "If the body ſhould

 " bring

"bring an action of damage against the soul, for an injury "done to it, it could not escape condemnation."

Sect. XXX.

The understanding and will are the principles of human actions.

Human or moral actions being free or within our power, and every thing being in our power which is directed by our will; it follows that human or moral actions are actions which may be directed by our will. But because the will never determines itself, unless it be excited to desire or reject by the understanding *; hence it is justly concluded, that the understanding likewise concurs in the exertion of free human actions; and therefore there are two principles of free human or moral actions: the *understanding* and the *will*.

* The will hath good or evil for its object, and therefore it always tends towards good, and flies from evil. Whence it is plain, it cannot choose but what is represented to it by the understanding, under the appearance of good, just, or advantageous; nor reject but what is exhibited to it under the semblance of evil, unjust, or hurtful. So Simplicius upon Epictetus, cap. I. "But it is certain "that the acts of the willing power, are preceded by some "judgment or opinion. If an object be represented to the "mind as good or evil, propensity or aversion are excited, "and appetite or desire succeeds. For before we desire any "agreeable object and embrace it, or fly from any thing "contrary to what is desirable, the mind must necessa-"rily be previously prone or averse towards it."

Sect. XXXI.

What the understanding is?

Understanding is the faculty by which the mind perceives, judges, and reasons. When this faculty takes the name of *imagination*, we have sufficiently shewn in another treatise. (*in the elements of rational philosophy.*)

Sect. XXXII.

Without its concurrence an action is not moral.

But since the will cannot exert itself, unless it be excited by the understanding, (§ 30.) it follows that

that it cannot prefer a juſt action as ſuch, nor abhor an unjuſt one as ſuch, unleſs the underſtanding hath firſt diſtinctly perceived the action to be juſt or unjuſt, by comparing it with the rule of action, i. e. by reaſoning. And therefore moral actions preſuppoſe the capacity of perceiving a rule of action, and of comparing actions with the ideas of juſt and unjuſt *.

* Hence it is manifeſt that the law of nature does not extend to infants incapable of diſcerning good from evil; much leſs to the actions of mad perſons, changelings, or ſuch as are diſordered in their judgments by any diſeaſe; becauſe ſuch cannot reaſon about juſt and unjuſt. Ariſtotle therefore juſtly obſerves, Ethic. c. 34. "With reſpect to "things of which ignorance is the cauſe, man is not un-"juſt. For in the caſe of inevitable ignorance, one is as an "infant that beats its father without knowing what it does. "On account of this natural ignorance children are not "reckoned unjuſt. Whenever ignorance is the cauſe of "acting, and one is not the cauſe of his ignorance, men "are not to be deemed culpable or unjuſt."

Sect. XXXIII.

Hence conſcience.

That faculty by which we reaſon about the goodneſs or pravity of our actions is called *conſcience*, concerning which we have diſcourſed at large in another treatiſe. Here however it is neceſſary to repeat, or rather add ſome obſervations upon conſcience.

Sect. XXXIV.

Which is reaſoning.

Becauſe conſcience reaſons concerning the goodneſs and pravity of actions; (§33) but actions are called juſt, in reſpect of an external obligation ariſing from a law; conſcience muſt therefore compare the one with the other, the law and the fact; that is, form two propoſitions, and from them deduce a third; which, ſince it cannot be done but by ſyllogiſm, it follows that every reaſoning of

 conſcience

conſcience is a ſyllogiſm, conſiſting of three propoſitions, the law, the action, and the concluſion.

* Such was that reaſoning of Judas's conſcience, Mat. xxvii. 4. "I have ſinned in that I betrayed innocent blood." In which the firſt propoſition expreſſes a law, the ſecond Judas's action, and the laſt the concluſion or ſentence of his conſcience. Nor does any thing elſe paſs in our mind when conſcience reaſons within us. It is therefore moſt wickedly miſrepreſented by Toland and others, as an empty name, made a bug-bear by prieſts.

Sect. XXXV.

It is divided into good and evil conſcience.

Since conſcience in its reaſonings always terminates in a ſentence which it draws (§ 34): but every ſentence either condemns or abſolves according as the action is found to be conformable or diſagreable to the law. Conſcience, when it abſolves, is called *good*, and when it condemns, it is called *evil*; the former is attended with tranquillity and confidence; the latter with ſuſpiciouſneſs and dread.

* Hence St. Paul, *Rom.* ii. 15. calls the acts of conſcience λογισμὸς, &c. thoughts excuſing or accuſing; and St. John, 1 Ep. iii. 21. ſays, if our hearts condemn us not, then have we confidence towards God, *&c.* So ſpeak the Poets likewiſe,

Prima hæc eſt ultio, quod, ſe
Judice, nemo nocens abſolvitur : improba quamvis
Gratia fallaci Prætoris vicerit urna.

Juv. Sat. 13.

Sect. XXXVI.

It is likewiſe divided into antecedent and conſequent.

We may reaſon either about paſt or future actions, and therefore conſcience reaſoning about actions not yet performed, is called *antecedent conſcience*, and when it reaſons about actions already done, it is called *conſequent conſcience.*

Sect. XXXVII.

In ſome perſons both are found.

In both caſes conſcience compares the action with the law. But becauſe the good and upright man, who

who hath a due ſenſe of virtue and duty alone ſets himſelf to conform his future actions to the divine law; ſuch only exerciſe antecedent conſcience. The conſequent exerts itſelf even in the breaſts of the moſt profligate.

* Virtue is always united with an earneſt indefatigable care to underſtand the divine law. The greater progreſs one has made in virtue, the more ardent is this deſire in his breaſt. And hence it is, that rightly diſpoſed minds are ſtrict inſpectors into the nature even of thoſe actions which appear trivial and indifferent to others; for which reaſon, their conſcience is ſaid to be tender and delicate. Plutarch ſays elegantly, de profectu virt. ſent. p. 85. "Let this likewiſe be added, if you pleaſe, as a mark of no ſmall moment, that he who is making proficiency in virtue, looks upon no ſin as venial, but carefully ſhuns and avoids every appearance of evil."

Sect. XXXVIII.

Conſcience either excites, admoniſhes, or reclaims.

Further, as often as we compare a future action with the law, we find it either to be commanded, forbidden, or permitted. In the firſt caſe conſcience excites us to perform the action. In the ſecond it reſtrains us from it. In the third, having wiſely examined all its circumſtances, it adviſes what ought to be done. Conſcience is therefore divided into exciting, reſtraining, and admoniſhing.

* Thus conſcience excited Moſes and Zippora to circumciſe their ſon, recalling to their mind the divine precept about circumciſion, *Exod.* iv. 24. Conſcience reſtrained David from perpetrating his intended murder of Nabal, ſetting before him the divine command, "Thou ſhalt not kill." 1 *Sam.* xxv. 32. Finally, conſcience admoniſhed St. Paul not to eat meat which he knew had been conſecrated to idols, and to give the ſame counſel to the Corinthians. For tho' he knew that chriſtians could not be defiled by meats and drinks; yet his conſcience adviſed him to act prudently, leſt he ſhould give offence to any one, 1 *Cor.* x. 28. and hence his golden maxim: "All things

things are lawful to me, but all things are not expedient: all things are lawful, but all things edify not."

Sect. XXXIX.

Con-ſcience is either right or erroneous.

Moreover, becauſe conſcience is a reaſoning, the ſame things agree to it which are true of a ſyllogiſm; wherefore as reaſoning, ſo conſcience may be either *right* or *erroneous*; and as every reaſoning is either faulty in the *form* or in the *matter*, ſo conſcience errs, either becauſe the law, or becauſe the action is not rightly repreſented; or becauſe the rules of juſt reaſoning are not obſerved.

* To illuſtrate this by examples. The Jews erred in the *matter*, when they thought they could without ſin with-hold from their parents what was due to them, provided they devoted it to God. For the *major*, in their reaſoning, ſet forth a *falſe law.* "But ye ſay, whoſoever ſhall ſay to his father or his mother, it is a gift by whatſoever thou mighteſt be profited by me." *Mat.* xv. 5. So likewiſe Abimelech, when he imagined he could innocently take Sarah into his bed. For he made a falſe ſtate of the fact, imagining he was to lie with an unmarried woman, *Gen.* xx. 2. To conclude, the Phariſees erred in the *form*, when they inferred from the law relative to the ſabbath, this falſe concluſion, that no work of neceſſity and mercy was to be done on it. *Mat.* xii. 10.

Sect. XL.

It is either certain or probable.

Again, as in other reaſonings, ſo likewiſe in thoſe of conſcience chiefly, it happens that an argument is ſometimes taken from a certain principle, and ſometimes from an hypotheſis, a probable propoſition, but yet merely hypothetical. Hence conſcience is called *certain*, when it argues upon an indiſputable law; and *probable*, when it founds upon the probable opinion of others *. Now, becauſe there are various degrees of probability, conſcience muſt ſometimes be more, and ſometimes leſs probable.

* Probable

* Probable conſcience muſt not therefore be oppoſed to right conſcience, becauſe probable conſcience may be right. But it may be falſe; for as in reaſoning we may be deceived by a ſpecious ſhew of certainty, and miſtake a *paralogiſm* for a demonſtration; ſo we are much more liable to have a falſe appearance of probability put upon us by *ſophiſms*: whence we ſee the ſlipperineſs of that doctrine maintained by certain modern caſuiſts concerning the ſufficiency of *probable conſcience*, to exculpate from ſin, of which ſee Lud. Montalt. Litt. ad provincial. Ep. 5. and Sam. Rachel. Diſſer. de *probabiliſmo*. For unleſs we admit a rule which is a mere *proteus* to be a good one: We cannot poſſibly imagine we have done our duty, if we take probable conſcience for our guide, which is neither always right, nor certain, nor conſtant (§ 5): eſpecially, ſince theſe doctors meaſure probability by the opinions of others; whereas the apoſtle forbids us to truſt to the judgment of others in matters of ſo great moment. "Let every man be fully perſuaded in his own mind." *Rom.* xiv. 5.

Sect. XLI.

What doubtful and ſcrupulous conſcience mean?

Becauſe what is probable may be true, or may be falſe (§ 40): therefore it happens that probable arguments preſent themſelves to us on both ſides of the queſtion; now in this caſe we think more deliberation is required, the affair being dubious; and conſcience is then ſaid to be *doubtful*; but if the perplexity we are in, and cannot get totally rid of, be of ſmaller conſequence, it is then called *ſcrupulous* *.

* That doubting of the mind, which ſuſpends it between two opinions, is not improperly called by the learned Wolfius *Scrupulus*: But our definition ſeems more agreeable to the primitive meaning of the word. For *Scrupulus* ſignifies a very ſmall pebble, which yet getting into the ſhoe creates no ſmall pain. So Servius explains it, ad Æn. 6. v. 236. Apuleius oppoſes (ſcrupulum) to a more perplexing anxiety which he commonly calls *lancea*. See Scip. Gent. ad Apuleii Apolog. p. 150.

Sect.

Sect. XLII.

What free and less free conscience mean?

Besides, it may happen that the mind, precipitated into vice by impetuous appetites, and as it were enslaved by evil habits, is not able to reason freely about actions; but is strongly biassed towards the side of its passions; in which servile state conscience is not a free and impartial reasoner. But the mind which hath delivered itself from such miserable bondage into a state of liberty is free. This distinction is accurately explained by *Wolfius's Ethic.* § 84.

* Hence that paradox of the Stoics: "Every wise man only is free: and every fool is a slave." Cicero. Parad. 5. He whose virtue hath rescued him from slavery to vice, into a state of freedom, despises and tramples upon every disorderly passion, and says with great magnanimity: "I will not receive arbitrary commands: I will not put my neck under a yoke: I must know what is greatest and noblest; what requires most strength of mind: the vigour of the soul must not be relaxed: If I yield to pleasure, I must succumb to pain, to toil, to poverty. Nay, ambition and anger will claim the same power over me," Seneca. Ep. 51. Upon which place Lipsius ad Philos. Stoic. l. 3. Disser. 12. discourses to this purpose: "Mark, says he, how many masters he had already rid himself of? Add to these, lust, avarice, and other vicious passions, and you will have a multitude of what may properly be called tyrants. How wretched is the slave who is in subjection to them! How free and great is he who hath put them under his feet? What liberty can we say remains to a conscience which so many vitious disorderly appetites and passions have fettered and enshackled?"

Sect. XLIII.

What sleeping, awakened and seared conscience mean?

We know by experience that men are sometimes lulled so fast asleep by their vices, that they have no feeling of their misery, and never think upon duty, or right and wrong. Now, as we then say, conscience is in a deep *lethargy*; or if it is, by a long habit of vice, become quite obdurate and callous,

callous, we ſay it is *ſeared* as with a burning iron *. So conſcience ſeems as it were to *awake*, when a perſon rouzed by calamity, or a ſenſe of danger, begins to examine and ponder his actions with ſome attention, and to reflect and reaſon about their goodneſs or depravity.

* *Cauterio uſta*, an emphatical way of ſpeaking by St. Paul, 1 Tim. iv. 2. For as the finger, or any member of the body burnt with a hot iron loſes all ſenſibility; ſo the mind inured to a vitious courſe, does not feel its miſery which others behold with horror: the ſame apoſtle, Epheſ. iv. 19. calls ſuch perſons *paſt feeling*. See Beza's commentary on the place.

Sect. XLIV.

What is meant by quiet, diſturbed, anxious, diſquieted conſcience and remorſe?

We have already remarked that every one's conſcience condemns or abſolves him (§ 35): but becauſe abſolution muſt be accompanied with the higheſt ſatisfaction of mind, and condemnation with the bittereſt uneaſineſs and diſquiet; hence it follows, that a good conſcience, acting upon certain evidence, is for the moſt part quiet and eaſy; an evil conſcience is diſturbed by racking remorſe; (which torment the antients compared to the burning torches of the furies): and a dubious one is very anxious and reſtleſs, to ſuch a degree, that it knows not to what hand to turn itſelf. Theſe affections however belong more properly to the effects of conſcience than to conſcience itſelf, as every one will immediately perceive.

* So Cicero pro Sex. Roſc. Amer. cap. 24. Now theſe remorſes of conſcience are an irrefragable argument againſt thoſe who abſurdly maintain, that the uneaſineſs of conſcience ariſes wholly from the fear of civil puniſhment, to which criminals are obnoxious. For in the firſt place, 'tis not private perſons only who are harraſſed day and night by theſe terrible furies; but even thoſe whom birth and grandeur have ſet above all liableneſs to puniſhment in this world, ſuch as a Nero, according to Sueton. cap. 34. And ſecondly, if any ſhould rather imagine he feared the

juſt reſentment of the people, there are not wanting examples of perſons who in their dying moments, when they could have nothing to fear from men, have been inexpreſſibly tortured by a ſecret conſciouſneſs of crimes unknown to the world: as Chilo Lacedemonius, who in Aulus Gell. Noct. Att. l. 3. thus ſpeaks, " I ſurely, ſaid he, at this moment do not deceive myſelf, when I think I have committed no crime the remembrance of which can create me any uneaſineſs, one only excepted, *&c.* And Sueton relates a ſaying of the emperor Titus to the ſame purport. Tit. cap. 10.

Sect. XLV.

Whether conſcience be the rule of human actions?

Whence we ſee what judgment we are to form of the opinion of thoſe who aſſert that conſcience is to be held for the internal rule of human actions. For if a rule cannot anſwer the end of a rule unleſs it be right, certain, and invariable (§5); who will admit conſcience to be a rule which is ſometimes erroneous (§ 39); ſometimes only probable (§ 40); ſome times doubtful and wavering; (§ 41) and frequently overpowered by perverſe appetites (§ 42); wherefore, tho' he be guilty who acts contrary to conſcience, whether certain or probable; yet he cannot for that reaſon be ſaid to act rightly and juſtly, who contends that he has acted according to his conſcience *.

* Conſcience is not the rule, but it applies the rule to facts and caſes which occur; wherefore, it is ſafer to omit an action concerning the pravity of which we reckon ourſelves fully convinced, than it is to do an action which conſcience eſteems juſt and good, without being certain of the law. He then who follows an erroneous conſcience ſins on this very account, that he follows it rather than the will of the legiſlator: tho' he be more excuſable than one who acts directly againſt conſcience, yet he is guilty. For which reaſon, I cannot go along with the opinion of Limborch, who in his Chriſtian Theol. l. 5. c. 2. § 8. maintains, that even an erroneous conſcience muſt be obeyed.

Sect. XLVI.

Hence we may conclude, that while conscience is uncertain, and fluctuates between contrary opinions, action ought to be suspended. This we assert in opposition to Ger. Gottl. Titus, in his observations on Puffendorf de off. hom. & civ. l. 1. c. 1. § 6. And for one to do any thing with such an obstinate obdurate mind, as to be very little concerned about knowing the divine will, and determined to do the same, even tho' he should find it to be prohibited by God, is the heighth of perverseness.

Why action ought to be suspended while conscience doubts?

* To this purpose it is well said by Cicero de Off. l. 9. "For this reason it is a good precept which forbids us to do any thing, of the goodness or iniquity of which we are in doubt. For honesty quickly would shew itself by its own native brightness: and the doubting about it is a plain intimation that at least we suspect some injustice in it." *i. e.* He who ventures to do what he doubts whether it be honest or dishonest, by so doing bewrays a propension to do an injury. Hence the apostle says, *Rom.* xiv. 23. "And he that doubteth is damned if he eat, because he eateth not of faith, and whatsoever is not of faith is sin."

Sect. XLVII.

From what hath been laid down, it is plain that *ignorance* and *error* are the great hinderances to conscience in the application of a law to a fact. By the former is understood the mere want of knowledge; by the other is meant the disagreement of an idea, a judgment, or a reasoning to truth, or the nature of the thing. One therefore is said to be ignorant who hath no idea before his mind; and one is said to err, who hath either a false idea of the object, that is, an idea not conformable to it; an obscure, confused, or unadequate idea. For an error in the idea must of necessity infuse itself into the judgment made concerning an object, and from thence into all the reasonings about it.

The weaknesses or defects of the understanding, ignorance and error.

Sect. XLVIII.

Whether ignorance and error of all forts be culpable?

But becaufe all men are not under an obligation to find out the more abftrufe truths which may be faid to lie at the bottom of a deep well; and in reality the ignorance of fome things is rather attended with advantage than detriment *; (yea, as Terence obferves, Hecyr. the ignorant and illiterate often do more good in one day, than ever the learned and knowing do;) hence it may be inferred, that ignorance and error of every kind is not evil and blameable.

* An example of this might be brought from the ignorance of certain crimes, which ought not fo much as to be named; for there the maxim helds, *ignotorum nulla cupido*; what is unknown is undefired. Who would not wifh many were in a ftate of ignorance, which would effectually fhut out and render the mind quite inacceffible to certain vile concupifcences? Juftin. Hift. 2. 2. fays, "the Scythians were better through their ignorance of feveral vices than the Greeks were by their knowledge of virtue." Nor does Quintilian feem to have lefs admired the ancient Germans, when fpeaking of a moft enormous vice, he fays "they were totally ignorant of it: their manner of living was more pure, *&c.*"

Sect. XLIX.

What kind of ignorance and what kind of error is culpable?

Yet fince the will makes no election unlefs it be excited to it by the underftanding; and therefore the underftanding concurs in producing moral actions (§ 30), the confequence from this is, that they are not blamelefs who are grofly ignorant of thofe truths relative to good and ill, juft and unjuft, which it was in their power eafily to underftand, or who err with regard to thefe matters, when error might have been avoided by due care and attention to acquire right and true knowledge.

Sect. L.

Ignorance is either vincible

Hence arife various divifions or claffes of ignorance and error, fo far as it is or is not in our power to

to escape ignorance, it is *vincible* or *invincible* *. So far as one is or is not the cause of it himself, it is *voluntary* or *involuntary*. Finally, if one does any thing he would not have done had his mind not been obscured by ignorance, such ignorance is called *efficacious* or *effectual*. But if he would have done the same action tho' he had not been in the state of ignorance in which he did it, it is called *concomitant*. Repentance is the mark of the former; but the latter discovers itself by the approbation given to the action done in a state of ignorance, when that ignorance no longer takes place. Now all this is equally applicable to error.

or invincible, voluntary or involuntary, efficacious or concomitant.

* Ignorance and error are said to be invincible, either in regard of their cause or in themselves; or in both respects at the same time. Thus the ignorance of a drunken person is in itself invincible, so long as his madness continues; but not in respect of its cause, because it was in his power not to have contracted that madness. On the other hand, the hurtful actions of mad men proceed from ignorance, which is invincible, both in itself and in regard of its cause, since they not only do not know what they are doing, but it was not in their power to have escaped their madness. All this is true, and hath its use in the doctrine of *imputation*: But the first cannot so properly be called invincible, since it might and would have been avoided, had not the mind been very regardless of duty. The matter is admirably explained by Aristotle in his books to Nicomachus, 3. 7. where speaking of that law of Pittacus which inflicted a double punishment upon the crimes committed by drunken persons, he immediately adds: "A double punishment is appointed for the crimes of drunken persons; because these actions are in their source from them. It was in their power not to get drunk. But drunkenness was the cause of their ignorance." Concerning this law of Pittacus see Diogenes Laertius, 1. 76. and Plutarch in Conviv. sept. sap. p. 155.

Sect. LI.

We proceed now to consider the other principle of human or moral free actions, *viz.* the *will*, (§ 30) which is

What will is?

is that faculty of our mind by which we choose and refuse. Hence it is justly said, that truth and falshood are the objects of the understanding; but that the will is conversant about good and ill. For the will only desires truth as it is good, and is averse to falshood only as it is ill *.

* Thus no wise man desires to know his future calamities, because it would only serve to anticipate his suffering. And therefore, however true his foreknowledge might be, it would not be good. Children, on the other hand, are very fond of fables, even tho' they know they are feigned, because they perceive them to be fit lessons for their instruction; or at least very entertaining: and on these accounts, they look upon them as good.

Sect. LII.

Its nature and acts.

From this definition we may conclude that the will cannot choose any thing but what is exhibited to it by the understanding under the shew of good, nor turn aside from any thing but what appears to it to be ill. The greater good or ill there seems to be in any thing, the stronger in proportion is our inclination or aversion; and therefore the desire of a lesser good or a lesser evil may be overpowered by the representation of a greater good or evil. Aversion does not consist in a mere absence of desire, but hath something positive in it, which is called by Koehler, exerc. jur. nat. § 167. *noluntas* vel *reclinatio*, *refusing* or *aversion*.

* As the Civilians accurately distinguish between *non nolle & velle*, l. 3. D. de reg. Juris; so we ought to distinguish between *not willing*, and *not desiring* and *refusing*, or *having an aversion*. There are many things which a wise man does not choose or will, tho' he does not abhor them. Thus he does not desire immortality on earth, because nature hath not granted it; nor empire, because fortune hath not allotted it to his birth: But he has no aversion to these things, but on the contrary pronounces them great and noble goods. He does not desire what his rank puts beyond his power to attain, but he would not dislike

dislike it if he could obtain it. Thus *Abdolominus*, intent upon his daily employment, dressing and weeding his little garden, had no thoughts of royalty: he did not desire it, yet he did not refuse and despise it, when he was saluted king, and presented with the royal robes and ensigns. Cur. de gest. Alex. 4. 1.

Sect. LIII.

Its spontanity and liberty.

From the same definition it is clear that man, with regard to his will, acts not only *spontaneously* but *freely*. For *spontaniety* being the faculty of directing one's aim to a certain end, but liberty being the power of choosing either of two possibles one pleases; it is plain from experience, that both these faculties belong to our minds. The servile subjection one is under to his perverse appetites and affections till virtue makes him free, is not inconsistent with these properties. For these obstacles are of such a kind, as hath been observed, that they may be removed and overpowered by the representation of a greater good or evil to the understanding (§ 52) *.

* Thus, whatever propension a thief may have to steal, yet he would not yield to that wicked cupidity, could he set before his eyes the dismal effects of his crimes, the horrors of a dungeon and shackles, and the ignominy of a gibbet. And those who are most highly charmed with indolence and voluptuousness, would quickly be inflamed with the love of a nobler life and more honourable pursuits, if, calling in reason to advise them, they could fully perceive the excellence of wisdom, its agreeableness and manifold advantages on the one hand, and on the other side the irreparable ignominy and detriment which are inseparable from sloth and ignorance. Epictetus dispatches the whole matter with great brevity. Arrian. l. 17. "Can any thing overcome an appetite? Another appetite can. Can any thing get the ascendant of an inclination or propensity? Yes really another can." And he illustrates it by the same example of a thief we have just now made use of.

Sect. LIV.

Do temperament or bodily constitution affect it?

Hence it is evident, that bodily constitution, (which philosophers call *temperament*) does not infringe upon the liberty of human will. For tho' the mind be variously affected by the body, so as to be rendered by it more propense to certain vices; yet that propensity hath no more of compulsion or force in it than there is in the inducement to walk out when fine weather invites one to it. But who can deny that the will is left intire, and not hindered or prevented from choosing either to walk out or not as it shall appear most reasonable, when inticed by all the charms of spring?

Sect. LV.

Whether affections and habits encroach upon it?

The same is true concerning all the affections and motions excited in the mind by the appearances of good and ill. For tho' the mind, with respect to the first impression, be passive, every thing else is however intirely in its power; to resist the first impulse, not to approve it, nor to suffer it to gain too much force. And it likewise holds with regard to habits, *i. e.* propensions confirmed by long use and practice. For tho' these gradually become so natural, that tho' expelled with never so much force, they recoil, Hor. ep. 1. 10. v. 24. (*si expellas furca, tamen usque recurret*) yet they are not incorrigible, but may be amended, if one will but exert his liberty.

* Habits are affections and propensities become strong by daily repetition or custom. Now what has been contracted by practice may by disuse be abolished and erazed, if we will but give as great pains to destroy it as we did to establish it into strength. There is an elegant passage to this effect in Aristophanes in Vespis. thus translated into Latin.

Usus quo fueris diu,
Mutare ingenium, grave est.

Multos

Multos invenias tamen,
Qui mores moniti ſuos
Mutarunt melioribus.

Sect. LVI.

What may be ſaid of external force.

External violence is ſo far from taking away the liberty of the human mind, that it affords a ſtrong proof of our liberty. For tho' one may be hindered by force from doing what he chooſes to do; yet no force can make one will what he does not will, or not chooſe what he chooſes *. If the underſtanding repreſents the good attending an action as greater than the imminent evil, no external violence can force one to quit his reſolution, he will remain unſhaken by all the menaces of power or cruelty.

Nec civium ardor prava jubentium
Nec vultus inſtantis tyranni
Mente quatiet ſolida.

* This is likewiſe obſerved by Epictetus in Arrian, l. 1. 17. After he had aſſerted, that an appetite can only be overcome by another appetite, he adds: "But it may be ſaid, he who threatens me with death forces me. Truly the cauſe is not that which is threatened, but it is owing to your thinking it better to do the action than to run the risk of dying: it is therefore your opinion which forces you, *i. e.* one appetite overcomes another."

Sect. LVII.

The will is divided into conſequent and antecedent.

Hence we ſee that the diſtinction between *antecedent* and *conſequent will* ought not to be rejected; the former of which decides without a view of all the circumſtances which may happen at the time of acting; the other ſuits itſelf to the circumſtances which appear at that inſtant. The one therefore is not oppoſite to the other, tho' they be very different. Thus it is true that God loves peace, and yet that in certain circumſtances he does not diſapprove war.

Sect. LVIII.

Actions are spontaneous, forced, voluntary, and mixed.

Further, it is equally plain that those actions are *spontaneous* which are performed by a mind determining itself to a certain known proposed end; these are not spontaneous which do not proceed from such a determination of the mind, but are done without intention. Again, even spontaneous actions are *voluntary*, to perform which no external necessity compels; and such are *forced*, to which one is necessitated by some external urgent circumstances. We need not add *mixed*, because actions called such, being performed under some external necessity urging to it, coincide with those which are called forced actions *.

* Those are called by some mixed actions, which one does under an urgent necessity, so as that he would rather not do them. Such as that case described by Lucretius de rer. nat. l. 2. v. 277.

> *Jamne vides igitur, quamquam vis extima multos*
> *Pellit, & invitos cogit procedere sæpe,*
> *Præcipitesque rapit, tamen esse in pectore nostro*
> *Quiddam, quod contra pugnare obstareque possit?*

The same happens in every forced action. For no external violence can force us to will or not to will (§ 56.) and therefore there is no use for the distinction between compelled or forced and mixed actions.

Sect. LIX.

Actions not spontaneous are involuntary. Forced actions are voluntary.

Hence it is obvious that no action which is not spontaneous is voluntary (§ 58); but forced actions may be voluntary. For tho' we would rather not act were not a very great evil set before us, yet it is the will which determines to act; whence it follows, that the antient lawyers were in the right when they affirmed, that one who is forced, wills. D. l. 21. § 5. *quod met. causa.* "coactum etiam velle."

REMARKS

REMARKS on this Chapter.

Our Author doth not enter at all into the dispute about necessity and free agency. It would have been a digression from his subject. The question is most accurately handled by Mr. Locke in the chapter of Power, in his Essay on human understanding. See likewise what I have said of it in my Introduction to the principles of moral philosophy; and in the Christian philosophy, sect. 2. prop. 4. But I think the whole matter may be dispatched in a few words. It is as much a matter of experience as any other whatever, That several things depend upon our will as to their existence or non-existence; as to sit, or stand, or walk; to write or not write: to think or leave off thinking on this or the other subject, &c. But so far as it depends in this manner on our will, or pleasure to do, or not to do, we are free, we have power, dominion, agency; or we are not passive but active beings. To say we are not free, but necessary, must be to assert either that we are not conscious, which is contrary to experience; or that we never will, which is also contrary to experience; or that our will never is effective, which is equally so, since many things depend on our will: For necessity must mean one or other of these three, or all of them together. There is no other property included in the idea of a free agent; there is no other conceivable property belonging to action or agency, besides willing with power to effect what is willed. To say that the will is not free, because it must desire good and hate ill as such, is to say freedom or activity cannot belong to a mind endued with the power of willing; since willing means complacency in good, or preferring it, and aversion to evil, or desire to avoid it, *i. e.* it is to say freedom means some property that can't exist, because it implies a contradiction, *viz.* willing without willing. Freedom is the very idea of agency: it is that which constitutes an agent; and it signifies having a certain degree or extent of power, efficiency, or dominion by our will. And that we have a certain degree or extent of power, efficiency, or dominion by our will, is as manifest to experience as that we think: nor can a proof of it be demanded, unless at the same time a proof of thinking and consciousness be demanded.

As for what our Author says about erroneous conscience, it will be better understood by what is said in the fourth chapter about imputation, and our remark added to that chapter. Mean time we may observe, 1. That if to acquire knowledge for the direction of our actions be not among our τὰ ἐφ' ἡμῖν, or within our power, the direction of our actions cannot be in our power, that is, we are not agents. If we are not accountable for our not having knowledge sufficient to direct our actions rightly, we cannot be accountable for our actions. 2. Our views, our judgments of things must be our rule; we can have no other: yet ultimately, the nature of things is the rule, because the natures of things are stubborn, and will not yield to our misapprehensions

of them. It is the ſame here as with regard to mechanicks, where no difficulty is ſtarted. The nature of mechanical powers and properties will not ſubmit to our notions; yet we muſt work in mechanical arts according to our apprehenſions of mechanical laws and properties. Our ideas and judgments are our immediate guide; but the natural qualities and relations of things are the ultimate ſtandard. The former may vary, but the latter are unchangeable. The ultimate meaſure of opinions, which is truth or nature, is conſtant, immutable.

CHAP. III.

Of the rule of human actions, and the true principle of the law of nature.

Sect. LX.

Of what nature or kind the rule of human action muſt be.

SUch, we have already ſeen, is the nature of our free actions, that they muſt have a rule to direct them (§ 4); there we likewiſe ſhewed that a rule could not ſerve the purpoſes of a rule, if it be not ſtreight or right, certain, evident, and invariable, and have external as well as internal obligation. Let us now enquire a little more accurately what this rule is which hath all theſe properties eſſential to a rule for human, free, moral actions.

* Let us not confound the rule of human actions with the principle of natural law. The former is what philoſophers call the (principium eſſendi) becauſe it conſtitutes the principle or ſource of obligation to us. By the latter we underſtand principium cognoſcendi, *i. e.* the principle, the truth or propoſition from which our obligation to any action appears or may be deduced. Theſe are different, even with regard to civil ſtates. For the ſource or principle of the obligation under which all the members of any ſtate whatſoever lie, is the will of the ſupreme authority in that ſtate, and that is alſo the rule to which every member of a ſtate is obliged to conform himſelf. But if it is asked whence or how that ſupreme will may be known, in every ſtate you will be referred to its laws; and therefore, theſe are likewiſe in every ſtate the ſole and adequate principle or ſource of knowledge with reſpect to civil duties and obligations.

Sect.

Sect. LXI.

The rule of human actions muſt either be within us or without us. If it be within us, it can be none other but either our own will, or our underſtanding and conſcience. But neither of theſe faculties is always right, neither of them is always certain, neither of them is always the ſame and invariable; wherefore neither any of them, nor both of them together, can be the rule of human actions; whence it follows that the rule of human actions is not to be found in ourſelves; but if there be any ſuch, it muſt be without us.

The rule of human actions is not to be found in us, but without us.

Sect. LXII.

Now without us exiſt other created beings, and likewiſe a *God*, the author of all things which exiſt. But ſince we are enquiring after a rule of human actions, carrying with it an external obligation (§ 9) and made known or promulgated to all mankind by right reaſon (§ 11); and ſince external obligation conſiſts in the will of ſome being, whoſe authority we acknowledge (§ 9), there being no other whoſe authority we are obliged more ſtrictly to acknowledge than the infinitely perfect and bleſſed *God* (§ 10); and ſeeing he alone can promulgate any thing to us by right reaſon, of which he is the author, it follows, by neceſſary conſequence, that the *will of God* muſt be the rule of human actions, and the principle or ſource of all natural obligation, and of all virtue.

It is to be found in the will of God.

* We therefore fall in with the opinion of the celebrated Sam. a Cocceis, who in his diſſertations already cited (§ 10) has demonſtrated this truth by ſolid arguments, and likewiſe defended it againſt objections and cenſures with great judgment and erudition, Diſſert. 1. qu. 2. § 6. & ſeq. where he has gathered together very many paſſages from ancient authors to prove this to have been the more general opinion of ancient moraliſts, the chief of whom are Xenophon, Sophocles and Cicero.

Sect. LXIII.

The will of God is a right, certain, and constant rule.

That this rule is *right* cannot be doubted, ſince an infinitely perfect Being cannot will what is not perfectly good and right: it muſt be a *certain* rule, ſince reaſon diſcovers it to all men; and it muſt be *unvariable*, becauſe the will of God can no more change, or be changed, than God himſelf, or right reaſon, by which it is diſcoverable. Finally, it muſt be *obligatory*, ſince God hath the juſteſt claim and title to our obedience; and men have no reaſon or right to decline his authority, and cannot indeed if they would. Hence at the ſame time it is evident, that every will of God is not the rule of human actions, but his obligatory will only *.

* The will of God is of a large extent, and its various diviſions are fully explained in treatiſes of natural theology; by none more accurately than by Ruardus Andala, Theolog. nat. part. 2. c. 8. § 6. & ſeq. and Wolfius Theolog. nat. part. 1. c. 3. It is ſufficient for us to obſerve, that God himſelf being the primary object of his will, as he loves, approves, and delights in his own perfections, and the whole univerſe, to which he gives being by his will, is upheld, governed and moved according to certain laws choſen and approved of by him, and is therefore the object of his will; wherefore here we underſtand by the divine will, the will of God relative to the actions of his intelligent creatures, either with reſpect to doing, or not doing: and this will we call *moral* or *obligatory*.

Sect. LXIV.

This rule may be called a law with regard to mankind.

Since therefore the *obligatory will of God*, which we have ſhewn to be the only rule of human actions, is his will with reſpect to the actions of his rational creatures, as to acting or forbearing to act (§63); it is evident, that this rule, conſidered with relation to man, may properly be called *a divine law*, becauſe it is the will of the ſupreme Being, commanding or forbidding certain actions with rewards and penalties (§ 9). But becauſe there are other laws of God

God to mankind which are made known by revelation, and are therefore called *poſitive*, thoſe which are known to man by natural reaſon, are juſtly denominated *natural*; and according as they either command, prohibit, or permit, they are with good reaſon divided into *affirmative*, *negative*, or *permiſſive*.

Sect. LXV.

The explication of the divine juſtice may be deduced from the divine will.

Now ſince this divine will, or divine natural law, is the ſource and principle of all juſtice (§ 63), it follows that every action, not only human, but divine, which is conformable to this divine will, is *juſt*; and therefore it is objected, without any reaſon, againſt this doctrine, that there could not be any ſuch thing as divine juſtice, were there no other principle or ſource of the law beſides the *divine will* *.

* The author of the Obſervat. Hanover. ob. 8. objects againſt this doctrine of Sam. de Cocceis in this manner: "Other dangerous conſequences would likewiſe follow from this poſition, ſuch as have indeed been thrown out by ſome moſt raſhly and unwarily; as for inſtance, that there is no ſuch thing as divine juſtice. For if juſtice only means the command of the Creator, or of one who hath power to enforce his will; it is manifeſt that juſtice cannot belong or be aſcribed to God, ſince he cannot be forced or compelled; and therefore he may without any injuſtice damn an innocent perſon, and make the greateſt ſcelerate immortally happy. Upon which hypotheſis, the fear of God will indeed remain, but the love of him cannot take place." But ſince God wills nothing but what is right and juſt, why may not the divine juſtice be explained from the conſideration of his will? There is indeed, with reſpect to God, no command, no co-action, and therefore no external obligation: but the ſame holds true with regard to ſupreme authority in ſtates, in relation to the laws conſtituted by it. For tho' a prince who has ſupreme abſolute power be not ſtrictly ſpeaking bound by his own laws; yet we call him juſt, when he renders to every one conformably to his own laws. Why then may we not call God juſt, becauſe he renders to every man what is due

due to him, according to his own will and law? Man therefore is denominated juſt, when he gives obedience to the will of God promulgated as a law. But God is juſt, becauſe he renders to every one his due without law, without co-action or external obligation. God cannot damn an innocent perſon, or make an abandoned ſcelerate happy. Becauſe by ſo doing, he would act not according to his own will, by which he wills nothing but what is juſt, equitable, and ſuitable to his own perfection.

Sect. LXVI.

The difference between the rule of divine and the rule of human juſtice, in what does it conſiſt?

Herein chiefly lies the difference between *divine* and *human* juſtice, that with regard to the former there is no law or co-action; whereas the latter includes in it a reſpect to a law, and external obligation or co-action (§ 65 & § 64). Wherefore the divine will, as it is a rule of action to men, carries with it a communication of ſome evil or puniſhment to tranſgreſſors; tho' that puniſhment be not, as in human laws, defined and aſcertained, but be, for the greater part, indefinite, and reſerved to God himſelf, to be inflicted according to his wiſdom and juſtice *.

* Thoſe who call every ſuffering or evil which attends a bad action, or is connected with it, *puniſhment*, rightly divide *puniſhment* into *natural* and *poſitive*. So the learned Koehler. exercitat. jur. nat. § 362, & ſeq. But if by *puniſhment* be underſtood the ſuffering or evil which the law itſelf threatens againſt offenders, it is *poſitive puniſhment* only which properly falls under the name of *legal* or *authorative puniſhment*. *Natural puniſhment* is acknowledged even by atheiſts. *Poſitive puniſhment* thoſe only can acknowledge who believe the divine Being, and providence: Now, tho' particular *poſitive puniſhments* be not defined; yet right reaſon ſufficiently proves, that God cannot but render to mankind according to their actions, whether they be good or bad, ſuitable rewards and puniſhments. For that plainly and directly follows from the idea of the divine juſtice, and is admitted by all who do not call divine providence into doubt. Xenophon Memorab. Socrat. l. 4, 16. " Do you think the Gods would have impreſſed human minds with an opinion that they

they can inflict punishments and bestow rewards upon them, if they really could not do it; and if men being for ever deceived never felt any such thing?"

Sect. LXVII.

That we may apply this rule, there must be some principle or criterion by which it may be known or ascertained.

But since it cannot be doubted that there is no other rule of human actions but the will or law of God (§ 63), it is to be enquired how we may come to the certain knowledge of this law. But since it is universally acknowledged to be promulgated to all men by right reason (§ 11), and since right reason is our faculty of reasoning, by which we deduce truths from other truths by a chain of consequences (§ 15), it is obvious that there must be some truth or proposition, from which what is agreeable to the will of God, and therefore just, may be ascertained by necessary consequence. There must then be some universal principle of science with regard to the law of nature*.

* How that differs from the rule itself, hath been already explained (§ 60). Tho' the celebrated Sam. de Cocceiis hath taken the term *principle* in a larger acceptation, yet what is objected to him by Jac. Frid. Ludovici is a mere logomachy. For how the will of God may be discovered by us, he shews Differ. 1. qu. 3. and he has there clearly distinguished between the *will of God*, as a rule and principle *essendi*, *i. e.* of moral obligation, and the means of science, or the proofs by which the will of God may be ascertained to us, which are the principles of science with respect to the law of nature.

Sect. LXVIII.

This principle must be true, evident, and adequate.

Every principle of science must be *true*, *evident*, and *adequate*; wherefore the principle of science, with respect to natural law, must be *true*; lest being false or fictitious, the conclusions inferred from it be such likewise: it must be *evident*, and that not only in this sense, that it is intelligible to the literate; but universally, to the unlearned as well as the learned, all being equally under obligation to conform

conform themſelves to the law of nature. In fine, it muſt be *adequate*, or of ſuch an extent, as to include in it all the duties of men and citizens, not Chriſtians only, but thoſe alſo who have not the benefit of divine revelation *.

* In like manner therefore, as the more ſubtile demonſtrations of the divine exiſtence are ſuſpected, becauſe that truth muſt be capable of an evidence that may be underſtood by the moſt ordinary underſtanding (and therefore the apoſtle ſays, "God may be found out by ſearching, and is not far from any of us," *Acts* xvii. 27.) So a too ſubtle principle of natural law is ſuſpicious, ſince all are, ἀναπολόγητοι, without excuſe, even the illiterate, and thoſe who are ſtrangers to ſubtle refined philoſophy, if they offend againſt the law of nature.

Sect. LXIX.

Whence this principle is not to be found in the ſanctity of God.

Therefore we muſt not expect to find this principle of the law of nature in the conformity of our actions to the ſanctity of God: for tho' the propoſition ſhould be granted to be true, yet it is not evident enough, nor of ſuch a nature, as that all the duties of men and citizens can be inferred and proved from it *.

* How obſcure the idea of the divine ſanctity is, whether in a theological or juridical ſenſe, hath been already proved by Sam. Puffendorf. Specim. controverſ. 4. 4. and Thomaſ. fundam. juris. nat. & gent. And becauſe there are many human duties, of which there is no archetype in God, as for inſtance, gratitude towards our benefactors, reverence toward our ſuperiors, paying debt, and ſuch like: For theſe reaſons it is not the principle of moral knowledge.

Sect. LXX.

Nor in the juſtice and injuſtice of actions conſidered in themſelves.

Nor is this a ſufficient principle, "that what is in its own nature juſt is to be done, and what is in its own nature unjuſt is not to be done." For tho' we have already admitted, that certain actions are in

in their own nature good, and others evil, and that man is therefore obliged to perform the one, and to avoid the other, by an intrinsic obligation (§ 8); yet an action antecedently to, or independently of a law, is not just (§ 7); not to add that this principle is not evident enough, nor that all human offices are not deducible from it *.

* To just actions we are impelled by an external obligation (§ 7). External obligation consists in the will of an acknowledged superior, commanding under penalty (§ 9): such a will is a law (§ 9). Wherefore, no action can be just or unjust but in reference to a law: and hence every sin is called *ἀνομία*, *i. e.* a transgression of a law. 1 Ep. *John* iii. 4.

Sect. LXXI.

Nor in the consent of all nations.

None, I think, will rashly go into the opinion of those learned men, who held the consent of all nations, or of all the more civilized nations, to be the principle of natural law. For it is not *true*, that what all nations agree in, is also conformable to the divine will *; nor is this universal consent *evident* to all, since it must be collected from various testimonies of authors, antient and modern; nor is it sufficiently *adequate* to point out all duties *.

* Thus Cicero thought the voluntary law of nations, as it is called, must be established, Tusc. quest. disp. 1. 13. " The agreement of all nations in a thing is to be held a law of nature." Grotius lays great stress on this principle de jure belli & pacis, proleg. § 11. where speaking of the way of establishing the laws of nature and nations, he says, " I have made use of the testimonies of Philosophers, Historians, Poets, and in the last place Orators; not that we are rashly and implicitly to give credit to whatever they say (for it is usual with them to accommodate themselves to the prejudices of their sect, the nature of their subject, and the interest of their cause): But that when many men of different times and places unanimously affirm the same thing for truth, this ought to be ascribed to an universal cause; which, in the questions treated of by us, can be no other

other than either a juſt concluſion drawn from the principles of nature, or an univerſal conſent. The former points out the law of nature, the other the law of nations." But we find a wonderful conſent almoſt of all nations in many things which none will aſſert to be of the law of nature or nations; as in polytheiſm, idolatry, ſacrifices, robbery committed in a foreign territory. Beſides this agreement of nations is not eaſily ſhewn, as Grotius himſelf confeſſes, l. 1. 1. 15. "But the more extenſive is the law of nations, which derives its authority from the will of all, or at leaſt, of many nations. I ſay, of many, becauſe there is ſcarce any right found, except that of nature, which is alſo called the right of nations, common to all nations. Nay, that which is reputed the right or law of nations in one part of the world, is not ſo in another, as we ſhall ſhew hereafter, where we come to treat of *priſoners of war* and *poſtliminy*, or the *right of returning*." How many duties therefore cannot be deduced from the conſent of nations?

Sect. LXXII.

Nor in the ſeven precepts of *Noah*.

But as thoſe who endeavour to eſtabliſh the law of nature and nations from the conſent of nations, not only lay down a falſe, unevident, and unadequate principle; but likewiſe go out of the queſtion into one of another kind, while they derive the law of nature not from nature itſelf, but from the traditions or opinions of nations: ſo the opinion of thoſe who have attempted to deduce the law of nature and nations from the precepts given to Noah, labours under the ſame defects, as hath been ſufficiently proved (§ 16).

Sect. LXXIII.

Nor in the right of all to all things, or in the ſtudy of external peace.

What ſhall we then ſay of the whole philoſophy of Hobbes in his books de Cive, or his Leviathan? when he aſſerts the right of every man in a ſtate of nature to all things, he affirms a propoſition which is neither *true*, nor *evident*, nor *adequate*, ſince the duties of men to God and themſelves cannot be deduced from that principle; yea, while he goes about in that

that manner, pretending to eſtabliſh the law of nature, he really ſubverts it, as Hen. Cocei. def. de jure omnium in omnia, has ſhewn. Hence it is plain what we are to think of this other principle, viz. "that external peace is to be ſought and ſtudied if it can be obtained, and if not, force and war muſt be called to our aid." For here likewiſe Hobbes lurks behind a curtain *.

* Firſt of all, this principle is far from being evident. For what means this limitation, *if it can be had?* How liable is it, however it may be explained, to be abuſed by litigious perſons, who will complain that they cannot enjoy peace, if others will not ſuffer them? like the wolf in the fable, who pled that the lamb had troubled his water. Phæd. Fab. 1. 1. Some poet has juſtly ſaid,

Sic nocet innocuo nocuus, cauſſamque nocendi
Invenit. Heu regnant qualibet arte lupi.

This defect in this principle hath been already obſerved by Thomaſ. in Fundam. Jur. nat. & gent. 1. 6. 18.

Sect. LXXIV.

Nor in the ſtate of integrity.

That principle laid down by Val. Alberti profeſſor of divinity and philoſophy at Leipſic, hath a ſpecious ſhew of truth and piety, viz. a ſtate of *integrity*. But Puffend. Specim. controv. 4. 12. and Thomaſ. juriſp. divin. 4. 40 & ſeq. have proved it to be falſe. And granting it to be true, that whatever is agreeable to a ſtate of *primitive integrity*, is truly of the law of nature; yet how unevident this principle muſt be, not only to Pagans, but even to Chriſtians, is manifeſt. Further, ſince the laws of citizenſhip, of war, of contracts, and many others, for which there was not place in that moſt happy ſtate, cannot be deduced from the idea of it, who can call this principle *adequate* *?

* How few things are told us in the ſacred records that can give us an image of that ſtate of integrity? About what is revealed to us in ſcripture concerning that ſtate, Chriſtians are divided into various ſects and very differing opinions.

opinions. What then ſhall we ſay of the Heathens, ancient and modern? They have a fable among them about a golden age, which ſome imagine to have taken its riſe from a tradition concerning the paradiſe-ſtate. They have other fictions with which they are highly delighted, which have ſome reſemblance to the Chriſtian doctrine concerning God, of which Pet. Dan. Huet. Quæſt. Alnet. p. 172. hath treated in the learned manner ſo peculiar to him. But ſo diſſonant and widely differing are all theſe things, that no Chriſtian will ever be able to perſuade a Pagan, nor no Pagan a Chriſtian, that this or the other thing is of the law of nature, which the one derives from his traditions and the other from his revelation, with relation to a ſtate of integrity. We muſt therefore find out ſome principle common to Jews, Chriſtians and Pagans, which can be no other but that right reaſon which is common to all mankind.

Sect. LXXV.

Nor in ſociability.

Grotius, Puffendorf, and ſeveral antients, were wonderfully pleaſed with the principle of *ſociability*; nor can it be denied, as we have afterwards expreſly proved, that men are ſo framed that they muſt live *ſocially*: but that this is not the *true*, *evident*, and *adequate* principle of the law of nature, hath been already demonſtrated by the learned and worthy Sam. de Coccius de principio juris nat. diſſ. 1. qu. 2. § 9. I ſhall only add this one thing, that many of our duties to God, and to ourſelves, would take place, even tho' man lived ſolitary, and without *ſociety* in the world *.

* Cicero de legibus 1. 5. de off. 1. 16. & ſeq. Seneca de Benef. 4. 18. Iamblichus in Protrept. cap. 20, and ſeveral others, have conſidered the preſervation of ſociety as the true fountain of juſtice, and the foundation of natural law: many authors of this ſentiment are accumulated by Puffendorf de jure nat. & gent. 2. 3. 15. and Jo. Hen. Boecler. in Grotii proleg. p. 48. But however many, formerly or at preſent, may have concurred in this opinion, we cannot however chooſe but obſerve there is a great difference amongſt them in their account of the reaſon by which men are obliged to ſociability: Some aſſert, we

we are inſtigated to it by nature; ſome that we are bound to it by the will of God: others again maintain, that neceſſity alone compels men to a ſocial life.

Sect. LXXVI.

Nor in the order of nature, and ſuch like hypotheſes.

Other principles of natural law are highly boaſted of by others; ſuch as the order of nature, which the Creator intends in his works; the intereſt of mankind; a moral Theocracy, and other ſuch like principles *. But it is agreed to by all, that theſe principles are not evident or adequate; and ſome of them indeed cannot be admitted without ſome cautions and reſtrictions.

* After Sfort. Palavicinus, Hen. Bodinus in Diſſer. de jure mundi, maintained the order of nature to be the firſt principle of natural law. But the latter hath been refuted by Thomaſius de fundam. definiendi cauſſ. matr. hact. recept. inſufficient. § 18. The utility of mankind hath been aſſerted to be the firſt principle by the famous Leibnitz and others, who with Thomaſius have ſet up this propoſition as fundamental, " That all things are to be done which tend to make human life more happy and more laſting, and that all things are to be avoided which tend to render it unhappy, or to accelerate death, Thom. fund. jur. nat. & gent. 1. 6. 21. A moral theocracy was aſſerted to be the firſt principle in a diſſertation to that effect, by Jo. Shute an Engliſhman; from which ingenious diſſertation, ſeveral obſervations are excerpted by the often cited Sam. de Cocceis de princip. juris nat. & gent. diſſ. 1. qu. 3. § 8.

Sect. LXXVII.

The will of God intends our happineſs.

But to give the opinion, which, upon a mature examination of this ſubject, appears to me the moſt ſolid, firſt of all I would obſerve, that God being infinitely wiſe and good, cannot will any thing elſe with relation to mankind but their happineſs. For being perfect, he ſtands in no need of any thing; and therefore men, who of all the beings within our cognizance, alone are capable of felicity, were not created by him

 for

for his own advantage, but that he might render them capable of true happineſs *.

* We do not exclude the primary end, which is the glory of the Creator, and the manifeſtation of his perfections, which ſo clearly appear in his works. But this end is univerſal, and extends to the whole univerſe. Wolf. von den Abſichten der Dinge. cap. 1. § 2. cap. 2. § 1. The particular end for which God created man, muſt be inferred from the eſſential parts and properties of which man conſiſts or is compoſed. Since therefore, he is endued with *underſtanding*, by which he may come to the knowledge of God and of true good; with *will*, by which he is capable of enjoying God and true good; and he hath a *body*, by means of which he can produce various actions, which tend to acquire and preſerve his true happineſs; hence it is manifeſt that God made man that he might be a partaker of true felicity.

Sect. LXXVIII.

To this the will of God obliges us.

This being the will of God, that man ſhould aim at and purſue true happineſs, and his will being the rule of human free actions, and therefore the ſource of the law of nature and juſtice (§ 62); by conſequence whereas, human legiſlators being themſelves indigent in ſeveral reſpects, have their own advantage no leſs in view than that of their ſubjects in making laws, God, on the contrary, muſt have made laws to men ſolely for their own benefit, and have intended nothing by them but their attainment to true happineſs, by conforming themſelves to them *.

* Therefore utility cannot be ſaid, with Carneades and others, to be the ſole ſource of juſtice and equity (§ 76). For the law of nature would thus not be obligatory, but might be renounced by any one at his pleaſure, or by all mankind, as Sam. de Cocceiis has proved, Diſſ. 1. qu. 2. § 9. But whatever we do for the ſake of our true happineſs, according to the law of nature, we do it agreeably to the divine will and command, and therefore, according to obligation not merely internal, but likewiſe extrinſical;

ſical: and for that reaſon, ſo far is any one from having a right to renounce his happineſs, that on the contrary, any one would no leſs deſerve puniſhment by violating a natural law conſtituted for his good, than any one who in a common-wealth ſhould offend againſt a law eſtabliſhed for the public good.

Sect. LXXIX.

That happineſs conſiſts in the fruition of good by love; and therefore love is the principle of the law of nature.

If therefore God intend the happineſs of mankind, and the law of nature be directed towards it as its end (§ 78), and true happineſs conſiſt in the enjoyment of good, and the abſence of evil; the conſequence muſt be, that by the law of nature God muſt intend that we may attain to the enjoyment of true good, and avoid evil. But ſince we can only enjoy good by love, hence we infer that God obliges us to love, and that love is the principle of natural law, and, as it were, a compend of it *.

* Here we ſee a wonderful harmony and conſent, between the natural and revealed law or will of God. Our Saviour gives us a ſummary of revealed law in theſe few words: "Thou ſhalt love God with all thine heart, and with all thy ſoul, with all thy mind, and with all thy ſtrength: and thou ſhalt love thy neighbour as thy ſelf." *Matt.* xxxii. 37. *Luke* x. 27. and he adds, "upon theſe hang the law and the prophets." Agreeably to this doctrine of our Saviour, the apoſtles call love ſometimes ἀνακεφαλαίωσιν τοῦ νόμου, the ſum of the law; ſometimes πλήρωμα νόμου, the fulfilment of the law; at other times, σύνδεσμον τῆς τελειότητος, the bond of perfectneſs; and ſometimes, τὸ τέλος τῆς παραγγελίας, the end of the commandment, *Rom.* xiii. 9. *Coloſſ.* iii. 14. 1 *Tim.* i. 5. But right reaſon teaches the ſame truth, and inculcates no other principle of natural law but *love*, as the ſole mean by which we can come to the enjoyment of that happineſs or true good, which is the intention of God and of his law; whence Leibnitz alſo, Præf. t. 1. cod. juris gentium diplom. defines juſtice to be, *the love of a wiſe man.*

Sect. LXXX.

What is love and hatred?

Love in us is the deſire of good, joined with delight in its perfection and happineſs. *Hatred* is aversion

aversion from evil, joined with satisfaction in its unhappiness; wherefore what we *love*, we receive pleasure from its perfection and happiness, and we are disposed to promote that perfection and happiness to the utmost of our power. What, on the contrary, we *hate*, we rather desire its misery than its happiness.

Sect. LXXXI.

Love does not give uneasiness.

Since we receive satisfaction from the excellence and happiness of what we *love* (§ 80) it is obvious that the lover does not will to give uneasiness to what he loves; nay, he rather suffers pain if any other should attempt any such thing. For because he who gives uneasiness to one, or suffers it to be done without feeling any pain, takes pleasure in another's unhappiness; but to take delight in the suffering of any one, is the same as to hate (§ 80); and to love and hate the same object at one and the same time is a contradiction; the consequence is, that it is inconsistent or impossible at the same time to love one, and to hurt him; or to bear his being hurted by another without disturbance and pain.

Sect. LXXXII.

Hence the first degree of love, which we call the love of justice.

One may be hurt two ways, either by doing something which makes him more unhappy than he is by nature, or by depriving him of some happiness he is already possessed of. But seeing to do something which conduces to render one more unhappy than he is, is to *hurt* one; and to dispossess one of something he hath justly acquired, and which contributes to his happiness, is to *deny* one, *or to take from him something that belongs to him*; hence it follows, that he violates the law of love in the highest manner who hurts one, and disturbs his possession, or takes it away, and hinders his enjoyment of it; and, on the other hand, the lowest degree of love is to hurt no person, but to render to every one what

what is due to him, or leave him in the undisturbed possession and enjoyment of what he hath; which degree of love we call the *love of justice**.

* This is observed by Seneca in his Ep. 95. where he says, how small a thing is it *not to hurt* him whom we ought to profit! He who does not hurt any one is only not a scelerate: he has not yet attained to that kind of justice which the law of love requires, even to do good to others to the utmost of our abilities, and therefore he hath no virtue to glory in. Whence Leibnitz, in Præf. cod. dip. distinguishes three gradations in the law of nature. *Strict justice*, which is to do no hurt; *equity* or *love*, which is to render to every one what is due to him; and *piety*, which disposes to observe all the rules of virtue; but we must differ from him with regard to his second gradation, because he likewise gives to another his due or his own, who renders what is due to him in strict justice, and therefore *rendering to every one his own*, is not to be referred solely to distributive justice.

Sect. LXXXIII.

From which there is another very differing degree, which we call the love of humanity and beneficence.

But because a lover receives pleasure from the happiness of him whom he loves (§ 80), it follows that he renders to him whom he loves chearfully, even that which is not strictly due to him, or his right, if he perceives it to be conducive to his happiness: and this is a more sublime degree of love, which we call *love of humanity, or beneficence**. But because we call the capacity of discerning things which are contributive to our own happiness and that of others, *prudence* or *wisdom*; it is obvious that this love of humanity or beneficence must have wisdom for its guide and director*.

* Humanity and beneficence differ in this, that by the former we render to others whatever we can do, without any detriment to ourselves, for their advantage: the latter makes us not spare our own goods in order to benefit others, but disposes us to do kind offices to them to our own prejudice. Of the former Cicero speaks de off. I. 16. "All these things seem to be common to all men, which "are

" are of the kind described by Ennius in one instance, " He that directs the wandering traveller, doth, as it " were, light anothers torch by his own, which gives " never the less light, for that it gave another." By this single example he clearly points out us, that we ought to render even to strangers, whatever good offices may be done to them without prejudicing ourselves. Whence these following, and others of the same nature, are called common benefits, " To suffer any one to take from our fire to " kindle his: To give good and faithful advice to one who " is deliberating. And all things, in one word, which are " beneficial to the receiver, and nowise hurtful to the " giver." Of the latter Seneca has wrote a book which is entitled *De beneficiis*, concerning benefits.

Sect. LXXXIV.

The difference between them in respect of obligation.

Moreover, whereas he who does not observe the love of justice, who hath it not, or does not act conformably to it, is a profligate person; he, on the other hand, who hath not the love of humanity and beneficence, can only be said not to perform the nobler and greater virtues (§ 82). Now none may be forced to do virtuous actions, but all acts of wickedness may be restrained by punishments (§ 9). Whence it is plain, that men may be compelled to acts of justice, but not to acts of humanity and beneficence. But when obligation is joined with coaction, it is *perfect*; when it is not, it is *imperfect* (§ 9). We are therefore *perfectly* obliged to the love of justice, and *but imperfectly* to the love of humanity and beneficence *.

* Those who fulfil their imperfect obligations are said by Seneca to be good men according to the letter of the law; but elsewhere he shews it to be a very small attainment to be good in that sense only; and that in order to merit the character of a wise and virtuous man much more is required, even the love of beneficence, to which one knows he is not strictly obliged. " Many good offices, says he, are not commanded by law, and do not found an action, which however the circumstances and condition of human life, more powerful than all law, render fit or lay a foundation

foundation for. No human law forbids us to discover our friend's secrets; no human law commands us to keep faith with our enemy. What law obliges us to fulfil our promise to any one? Yet I will complain of him, and quarrel with him, who hath not kept the secret entrusted to him, and will look upon him with indignation who does not keep his pledged faith." Seneca de beneficiis, v. 21.

Sect. LXXXV.

Love, how distinguished in respect of its object.

Since *love* always tends towards good (§ 80). But whatever we embrace with affection as good, must either be a more perfect being than our selves, equal, or inferior to us, and less excellent. Love of the first kind, we call *love of devotion* or *obedience*; love of the second kind, we call *love of friendship*; and love of the third sort, we call *benevolence*.

Sect. LXXXVI.

What love of devotion is; what love of friendship; and what benevolence?

Love of devotion or *obedience*, is love towards a more excellent and perfect being, with whose excellence and happiness we are so delighted, that we look upon such a being, as to be honoured and obeyed with the highest complacency and veneration. The *love of friendship* is the love of our equal, or satisfaction and delight in his happiness, equal to what we perceive in our own. The *love of benevolence*, is the love of an inferior and more imperfect being, which disposes us seriously to promote its happiness, as much as the nature of the being permits.

Sect. LXXXVII.

The nature of the love of devotion and obedience.

From these definitions it follows, that we cannot have love of devotion or obedience towards a being, unless we be persuaded of its superiority and greater perfection; nor can this love take place, unless such a being be of such a character and temper as to desire to be loved by us. And this love ought always

always to be joined with veneration and obedience ſuitable to the perfections of ſuch a being *.

* For veneration or honour is a juſt eſteem of the perfections belonging to a being; obedience is a diſpoſition to perform with readineſs, whatever another as ſuperior hath a title to exact from us, and to with-hold from doing what he forbids. But ſince there may be various degrees of perfection and ſuperiority, there will alſo be as many various degrees of veneration and obedience; and the more ſublime the perfection of a being is, the greater veneration and obedience are due to that being.

Sect. LXXXVIII.

The love of friendſhip its nature.

Further it is plain that the love of friendſhip ariſes from equality. Now equality is either an equality of *nature*, or an equality of *perfections*. Wherefore, where the former takes place, equal offices of love are reciprocally due; and for that reaſon, amongſt all who are by nature equal, theſe incomparable rules ought to obtain. "Whatever you "would not have done to yourſelf, do it not to an"other." And, "Whatever you would have an"other do to you do unto them." Matt. vii. 12. Luke vi. 31. Tob. iv. 16. The firſt of which is the foundation of the love of juſtice; the other, of the love of beneficence and humanity. But becauſe, however equal the being beloved, and the being loving may be by nature, yet the one may be either more perfect, or more imperfect than the other; it may happen that we may be obliged to have at the ſame time a love of friendſhip towards a man, as equal to us by nature, and a love of devotion and obedience, or of benevolence towards him as being more perfect or more imperfect *.

* Thus, tho' a prince as ſuperior hath a right to our veneration and obedience, that does not hinder but that he is obliged to render to us the good offices founded upon equality of nature: as for inſtance, not to do us any injury; nor to fix ignominy upon what does not deſerve it; and in

one word, to do what Pliny commends in Trajan, i. e. "to remember no leſs that he is a man, than that he is ſet over other men to rule them."

Sect. LXXXIX.

The love of benevolence.

Finally, ſince benevolence ſeeks the enlargement and promotion of the happineſs of a more imperfect being, as much as its nature is capable of happineſs (§ 86). Hence it follows, that we ought not to hurt ſuch a being, or refuſe to it what is its right and due; but that we ought to do good to it, to the utmoſt of our power, with prudence however; and therefore whatever kindneſs is not agreeable to reaſon, or conducted by prudence, is not benevolence and liberality, but profuſion, or any thing elſe you pleaſe to call it.

Sect. XC.

What are the objects of this love?

Now if we conſider accurately the beings with which we are ſurrounded, we ſhall find there are three only, to which we are under obligation to render the offices of love: God, the creator of all things; ourſelves, who are certainly the neareſt to ourſelves; and other men, whom we plainly perceive to be by nature equal to us. For as to ſpirits, ſuch as angels, we know not their nature, nor have we ſuch commerce with them, as to be under the obligation of certain duties towards them. And between men and brutes there is no communion of right, and therefore no duty is properly owing to them; but we owe this to God not perverſely to abuſe any of his creatures *. Puffend. de jure nat. & gent. 4. 3. 6.

* For ſuch a communion of right muſt, as we ſhall ſhew afterwards, ariſe from compact. But brutes are not ſuſceptible whether of active or paſſive obligation ariſing from compact. We cannot therefore aſſent to the Pythagoreans, Porphyry, in his books, περι αποχῆς, who not only aſcribe ſenſe and memory, but a rational mind

mind to brutes. However ſo far as men perceive any affection in brutes, ſo far do they render a love of benevolence toward them; ſo as not to abuſe their power of killing them, but to take pleaſure in rendering their life more commodious to them, as we ſee in the inſtance of domeſtic dogs. Plutarch elegantly obſerves in Caton. major. "But we ſee benignity hath a much larger field than "juſtice; we ſometimes extend beneficence to brute ani-"mals thro' the largeneſs of bounty; for a merciful man "looks upon himſelf as obliged to take care of horſes which "work for him, and not only of young animals but of "old ones."

Sect. XCI.

The firſt axiom of love to God.

Since we cannot conceive otherwiſe of God than as a moſt excellent, moſt perfect, and infinitely good Being, upon whom depends abſolutely our exiſtence and felicity, of whoſe ſuperiority we are abſolutely perſuaded, as well as of his will and deſire to be loved by us (§ 87), it follows, that we owe to him a love of devotion and obedience, which that it may be worthy or ſuitable to a moſt perfect Being, this rule or maxim immediately occurs, "That God, upon whom we abſolutely depend, ought to be adored by us with all the vigour of our mind; and that to him ought to be rendered the moſt perfect and ſincere obedience *."

* For ſince the veneration we pay to a ſuperior Being ought to be ſuitable to it (§ 87); we cannot but hence infer that the higheſt veneration is due to the moſt perfect Being. And becauſe God knows moſt perfectly, not only our external actions, but likewiſe all the inward motions of our mind; we owe to him, not merely external ſigns of veneration, but inward reverence and piety. And this is that worſhip and love which the ſacred writings require of us.

Sect. XCII.

A ſecond axiom concerning love to ourſelves.

Our love to ourſelves muſt conſiſt in ſatisfaction and delight in our own perfection and happineſs (§ 80). Hence therefore we are obliged to purſue the

the preſervation and augmentation of our perfection and happineſs with all our might. But ſince the more perfect a being is, the more honour and obedience we owe to it (§ 87); we muſt take care that we do not love ourſelves more than God, leaſt our ſelf-love ſhould thus degenerate into immoderate and unproportioned ſelfiſhneſs. Whence flows this other maxim, "That man is obliged to omit nothing, that may conduce to preſerve, promote, or augment his perfection and happineſs, which is conſiſtent with his love of God *."

* For God obliges man to ſeek after the enjoyment of good (§ 79), and therefore to promote and preſerve his own happineſs; becauſe therefore ſometimes goods are preſented to him, of which one is greater than the other; and that leſſer good which deprives us of a greater one, ought to be eſteemed an evil, it is obvious that God obliges us to chooſe that which of many goods is the greateſt.

Sect. XCIII.

A third axiom concerning love to others.

Since moreover all men are by nature equal, and that natural equality requires a reciprocal obligation to equal love (§ 88); the conſequence of this is, that we are obliged to delight in the happineſs of others, not leſs, but not more than in our own; and therefore to love others as ourſelves; but ourſelves not leſs than our neighbour. Whence flows a third maxim, "That man is obliged to love his fellow-creature no leſs than himſelf, and conſequently not to do to any other, what he would not have him do to him; but, on the other hand, to do to another all thoſe offices of kindneſs which he can reaſonably deſire them to render to him."

Sect. XCIV.

This principle is true, evident and adequate.

In fine, upon a due conſideration of the pre-requiſites to a principle of moral ſcience which have been

been explained, we will find that this is the most genuine principle of moral science. Nothing can be more *certain*, it necessarily flows from the divine will and the nature of man; and, which is very satisfactory to me, it is authorised by the sacred writings. Nothing can be more *evident*, since it is such as may be easily conceived by the unassisted reason of every man, even among Pagans. Nothing can more *adequate*, for in fact we shall soon see, that there is no duty of a man as such, or of a citizen, which may not be easily and clearly deduced from this first principle.

REMARKS on this chapter.

I can't help thinking that our excellent author is not so distinct in this chapter as he ought to have been, and withal too tedious. It was indeed necessary to distinguish between the *principle which constitutes external or legal obligation*, and the *principle which is the medium of knowledge with regard to it; or the mean by which it may be known and demonstrated.* Now it is the will of God which constitutes external or legal obligation. But what is the medium by which the divine will may be known? Our author had already often said, that right reason is the faculty by which it may be known. But hence it follows, that conformity to reason, is the mean by which agreeableness to the divine will may be known and demonstrated. Why then does he dispute against those who say conformity to Reason, or which comes to the same thing, to our rational nature, is the principle or mean of moral knowledge? Or why does he not immediately proceed to enquire what is, and what is not agreeable to reason or our rational nature? Why does he dispute against those who in their reasonings about the laws of nature, infer them from the divine sanctity or moral rectitude, which must mean reason, or our rational nature compared with the rational nature of the supreme Being? For if the law of nature be discoverable by reason, conformity to reason, to the reason of God, and the reason of man, must be the *principle* of knowledge with regard to the law of nature. Nor can the divine sanctity or divine moral rectitude be an obscure idea, unless conformity to reason, or to a reasonable nature, be an obscure idea. Our author seems to have forgot what he said (§ 1), when he says (§ 86), that the happiness and perfection of mankind is not a principle from which the law of nature can be inferred; and what he here refutes, he afterwards (§ 77) returns to, as a necessary first principle in demonstrating the law of nature, *viz.* "That God intends the "happiness and perfection of mankind." For if his reasoning,

(§ 77)

(§ 77) be juſt, the buſineſs of the moral ſcience is to enquire what tends to the perfection and happineſs of man, and what is neceſſary to it; and theſe will be good moral reaſonings, which ſhew an action to be conducive to human happineſs and perfection, or contrariwiſe: For thus they ſhew what the divine will commands, and what it forbids: nay, according to his reaſoning in that ſection, we cannot advance one ſtep in morals, without firſt determining what our happineſs and perfection requires, and what is repugnant to it. He ſeems likewiſe (§ 70) where he ſays, "That the intrinſic pravity or goodneſs of actions, is not a "ſufficient principle for deducing and eſtabliſhing the moral "laws of nature," to have forgot what he had ſaid in the former chapter, and frequently repeats in ſucceeding ones, of the *priority* in *nature* or *idea* of *internal* to *external* obligation. And indeed, to ſay that the laws of nature concerning human conduct, cannot be deduced from the conſideration of the internal nature of actions, is in other words to ſay, that they cannot be deduced by reaſon; for it is to ſay, that they cannot be deduced from the conformity or diſconformity of actions to reaſon. All I would infer from this is, 1. That it is impoſſible to make one ſtep in moral reaſonings, without owning a difference between conformity and diſagreeableneſs to reaſon, and uſing that general expreſſion, or ſome one equivalent to it; for the will of God cannot be inferred but from conformity to reaſon, or ſomething equivalent to it, i. e. from ſome principle, which however it may be expreſſed, ultimately ſignifies conformity to the nature of things, or to reaſon. 2. That conformity to reaſon, to a reaſonable nature, to moral rectitude, to the divine nature, and conduciveneſs to the perfection and happineſs of a rational being, or conduciveneſs to the perfection and happineſs of man, as ſuch, and ſeveral other ſuch phraſes uſed by moraliſts, have and muſt all have the ſame meaning, or terminate in the ſame thing. 3. That to aſk why a reaſonable being ought to act agreeably to reaſon, is to aſk why it is reaſonable to act reaſonably; or why reaſonable is reaſonable. This muſt be the meaning of that queſtion, as it is diſtinguiſhed from this other, "Is there good "ground to think, that the ſupreme Being, the maker and go-"vernor of the univerſe, wills that his reaſonable creatures "ſhould act reaſonably, and will proportion their happineſs ac-"cording to their behaviour?" which queſtion does likewiſe amount in other terms, to aſking whether it is agreeable to ſupreme reaſon, to approve acting according to reaſon? There is therefore no neceſſity of dwelling long upon either of theſe queſtions in moral philoſophy; but it is its buſineſs to enquire what rules of conduct, what methods of action are agreeable, and what are diſagreeable to reaſon, to the nature of things, to the qualities of reaſonable beings, to the perfection and happineſs of mankind as ſuch; all which phraſes, as hath been ſaid, muſt have the ſame meaning, and may therefore be promiſcuouſly uſed: And indeed about them there can be no diſpute, unleſs one

one has a mind to make a particular favourite of some one of them in opposition to all the rest; in which case, the dispute, 'tis evident, will be merely about a phrase; as in fact, most disputes in the moral science realy are, for that very reason, viz. through a particular liking to some favourite words.

Our author's method of reasoning is, when he brings it out, plain and just enough. It amounts to this, "If we own the "being of a God, and have a clear and just idea of his per-"fection, we must own that he wills the perfection and happi-"ness of all his creatures, his moral creatures in particular: "man therefore being a moral creature, God must will "the happiness and perfection of man. He must then for that "reason, will that man pursue his own perfection and happi-"ness. But such is the nature of man, and so are things relat-"ing to him constituted and connected, that the pursuit of his "perfection and happiness consists in what may properly be ex-"pressed in one word, *Love*, the love of his Creator, the love of "his fellow creatures, those of his own kind in particular, and "the love of himself." Now according to this way of reasoning what our author hath to prove, is the latter proposition; and accordingly he goes on in the succeeding chapters to prove it.

In other words, our author's manner of deducing human duties amounts to this, "Every *obligation* which man can be under as "a rational agent, *external* or *internal*, may be expressed by one "word, *Love*. For we can owe nothing to any being but love: "all our obligations must therefore be reducible to these three; "the love of our Creator, the love of our fellow-creatures, of "those of our own kind, or with whom we are more nearly "and immediately connected in particular; and the love of "ourselves." And accordingly our author proceeds to explain the duties belonging to these three classes. The principle upon which he founds may justly be called clear, certain, and adequate. For if there be any such thing as obligation upon a rational agent, external or internal, it can be nothing else, but obligation to love: internal obligation can belong to nothing else but the dictates and offices of reasonable love; and therefore external obligation can belong to nothing else. Wherefore love is justly said in the sacred writings, to be the fulfilment of the law; of the law of nature, of the law of reason, of the law of God. But let me observe, that this method of our author's, is the same in other words with some of them he refutes. For is it not evidently the same thing as to say "that duty, obligation, or what is reasonable with regard to human conduct, must be inferred from the human nature, and the constitution of things relative to him. But according to the frame of man and the constitution of things, the chief happiness and perfection of every man arises from the love and the pursuit of order within and without him; or from the observation of the prevalency of wisdom and good order, and consequently of greater happiness in the administration of the universe; and from such an orderly discipline of his affections

affections as tend to produce univerfal happinefs, order, and perfection, as far as his affections, and the actions they lead to, have any influence? According to which ftate of the queftion, the remaining enquiry will be what the love of good order and general happinefs requires.

CHAP. IV.

Of the application of this rule to actions, and the differences of actions proceeding from thence.

Sect. XCV.

HAVING confidered the nature of human free actions, and the rule according to which they ought to be regulated; the next thing to be confidered, is the application of this rule to free actions. The application of a law to a fact is called *imputation*, and therefore we fhall in this chapter treat of it.

The connexion.

Sect. XCVI.

Imputation being the application of a law to a fact (§ 95), which cannot be done otherwife than by comparing a law and a fact, i. e. by two propofitions compared together, and with a third by a fyllogifm; the confequence is, that *imputation* is a fyllogifm or reafoning, the major propofition of which fignifies a *law*; the minor a certain *action*: and the conclufion is the *fentence*, with regard to the agreement or difagreement of the action with the law *.

Imputation is made by comparing a law with a fact; and therefore by reafoning.

* To *impute*, properly fignifies to place fomething to the account or charge of another perfon. Sen. epift. 8. "Hoc non imputo in folutum de tuo tibi." Now as that can't be done without ballancing accounts with one, hence it came about, that this term feemed proper to exprefs that application of a law to facts, which is done in like manner by a fimilar comparifon. Thus when, as the ftory is told by Livy, Horatius had killed his fifter, and a queftion

arofe, whether the law againft murder, ordaining that the perfon guilty of it fhould have his hands tied, and his head veiled, and be whipped either within or without the walls, and then be hanged upon a tree, ought to be applied to that action? The Duumviri legally appointed by Tullius Hoftilius the king, to judge of the matter, were of opinion, that the law extended to the fact, upon which one of them pronounced this fentence: "I find you, Publius Horatius, guilty of murder. Go, lictor, bind his hands." But Horatius appealing, and the father himfelf appearing for him, the people abfolved him. The Duumviri therefore reafoned in this manner, "He who knowingly with evil defign kills a perfon, is as a murderer to be punifhed fo and fo. This is the law. Publius Horatius by running his fifter through with his fword, has willingly and with evil intention killed a perfon. This is the fact. He is therefore to be punifhed fo and fo. Here is the fentence." But the people computed or ftated the account in another manner thus: "He who kills an enemy to his country, is not to be punifhed as a murderer. Here is the law. Publius Horatius in killing his fifter, killed an enemy of her country. Here is the fact. Therefore he ought not to be punifhed as a *murderer*. Here is the fentence, and it is a fentence of abfolution." The Duumviri therefore imputed the fault to Publius Horatius, but the people did not impute it.

Sect. XCVII.

Wherein it differs from confcience.

Having faid much the fame thing above concerning *confcience* (§ 94), which however is not the fame with *imputation*, let us obferve wherein the difference between them confifts; and it lies in this: Whereas confcience is a reafoning about the juftice and injuftice of one's own actions: imputation is a reafoning about the agreement or difagreement with law of another's actions. In the firft cafe, every one is his own judge: in the other, another perfon judges of our actions, and compares them with the law *.

* But becaufe it does not belong to every one to judge of the actions of others, and yet fuch is the weaknefs of human nature, that moft perfons are very indulgent to their

their own faults, and not very ſevere in ſearching their own conſciences, and yet are very quick-ſighted and rigid with regard to the failings and blemiſhes of others; it is no wonder that judging others is reprehended as unjuſt and wicked, not only by our Saviour, Matt. vii. 1. Luke vi. 37. and by his apoſtle, Rom. ii. 1. xiv. 4. 1 Cor. iv. 5. but likewiſe by profane writers, who had only right reaſon to guide them in their determinations. Hence the pleaſant witty fable of the two budgets, one of which filled with his own faults a man carried on his back, the other filled with the faults of others he carried on his breaſt: To which Phædrus ſubjoins this moral, fab. 4. 9. v. 4.

Hac re videre noſtra mala non poſſumus:
Alii ſimul delinquunt, cenſores ſumus.

Several parallel paſſages of ancient authors are collected by Iſ. Caſaubon, ad Perſ. p. 340. and by learned men upon this fable, whoſe coffers we will not pillage.

Sect. XCVIII.

An action is imputed either by God or by human judges.

Every application of law to fact is called *imputation* (§ 9), whether an action be compared with the divine law or with a human law; and in like manner, whether God himſelf, or men, whoſe office it is, apply law to a fact. The former, however, moraliſts are accuſtomed to call imputation *in foro divino*; the latter in *foro humano*. But there is this very conſiderable difference between the two, that in the latter none ſuffers puniſhment for thoughts, l. 18. D. de poenis; but God being omniſcient, and requiring internal obedience (§ 91), he juſtly imputes to us even thoughts which are diſagreeable to his law *.

* The ancient philoſophers were not ignorant of this truth, and have aſſerted that God ſeeth not only all our outward acts, but likewiſe our moſt ſecret thoughts. So Thales Mileſius, Socrates, Plato and his followers, Pythagoras and his diſciples, and all in general who entertained juſter and ſublimer conceptions concerning God. Teſtimonies to this purpoſe are collected by Huet. in qu. Alnet. ii. 2. 16. Hence we ſee, how reaſonable the interpretation of the Moſaic law is, which our Saviour gave, Matt. v. 22, 28.

Sect. XCIX.

And then man is declared to have merited either punishment or reward.

Further, whereas the law which is applied to human actions is enforced by a sanction (§ 64), hence it it follows, that *to impute* is the same as to declare, that the effect which a certain law assigns to an action, agrees to such a particular action. This effect is called in general *merit*; *punishment*, if the effect of an action exhibited by the law be evil; and *reward*, if the effect be good *.

* But since a legislator is not obliged to propose rewards, hence it is manifest that even actions in themselves just are not meritorious. To this purpose belongs that remarkable saying of Christ: "So likewise ye, when ye shall have done all these things which are commanded you, say, we are unprofitable servants: we have done that which was our duty to do, *Luke* xvii. 10." But if a law-giver promises rewards, as God has done, who has enacted his laws, not for his own sake, but for the advantage of mankind, because he wills their perfect happiness (§ 78); rewards may be said to be merited, not in respect of the law-giver, who of free-goodness proposed them, but in respect of imputation.

Sect. C.

The definition of imputation and axioms relative to it.

Imputation therefore is a reasoning by which an action of another person, being, in all its circumstances, compared with a law, whether divine or human, is declared to merit, or not merit a certain effect proposed by a law. From which definition it is manifest, that we cannot certainly pronounce whether an action be imputable or not, unless we have a distinct comprehension both of the law and of the action in all its circumstances: and that one circumstance often alters the whole state of the case.

Sect. CI.

It supposes the knowledge and interpretation of the law.

Since the *law* must be known to him who would form a right judgment of the imputability of actions, the consequence is, that he ought to be sure there is a certain law, and ought rightly to understand

ſtand the whole of that law, and therefore to *interpret* it rightly, if it be conceived in conciſe or obſcure terms; *i. e.* he ought diſtinctly to comprehend the mind of the law-giver declared by words, or by whatever other ſigns.

* Interpretation therefore does not properly belong to the law of nature, but only to poſitive laws, whether divine or human. For ſince legal interpretation is a diſtinct repreſentation of the law-giver's mind, declared by words or other ſigns (§ 101): and the law of nature is not conceived in words, but is promulgated by right reaſon (§ 11): it follows, that the mind of the ſupreme law-giver cannot be collected from words or other ſigns; and therefore this law does not admit of interpretation. Reaſon ſufficiently underſtands itſelf without an interpreter. Arrian. Diſſ. Epict. 1. " The reaſoning faculty being conſcious to itſelf, clearly perceives what it is, and what it can do, and of what price and value it is, if it applies itſelf to the direction of our other faculties."

Sect. CII.

Its foundation.

Seeing an *interpreter* repreſents diſtinctly the law-giver's meaning, declared by words or other ſigns; it follows, that in interpreting laws, great attention muſt be given both to the proper and the metaphorical ſignification of words; to their connection with what precedes and what follows, and to the nature and character of the ſubject itſelf; and yet more eſpecially to the ſcope and intention of the law-giver, which induced him to enact the law; wherefore they judge well, and we agree with them who aſſert the reaſon of the law to be its ſpirit or ſoul. See our preface ad Elem. Pandect.

* We have a remarkable example of the utility of this rule in our Saviour's explication of the law about the ſabbath, when he was cenſured by the Jewiſh doctors for teaching, that works of charity and mercy ought not to be intermitted on the ſabbath-day. He on that occaſion ſhews the ſource whence the interpretation of that law muſt be brought. He ſays, " The ſabbath was made for

 man,

man, and not man for the ſabbath, *Mar.* ii. 27. From which reaſon of the law it clearly follows, that all works which tend to diſturb the tranquillity and piety of mankind were forbidden to be done on that day; but not ſuch as conduce to human preſervation and happineſs. But take away this ſole and adequate reaſon of that law, and it is moſt certain that in the words of the law themſelves, there is nothing from which one would have inferred our Saviour's doctrine.

Sect. CIII.

Its various ſorts.

Further, ſince the reaſon of a law is as it were its ſoul, hence it muſt follow, that the law ceaſes when the ſole reaſon of it wholly and abſolutely ceaſes: that if it do not agree to a certain caſe, that caſe cannot fall under the law on account of the very reaſon of the law; and this is the foundation of what is called *reſtrictive interpretation*; to which may be rightly referred *equity*, *i. e.* a power of correcting the law in reſpect of univerſality: Grot. de Æquit. indulg. & facilit. c. 1. n. 3. that if the words of a law do not quadrate with a certain caſe, and yet the reaſon of the law be applicable to it, then there is place for what is called *extenſive interpretation*: Finally, that when the words and reaſon of the law keep as it were pace together, then there is only room for *declarative interpretation* *.

* For example, our Saviour interprets the law of the ſabbath reſtrictively; the laws concerning adultery and homicide extenſively, *Mat.* v. which not being done by the Phariſees, they reaſoned ill concerning the imputation of actions. Hence it was, that they accuſed the apoſtles of impiety for plucking ears of corn on the ſabbath; and our Saviour himſelf for healing the ſick on the ſabbath; and that they reputed thoſe righteous who fulfilled the traditions of the Rabbins, and waſhed, *e. g.* their cups carefully, paid tithes, gave alms to the poor, faſted frequently, though they did all this thro' vain-glory, neglected the weightier matters of the law, and committed groſs crimes.

Sect.

Sect. CIV.

The difference between authentic, customary, and doctrinal interpretation.

Besides, because the law is interpreted either by the legislator or judge, or some other, to whose office it belongs to apply the law to facts, or by a lawyer, interpretation on these accounts is therefore called *authentic*, *customary*, or *doctrinal*; the foundation of the first is the will of the legislator; of the second, practice in courts of justice; and of the last, the application of the rules of interpretation abovementioned *.

* We have examples of all these three in the sacred writings: Thus, after God, *Numb.* xxvii. 7. had given this law: " If a man die and have no son, then ye shall cause his inheritance to pass unto his daughter," the supreme legislator himself adds this interpretative clause, *Numb.* xxxvi. 5, 6. " So shall not the inheritance of Israel move from tribe to tribe." This is an example of *authentic* interpretation, which is frequently the same as a new law. We have an instance of *customary* interpretation, *Ruth* iv, 7. where the plucking off and casting the shoe, which was originally restricted to a particular case, *Deut.* xxv. 7. is by judicial interpretation extended to rejection of inheritance; with relation to which custom we have a curious disquisition by An. Bynæus de Calc. Heb. l. 2. c. 7. Finally, there is an instance of *doctrinal* interpretation, *Nehemiah* viii. 13.

Sect. CV.

An action is imputed to its author or cause.

Because he who would interpret a law aright, ought to know all the circumstances of the fact, (§ 108), and the principal circumstance is the person acting; hence we conclude, that an action is to be imputed to him who is the author or cause of it; and, on the contrary, imputation ceases if any thing be done, of which the doer is neither the cause nor the author, tho' we sometimes impute the merits of one to others; which imputation is commonly called *imputation by favour*, in contradistinction to that which is *of debt* or *merit*, strictly so called. Puffend. de jur. nat. & gent. 1. 9. 2.

* And this is the origine of hereditary nobility; yea, sometimes of hereditary kingdoms. Thus among the Germans, the distinguishing nobleness, or the eminent services of fathers, gave dignity even to striplings, Tacitus, de moribus Germ. c. 13. And of hereditary kingdoms, Polyb. Hist. 6. 5. "This is the origine of hereditary sovereignty: hence it is, subjects obey for a long time, not only kings but their Offspring, through a persuasion that being descended from them, and educated by them, they will be like to them in temper and disposition."

Quære If the fact is [illegible].

Sect. CVI.

What actions are not imputable.

If therefore an action be imputed to none, unless he be the cause or author of it (§ 105); but a person cannot be called the author of any action which is not *human*; *i. e.* which is not done by the will, under the direction of the understanding (§ 30); hence it is obvious, that neither passions, nor natural actions, nor events wholly providential, nor things done in a fit of madness, nor natural imperfections either of body or mind, nor things done in sleep or drunkenness can be imputed to any person, but so far as it depended upon the agent to prevent them (§ 26, 29, 49) *.

* Thus impudence is imputed to one, if he neglect the decorum with regard to natural actions. Thus shipwreck is imputed to the commander of the ship, if by his fault the ship was lost; whereas in other cases, what can be more true than what Tacitus says, Ann. 14. 3. "Who is so unjust as to make a crime of what the winds and waves have done?" Thus deformity is imputable to one who has sacrificed his nose to Venus, whereas in other cases Phædrus justly pronounces, Fab. 3.

Sed quid fortunæ, stulte, delictum arguis?
Id demum est homini turpe, quod meruit pati.

Much more reasonably still is ignorance imputed as a fault to a man who had opportunity of a good education in his youth, which is not reckoned criminal in the vulgar; yea, dreams are imputed, which are occasioned by waking thoughts and actions throughout the day; of which kind of dreams called by the antients ἐνύπνια, according to Macrobius in Somn. Scip. 1. 13. Claudian justly asserts,

Omnia

Omnia, quæ ſenſu voluuntur vota diurno,
Pectore ſopito, reddit amica quies.
Furto gaudet amans, permutat navita merces,
Et vigil elapſas quærit avarus opes.
Hon. Aug. Præf. v. 1.

To which Gaſp. Barth, in his notes, p. 714. has added more examples. In fine, wilful drunkenneſs, and the actions perpetrated in that condition, are imputed for a reaſon that needs not be mentioned, it is ſo obvious.

Sect. CVII.

Whether actions done thro' ignorance or error be imputable.

As for what relates to ignorance and error, ſince both theſe imperfections of the underſtanding are either *culpable* or *inculpable* (§ 48, 49), *vincible* or *invincible*, *voluntary* or *unvoluntary* (§ 50), it follows from the ſame principles, that inculpable, invincible, involuntary ignorance cannot juſtly be imputed to a perſon; but that an action done thro' culpable, vincible, and voluntary ignorance is juſtly imputable: and the ſame holds with regard to error: much leſs can ignorance or error be any excuſe to one, if the action itſelf be unlawful, or be done in an unlawful place, time, or manner; becauſe, in ſuch caſes, it not only was in the agent's power not to be ignorant or not to err, but he was abſolutely obliged to omit the action *.

* Judah, when he went into Thamar his Daughter-in-law, could not plead ignorance, becauſe the action was in itſelf unlawful, *Gen.* xxxviii. 15, 16. Nor is he excuſable, who ſporting with darts in an unlawful time and place, ignorantly wounds a man, becauſe an action done in a place and time in which it ought not, is in itſelf unlawful, § 4. Inſt. de lege Aquilia. Nor is an injury done to one who was pruning a tree near the highway, if he be charged with killing a man, whom he might have ſaved by calling out to him, § 5. inſtit. eodem. Thoſe who were thus employed among the Romans uſed to cry aloud *cave*, take care: among the Athenians φύλαξαι, as Theod. Marcil. ad § 5. inſtit. eod. ſhews. Wherefore the ſentence of the Areopagites mentioned by Ariſtot. mag. mor. 1. 17. abſolving a woman who killed a young man by

by a love-charm which ſhe gave him, becauſe it was not done deſignedly, having given him the draught out of love, and miſſed her aim, was blameable, ſince it proceeded upon a ſuppoſition that it was not unlawful to give ſuch love-making medicines. How much more juſtly does the Roman lawyer Paullus, l. 38. § 5. D. de pœnis, condemn ſuch practices, as giving medicines to create love or abortion: Qui abortionis aut amatorium poculum dant, etſi dolo non faciant, tamen quia mali exempli res eſt, &c.

Sect. CVIII.

Of error in fact and in law.

Further, one may err either in point of *fact* or in point of *law*. To the former belong the rules already laid down (§ 107), becauſe a circumſtance in a fact may eſcape the moſt prudent perſons, and therefore his error, in point of fact, may be *inculpable*, *invincible*, *involuntary*. But error, in point of law, with relation to the law of nature, does not excuſe, becauſe right reaſon promulgates this law to every one, unleſs, perhaps, when age, ſtupidity, and the more ſubtle nature of a particular law dictate a milder ſentence. But as for civil law, ignorance of it is ſo far imputable, as it is ſo framed and promulgated that the perſon might know it *.

* For who would rigidly exact an accurate knowledge of the law of nature from infants, or thoſe hardly arrived beyond the infant ſtate, from deaf and dumb perſons, from changelings, or from ſtupid perſons brought up among the brutes? Beſides, tho' the law of nature be as it were written or engraved on the minds of men, yet it cannot be otherwiſe known than by reaſoning about juſt and unjuſt (§ 15): now, becauſe ſome precepts of the law of nature flow immediately from clear principles of reaſon, others are derived from principles of reaſon by many intermediate ſteps, and a long chain of reaſoning, none can doubt that precepts of the firſt ſort may be known by every perſon who is not quite ſtupid; whereas thoſe of the latter ſort are more difficultly underſtood, and require a more improved and perfect underſtanding. Hence by the Roman law, tho' it reckoned inceſt forbidden by the law of nations, l. 38. § 2. D. ad L. Jul. de adult. c. 68. D. de rit.

rit. nupt. yet the puniſhment was ſometimes mitigated, both with reſpect to men and women; as, for inſtance, if a ſon-in-law ſhould after divorce lie with his mother-in-law, l. 38. § 5. D. ad L. Jul. de adulterio: of which no other reaſon can be given but becauſe the unlawfulneſs of inceſt cannot be inferred immediately, or without a long train of reaſoning from the principles of natural law.

Sect. CIX.

Whether undeſigned and forced actions are imputable.

Since the free will of man muſt concur to render an action ſuch of which one can be called the author and cauſe (§ 30); but unintended actions are ſuch, that they do not proceed from the determination of the mind (§ 58); hence it follows, that an action which one does againſt his will, or without intention, cannot be imputed to him; on the contrary, whatever is done ſpontaneouſly, is imputable, and much more whatever is done of one's own free accord: yea, what one is forced to do is imputable to him, if he who forced him had a right to force him; but not, if he who forces him was not in the exerciſe of his right, or if the perſon forced was, previouſly to the force uſed, under no obligation of doing it *.

* Becauſe, tho' a perſon compelled or forced wills (§ 58), yet *right* and *obligation* are correlates, which mutually found or deſtroy one the other (§ 7); and therefore, when *right* ceaſes, *obligation* muſt alſo ceaſe: the conſequence from which is, that if the one hath no right to compel, the other can be under no obligation to do what he was unjuſtly compelled to. Hence it is, that the promiſe of a ſtubborn debtor, extorted by the magiſtrate by threatning execution is valid, becauſe the magiſtrate is in the exerciſe of his right when he forces ſtubborn debtors to pay: But if a robber forces a traveller to promiſe him a certain ſum of money, becauſe the robber hath no right to force him, the traveller can be brought under no obligation to perform what he was thus compelled to promiſe. To this effect is that famous Epigram of Martial.

Quid ſi me tonſor, dum curva novacula ſupra eſt,
Tunc libertatem divitiaſque roget?

Promittam,

Promittam, nec enim rogat illo tempore tonſor,
Latro rogat: res eſt imperioſa timor.
Sed fuerit curva quum tuta novacula theca:
Frangam tonſori crura, manuſque ſimul.
Epig. 11. v. 5.

Sect. CX.

Whether bodily conſtitution, habit, &c.

But ſeeing neither temperament, affections, propenſions, habits, nor external force, hinder the free exerciſe of the will (§ 54 & ſeq.) it is abundantly manifeſt, that neither bodily conſtitution, which hath ſo great an influence commonly on the affections of the mind, nor paſſions, however impetuous and vehement, nor habit, tho' become a ſecond nature, can hinder the imputation of an action; tho' ſometimes, in human courts, he be reckoned an object of juſt commiſeration, who was tranſported into a bad action by the violence of juſt grief, or any afflictive paſſion *.

* It is eaſier, as Ariſtotle has obſerved, to reſiſt luſt, or any voluptuous appetite, than the afflictive paſſions. See Nicomach. 3, 12. 3, 15. 7, 7. Mag. moral. 2. 6. The ſame is obſerved by Marcus Antoninus, εἰς ἑαυτόν, 2. 10. So that one cannot but wonder to find Ariſtotle, as if he had forgot himſelf, aſſerting, ad Nicom. cap. 2. "That it is more difficult to reſiſt the impulſes of pleaſure than of anger," ſince to be deprived of pleaſure is only a privative evil, and that only for the greater part but apparent, not real; whereas to feel pain is a poſitive, and very frequently a real ill. Who does not think parricide more to be imputed to Nero, who was not excited to that wickedneſs by any afflictive paſſion, but by mere cruelty and wickedneſs, than to Oreſtes, who giving the reaſon why he killed Clytemneſtra, ſays, *Now is ſhe who betrayed my father's bed killed.* Eurip. Oreſt. v. 937.

Sect. CXI.

Whether actions extorted by ſome are imputable?

Hence it is eaſy to ſee whether one be in any degree excuſable, who being overpowered by fear, to which the braveſt mind may ſuccumb, commits any

any action contrary to law. For if the fact be such that there is no room to plead necessity, in vain is it pretended. But in what cases necessity cannot be pleaded, we shall enquire more accurately afterwards.

* Truly, if any thing be commanded contrary to piety and justice, that then no pain or force ought to be yielded to, both the scriptures and reason teach. This is acknowledged by several Pagan writers. So Juvenal, § 8. v. 80.

Ambiguæ si quando citabere testis,
Incertæque rei: Phalaris licet imperat, ut sis
Falsus, & admoto dictet perjuria tauro,
Summum crede nefas, animam præferre dolori,
Et propter vitam vivendi perdere caussas.

Sect. CXII.

When and how an action is imputed to the moral cause?

Whensoever the understanding and will, and the physical motion of the body concur to an action, then he who does it is called *the physical cause of the action*; but if the mind alone acts without any corporeal motion, he is called *the moral cause*. Since therefore understanding and will are the only principles of human actions (§ 30), hence it follows, that an action is no less imputable to the *moral cause* than to the *physical cause*, if the concurrence of the will and understanding in both be equal; more imputable to the *moral* than to the *physical cause*, if one induces another, who is under obligation to obey him, to act, by commanding or compelling him; less imputable to the *moral* than to the *physical cause*, if one concurs with the action by advice or approbation only *.

* Hence that distinction of Hen. Koehlerus, in his Exercit. juris natur. § 108. & seq. between *efficacious will*, when the effort is sufficient to produce or suspend the action, and *inefficacious will*, when the effort alone is not sufficient, is to be admitted as of great use: wherefore, if the will of the moral cause be *efficacious*, the action is justly imputed to him; and in proportion as the will is more or less such, the

the action is more or less imputable to one. For who doubts, for instance, that if a father command his son to steal, the theft is more imputable to him than to a stranger, either commanding or persuading to do it?

Sect. CXIII.

Whether the condition of the agent contributes any thing toward imputability.

To the circumstances of the person to whom an action is imputable (§ 105), belong his dignity, rank, and quality; and therefore it is indisputable, that when many persons concur in the same action, if the action be just it is less imputable, and if the action be unjust, it is more imputable to him whom relation, prudence, duty, age, dignity, ought to influence to good conduct, and restrain from bad, than to a stranger, an ignorant, stupid person, one under no particular tie, a boy, a stripling, or, in fine, a person of no rank or dignity.

* Thus, whatever good service was done to a relative, the ancients called *a good office*, what was done to a stranger they called *a benefit*. Seneca de Benef. 3. 18. The latter is more imputable than the former. On the other hand, an injury done to a father by a son, whom filial duty ought to have restrained from such a crime, is more imputable than one done by a stranger is to him. And who does not blame the faults committed by a prudent person well instructed in the thing, more than those done by a stupid ignorant person: those committed by a person of age and experience, or even by a man arrived at the years of discretion, than those done by a youth: those committed by a theologue skilled in sacred matters, than those done by an illiterate person: those, in fine, committed by a person of distinction, or placed in any honourable station, more than those done by a vulgar person of lower life? So Hieronymus in Ezech. 2. Salvianus de gubern. Dei, p. 118. and so likewise Juvenal in these well known lines.

Omne animi vitium tanto conspectius in se
Crimen habet, quanto, qui peccat, major habetur.

Sat. 8. v. 140.

Sect. CXIV.

Since, in the imputation of actions, regard ought to be had not only to the perſon of the agent, but to all the other circumſtances; but that concurrence of circumſtances in the object, of time and place, together with ſufficient abilities, without which an action cannot be done, is called *occaſion* or *opportunity*; it follows neceſſarily, that he is not excuſable whom occaſion tempts to commit any crime; nor he who loſes the opportunity of doing a good action thro' indolence or negligence; but an omiſſion of an action is not to be imputed to one who had no opportunity of doing it *.

Occaſion being wanting, the action is not imputed.

* For the occaſion of committing a fault or temptation to it, ought to be avoided; and one ought to reſiſt the allurements of vice. He who does it not is blameable, if he yields to ſinful appetites or paſſions. He is therefore the author and cauſe of that action; and it ought to be imputed to him. It is therefore a wretched excuſe Chæreas offers for himſelf in Terence: "Should I loſe ſo deſirable, a ſo much longed for, ſo favourable an opportunity?" For he ſuffered himſelf to be tempted to ſin. On the other hand, how blameable the not taking hold of an opportunity of doing well is, Chriſt elegantly ſets forth to us in the parable of the ſervants, *Matt.* xxv. 14.

Sect. CXV.

Much leſs then can the omiſſion of theſe actions be imputed to one, which are either impoſſible in the nature of things, or contrary to laws and good manners, or at leaſt which he had not ſufficient ability to perform, except ſo far as one had weakened the abilities with which he was endowed by his own fault, or had raſhly, with bad intention, promiſed what he might have foreſeen to be impoſſible for him to perform.

Whether the omiſſion of things impoſſible can be imputed, or how and when?

* Hence it is plain, why a debtor who had ſquandered his eſtate is ſtill liable, and is not excuſable on account of his indigence, becauſe he reduced himſelf by his own fault: and

and why an alchymist, who had promised mountains of gold, when he was found to have deceived, was as justly condemned of fraud, as one who had knowingly, and with evil intention promised a treasure. See an example in Tacitus, Annal. 16. 1. in the story of Cesellius Bassus.

Sect. CXVI.

What actions are good, and what are evil?

Moreover, actions compared in this manner with a rule of action, take different names. If they, in all their circumstances, be agreeable to right reason, not obliging by external obligation, or to internal obligation merely (§ 7), they are *good*; but if in one or more circumstances they deviate from right reason to whatever side, they are *bad*. From which definitions it follows, hatt an action must be both materially and formally good (as the schools speak) in order not to be classed with bad actions *.

* Hence the largesses, the fastings, and all the austerity of the Pharisees were not good actions, tho' *materially* conformable to right reason, because not done from a good motive, but from ostentation and vain-glory. We ought not only to do good things, but we ought to do them in a right manner. The just man is rightly described by Philemon in Stobæus, Serm. 9. thus: "Not he who does good things in whatever manner he does them, but he who sincerely desires not merely to be thought, but really to be upright in all his conduct, is good."

Sect. CXVII.

What actions are just, and what are unjust?

Again, if we compare actions with a law, those which are in all things agreeable to law are *just*; those which are, in any one circumstance, disagreeable to law, are *unjust*, and are therefore called *sins*. Whence we may learn why St. *John* places all sin in ανομια, *i. e.* a transgression of a law.

Sect. CXVIII.

The difference between just and honest

Finally, since the divine law or will obliges us to *love* (§ 79), and love is either love of *justice*, or love of *beneficence* (§ 82), an action agreeing in all

all circumstances with the love of justice, is a *just action*, and one ever so little repugnant to it, is an *unjust action*; but those which proceed from the love of humanity and beneficence, are called *honest*, and those which are not agreeable to that love, are called *dishonest*, *base*, *inhumane*; and hence it is easy to understand wherein the difference lies between *expletive* and *attributive justice*.

actions, and between unjust and dishonest actions.

REMARKS on this Chapter.

Our Author's positions concerning the interpretation of laws, and the imputation of actions *in foro humano*, are very clear and just. But it may not be improper to add the following observations concerning the effects of ignorance and error *in foro divino*, *i, e.* with respect to the good and bad consequences of actions occasioned by ignorance or error, according to the laws of God in his government of the world.

1. It must be as true in morals as it is confessed to be in mechanics, that deviation from truth will lead into a wrong manner of acting; and all action must be liable to all the consequences of the laws of nature, *i. e.* to all the consequences connected with it in the regular and wise constitution of things, according to which every cause operates, means are proper and effectual, and different operations have different effects. And in fact we know no mistakes in action through ignorance, rash judgments, or whatever way it happens, which do not produce hurtful consequences; insomuch that there is good reason to conclude, that more of the misery of mankind is owing to wrong methods of action which are the effects of ignorance or error, than to any other cause. It must be true in general, that in a world governed by general laws; or in which connexions are invariably established, every deviation from truth, every mistake about the connexions of things in it, must be in some degree hurtful.

But, 2. Since all the interests of intelligent agents require government by general laws, or fixed connexions which operate invariably, the government of the world will be perfectly good, if the connexions or general laws which constitute it are the best adapted that may be, to promote the greater good of rational agents in the sum of things. Now, that it is so, must be certain, if the being and providence of an infinitely good God can be proved *à priori*. And there is sufficient reason to conclude that it is so *à posteriori*, because the more examples we find by enquiring into the government of the world, of such good general laws, the greater is the presumption that the whole is governed by the best general laws. But the further we enquire, the further we search, the more and clearer instances do we find

of good, of perfect government. See my *Principles of Moral and Christian Philosophy*.

3. Our great business therefore is to endeavour to acquire just notions of the connexions of things; or of the good and bad consequences of actions, in order to act agreeably to them. If getting knowledge to direct our conduct were not in our power, directing our conduct could not be in our power: wherefore, if ignorance, want of knowledge, error, false notions or judgments be not imputable to us, wrong actions are not imputable to us. So that ultimately, whether we speak of the imputation of actions in the juridical stile, or in other words, as we have now spoken of it, (both of which must mean the same thing) it is ignorance or error in judgment that is imputed, when action is imputed; it is ignorance or error that brings evil upon us, when wrong action does it; because every action is directed by our present opinion and judgment, and the affection corresponding to it. And for that reason, our chief business, interest and duty, must be to have just or true ideas of the nature and consequences of actions; or of the connexions of things, according to which our actions ought to be regulated, since it is according to them that actions have certain effects or consequences.

4. False judgments, which tend to direct into a wrong course of action, or to introduce a wrong temper into the mind, must, (as hath been said) be hurtful. But, on the one hand, it is as sure as that there is a God, and that the world is governed by good laws, for the greater general good of the whole, that a virtuous reasonable temper, and virtuous reasonable conduct, are, upon the whole of things, the most advantageous course of acting. It is so in fact in the present life considered by itself without any regard to futurity; and it must be so in a special manner in a future state. And, on the other hand, it is as sure as that there is a God, that no opinions, tho' false, which do not tend to corrupt the temper, or to lead into a wrong course of action, can render us obnoxious to the divine displeasure, can be provoking to him, as such, if the bent of the heart be sincerely towards truth and right; or can as such involve in any hurtful consequences appointed to be punishments of false opinions, not tending to corrupt the temper, nor to lead to vitious behaviour; and not proceeding from want of love to truth and right in any degree, or from want of impartial, honest diligence, as far as that is in our power, to find out truth and avoid error.

How moral conscience, or our sense of right and wrong may be, and only can be impaired, corrupted, or overpowered, is explained at great length in the *Enquiry concerning virtue*, Characteristicks, T. 2. p. 40, *&c.* And to improve it, and preserve it pure and untainted, must be our chief duty and interest. Enquiries therefore into right and wrong conduct are of the utmost importance. They are enquiries into the natures and consequences of things, and are in that sense *philosophy*. But which is more, they are enquiries into the natures and consequences of things

things which ought to direct our conduct; and therefore they are *moral philosophy*, or compose the science of life, the science of right conduct, the science and art of living suitably to our nature and rank, suitably to our dignity; agreeably to the will of our Creator, manifested by the connexions of things established by him; and agreeably to our own best interest. For this must be certain, that it is the established connexions of things which constitute our best interest. And if the established connexions of things be according to the best order, acting according to virtue or the best order, must be in the sum of things our best interest. And why should we doubt that it is really so in a future state, and for ever, since it is really so at present, even while virtue is but in its first state of education, culture and discipline; since the compleat natural effect of highly improved virtue cannot take place till virtue be brought to a great pitch of perfection by gradual culture, because the effect cannot precede the cause. But that virtue is our best interest, as well as acting according to the best order, and easily discoverable to be such, will appear as our author proceeds in his deduction and demonstration of particular duties or virtues. I thought it proper to add this remark, as well on account of those who speak vaguely and loosely about the imputability of ignorance and error, as of those who maintain opinions which result in asserting, That sincere love of truth, and impartial diligence to discover it, is not the best temper, the best part we can act, nay, all the good within our power, with regard to knowledge, speculative or practical. And if this be not the temper and conduct which leads to happiness, according to the constitution of things, what a terrible, what a wretched constitution of things must it be!

CHAP. V.

Of the duties of man to God.

Sect. CXIX.

HItherto we have but premised some of the first principles of the beautiful moral science; let us now proceed to consider the *offices* or *duties* which the *law of nature* prescribes to mankind; to all and every one of the human race. What the Greek philosophers called τὸ Δέον, and the Stoics τὸ καθῆκον, Tully afterwards, in explaining this part of philosophy in the Roman language, called

A Transition to the doctrine of duties.

officium

officium, not without deliberating about the matter a long time, and consulting his friends *.

That the Stoics called it τὸ καθῆκον, and held the doctrine of *duties* as the chief part of moral philosophy, we are assured by Diogenes Laertius, who has not only briefly and clearly explained the chief precepts of the Stoics with relation to human duties, but has likewise commended their treatises on the subject, as that of Zeno, l. 7. 4. of Cleanthes, cap. 7. of Sphærus ibidem, &c. Plutarch mentions a book of morals by Chrysippus de repugn. Stoic. Cicero mentions one of Panætius upon duties (de off. 3. 2.) and in his letters to Atticus, 16. 11. he speaks of one by Posidonius. When, after their example, Cicero had wrote a treatise of the same kind in Latin, after long deliberation what title to give it, all things duly considered, he could not find a more proper word to express the το καθῆκον of the Stoics than the Latin word *officium*. So he writes to Atticus, 16. 6. " Quod de inscriptione quæris, non dubito, quin καθῆκον officium sit, nisi quid tu aliud. Sed inscriptio plenior *de officiis*.

Sect. CXX.

Office or duty defined.

By *office* or *duty* I understand an action conformable to the laws, whether of perfect or imperfect obligation. Nor can I entirely approve the definition given by the Stoics, who say, it is an action, for the doing which a probable reason can be given; or, in other words, an action which reason persuades to do *. Diog. Laert. 7. 107. 108. Cicero de finibus, l. 3. 17.

* For since nothing is done even rashly, for which a probable reason may not be given, whatever is done, not only by men, but by brutes, may be called *officium*, *office* or *duty*. And thus the Stoics understood the word, of whom Laertius says, l. 7. 107. " They extended the word to plants and animals, for with regard to these there are offices." It is true, an office ought to be founded upon a reason, but it ought to be a reason which is proper to determine men to act or forbear acting, and not brutes, i. e. an obligatory reason.

Sect.

Sect. CXXI.

The nature of duty.

But ſince office or duty means an action conformable to law, it is plain that duty cannot be conceived without a law; that he does not perform a duty, who impoſes upon himſelf what no law commands; that an action ceaſes to be duty, when the law, or the reaſon of the law enjoining it ceaſes; and that when a law extends to certain perſons only, of two perſons who do the ſame action, the one performs his duty, and the other acts contrary to his duty *.

* It is proper to illuſtrate theſe propoſitions by examples. None will ſay that Origen did a duty when he emaſculated himſelf, whether by an inſtrument, as Hieronym. relates, ep. 65. or, as others have narrated, by medicines. Epiph. Haer. 64. For there is no divine precept commanding it, inſomuch that Origen himſelf afterwards acknowledged he had miſunderſtood that paſſage in St. Mat. xix. 12. See Huet. Origeniana I. 1. 13. p. 8. None will deny that a chriſtian would act contrary to his duty, if he ſhould not ſubmit to the law of circumciſion, or offer ſacrifice to God, tho' formerly both were duties, Gal. iii. 23, 25. iv. 3, 4, 5. 2 Col. ii. 20. Heb. ix. 9, 10. Finally, if a prieſt uſurps the office of a judge, he acts contrary to his duty, and is guilty of intruſion into a charge not committed to him; whereas a judge doing the ſame action, does his duty, 1 Peter iv. 15.

Sect. CXXII.

Duty divided into perfect and imperfect.

The obligation binding one to do his duty being either perfect or imperfect (§ 120), *duty* muſt likewiſe be divided into *perfect* and *imperfect*; the former being done in obedience to perfect obligation, or a law; the other being performed in conſequence of imperfect obligation, or from virtue *.

* Accordingly, to do hurt to no perſon, to fulfil contracts, to repair damage done by us, and ſuch like duties, are perfect. To relieve the indigent, give alms, ſhew

 thoſe

those who are gone out of their way the right road, give counsel to those who are in doubt, and such like duties, are imperfect. See Cicero de off. 3. 12. & seq.

Sect. CXXIII.

Into natural and christian.

Further, law being the rule of duties (§ 121), because law is either *divine* or *human*, and divine law is either *natural* or *positive*, there are so many corresponding divisions of duties. Those which are commanded by the divine natural law, are called *natural duties*. Those commanded by the divine positive law, are called *christian duties*; and those, in fine, which are enjoined by human laws, are called *civil offices* or *duties* *.

* To worship God with religious reverence, to honour our parents, to defend ourselves against injuries, are *natural duties*, l. 2. l. 3. Dig. de just. & jure: To deny ourselves, take up our cross, and follow Christ, are *christian duties*: to pay civil taxes, to observe particular forms and times in law-suits, and such like, are *civil duties*.

Sect. CXXIV.

Into duties to God, to ourselves, and to others.

But the principal division of duties is taken from their object. For as there are three objects to whom we owe certain duties, GOD, *ourselves*, and *other men* (§ 90), so there are duties of three kinds; *duties to God*, *duties to ourselves*, and *duties to other men*; of all which we are to treat in order.

Sect. CXXV.

The foundation of our duties towards God.

As to our *duties towards God* we have already observed, that they must be inferred from the consideration of the divine perfections (§ 87); and hence we concluded, that God ought to be loved with a love of *devotion and obedience*, and therefore ought to be worshipped with all the powers of our soul, as the most perfect of Beings, upon whom we wholly depend, and to be obeyed with the most sincere and perfect obedience (§ 91).

Sect.

Sect. CXXVI.

Our obligation to know God.

Since the duties we owe to *God* must be deduced from his infinite perfections (§ 125), it follows, by necessary consequence, that man is obliged not only to acquire the most lively knowledge of God, and of his perfections, but daily to encrease this knowledge, and advance in it, that he may attain daily to greater and greater certainty and perfection in it; which, since it cannot be done but by daily meditation upon those truths which reason is able to discover concerning God, by the careful and serious contemplation of his works of creation and providence, so full of evident marks of his infinite wisdom and goodness; hence it is manifest that we are obliged to these exercises, and that those who neglect these means of coming to the knowledge of God, which are in every one's power who has a sound mind, are in a state of inexcusable ignorance; and those who ascribe any imperfection to God, are in a state of inexcusable error (§ 107) *.

* Hence the apostle says what may be known of God is manifest to the Heathens, because the invisible perfections of God from the beginning of the world are clearly discovered by his wonderful works, and therefore they are without excuse who know him not, Rom. i. 20. And whence else indeed that universal consent in the acknowledgment of his being and perfections urged by Cicero, Qu. Tusc. 1. 13. de nat. deorum, 2. 2. Maxim. Tyr. diss. 38. Ælian. Var. hist. 2. 31. Sen. ep. 117? For tho' this universal consent be not a demonstrative argument of the Being of God (§ 71), yet hence it is manifest, that as the apostle says, "What may be known of God is easily discoverable." For which reason, Cicero de nat. deorum, 2. 2. affirms, "If any one doubt whether there is a God, I cannot comprehend why the same person may not as well doubt whether there be a sun or not."

Sect. CXXVII.

And to have just apprehensions of his perfections.

Hence it likewise follows, that we are obliged, or that it is our duty to have just apprehensions of the divine perfections, and to know and believe that he is the Creator and Governor of all things, that all things are made by him, and are under his providence and government, human affairs principally; and that he is one *pure*, *eternal*, *independent*, *omnipotent*, *incomprehensible*, *intelligent*, *wise*, *omniscient*, *free*, *active*, *good*, *true*, *just*, and most *excellent Being* *.

* Epictetus Enchirid. c. 38. tells us, "The chief thing in religion is to have just ideas of the immortal powers, and of their infinitely wise and good administration." And they are in a great error indeed, who think that the whole of our duty consists in probity and integrity, of life, and that it is a matter of indifference what one thinks of God, or what notions he entertains of divine things. For since our duties to God can only be inferred from his perfections (§ 125), how can one render to God the homage and reverence due to him, or that sincere and universal obedience to which he is justly entitled, if he be ignorant of his perfections, or has imbibed false and corrupt notions of them?

Sect. CXXVIII.

All impiety and blasphemy are inexcusable.

He who obstinately denies the being, or any of the perfections of God, is *impious*: he who ascribes imperfections to God, repugnant to his nature, is called a *blasphemer*: since therefore they, who do not know the perfections of God, are inexcusably ignorant, and they, who attribute any imperfection to him, inexcusably err; it is incontrovertible that all *blaspheming* and *impiety* are inexcusable. But they are therefore *impious*, and without excuse, who, with a hardened mind, deny the divine existence or providence; and they are *blasphemers*, who, with *Homer*, and other poets, assert a plurality

lity of Gods, and reprefent them as contending and quarrelling one with another; as adulterers, inceftuous, or deformed, lame, in pain, and groaning in an effeminate manner; and who have not only profeffed in words fuch abfurd opinions of the Gods, but have not hefitated to fet them forth to the eyes of men under horrible images, and by wicked and vile ceremonies *.

* The ancient writers of apologies for the chriftian religion have feverely reproached the Pagans for this impiety and blafphemy, as Juftin Martyr, Athenagoras, Theophilus Antiochenus, Tatianus, Hermias, Tertullian, Cyprian, Minucius Fælix, Arnobius, Lactantius, Eufebius, Julius Firmicus Maternus, and others. But which is more furprizing, fome Pagan authors have likewife reproved this madnefs of their cotemporary countrymen. Not to quote feveral paffages of Lucian and other Heathen writers to this effect, I fhall fatisfy my felf with mentioning one of Sophocles preferved to us by Juftin Martyr Parænef. ad Græc. p. 17. and de monarchia Dei, p. 104, and by Eufebius, Præp. Evang. p. 348, and fome others. "In truth, there is one God who made heaven and the fpacious earth, the ebbing and flowing fea, and the mighty winds. But many of us having loft our underftanding, for a confolation in our calamities, make to ourfelves Gods, and endeavour to propitiate lifelefs images by facrifices to them: we celebrate feftivals foolifhly, imagining ourfelves pious in fo doing." Is it not truly wonderful to find Sophocles reproaching his fellow Pagans for the fame impiety the apoftle charges them with, Rom. i. 21, 22, 23.

Sect. CXXIX.

Our obligation to promote the glory of God.

He who has a juft and lively notion of any perfections, cannot but be highly delighted with the contemplation of them, and will fpare no pains to perfuade others to pay the fame regard to the Being poffeffed of them; it is therefore our duty to endeavour to bring others to the knowledge of the divine perfections, and to reftore thofe who err to a right apprehenfion of them; and, as much as in us lies, to convince the impious, by folid and perfuafive

ſuaſive reaſoning with them, of their abſurdity and wickedneſs, and bring them to render due reverence to God: and they who do ſo, are ſaid to exert themſelves *to promote the glory of God.*

* I have ſaid by ſolid and perſuaſive arguments, not menaces and penalties. For ſince ignorance and error are vices not of the will, but of the underſtanding, there is no other remedy for them, but to convince perſons of the truth, and to excite them by proper arguments to embrace it: and hence it is evident, that thoſe can never be ſerviceable to the ignorant or erring, who are for employing fire and gibbets againſt atheiſts, eſpecially ſince it hath never been an uncommon practice to brand with that name (to uſe the words of Clemens Alex. in Protrept.) " men living regularly and modeſtly, who were quicker-ſighted in diſcerning impoſtures about the Gods than the generality of mankind." Of this many examples are brought by the learned. See Ælian. Var. Hiſt. 2. 31.

Sect. CXXX.

And to the love of God.

Becauſe he who has a juſt conception of the divine perfections, cannot but highly delight in them (§ 129), and the deſire of good to an object, with delight ariſing from the conſideration of its perfection and happineſs, is *love* (§ 8), the conſequence is, that God muſt be loved. And becauſe of the more excellent and ſublime a nature a Being is, the more love and veneration is due to it (§ 87): God ought to be loved with the moſt perfect love; *i. e.* as the ſcripture expreſſes it, " with all our heart, with all our ſoul, and with all our ſtrength," Mat. xxii. 37. Luke x. 27. Becauſe goodneſs is one of the divine perfections (§ 127); God is in himſelf, and with regard to mankind, infinitely good: he is therefore to be loved for both theſe reaſons *.

* What the Epicurean philoſophers and the Sadduceans in ancient times ſaid of the pure love of God, is well known to the learned: And in our own times, ſome myſtick divines have renewed that doctrine, the chief of whom is Franc. Saignac de Fenelon, Archbiſhop of Cambray,

bray, whose treatise entitled, "The maxims of the saints," gave rise to a controversy, of which I have elsewhere given a short history (Elem. Philos. moral. § 198). But who can conceive God otherwise than as good to all his creatures? How idle then is the question about the pure love of God? nay, how dangerous? This hath been shewn by Leibnitz, in Præf. prodrom. & mantissæ codicis juris gentium, by Wolsius and others.

Sect CXXXI.

And likewise obedience and fear.

Among the divine perfections are omnipotence and omniscience (§ 127); but none can keep these perfections in view without being excited to the diligent, unintermitted study of doing whatever may be pleasing to God, and of avoiding whatever may be disagreeable to him; which study and endeavour we call *obedience* to God. And since none can represent God to himself as a most just Being, without being seriously concerned not to offend him; not to do or say any thing that is dishonourable to him, or tends to create his displeasure; it must be our duty to *fear* him: for this concern not to incur his anger is *fear*, and when united with the love of him above described (§ 130), it is properly called *filial fear* *.

* *Filial fear*, is therefore attended with love, and *servile fear* with hatred: it excludes love. But since it is our duty not only to fear God, but likewise to love him (§ 130), the consequence is, that the law of nature requires *filial* not *servile fear* of God, the latter of which wicked men and evil spirits cannot shake off.

Sect. CXXXII.

As also to avoid superstition.

He who fears God with a servile fear, separates the love of God from the fear of him (§ 131); but because love of God consists in delight in the consideration of the divine perfections (§ 130); he therefore who fears God without any knowledge of his perfections, is called *superstitious*; and hence it follows, that a good man ought carefully to avoid all

all superstition, because it proceeds from ignorant servile fear *.

* *Superstition* is fear of God, which results not from the contemplation of the divine perfections, but from false conceptions of God. This is Theophrastus's meaning, Charact. p. 47, where he defines superstition, "Δειλίαν πρὸς τὸ δαιμόνιον, a trembling dread of the Divinity." By Δειλίαν, Casaubon in his notes understands fear different from that which becomes good men who have just ideas of the Deity; and by τὸ δαιμόνιον, the Gods and Demons, and whatever in times of ancient ignorance was thought to have any share of Divinity. This absurd dread, as it is in the mind, is called *internal superstition*, and as it discovers itself in outward acts, it is called *superstitious worship*.

Sect. CXXXIII.

Its effects.

All superstition, internal and external, being inconsistent with just apprehensions of the divine perfections (§ 132), one who has just notions of them, will keep himself carefully from all slavish fear of created beings, and from those absurd errors, whereby God is represented as avaritious and placable by gifts; and likewise from magical arts and divinations, from idol-worship; and, in fine, from this absurd opinion, that God may be propitiated by mere external worship,, tho' not accompanied either with internal fear or love.

* These are the principal branches of *superstition*, to which all its other effects may be reduced. See Budd. de Super. & Atheismo, cap. 7 & 8. Hence it appears how idle the comparison between *superstition* and *atheism* is, both being equally repugnant to true piety, as the same learned writer has proved against Bayle, cap. 4. § 5. None however will deny, that very many great evils proceed from *superstition*, insomuch that there is reason to cry out with the Poet,

Quantum religio possit suasisse malorum.

If by *religio* be meant the *dread of God*, disjoined from *love*, i. e. *superstition*. Upon this subject Juvenal's fifteenth satyr is well worth our reading. For it often happens, that as the Poet there says,

Inter

Inter finitimos vetus atque antiqua ſimultas,
Immortale odium, & nunquam ſanabile vulnus.
Ardet adhuc Ombos & Tentyra. Summus utrimque
Indo furor vulgo, quod numina vicinorum
Odit uterque locus, quum ſolos credat habendos
Eſſe Deos, quos ipſe colit.

Sect. CXXXIV.

And to repoſe our truſt in God.

Further, ſince none can repreſent the divine perfections to himſelf without preſenting to his mind the ideas of perfect wiſdom, power and goodneſs; ſuch a perſon cannot but place his confidence and truſt in God, and be ſatisfied in his mind with the divine adminiſtration; and thus be diſpoſed to ſubmit to whatever may happen to him in the courſe of divine providence with a firm and cheerful ſoul; nor will he be ſtumbled becauſe evils fall upon the good, and good things fall to the ſhare of the wicked, but be perſuaded that all things ſhall co-operate to the good of the virtuous, to good in the whole.

Sect. CXXXV.

Of internal and external worſhip.

In theſe and the like offices does that *internal worſhip* of God conſiſt, by which we underſtand the love, fear and truſt, with which we embrace God in our pure minds. But man being ſo framed, that his affections naturally exert themſelves in certain external actions, his internal love of God could not be thought ſincere unleſs it exerted itſelf in *external love*; *i. e.* in ſuch external acts as expreſs love, fear, and reſignation towards God *.

* Some have denied that the neceſſity of external worſhip can be proved from principles of reaſon, partly, becauſe God does not ſtand in need of it; (as the philoſopher Demonax in Lucian, in Demonacte, tom. 1. p. 861, aſſerts, when being accuſed of impiety, for not offering ſacrifice to Minerva, he anſwered, "I did not think ſhe ſtood in need of ſacrifice.)" Partly becauſe human ſociety, and the tranquillity of human life, is not hurt by the omiſſion of external worſhip: (See Thomaſius, Juriſprud. divin.

divin. 2. 1. 11. and his introd. in Ethic. 3. 37. & seq.) But neither does God ſtand in need of internal worſhip, which none will deny to be a duty. And the other argument falls to the ground, when that fundamental error is refuted, which aſſerts that nothing is of the law of nature but what can be inferred from ſociability (§ 75.) See Hochſtet. Colleg. Puſend. Exercit. 3. 38.

Sect. CXXXVI.

External worſhip ought to flow from the love of God.

Since therefore the external worſhip of God conſiſts in actions flowing from love, fear, and reſignation towards God (§ 135), but love muſt naturally exert itſelf in praiſing the Being in whoſe perfection and happineſs we highly delight, it muſt be our duty always to ſpeak honourably of God, and with due reverence, and to excite others by our actions to love him, to ſing praiſes to him, and not to diſhonour his name by raſh ſwearing, by perjury, or by whatever irreverent diſcourſe.

Sect. CXXXVII.

As alſo from the fear of God.

From the fear and obedience we owe to God as the moſt perfect of Beings, we may juſtly conclude that all our actions ought to be conformed to his precepts, and that we ought always to have in mind his omnipreſence and omniſcience, by which he diſcerns our moſt ſecret thoughts; whence it follows, that all hypocriſy and diſſimulation ought to be avoided, as being neceſſarily accompanied with injurious and contemptible apprehenſions of God.

* Thales Mileſius, acknowledged this ſublime truth, when being asked, "whether God ſaw unjuſt actions," he anſwered, "yea and unjuſt thoughts likewiſe," Clemens Alexand. Strom. 5. p. 594. But who can chooſe but fear an omnipotent God, who knoweth and ſeeth all things? Epictetus ſays elegantly in Arrian, "Wherefore, doors and windows being ſhut, or when you are in darkneſs, ſay not you are alone; for you are not. And you certainly are not, becauſe God is preſent." We are therefore under the ſtrongeſt obligation to ſincere piety, ſince we are always in the ſight of God.

Sect.

Sect. CXXXVIII.

Confidence ought to be placed in God.

In fine, he who places his trust in God (§ 134), will never cease to send up pure devout prayers to him, and will cheerfully embrace every occasion of speaking well of and with God privately and publicly. For this is what right reason prescribes concerning the external worship of God. As for the external rites, it is likewise obvious, that public worship cannot be performed unless certain times and places be devoted to it; and a duty of such importance ought to be done with all decency; but as to the rites or ceremonies themselves, reason can lay down no other rule about them, but in general, that they ought to be in every respect such as are proper to recal to our minds those sentiments in which divine worship consists.

REMARKS on this Chapter.

I have but little to add to what our Author hath said of Religion. Our Harrington justly lays down the following truths relative to religion as aphorisms. "Nature is of God: some part in every religion is natural; an universal effect demonstrates an universal cause; an universal cause is not so much natural, as it is nature itself; but every man has either to his terror or his consolation, some sense of religion: man may therefore be rather defined a religious than a rational creature; in regard that other creatures have something of reason, but there is nothing of religion." So we frequently find ancient philosophers reasoning about human nature and religion, as I have shewn from several authorities in the 7th chapter of my *Principles of Moral Philosophy*, the whole of which treatise is designed to be a demonstration *à posteriori, i. e.* from the wisdom and goodness of providence, that the whole world is made and governed by an infinitely perfect mind, in the contemplation, adoration and imitation of whom the chief happiness of man consists, according to his make and frame. The arguments, *à priori*, for the proof of a God, are shewn in the conclusion of that essay not to be so abstruse as is said by some; and they are more fully explained in my *Christian Philosophy*. The end, the happiness, the duty of a Being (all which ways of speaking must mean the same thing) can only be inferred from its frame and constitution, its make and situation. But nothing can be more evident than, "That man is made to love order, to delight in the idea of its universal prevalence throughout nature, and to have joy and satisfaction from the

con-

consciousness of order within his own breast, and in the conduct of his actions." All the joys of which man is susceptible, which never nauseate or cloy, but are equally remote from grossness and disgust, or remorse, may be reduced to the love of order and harmony: nothing else can give him any pleasure in contemplation or in practice, but good order; the belief of good administration in the government of the world; the regular exercises of those generous affections which tend to public good; the consciousness of inward harmony; and the prevalence of good order and publick happiness in society, through regular and good government: to these classes are the principal pleasures for which man is framed by nature, reducible, as might be shewn, even from an analysis of the pleasures belonging to refined imagination or good taste in the polite arts: but whence such a constitution? Does it not necessarily lead us to acknowledge an infinitely perfect author of all things; an universal mind, the former and governor of the universe, which is itself perfect order and harmony, perfect goodness, perfect virtue? Whence could we have such a make? whence could we have understanding, reason, the capacity of forming ideas of general order and good, and of delighting so highly in it, but from such a Being? Thus the ancients reasoned. Thus the sacred writers often reason. And this argument is obvious to every understanding. It is natural to the mind of man. It is no sooner presented to it than it cleaves to it, takes hold of it with supreme satisfaction, and triumphs in it. And what part of nature does not lead us naturally to this conception, if we ever exercise our understanding, or if we do not wilfully shut our eyes? But having fully enlarged upon this and several other arguments for the Being of a God in my *Principles of Moral Philosophy*; I shall here only remark, 1. That Polybius, Cicero, and almost all the ancients, have acknowledged that a public sense of religion is necessary to the well-being and support of society: society can hardly subsist without it: or at least, it is the most powerful mean for restraining from vice, and promoting and upholding those virtues by which society subsists, and without which every thing that is great and comely in society, must soon perish and go to ruin. 2. That with regard to private persons, he who does not often employ his mind in reviewing the perfections of the Deity, and in consoling and strengthening his mind by the comfortable and mind-greatning reflexions to which meditation upon the universal providence of an all-perfect mind, naturally, and as it were necessarily lead, deprives himself of the greatest joy, the noblest exercise and entertainment the human mind is capable of; and whatever obligations there may be to virtue independent of, or abstract from such a perswasion, he cannot make such progress in virtue, he cannot be so firm, steady and unshaken in his adherence to it, as he who being persuaded of the truth just mentioned, is daily drawing virtuous strength and comfort from it. This is fully proved by an excellent writer on morals, who, notwithstanding,

withſtanding hath been often moſt injuriouſly reproached for aiming at a ſcheme of virtue without religion. This author hath fully proved that the perfection and heighth of virtue muſt be owing to the belief of a God; ſince, where the latter is wanting, there can neither be the ſame benignity, firmneſs or conſtancy; the ſame good compoſure of the affections, or uniformity of mind, Characteriſtics, T. 2. p. 56, &c. 3. I would remark, that the being and providence of an univerſal, all-perfect mind, being once eſtabliſhed, it plainly follows from hence, by neceſſary conſequence, that all the duties of rational creatures may be reduced to this one, with ſeveral antient moraliſts, *viz.* " to act as becomes an intelligent active part of a good whole, and conformably to the temper and character of the all-governing mind." This is acting agreeably to nature; to the nature of an intelligent creature endued with active powers, a ſenſe of public good and order; agreeably to the nature of the Supreme Governor of all things, and to the order of his creation and government. All our duties may be reduced to, or comprehended under that one general article of acting as becomes an intelligent part of a good whole: for to do ſo, we muſt delight in the author of the world, and reſign to his will cheerfully the management of all things independent of our will; and by our will cheerfully co-operate with him in the purſuit of publick good, as far as we are active and have power, or as things are made by him dependent upon our will and conduct. He who is incapable of receiving pleaſure from the belief of a God, and the contemplation of general order and harmony, muſt be a very imperfect creature: for he wants the nobleſt of ſenſes or faculties. And he who can delight in the contrary perſuaſion, *i. e.* in the idea of a fatherleſs world and blind chance, or, which is yet more horrible, malignant adminiſtration, muſt have a very perverted mind, if perverſion has any meaning: he muſt be as properly a monſter, in reſpect of a moral frame, as any deformity is monſtrous in regard to bodily texture.

CHAP. VI.

Of the duties of man to himſelf.

Sect. CXXXIX.

Man is obliged to love himſelf.

NOthing is nearer to man, beſides the ever-bleſſed God, than he is to himſelf; nature having inlaid into his frame ſuch a ſenſibility to his intereſts, and ſo tender a love of himſelf, that we juſtly look upon him to be out of his ſenſes and diſtracted, who

 hates

hates and wiſhes ill to himſelf. Nor is this *ſelf-love* unjuſt, while it does not diſturb good order. For it is that love with which one delights in his own perfections and happineſs, and is concerned to procure and augment theſe goods. But ſince God hath created us, and adorned us with many excellent perfections, and given us the means of improving in perfection and happineſs, he muſt be concluded to will that we ſhould endeavour to promote our happineſs and perfection, and be delighted with it; *i. e.* that we ſhould love our ſelves (§ 92).

Sect. CXL.

What this love is.

From which we have already inferred (§ 92), that man is bound to purſue, promote, and preſerve his own perfection and happineſs, as far as is conſiſtent with the love of the ſupreme Being *.

* Therefore, we do not perform theſe duties to ourſelves that we may be happy (for we have ſhewn above, that this tenet is falſe, that utility is the only ſource or rule of juſt and unjuſt) but becauſe God wills that we ſtudy to promote our happineſs and perfection: and therefore to promote our perfection and happineſs is itſelf our duty; and is not the cauſe which impels or obliges us to it.

Sect. CXLI.

What are its objects.

Since man is obliged, by the will of God, to all and every thing which tends to promote, preſerve, and enlarge his happineſs and perfection (§ 140); and man conſiſts, not only of mind, but of body likewiſe, in ſuch a manner, that he is a compound of *body* and *mind*; the conſequence is, that man is obliged to promote the perfection of both his conſtituent parts; and becauſe the faculties of the mind are two, *underſtanding* and *will*, he is obliged to ſtudy the perfection of both; wherefore the duties of man, with reſpect to himſelf, are relative partly to the *whole man*, partly to the *underſtanding*, partly to the *will*, and partly to his *body* and *external ſtate* *.

* It

* It is proper to obſerve this, in oppoſition to the doctrine of Socrates and others, who maintained that the body is not a part of man, but his inſtrument only, and that external things do not properly appertain to man, or in the leaſt concern him. So Simplicius, in his preface to his commentary on Epictetus, " If a man commands his body, and the body doth not ſo much as command itſelf, then man is not body, and for the ſame reaſon, he is not both mind and body, but wholly mind." Whence he a little after reaſons thus : " He who beſtows his care upon the body, beſtows it upon things which belong not to man, but his inſtrument : But he, whoſe ſtudy and cares are ſet upon riches, and ſuch like external things, beſtows his care neither upon man, nor his inſtrument, but upon things ſubſervient to that inſtrument." Many other ſuch fooliſh boaſts we find in ſome ancient writers, which are equally falſe and hurtful.

Sect. CXLII.

These duties ought not to be severed.

Whence we conclude, that theſe duties ought not to be ſevered from one another ; and therefore, that neither the mind nor the body ought totally to be neglected : but if it ſhould happen that the duties due to both cannot be performed, we ought, of many perfections and goods, which cannot be obtained at one and the ſame time, to chooſe the moſt excellent and neceſſary (§ 94). And therefore the mind being more excellent than the body, we ought to be more diligent about the perfecting of our minds than our bodies, yet ſo as not to neglect the latter *.

* They therefore act contrary to their duty, who are ſo taken up about the body that they ſuffer their mind, as it were, to brutalize. But, on the other hand, they do not fulfil the whole of their duty, who impair their bodies by their too ſedulous uninterrupted application to the culture of their minds in knowledge and wiſdom. Neither of theſe duties is to be neglected.

Sect. CXLIII.

Man is obliged to preserve his life and eschew death.

As for what relates to the *whole man*, as consisting of soul and body, his felicity and perfection as such, consists in this, that the union of his mind and body be safe, because these parts being separated, tho' the mind, being immortal, survive, yet the man no longer subsists. Man therefore is obliged to take care to preserve his life, and to avoid the dissolution of the union between his body and mind, which is death, unless the mind be persuaded of a greater good to be obtained by death: in which case one ought not indeed voluntarily to choose death, but to suffer the menaces of it and itself with a brave and intrepid magnanimity *.

* There is reason therefore to pronounce Hegesias πεισιθάνατος, to have been mad, who thought man obliged to put an end to his life, and went about urging men to destroy themselves, by so many arguments that his hearers threw themselves in great numbers into the sea. Cic. Tusc. 1. 34. Valer. Max. 8. 9. For if it be true, that one must be distracted and out of his senses to hate himself (§ 139), we must say of Hegesias's doctrine and conduct with a poet on another occasion,

Non sani esse hominis, non sanus juret Orestes;

especially, since he reduced all human obligations to pleasure, and admitted not of a future existence, from which any consolation could be drawn to make death more desirable than an afflicted life. On the other hand, the apostle's desire was not contrary to his duty, when he *longed to be dissolved*: nor are the martyrs to be blamed, who, supported by the hopes of immortal glory after death, feared no tortures; because an evil which delivers us from a greater one, and procures us a very great good, is rather to be accounted good than ill.

Sect. CXLIV.

And therefore self-murder is unlawful.

Hence moreover we infer, that he acts contrary to his duty who lays violent hands on himself. And this may be proved from other considerations, as, that this action is repugnant to the nature of love,

love, and to a right diſpoſition of mind, and therefore involves an abſurdity or contradiction in it; that it is inconſiſtent with that truſt and reſignation which are due to God, and that acquieſcence in the divine will, which we have already ſhewn to be commanded by the law of nature (§ 134). But it will be ſufficient to add this one argument. Man is obliged to love man as himſelf; and therefore himſelf as others (§ 93). But the love of juſtice does not permit us to kill a man, therefore ſelf-love does not permit us to deſtroy ourſelves *.

* Thus we ought to reaſon with thoſe who are capable of reaſoning; as for thoſe who are furious and out of themſelves, the fatal action is not to be imputed to them (§ 106). Nothing can excuſe ſelf-murder but madneſs: not a guilty conſcience, ſince there are means of quieting it, *viz.* by reformation: nor the greateſt diſtreſs and pain; for tho' it be true, that of two evils the leaſt ought to be choſen; yet voluntary ſelf-murder is not a phyſical but a moral evil, which cannot be choſen; and no calamity or pain is ſo great, but it may be alleviated by reſignation to the divine will: let me add, that it is not the leaſt ſpecies of madneſs to die for fear of dying. See Wolf. Philoſoph. Moral. § 340 & ſeq.

Sect. CXLV.

So is the neglect of life and health.

From the ſame principles laid down (§ 143), it is evident that they act no leſs contrary to their duty who haſten their death by immoderate labour, or by luxury and laſciviouſneſs, or who do not take proper care of their health; and who, when neither duty calls, nor neceſſity urges, voluntarily expoſe themſelves to danger, and bring themſelves into peril or pain by their own fault.

* For whoever is the author or cauſe of an action, to him that action is juſtly imputable (§ 105). But who will call it into queſtion, that he is the cauſe of his death who deſtroys and tortures himſelf by exceſſive toil? he who wears out and waſtes the ſtrength of his body by riotous living? He who takes no care of his health, but expoſes

himſelf unneceſſarily to manifeſt dangers? Since therefore, even *in foro humano*, by the *Lex Cornelia*, not only he is guilty of murder, who with premeditated evil intention directly kills a man, but even he who was the cauſe of his death; (l. 16. § 8. Dig. de pœnis, l. 1. D. ad L. Corneliani de Sicar.) who can doubt but he muſt be guilty of ſelf-murder *in foro divino*, who was the cauſe of his own death?

Sect. CXLVI.

The duties of man with regard to his underſtanding.

The perfection of human *underſtanding* certainly conſiſts in the knowledge of truth and good; to acquire, enlarge, and preſerve which man being obliged (§ 140), the conſequence is, that every one is bound to exert himſelf to ſtrengthen and cultivate his underſtanding, or to improve his faculty of diſcerning truth from falſhood, and good from evil; and to let no opportunity paſs neglected, whether of inſtruction from others, from books, or from experience, of learning uſeful truths, and wholeſome precepts and maxims concerning good and evil *, that thus he may attain to all the uſeful knowledge within his reach; and if he be in that condition of life that does not allow him to learn all that it is uſeful to know, he may at leaſt be maſter of what it is moſt neceſſary and advantageous for him to underſtand, and have that at his command as ready coin, ſo to ſpeak.

* This knowledge is equally neceſſary to all men, partly becauſe the will cannot purſue but what the underſtanding repreſents to it as good, nor decline but what the underſtanding hath diſcerned to be evil (§ 30); and partly becauſe even actions done through ignorance are imputed, ſo far as the law might, and ought to have been underſtood (§ 108.) Sophocles therefore ſays with good reaſon in his Antig. v. 1321. "To have wiſdom is the principal thing with regard to happineſs."

Sect. CXLVII.

Of the particular culture to

From which laſt propoſition (§ 146), it follows, that whereas all perſons are equally obliged to the duties

duties hitherto mentioned; every one is for himself in particular obliged to that ſpecial culture of his underſtanding, which is ſuitable to his particular talents and genius, and to his rank and condition in life; and therefore every one ought to know his force and genius, and one is hardly excuſable if he chooſes a way of life to himſelf for which he is not qualified, or if he forces any in his power*, under his authority, or committed to his direction, ſo to do.

which particulars are obliged.

* The culture therefore of our underſtanding, to which we are obliged, is either general, to which all men are equally bound, of which § 146; or ſpecial, of which in this ſection. The foundation of this diſtinction is, that all men have reaſon in common; but every particular perſon has his particular caſt and genius, his particular talents; underſtanding, memory and judgment not being common to all in the ſame degree. All men are therefore obliged to cultivate their reaſon, but all men are not equally well qualified for the ſame way of life, the ſame profeſſion and buſineſs. Whence we may, moreover, conclude, that an *internal ſpecial call* (if we ſet aſide divine inſpiration) is nothing elſe but the will of God concerning the particular kind of life one ought to chooſe, manifeſted to one by the gifts and talents with which he is endued, of which Perſeus ſpeaks, Sat. 3. v. 71.

Quem te Deus eſſe
Juſſit, & humana qua parte locatus es in re,
Diſce. ————

Sect. CXLVIII.

The perfection of the *will* conſiſts in the deſire and fruition of good. But ſince we cannot purſue good, unleſs we have firſt conceived a juſt notion of its excellence, nor avoid evil, unleſs we know it to be ſuch (§ 30); hence it is manifeſt, that we ought not to acquieſce in any knowledge of good and evil whatſoever, but exert ourſelves with all our power to have a true and lively conception of them; that not every good is to be choſen, but of

Duties relative to the will.

many goods that which is best and most necessary: yea, that evil ought not to be avoided, if it be necessary to our attaining to a greater good: and finally, that our chief good ought to be desired and pursued above all things; and that we ought to bear the want of other goods with a patient and satisfied mind, if we cannot attain it without being deprived of them *.

* They are therefore mistaken, as we have already observed, who place our chief happiness, which we ought to pursue in this life, in the enjoyment of all goods; as Plato in Cicero, Qu. Acad. l. 6. For because such enjoyment is above human power, and the condition of this life, the consequence is, that we should apply our endeavours to attain to our best and greatest good, what our Saviour elegantly calls, " τὴν ἀγαθὴν μερίδα, the good part." Luke x. 42.

Sect. CXLIX.

The amendment of the will is chiefly necessary.

Further, since he who is obliged to the end, is likewise obliged to the means, it follows, that none of these means ought to be neglected which right reason shews to be necessary or proper for attaining to our greatest happiness; but that we ought to apply ourselves with uninterrupted care daily to amend and perfect our minds, to obtain the right government of our affections, and to rescue ourselves from every vitious appetite and passion *.

* For these often so mislead a man, that he falls short of his end; is deprived of true happiness, and makes a sad shipwreck of it. Besides, in general none can perform his duty aright who is not master of his passions and appetites, because these so distort and pervert the judgment, that nothing can be done in order, or according to the right rule. Hence that excellent advice of the poet,

Ne frænos animo permitte calenti:
Da spacium, tenuemque moram, male cuncta ministrat
Impetus. Pap. Stat. Theb. l. 10. 626.

The case is this: " Reason, to which the reins are committed, is strong, while it is undisturbed by the affections: but

but if these mix with it they darken and pollute it; it cannot govern or keep within due bounds what it cannot restrain or withdraw: the mind, when it is shaken and agitated by any passion, is a slave to it, and driven by it at its pleasure." Seneca de Ira, v. 7.

Sect. CL.

Our obligation to preserve and perfect our body.

It now remains to speak of our *body*, the perfection of which consists in the fitness of all its parts to perform their necessary functions; and it is plain that we are obliged to take care of our health, and therefore to direct our eating and drinking, labour, exercise, and every thing to that end; to the preservation of our health, and the increase of our strength and agility *; and, on the other hand, to avoid, as much as lies in our power, whatever tends to maim, hurt, or destroy our bodies, or any of its members, in any degree.

* But in this every one ought to have regard to his rank and station in life. For one degree and kind of vigour, agility and dexterity is requisite in one station, and another in another; one, *e. g.* to a wrestler, another to an artist, another to a soldier, and another to a man of letters. Whence it follows, that the same kind of exercise is not proper to every person; and therefore that prudence ought to have its end before its eyes, and to choose means suited to it. Regard ought also to be had to different ages of life. "An old man, if he be wise, does not desire the strength of a young man, no more than a young man does that of a bull or elephant," says Cicero, Cato major. c. 9. And for this reason, one kind of exercise is proper to old men, and another to young. "As we ought to fight against diseases, says he, so ought we likewise against old age. We ought to take care of our health, to use moderate exercise, and to eat and drink so as to refresh, not oppress our bodies."

Sect. CLI.

How far one is obliged to seek riches.

But all this is enjoined in vain, if one be so distressed by poverty, that he has it not in his power either to live in a wholesome manner, nor to regulate

late his labour as his health requires; and therefore it is obvious, that a person must have a right to seek after the things that are necessary to subsistence and decent living. When the provision of these things is abundant, it is called *wealth* or *riches*; and every one is obliged to acquire as large a share of them as he can by just means, and to preserve and use prudently what he hath justly acquired *.

* We do not by saying so approve of *avarice*, the basest and most pernicious of vices. For an avaricious person desires riches for riches sake; but a person who is wisely selfish, only desires them for the sake of living decently. To the former, no gain, nor no means of increasing wealth appear base and sordid; nay, so much as unjust; but this is the constant language of his heart,

O cives, cives, quærenda pecunia primum:
Virtus post nummos.

The other does not scrape riches, but takes hold of every allowable opportunity of gaining them. In fine, whereas the miser is insatiable, and yet does not enjoy his possessions, the other manages his affairs quite otherwise; and this is the genuine language of his soul,

Haud paravero,
Quod aut avarus ut Chremes terra premam,
Discinctus aut perdam ut nepos.

He manages his estate with prudent oeconomy, that he may not be forced to live at the expence of others, or shamefully to spunge them; that he may not be a burden or a shame to his friends; that he may not be continually harassed by dunning creditors or squeezing usurers; that he may have wherewithal to relieve the indigent, and assist his friends, and that his children may have no cause to reproach him after his death for their distress. And who will deny that these duties are incumbent upon every good man?

Sect. CLII.

And therefore to industry.

But because the end cannot be acquired without the means, and there is no other mean of acquiring what is necessary to supply our necessities but labour and industry, it is manifest that every one is bound to go through with the labours of the business

in

in life he hath chosen with a cheerful mind, and to give all diligence to get a comfortable subsistence; and therefore he acts contrary to duty who lives in idleness, and thus brings poverty and misery upon himself; for such distress is ignominious; whereas poverty is not criminal or shameful, when one, who does all in his power, is overwhelmed by some private or public calamity; or when one, without his own fault, can find no occasion of doing for himself.

* Both therefore belong to the duty of a good man, not to let any occasion slip of bettering his fortune without profiting by it, and to bear honest poverty with an equal mind. Job did both. And Horace joins both these duties together, who thus complains, in his elegant way, of the instability of fortune:

Laudo manentem. Si celeres quatit
Pennas: resigno, quæ dedit, & mea
Virtute me involvo, probamque
Pauperiem sine dote quæro.

Carm. l. 3. 29. v. 53.

Sect. CLIII.

And likewise to preserve and increase our good name.

Since a person ought not to neglect any of those things which are necessary to increase or preserve his happiness (§ 140); and none can doubt but a *good name*, which consists in the favourable opinion of others with regard to our virtue and accomplishments, is necessary to preserve and increase our happiness. [For one, of whose virtue and accomplishments all think well, all think worthy of happiness, and all are therefore sollicitous to promote his happiness.] For these reasons, every one is obliged to take care of his *reputation*, as a mean of his happiness; and therefore to act in every affair, private or public, as reason directs, and not only to preserve his good name by worthy actions, but, as much as lies in his power, to increase it.

* But if this be the intereſt and duty, even of thoſe who have never diminiſhed or ſullied their reputation by any baſe action, how much more are thoſe, whoſe youth is not free from blemiſhes, obliged to endeavour to wipe them off, and procure a good reputation by virtuous deeds? Themiſtocles is an example to us of this, of whom Cornelius Nepos, c. 1. ſays, "This reproach did not break but erect his ſpirit. For perceiving it could not be overcome but by the greateſt virtue, he devoted himſelf wholly and zealouſly to the ſervice of the public and of his friends, by which means he ſoon became illuſtrious." Sueton obſerves of Titus, "That he was recovered from the vices into which his mind had ſtrayed in his youth, by ſhame and the fear of ignominy," Tit. c. 7. Other Examples are to be found in Valerius Maximus, c. 9. and Macrobius, Saturn. 2. 9.

Sect. CLIV.

And to refute aſperſions.

But if it be one's duty to take care to preſerve his good name unblemiſhed (§ 153); ſince *calumnies*, i. e. *falſe reports*, may blacken it; the conſequence is, that we ought to omit nothing that is neceſſary to wipe off aſperſions caſt injuriouſly upon us, unleſs they be ſo groundleſs and malicious, or the author of them ſo contemptible, that it is better to overlook them with generous contempt*.

* Thoſe are called *manifeſt calumnies*, which it is not worth while to give one's ſelf the trouble of confuting. Theſe no more diſturb a good man than the barking of little dogs. And he who ſhamefully ſpits out ſuch againſt one, does not hurt another's reputation, but wholly deſtroys his own. So Simplicius upon Epictetus, c. 64. teaches us: "As, if it be day, the ſun is above the earth, and he who denies it does hurt only to himſelf, and not to the truth. So he who injures you, or throws falſe calumnies upon you, wrongs himſelf, he does not hurt you, or do you any miſchief." The caſe is different if the calumny be *ſpecious*, *i. e.* attended with ſome probability, which may not only deceive the unwary, but even the moſt prudent and cautious. For he who does not take proper methods to refute ſuch reproaches and clear himſelf, muſt appear diffident of his cauſe, and therefore he falls ſhort

of

of the care he is obliged to, with reſpect to maintaining his good character and name entire and unblamed. For that ought to be as dear to one as life.

Sect. CLV.

Whether in caſe of neceſſity our duties to ourſelves ought to be preferred before thoſe to God.

Tho' ſo far the love of ourſelves be moſt juſt and lawful; yet, no doubt, it becomes vitious, ſo ſoon as it exceeds its due bounds, and gets the aſcendant over our love to GOD, the moſt perfect of Beings (§ 92); and hence we concluded above, (§ 140), that all our duties to ourſelves keep their due rank and place, if they are performed in proper ſubordination to the love of God, or do not encroach upon it; whence it is manifeſt, that the common maxim, "*That neceſſity has no law*," is not univerſally true.

* This aphoriſm is in every one's mouth, and produced on every occaſion as an oracle, as if there were nothing ſo baſe and criminal but neceſſity would render it excuſable. Euripides, in a fragment of Hippolyt. obtect. ſays,

Quoties periclum eſt, ex mea ſententia
Neceſſitati debet & lex cedere.

"In my opinion, in caſes of imminent danger, even law ought to give way to neceſſity." And if this maxim were abſolutely true, the martyrs muſt have ſinned, who paying no regard to the indulgence neceſſity affords, could not be induced to offer the ſmalleſt quantity of incenſe to falſe deities, to eſcape the ſevereſt tortures: nor did Joſeph act leſs fooliſhly, who choſe rather to expoſe his life and liberty to the greateſt danger than ſatisfy the luſt of his miſtreſs: Nor would any wiſe man blame a ſoldier for deſerting his ſtation, when attacked by an enemy whom he was not able to reſiſt. And I might add more examples, but theſe are ſufficient to ſhew, that this maxim about neceſſity cannot be abſolutely true in every caſe.

Sect. CLVI.

Upon what it is founded.

But ſeeing this rule is not always true; and yet in ſome caſes it ought to be admitted (§ 155); different caſes muſt be diſtinguiſhed: now, becauſe in an

an action impoſed upon us by ſovereign neceſſity, no other circumſtance can vary the caſe, but either *neceſſity* itſelf, the nature of the *law*, or the nature of the *duty* to be omitted, theſe circumſtances ought therefore to be a little more accurately and diſtinctly conſidered, in order to be able to determine how far neceſſity has the power of a law, and when it has not.

Sect. CLVII.

Neceſſity what it is, and of what kinds.

By *neceſſity* we underſtand ſuch a ſituation of a perſon, in which he cannot obey a law without incurring danger. This danger, as often as it extends to life itſelf, is *extreme*; and when it does not, it ought to be meaſured by the greatneſs of the impendent evil. Again, neceſſity is *abſolute*, when it cannot be avoided by any means but by violating a law; and it is *relative*, when another might avoid it, but not the perſon now in the circumſtances *.

* The martyrs were in the caſe of *extreme neceſſity*, being obliged to renounce Chriſt, or to undergo the moſt violent tortures. But it was not extreme neceſſity which forced the Chriſtians to apoſtacy, when *Julian* excluded them from all opportunities of liberal education, from civil honours, and from military ſervice. Daniel was in the caſe of *abſolute neceſſity*, when he was to be expoſed to ſavage beaſts, unleſs he gave over praying to God. The neceſſity with which David ſtruggled when he muſt have periſhed by hunger, or have eat the ſhew-bread, was *relative*. For another who had undertaken a journey without flying precipitantly, would certainly have found other bread to ſatisfy his hunger.

Sect. CLVIII.

Where neceſſity merits favour.

Now every one may eaſily perceive, that not only *extreme neceſſity*, but even neceſſity in which life is not in danger, comes here into the account. For becauſe ſome calamities are bitterer than death, who can doubt but ſuch may ſtrike terror into the moſt

intrepid

intrepid breaſt; ſuch as being deprived of one's eyes, and other ſuch like diſtreſſes. Beſides, ſince of two phyſical evils the leaſt is to be choſen, the conſequence muſt be, that not only abſolute neceſſity deſerves favour, but even relative neceſſity, if one had no hand in bringing himſelf into the ſtrait *.

* If one unneceſſarily expoſes himſelf to danger, he is the cauſe of the neceſſity he is brought under, and therefore the event ought to be imputed to him (§ 105). And for this reaſon, the neceſſity into which one threw himſelf, who having torn an edict againſt the Chriſtians into pieces, was moſt terribly tortured, ſcarcely merited favour. Lactant. de mort. perſequut. cap. 13. But if one ſhould commit any thing contrary to probity and juſtice, even to eſcape death and tortures, who will deny that he does ill? Quintus, mentioned by the church of Smyrna, in a letter concerning the martyrdom of Polycarpus, is an example of this, who having voluntarily offered himſelf to martyrdom, and perſuaded others to do the ſame, ſo ſoon as he ſaw the beaſts, ſwore by the genius of Cæſar, and defiled himſelf by offering an idolatrous ſacrifice: upon which occaſion the Smyrneans thus expreſs themſelves, " We do not approve, ſay they, our brethren who unneceſſarily or imprudently expoſe and betray themſelves, ſince it is otherwiſe commanded in the goſpel." And we find the like admonitions in Origen upon John xi.

Sect. CLIX.

Affirmative laws, divine and human, admit the exception of neceſſity.

Law being either *divine* or *human*, and both being either *affirmative* or *negative* (§ 64); becauſe even a ſovereign cannot oblige one to ſuffer death without a fault, the conſequence is, that all *human laws* ought regularly to be underſtood, with the exception of neceſſity. And the ſame is true of *divine affirmative laws*, becauſe the omiſſion of an action cannot be imputed to one, if the occaſion for performing it was wanting (§ 114), unleſs the omiſſion be of ſuch a nature and kind, that it tends directly to reflect diſhonour on God; in which

which case, the negative law, forbidding all such actions likewise concurs (§ 131). And to this case belongs the action of Daniel, Dan. vi. 10.

* All this is clear. Men when they submit themselves to civil government, transfer to the magistrate all power, without which the end of government cannot be obtained. They therefore transfer to him the power of life and death, not promiscuously, because that is contrary to the end of government, but only so far as the public safety requires it. Therefore the supreme magistrate cannot oblige his subjects to suffer death without a reason, but then only when the public safety or good requires it; and therefore, his laws are regularly to be understood, with the exception of necessity. Hence Grotius says elegantly, de jure belli & pacis, 1. 4. 7. 2. "Laws ought to be, and commonly are made by men with a sense of human weakness."

Sect. CLX.

But not divine negative laws relative to our duties to God or ourselves.

Divine *negative* laws bind us either to duties towards *God*, towards *ourselves*, or towards *other men* (§90 & 124). Those which respect our duties towards God are of such a nature, that they cannot be intermitted without dishonouring God. But we are strictly bound to avoid whatever tends to dishonour God; the consequence of which is, that no necessity can excuse the violation of the negative laws relating to our duties towards God *. On the other hand, in a collision of two duties respecting ourselves, the safest course is to choose the least of two physical evils.

* Hence it is plain, that there is no excuse for him, who suffers himself to be tempted by any necessity he may be under to blaspheme God, sacrifice to idols, or contaminate himself by perjury. This the Pagan writers have acknowledged. So Juvenal,

Ambiguæ si quando citabere testis
Incertæque rei, Phalaris licet imperet, ut sis
Falsus, & admoto dictet perjuria tauro,
Summum crede nefas, animam præferre pudori
Et propter vitam vivendi perdere caussas. Sat. 8.

But

But tho' thoſe who ſuccumb under ſuch a direful neceſſity are not excuſable, yet the ſenſe of human weakneſs obliges us to pity their lot who were ſhaken by ſuch a cruel neceſſity, ſince we know that Peter found pardon for having denied Chriſt, after he had repented, Matt. xxvi. 75.

Sect. CLXI.

Divine affirmative laws reſpecting our duties to others admit of favour in the caſe of neceſſity.

As to our duties towards other men, affirmative laws, 'tis certain, admit of favour in the caſe of neceſſity; partly becauſe an omiſſion cannot be imputed when the occaſion of performing a duty was wanting (§ 114); partly becauſe the law of benevolence does not oblige us to delight in the happineſs of others more than our own, or to love others better than ourſelves (§ 94); and ſo far the maxim holds juſt, "Every one is neareſt to himſelf."

* Thus, *e. g.* the divine law does not oblige one to ruin himſelf to ſave another, or to give to another the ſmall morſel of bread that remains to himſelf, when he is ſtarving. That, the moſt holy and ſtrict law of love inculcated by the Chriſtian religion does not require, 2 Cor. viii. 13. Wherefore Seneca ſays rightly, de benefic. 2. 15. "I will give to the needy, but ſo that I may not want myſelf: I will relieve him who is ready to periſh, but ſo that I may not periſh myſelf." And this was the meaning of the ſcholaſtic doctors, when they pronounced this rule, "Well ordered charity begins at home."

Sect. CLXII.

What is the caſe with regard to negative laws.

Moreover *negative laws*, relative to our ſocial duties, in the caſe of providential neceſſity, interfere either with the duty of ſelf-preſervation, or with the duty of defending and increaſing our perfection and happineſs. Now in the former ſituation, ſince we are not obliged to love others more than ourſelves, (§ 94), without doubt, in the caſe of neceſſity, every way of preſerving ourſelves is allowable, when a man hath not fallen under that neceſſity by his own neglect or default; or if the condition of the perſons be equal; for equality leaves no room to

favour or privilege. In the latter caſe, it is better for us to want ſome perfection, or ſome particular kind or degree of happineſs, than that another ſhould periſh that we may have it *.

* For to want any perfection is a phyſical evil, if it be not our fault that we have it not. But to make another periſh is a moral evil, which is always to be reckoned greater than any phyſical one. But ſince the leaſt of two phyſical evils ought to be choſen, and therefore a phyſical evil is to be undergone rather than any moral one is to be acted, he certainly doth no evil, who in ſuch a caſe chooſes to ſave another perſon with ſome detriment to himſelf; wherefore, tho' he is not to be blamed who in a ſhipwreck catching hold of a plank which will not hold two, hinders another from getting upon it, yet he is altogether inexcuſable, who by the hopes of greater happineſs to himſelf, is induced to betray his friend againſt all honour and conſcience.

Sect. CLXIII.

What if the neceſſity proceeds from human malice?

All this holds true, if the neceſſity we are under be merely providential (§ 142); but if it proceeds from the malice of men, they do it either that we may periſh, or that they may lay us under the neceſſity of acting wrong. And in the former caſe, ſince we are not bound to love any other better than ourſelves, much leſs a bad perſon (§ 94); he is juſtly excuſable who ſuffers another to periſh rather than himſelf. In the latter caſe, the crueleſt things ought to be ſubmitted to, rather than do any thing diſhonourable to God (§ 131.) *

* Thus, for example, if we ſhould fall into the ambuſcades or hands of robbers, every way of extricating ourſelves out of this danger is allowable, becauſe no reaſon binds us to prefer the ſafety of a robber to our own. But Joſeph would have acted ill, if he had feared a priſon, and chains more than adultery, to which Potiphar's wife endeavoured to ſeduce him.

Sect.

Sect. CLXIV.

An admonition with regard to the application of these rules to particular cases.

Having mentioned these rules, most of which have been fully explained by others *, it will notbe difficult to determine the cases proposed by Pufendorff and others. Indeed, if we attend narrowly to the matter, we will find that many proposed on this subject are such as very rarely happen, and many others are of such a nature, that all is transacted in an instant, so that there is hardly time or room for calling in reason to give its judgment of the justice, or injustice of an action; to which cases, we may not improperly apply what Terence says,

Facile omnes, quum valemus, recta consilia ægrotis damus, Tu, si hic esses, aliter sentires. Andr. 1. 1. v. 9.

For which reason, it is better to leave many of these cases to the mercy of God, than to enter into too severe a discussion of them.

* Most of the preceding rules have been already treated of by Thomasius, Jurisp. divin. 2. 2. 143. & seq. but not upon the same principles we have here laid down. But the same author afterwards is for sequestrating them from the law of nature, and for recalling this one rule, " That all laws include a tacite exception of necessity :" but we can see no ground for omitting or sequestrating exceptions, which, what hath been said, fully proves to be founded upon, and to flow from right reason itself.

Sect. CLXV.

Whether it be lawful to cut off a member.

Thus none can doubt but necessity will excuse a person who must let a member be cut off to prevent his perishing; or that the other parts may not be endangered by it. For tho' we owe both these duties to ourselves, *viz.* to preserve our life, and to preserve every member intire, yet the least of two physical evils is to be chosen (§ 160); and it is certainly a lesser evil to be deprived of a member than to lose life. It is therefore a lawful

mean of ſaving life to do it by the loſs of a member *.

* But it is a more difficult queſtion, whether it be a preceptive law of nature, and whether he does contrary to his duty, who being in the direful neceſſity above mentioned, chooſes rather to die than to bear pain, to which he feels himſelf unequal; eſpecially when it is not certain what may be the event of the amputation, ſeeing not fewer who have undergone the torment with great conſtancy have periſhed than have been ſaved. Old age, bodily infirmity, the dangerous nature of the diſeaſe, the difference in opinion among the phyſicians, the unskilfulneſs or want of experience in the ſurgeon, all theſe conſiderations may eaſily determine one to think the cure more uneligible than death itſelf, and to judge it better to die without ſuffering ſuch exquiſite pain, than run the risk of undergoing it without ſucceſs. Wherefore, I would have us to remember the admonition given above, and to leave ſuch caſes to the divine judgment and mercy, rather than to pronounce hardily and raſhly about them.

Sect. CLXVI.

Whether it be lawful to eat human fleſh in extreme neceſſity?

There is no doubt but that they are excuſable, who in extreme hunger and want have recourſe to any food, even to the fleſh of dead men: for ſince here there is a conteſt between two duties towards ourſelves; of two phyſical evils, death and deteſtable food, the leaſt ought to be choſen (§ 160). But he is by no means excuſable who kills another, that he may prolong a little his own miſerable life by eating his fleſh; for however direful and imperious the neceſſity of long hunger may be, it does not give us a right to another's life that we ourſelves may be ſaved, becauſe here the condition and neceſſity * of both perſons are equal (§ 162).

* But what if all the perſons being under the ſame fatal neceſſity ſhould by conſent commit it to lot to determine which of them ſhould be ſacrificed to the preſervation of the reſt, (as in the caſe of the ſeven Britons, quoted by Ziegler upon Grotius de jure belli & pacis, 2. 1. 3. from the

the obſervations of Tulpius, Obſer. medic. 1. 43.) Here I affirm the ſame thing. For none hath a right to take away another's life. And he who conſents to his own murder is as guilty as he who kills himſelf or another. Ziegler juſtly aſſerts, ibidem p. 189. "That none ought ſo far to deſpiſe his own life, as to throw it away to ſatisfy another's hunger, nor ought others to attack their neighbour's life to quell their own cravings." To which Pufendorff hath not given an anſwer altogether ſatisfactory, de jure nat. & gent. 2. 6. 3.

Sect. CLXVII.

Whether in ſhipwreck?

The caſe is not the ſame, when one in ſhipwreck, having got upon a plank only ſufficient to ſave himſelf, keeps others from it with all his force; or with thoſe who leaping firſt into a boat, will not allow others, whom it cannot contain with ſafety, to come into it, but precipitate them into the ſea; becauſe in theſe caſes, he who firſt ſeized the plank, or they who firſt got into the boat, are in poſſeſſion, and therefore others have no right to deprive them of it, tho' they be in the ſame danger. And who will not own, that it is a leſs evil that a few, than that all ſhould periſh, or a greater good that a few, than that none ſhould be ſaved*?

* Upon the ſame principle may the caſe be decided of ſoldiers flying into a fortified camp or city, who ſhut the gates againſt thoſe who arrive a little later, leſt the enemy ſhould get in at the ſame time with them. Such was the deed of Pandarus, deſcribed by Virgil, Æn. 9. v. 722. & ſeq. and of others, of which caſes, ſee Freinſh. ad Curt. 4. 16. 8. But in all theſe, we are carefully to conſider whether the neceſſity be extreme and abſolute (158), or the danger be more remote, and ſuch as might otherwiſe be avoided. Hence the humanity of Darius, flying from Alexander, is very commendable, who, when he was preſſed to cut the bridge over the Lycus, anſwered, "That he would much rather leave a paſſage to the purſuers, than cut it off from the flyers, Curt. 4. 16.

Sect. CLXVIII.

Whether necessity excuses an executioner commanded to put an innocent person to death.

I can by no means think an executioner, or any other, excusable, who being commanded to put an innocent person to death, thinks he ought to obey, and that his own danger is sufficient to exculpate him. For this necessity proceeds from the wickedness of men; and in such a case every one ought to bear every thing, rather than do any thing tending to dishonour God (§ 163) *.

* Besides, nothing ought to be done in opposition to the certainty of conscience (§ 45): but here the executioner is supposed to know certainly the person whom he is commanded to put to death to be innocent: who then can absolve him from guilt? Nor does Pufendorff's distinction alter the case: "For tho' he says, that when an executioner merely executes the command of another, the action can no more be imputed to him than to the hatchet or sword," jur. nat. & gent. 1. 5. 9. 8. 1. 5. 6. yet certainly there is a wide difference between a sword or a hatchet, mere inanimate things, and a man endued with reason, whose conscience tells him the sentence he is to execute is unjust.

Sect. CLXIX.

Whether it be lawful to throw down one who is in our way when we fly.

But an innocent person, to save his life, may, in flying from his enemy, push out of his way, or throw down any person who stops or hinders his flight, even tho' he may have reason to suspect the person may thereby be hurted. For if one stops the person who flies with a bad intention, this necessity proceeds from human malice, and such a person really does what he can to make the person flying perish. And if one be in his way, without any intention to hurt him, this necessity is providential in respect of the flyer. But in both cases, every way of saving one's self is allowable (§163) *.

We need not stay to refute the contrary opinion of Albertus. Comp. jur. nat. orthod. conform. cap. 3. § 17. For his argument taken from the unlawfulness of killing an innocent

innocent perſon in the ſtate of integrity, is nothing to the purpoſe; becauſe neither is the principle of natural law to be deduced from that ſtate (§ 74); nor in that ſtate can any danger be conceived that muſt be avoided by ſuch an unhappy flight.

Sect. CLXX.

Whether in caſe of neceſſity we may lawfully ſeize upon another's goods?

The ſame muſt be ſaid of thoſe caſes in which one is neceſſitated by hunger or cold to lay hold of the goods belonging to others *; or when, in the danger of ſhipwreck, the goods of others muſt be thrown over board. For, in the firſt caſe, the neceſſity ariſes from the malice of men in ſuffering any to be in imminent danger from hunger or cold, (§ 163); and, in the laſt caſe, of two phyſical evils the leaſt is choſen, when, in the danger of ſhipwreck, men perceiving that they muſt either periſh themſelves together with the goods, or make reparation to others for their goods which are caſt in this neceſſity into the ſea (§ 160) *, throw them over board.

* Thoſe who differ from us in this matter call theſe actions *theft*, which they pronounce ſo great a crime that it can never be committed without guilt, even in circumſtances of the moſt urgent neceſſity. But if killing a man, even according to the principles thoſe very authors go upon, cannot be imputed to one as a crime, in the caſe of unblameable ſelf-defence, why ſhould theft be reckoned criminal by them, in the caſe of ſelf-preſervation? Beſides, who imagines theft to be a crime when done without any malicious intention, nay without ſo much as any deſign to make profit by it? Finally, ſince perſons in the meaneſt circumſtances may eaſily, after they have extricated themſelves out of their pinching ſtraits, make reparation for the very ſmall matter neceſſity can force them to take from another, who can make a crime of chooſing to take a little from its lawful owner, that may be eſtimated and repaid, with a ſerious deſign to make reparation, ſo ſoon as it poſſibly can be done, rather than to periſh? Add chap. 3. 10. of *theft*.

Sect. CLXXI.

The conclusion of this chapter.

But numberless such cases may happen, or at least may be put, some of which are truly perplexed and dubious; and therefore let us not forget the admonition already mentioned (§ 164). We shall add no more upon the subject, leaving other questions to those who assume to themselves the province of commanding or guiding mens consciences.

REMARKS on this chapter.

The principles our author hath laid down in this chapter, are most exact, and proper to decide all questions which can be proposed concerning the right, the privilege, the favour, the leave, or whatever we call it, that arises from necessity. It is however well worth while to look into what the learned Barbeyrac hath said upon this difficult subject in his notes upon Pufendorff's sixth chapter, book second, of the law of nature and nations. Pufendorff, in the beginning of that chapter, quotes an excellent passage of Cicero with regard to necessity, in which the general rule is very clearly stated. It is towards the end of his second book of *invention*; too long indeed to be inserted here, but deserving of attentive consideration. The chief design of our Author's *scholia* being to refer his readers to passages in ancient authors, where moral duties are rightly explained and urged by proper arguments, in order to shew that the duties of the law of nature are discoverable by reason, and were actually known in all ages to thinking persons, at least, he might very properly have on this occasion referred us to that place in Cicero. For this is no doubt the most perplexed subject in morals, *The right and priviledge of necessity*. And upon it we find Cicero reasoning with great accuracy and solidity: insomuch, that if we compare with this passage the 25th chapter of his second book of offices, where he treats of comparing things profitable one with another; and the 3, 4, 5, and following chapters in the third book, where he considers competition between *honesty* and *interest*, or *profit*, we will find full satisfaction upon this head. In the 4th chapter of the 3d book he hath this remarkable passage.— "What is it that requires consideration on this subject? I suppose it is this, that it sometimes happens men are not so very certain, *whether the action deliberated upon be honest or not honest*." For that which is usually counted a piece of villainy is frequently changed by the times or circumstances, and is found to be the contrary. To lay down one instance, which may serve to give some light to a great many others: pray what greater wickedness can there be upon earth (if we speak in general) than for any one to murder not only a man, but a familiar

friend?

friend? And shall we therefore affirm that he is chargeable with a crime who has murdered a tyrant, tho' he were his familiar? The people of Rome, I am sure, will not say so, by whom this is counted among the greatest and most glorious actions in the world. You will say then, *Does not interest carry it against honesty?* No, but rather honesty voluntarily follows interest. If therefore, we would upon all emergencies be sure to determine ourselves aright, when that which we call our advantage or interest seems to be repugnant to that which is honest, we must lay down some general rule or measure, which, if we will make use of in judging about things, we shall never be mistaken as to point of duty. Now this measure I would have to be conformable to the doctrine and principles of the Stoics, which I principally follow throughout this work. For tho' I confess, that the ancient Academics and your Peripatetics, which were formerly the same, make honesty far preferable to that which seems one's interest: yet those who assert, that whatever is honest must be also profitable, and nothing is profitable but what is honest, talk much more bravely and heroically upon this subject than those who allow, that there are some things honest which are not profitable, and somethings profitable which are not honest." The principle of the Stoics he explains more fully a little after, where he asserts with them, "Certainly greatness and elevation of soul, as also the virtues of justice and liberality, are much more agreeable to nature and right reason than pleasure, than riches, than even life itself: to despise all which, and regard them as just nothing, when they come to be compared with the public interest, is the duty of a brave and exalted spirit: whereas to rob another for one's own advantage, is more contrary to nature than death, than pain, or any other evil whatever of that kind." This question concerning the interferings which may happen between duty and private interest, or self-preservation, will clear up, as we go on with our Author in the enquiry into our duties to others, and into the rights and bounds of self-defence; I shall only add to what our author asserts, in opposition to Pufendorff, about executioners, that if we consult the apology of Socrates by Plato, and that by Xenophon, we will find several fine passages, which shew that we ought never to obey our superiors to the prejudice of our duty; but very far from it; and unless we are in an entire incapacity to resist them, we ought to exert ourselves to the utmost of our power, and endeavour to hinder those who would oppress the innocent from doing them any mischief See Grotius, l. 2. c. 26. § 4. 9. as also Sidney's discourse upon government, ch. 3. § 20, and Mr. Barbeyrac's notes on Pufendorff, of the law of nature and nations, b. 8. c. 1. § 6. I beg leave to subjoin, that I know nothing that can better serve to prepare one for wading through all the subtleties, with which morality in general, and this particular question about the contrariety or competition that may happen between self-love and benevolence in certain

tain cafes, are perplexed, than a careful attention to two difcourfes upon the love of our neighbour, by Dr. Butler (Bifhop of Briftol) in his excellent fermons, to copy which would take up too much room in thefe notes, and to abridge them without injuring them is hardly poffible, with fuch concifenefs and equal perfpicuity are they wrote. Thefe fermons make the beft introduction to the doctrine of morals I have feen; and the principles laid down in them being well underftood, no queftion in morals will afterwards be found very difficult. It is owing to not defining terms, or not ufing terms in a determinate fixed fenfe, (the terms *felf-love*, *private intereft*, *interefted* and *difinterefted*, and other fuch like, more particularly) that there hath been fo much jangling about the foundations of morality. They who fay, that no creature can poffibly act but merely from felf-love; and that every affection and action is to be refolved up into this one principle, fay true in a certain fenfe of the term *felf-love*. But in another fenfe, (in the proper and ftrict fenfe of *felf-love*,) how much foever is to be allowed to it, it cannot be allowed to be the whole of our inward conftitution; but there are many other parts and principles which come into it. Now, if we ought to reafon with regard to a moral conftitution, as we do with refpect to a bodily frame, we muft not reafon concerning it from the confideration of one part fingly or feparately from the reft with which it is united; but from all the parts taken together, as they are united, and by that union conftitute a particular frame or conftitution. The final caufe of a conftitution can only be inferred from fuch a complex view of it. And the final caufe of a conftitution is but another way of expreffing what may properly be called the end for which it was fo framed, or the intention of its Author in fo conftituting it. The end of our frame therefore, and by confequence the will of our Maker with regard to our conduct, can only be inferred from the nature of our frame, or the end to which it is adapted: But if we are to infer our end from our frame, no part of this frame ought to be left out in the confideration. Wherefore, tho' felf-love ought to be taken into the account, yet feveral particular affections muft alfo be taken into the account; benevolence muft likewife be taken into the account, if it really belongs to our nature; a fenfe of right and wrong, and reafon muft alfo be taken into the account; and whatever is taken into the account muft be taken into it as it really is, *i. e.* affections muft be confidered as fubjects of government, and reafon muft be confidered as a governing principle, for fuch they are in their natures. But of this more afterwards, in the remark upon the duties reducible to benevolence.

CHAP.

CHAP. VII.

Concerning our abſolute and perfect duties towards (others in general,) and of not hurting or injuring others (in particular.)

Sect. CLXXII.

The foundation of our duties towards others.

LEt us now proceed to conſider *our duties towards others*, the foundation of which lies, as was obſerved above, in this, that man is by nature *equal* to man, and therefore every man is obliged to love every other with a love of friendſhip (§ 85 & 88). And becauſe equality of nature requires equality of offices, hence we concluded, *that every man is obliged to love every man no leſs than himſelf* (§ 93).

Sect. CLXXIII.

They are either perfect or imperfect.

We have alſo ſhewn that there are two degrees of this love, one of which we called *love of juſtice*, and the other *love of humanity and beneficence* (§ 82 & ſeq.) But becauſe the former conſiſts in doing nothing that may render one more unhappy, and therefore in not hurting any perſon, and in giving to every one his own, or what is due to him; and the latter conſiſts in endeavouring, to the utmoſt of our ability, to increaſe and promote another's perfection and happineſs, and in rendering to him even what we do not owe to him by ſtrict and perfect obligation; the conſequence of this is, that of the duties we owe to others, ſome are duties of juſtice, which are of *perfect* obligation, and others are duties of humanity and beneficence, which are of *imperfect* obligation.

Sect. CLXXIV.

These duties defined.

Therefore those are *perfect duties*, to which one is bound by such perfect obligation, that he may be forced to perform them; such as to injure no person, and to render to every one what is due to him: those are *imperfect*, to which we cannot be forced, but are only bound by the intrinsic goodness of the actions themselves; such as, to study to promote the perfection and happiness of others to the utmost of our power (§ 84)*.

* *Perfect duties* therefore lay us under a necessity of not rendering any one more imperfect or more unhappy: *imperfect duties* shew us, that we then only arrive to the glory of being truly good and virtuous, when we delight in promoting the perfection and happiness of others, as much as in us lies. These duties were accurately distinguished by ancient lawyers, when with Paullus they said, some were rather of good will and virtue than of necessity (voluntatis & officii magis quam necessitatis) l. 17. § 3. D. commodati. Add to this a passage of Seneca quoted above in the scholium upon § 84.

Sect. CLXXV.

They are divided into absolute and hypothetical.

Since *perfect duties* may be reduced to *not injuring any one, and rendering to every one his due* (§ 174); but to injure, is to render one more unhappy than he is by nature, or would otherwise be (§ 82); and one may call that his *due*, or *his own*, which he hath justly acquired (§ 82); it follows, that obligation not to injure any one is *natural*; and obligation to render to every one his due is *acquired*; whence the former is called *absolute*, and the latter we call *hypothetical* *.

* *Absolute duty* is what one man has a right to exact from another, without any right acquired to himself by any previous deed: hypothetical duty is what one can exact from another, in consequence of a right acquired by some deed. Thus a man has a right, to exact from every other that he should not take away his life, which is not acquired

acquired by any particular deed: But no person hath a right to complain, that things are taken from him by another unjustly, unless he hath acquired a right or property in them by some deed: therefore, not to kill any one is a duty of an absolute nature: but not to steal, is a duty of a hypothetical kind. If Salmasius had attended to this distinction (Salmasius de usur. cap. 9.) he would easily have understood why the lawyers said that theft is forbidden by natural law (furtum admittere jure naturali prohibitum esse) l. 1. § 3. D. de furt. § 1. Inst. de oblig. quæ ex delict.

Sect. CLXXVI.

In what order these duties ought to be treated.

Further, since the right we acquire to any thing arises either from *dominion*, or from *compact* or *convention*, it follows that all *hypothetical* duties spring either from *compact* or from *dominion*; and therefore this will be the properest order we can follow, to begin first with considering *perfect absolute* duties, and then to treat of *imperfect* ones; next to speak of those *hypothetical* duties, which arise from *dominion* or *property*; and lastly, to handle those which arise from *compact*. But *imperfect* ones ought to be considered before we come to the *hypothetical* ones, because after *dominion* and *compacts* were introduced into the world, humanity becoming very cold and languid, men have sadly degenerated into selfishness.

Sect. CLXXVII.

Every man ought to treat every other as his equal.

First of all, it ought to be laid down as a maxim, that men are by nature equal (§172), being composed of the same essential parts; and because tho' one man may share perfections, as it were by his good lot, above others, yet different degrees of perfection do not alter the essence of man, but all men are equally men: whence it follows, that every one ought to treat every other as equally a man with himself, and not to arrogate to himself any privilege in things belonging to many by perfect right, without a just cause; and therefore not to do to any

any other what he would not have done to himſelf (§ 88).

* This rule is ſo agreeable and ſo manifeſt to right reaſon, that it was known to the Pagans. Lampridius tells us, that Alexander Severus delighted in this maxim. cap. 1. "He had this ſentence, ſays he, frequently in his mouth, which he had learned from Jews or Chriſtians: "Do not to others what you would not have done to yourſelf." And he ordered it to be proclaimed aloud by a public crier, when he was to correct or animadvert upon any perſon. He was ſo charmed with it, that he ordered it to be inſcribed every where in his palace, and on all public works." It is not improbable, as Lampridius obſerves, that Alexander had learned this maxim from Chriſtians: For we find it in the affirmative ſenſe, Mat. vii. 12. and Luke vi. 31. But it does not follow from hence, that reaſon could not have diſcovered this truth. We find ſimilar precepts and maxims in Simplicius upon Epictetus Enchirid. cap. 37.

Sect. CLXXVIII.

And then no perſon ought to be injured.

Since therefore we ought not to do to any one what we would not have done to ourſelves (§ 177); but none of us would like to be deprived by any other of our perfection and happineſs which we have by nature, or have juſtly acquired; *i. e.* to be injured or hurt (§ 82); the conſequence is, that we ought not to render any one more imperfect or unhappy, *i. e.* injure any one. And becauſe to what conſtitutes our felicity and perfection, belongs not only our *body*, but more eſpecially our *mind*, this precept muſt extend to both theſe parts, and an injury to our mind muſt be as much greater than an injury to our bodily part, as the mind is more excellent than the body *.

* Hence Epictetus ſeverely reproaches thoſe who look upon that only as an injury by which their body or their outward poſſeſſions are impaired, and not that by which their mind is rendered worſe. "When we have received any damage in what belongs to our bodies or eſtates, we imme-

immediately think we have ſuffered a great loſs. But when any detriment happens to us with reſpect to our will or temper, we think we have ſuffered no damage, for as much as he who corrupts or is corrupted by another, hath neither an aking head, ſtomach, eye or ſide, nor hath not loſt his eſtate; and we look no farther than to theſe outward things. But with us it admits no diſpute, whether it be better to have a pure and honeſt will, or an impure and diſhoneſt one, &c." Arrian. Diſſ. Epict. 2. 10.

Sect. CLXXIX.

No perſon may be killed, no injury may be done to one's body, health, &c.

The perfection and happineſs of man conſiſts in *life*, *i. e.* in the union of his ſoul and body (§ 143), which is of all he hath received from nature the moſt excellent gift, and is indeed the baſis or foundation of all the reſt: ſince therefore it is unlawful to deprive any one of the perfection and happineſs he hath received from nature, and we would not chooſe to have our life taken away by another, (§ 178), it is ſelf-evident, that it is our duty not to kill any perſon; not to do the leaſt detriment to his health; not to give any occaſion to his ſickneſs, pain, or death, or not to expoſe him to any danger, without having a right to do it, or with an intention to have him killed.

* For he who expoſes a perſon, over whom he hath no authority, to danger, is no leſs guilty than he who, abuſing his right and power to command, expoſes one whoſe death he deſires, to danger, purpoſely that he may get rid of him. There are examples of this in Polybius, 1. 9. Diod. Sic. Bibl. 14. 73. 19. 48. Juſtin. Hiſt. 12. 5. Curt. 7. 2. and likewiſe in the ſacred writings, 2 Sam. xi. 15. and xii. 9. where Nathan accuſes David of murder for having placed Uriah in a moſt dangerous ſituation, with intention that he might periſh. See Pufend. de jure nat. & gent. 8. 2. 4.

Sect. CLXXX.

Unleſs neceſſity obliges to lawful ſelf-defence.

Yet ſince none is obliged to love another more than himſelf (§ 94), and it may often happen

pen that either one's ſelf or another muſt periſh; the conſequence is, that in caſe any one attack us, in this doubtful ſtate of danger, every way of ſaving one's ſelf is lawful (§ 163); and therefore we may even kill an aggreſſor, provided we do not exceed the limits of juſt ſelf-defence.

Sect. CLXXXI.

Its limits.

But what are the limits of juſt ſelf-defence none will be at a loſs to underſtand, who calls to mind, that abſolute or inevitable neceſſity merits favour, (§ 158): For hence it follows, That blameleſs ſelf-defence takes place, if one be in abſolute neceſſity, or even in relative neceſſity, provided he be ſo, not by his own fault (§ 158): That all danger being paſt, there is no further any right of defence: That when danger can be avoided without hurting the aggreſſor, or by a leſſer evil, there is no right to kill him *; becauſe of two evils the leaſt ought always to be choſen.

* Man is always bound to chooſe that which is beſt, (§ 92); but that is beſt which is the ſafeſt and eaſieſt mean for obtaining our end. We are therefore obliged to take the ſafeſt and leaſt hurtful mean of ſaving ourſelves, and therefore to avoid killing a perſon, if there be any other way of delivering ourſelves from danger. Theocritus ſays rightly, "It is fit to remove a great contention by a ſmall evil."

Sect. CLXXXII.

Againſt whom we may uſe it.

Theſe evident principles being attended to, nothing can be more eaſy than to anſwer all the queſtions which are commonly propoſed with relation to due moderation in ſelf-defence. For if it be aſked againſt whom it is allowable, you will anſwer rightly, if you ſay, againſt all by whom we are brought into danger without any fault of our own (§ 81); and therefore even againſt mad perſons, perſons diſordered in their ſenſes, and even againſt thoſe who

who attack you by miſtake, when they are intending to aſſault another. For as Grotius of the rights of war and peace, 2. 1. 3. has well obſerved, the right of ſelf-defence in ſuch caſes does not proceed from his injuſtice or fault, by whom the danger is occaſioned, but from our own right of repelling all danger by any means, and of not preferring in ſuch circumſtances the life or ſafety of another to our own *.

* And to this belongs the fable of Oedipus, who having unknowingly killed his father, who attacked him, in his own defence, thus excuſes himſelf in Sophocles, in Oedip. v. 1032. " Anſwer me one thing. If any one ſhould attack you, even a juſt perſon, to kill you, would you ask whether it was your father, or would you not immediately defend yourſelf? I think, if you loved your life, you would defend yourſelf againſt the aggreſſor, and not ſtay to conſider what was juſt. I fell into ſuch a misfortune by fate, as my father, could he revive, would himſelf acknowledge."

Sect. CLXXXIII.

The extent of it in a ſtate of natural liberty.

Nor will it be leſs eaſy to determine how long this right of defence againſt an aggreſſor continues. For here doctors juſtly diſtinguiſh between thoſe living in a ſtate of nature, and ſubject to no magiſtrate, by whom they may be defended and protected; and thoſe who live in a civil ſtate, and under magiſtracy. For ſince, in a ſtate of natural liberty, there is none to protect us againſt injuries, our right of ſelf-defence cannot but begin the moment our danger commences, and cannot but continue while it laſts, or till we are abſolutely ſecure, (§ 181). But our danger begins the moment one ſhews a hoſtile diſpoſition againſt us, and while that continues, our right of ſelf-defence laſts.

* And this is the foundation of the whole rights of war, *viz.* that we may carry on acts of hoſtility againſt any perſon who hath clearly ſhown his hoſtile diſpoſition againſt us; and refuſes obſtinately all equal terms of peace,

 till

till having laid aside his enmity, he is become our friend: of which afterwards in its own place.

Sect. CLXXXIV.

And in a civil state.

On the other hand, in a civil state, one who shews enmity against another, trapps, or lays snares for him, may be coerced by the civil magistrate; the consequence of which is, that a member of a civil state, hath not a right, by his own force and arms, to resist another member who attacks him, or lays snares for him; nor, when the danger is over, to take that revenge at his own hand which he might expect from the magistrate. And therefore, the space or time of just self-defence is confined within much narrower limits in that state; it begins with the danger, and lasts no longer than the danger itself lasts *.

* And therefore the lawyers rightly permit violent self-defence, only in the moment of assault. Ulpian, l. 3. § 9. D. de vi & armis. "We may repel him by force who assaults us with arms, but in the moment, and not some time after." And Paullus more expresly in another place, where he says, "That one who throws a stone against one rushing upon him, when he could not otherwise defend himself, was not guilty by the Lex Aqu. l. 45. § 4. D. ad leg. Aquil.

Sect. CLXXXV.

The measure of violent self-defence.

Moreover, from these principles (§ 181), you may easily see that self-defence to the point of killing the aggressor is not lawful; if one was forewarned of the assault, or foreseeing it in time, could have kept at home, or retired into a safer place, or could, by wounding or maiming the injurious person, disable him *: tho' no person, when he is assaulted, be absolutely obliged to betake himself to flight, because of the danger or uncertainty of it, unless ther be nea rat hand a place of most secure refuge, (Pufen-

(Pufendorff of the law of nature and nations, 2. 5. 13.). But upon this head it is proper to obſerve, that under civil governments, the time of making an unblameable ſelf-defence being confined within very narrow bounds, and indeed almoſt reduced to a point or inſtant, ſince, in ſuch a perturbation of mind, one cannot think of all the ways of eſcaping; therefore, with good reaſon, ſuch caſes ought not to be too rigidly exacted, but great allowances ought to be made.

* Much leſs then can one with right have recourſe to force and killing, after the aggreſſor deſiſts, and ſhews he is reconciled to his adverſary. Whence Ariſtides in Leuctric. 1. juſtly obſerves, "That the Thebans being diſpoſed to all that was equal, and the Lacedemonians being obſtinate, the goodneſs of the cauſe was transferred from the latter to the former." See Grotius, 2. 1. 18. and Pufendorff, 2. 5. 19.

Sect. CLXXXVI.

For what things it is lawful.

Hence we may likewiſe perceive for what things one may proceed to ſelf-defence by force and violence: for ſince ſome calamities are bitterer to man than death, and not only extreme neceſſity, but even that which may be undergone with ſafety to our life, merits favour (§ 158); the conſequence is, that what is allowable for the ſake of life, is permitted likewiſe in defence of health, the ſoundneſs of our bodies, and even our chaſtity *; and likewiſe in defence of magiſtrates, parents, children, friends, and all others whom we find in danger.

* But here many differ from us, as Auguſtinus de libero arbitrio, 1. 5. Thomaſius, Juriſp. 2. 2. 114. Buddeus Theolog. mor. part. 2. c. 3. § 3. becauſe chaſtity being a virtue of the mind, cannot be forced or extorted from us. But tho' the chaſtity of the mind be ſecure enough, yet no injury is more attrocious to a chaſte virgin or matron than a rape. Wherefore, Quintilian ſays juſtly, Declam. 349. "You have brought an injury upon the girl, than

than which war hath nothing more terrible." Who then will blame an honeſt woman for defending herſelf againſt ſo high an injury, even at the expence of the raviſher's life?

Sect. CLXXXVII.

Whether it be allowable in defence of our honour and reputation?

The queſtion, whether one is excuſable for killing another in defence of his honour and reputation, *e. g.* for a box on the ear, or ſome more ſlight injury, is more difficult. But tho' nothing be more valuable, life only excepted, than honour; and therefore ſome think, that in this caſe violent ſelf-defence is not unlawful; (ſee Grotius of the rights of war and peace, 2. 1. 10.) yet becauſe the danger of loſing life, or other things upon an equal footing with life, alone give us the right to blameleſs ſelf-defence (§ 186); and becauſe honour and reputation are not loſt by an injury done to us; and there are not wanting in civil governments lawful means of revenging an injury; we cannot chooſe but aſſent to their opinion, who prudently affirm, that the right of violent ſelf-defence ceaſes in theſe caſes.

Sect. CLXXXVIII.

No perſon ought to be injured with regard to his underſtanding.

Again, the abſolute duty of not hurting any perſon extends no leſs to the *mind* than to the body (§ 178), and the faculties of the mind are *will* and *underſtanding*: as to the firſt therefore, none can deny that he greatly injures a perſon, who ſeduces into error a young perſon, or any one of leſs acute parts than himſelf by falſhood and ſpecious ſophiſtry; or who prepoſſeſſes any one with falſe opinions, or he who, even by a tedious diſagreeable method of teaching, or affected ſeverity, begets, in any one committed to his charge, an averſion to truth and the ſtudy of wiſdom *.

* Thus Petrus did a very great injury to Maximilian I. Emp. of whom Cuſpinianus relates, p. 602. " Maximilian when he was of a proper age for being inſtructed in letters,

letters, was put under the care of Petrus, where he learned Latin for some time with other fellow scholars of quality. But his teacher employed all his time in inculcating upon him certain logical subtleties, for which he had no disposition or capacity; and being often whipped on that account by one who better deserved to be whipt himself, seeing such usage is for slaves and not free-men, he at last conceived an utter disgust at all learning, instead of being in love with it." He never forgot what a detriment that was to him. The same Cuspinianus tells us, that he often complained very heartily of his fate, and sometimes said at dinner, while many were present, "If my preceptor Petrus were alive, tho' we owe much to our teachers, I would make him repent his having had the care of my institution," Add. Ger. a Roo. l. 8. p. 288.

Sect. CLXXXIX.

Nor with respect to the will.

Now because that injury done to the *will*, which is called *corruption*, is no less detrimental to one; the consequence is, that they act contrary to their duty who corrupt any person, by alluring him to pursue unlawful pleasures, or to commit any vice, and either by vitious discourse or example, debauch his mind; or when they have it in their power, and ought to restrain one from a vitious action, and reclaim him into the right course of life, either do it not, or set not about it with that serious concern which becomes them; but, on the contrary, do all that lies in them to forward him in his vitious carrier*.

* How great an injury this is, Dionysius the Sicilian tyrant well knew, who being desirous to give pain to Dion, who he heard was levying an army, and preparing to make war against him, ordered his son "to be educated in such a manner, that by indulgence he might be corrupted with the vilest passions: for which effect, while he was yet a beardless boy, whores were brought to him, and he was not allowed to be sober one minute, but was kept for ever carousing, reveling and feasting. He afterwards, when he returned to his father, could not bear a change of life, and guardians being set over him to reform him

him from this wicked way of living he had been inured to and bred up in, he threw himſelf from the top of the houſe, and ſo periſhed." Corn. Nep. Dion. cap. 4. This art was not unknown to the Romans. Examples of treating their enemies, or their ſuſpected friends in this manner, are to be found in Tacitus Hiſt. 4. 64. and Agricola's life, 21. 1. This ſecret tyranny is taken notice of by Forſtner upon Tacitus's annals, l. 1. I wiſh then, that from ſuch examples, youth eaſily corrupted into a vitious taſte and temper, and averſe to admonitions, would learn this profitable leſſon, to look upon thoſe as their worſt enemies who endeavour to ſeduce them from the paths of virtue into luxury and ſoftneſs, and to conſider them as tyrants to whom they are really in bondage, who ſet themſelves to deprave their morals.

Sect. CXC.

Nor with reſpect to the body.

Since it is not more allowable to hurt one's *body* than his mind (§ 178), it is certainly unlawful to beat, ſtrike, hurt, injure, wound any one in any manner or degree, or to maim any member or part of his body; to torment him by ſtarving, pinching, ſhackling him, or in any other way; or by taking from him, or diminiſhing any of the things he ſtands in need of in order to live agreeably and comfortably; or, in one word, to do any thing to any one by which his body, which he received from nature ſound and intire, can, by the malice or fault of another, ſuffer any wrong or detriment. Becauſe ſince we ourſelves certainly are ſo abhorrent of all theſe things, that death itſelf does not appear leſs cruel to us than ſuch injuries do; ſurely what we would not have done to ourſelves by others, we ought not to do to them, and we muſt, for that very reaſon, or by that very feeling, know that we ought not to do ſo to them *.

* And hence it ſeems to be, that by many ancient laws, retaliation was propoſed againſt thoſe who broke or hurt any member of another perſon. See Exod. xxi. 23. Lev. xxiv. 50. Aulus Gellius, Noct. Attic. xx. 1. Diod. Sicul.

Sicul. xii. 17. For tho' it be not probable, that either among the Hebrews or the Romans, this law of retaliation took place (κατὰ τὸ ῥητὸν) ſtrictly: (Joſeph. antiq. Jud. 4. 7. Gellius 20. 1.) yet by this it appears, that the beſt law-givers acknowledged it to be moſt juſt, that one ſhould not do to another what he would not have done to himſelf.

Sect. CXCI.

Nor in reſpect of fame and reputation.

As to the ſtate or condition of man, to this article chiefly belongs *reputation*, not only a ſimple good name, or being looked upon not as a bad perſon, but likewiſe the ſuperior reputation one deſerves by his ſuperior merits above others; (for of wealth and poſſeſſions, which cannot be conceived without dominion or property, we are afterwards to ſpeak). Now, ſeeing one's fame cannot but be hurt by *calumnies* (§ 154), or deeds and words tending to diſgrace one, which we call *injuries*; it is as clear and certain that we ought to abſtain from all theſe, as it is, that we ourſelves take them in very ill part *.

* Therefore Simplicius upon Epictetus Enchirid. cap. 38. p. 247. calls contumelies and ſuch injuries, evils contrary to nature, nay diſeaſes, ſpots in the ſoul. But what is contrary to the nature of the mind is certainly an evil, and what is ſuch, cannot but be contrary to the law of nature, which obliges us to do good.

Sect. CXCII.

Nor in reſpect of chaſtity.

Beſides, the condition of a perſon may be wronged in reſpect of *chaſtity*, becauſe being thus corrupted by violence, or by flattery, one's good name ſuffers, and the tranquillity of families is diſturbed, (§ 178); whence it is plain, that we ought not to lay ſnares againſt one's chaſtity, and that all uncleanneſs, whether violently forced, or voluntary; and much more, adultery, and other ſuch abominable, cruel injuries, are abſolutely contrary to the law of nature *.

* For tho' when both the parties consent, the maxim, "Do not to another what you would not have done to yourself," ceases; yet, first of all, in general, none desires any thing to be done to him that would render him less happy. But he is more unhappy, who is allured by temptations to pleasure, or to any vice. His will is hurt or injured (§ 189). Again, others very often are wronged, such as parents, husbands, relations, and at least, with regard to them, the debaucher violates the maxim, "Do not to another what you would not have done to you." Finally, he who seduces a woman into lewdness, corrupts her. But since, if we are wise, we would not choose to be corrupted ourselves by guileful arts, neither ought we to have any hand in corrupting any person. So far is seduction of a woman by flattery into unchastity from being excusable, that some lawyers have thought it deserving of severer punishment than force, "Because those who use force, they thought, must be hated by them to whom the injury is offered; whereas those who by flattering insinuations endeavour to persuade into the crime, so pervert the minds of those they endeavour to debauch, that they often render wives more loving and attached to them than to their husbands, and thus are masters of the whole house, and make it uncertain whether the children be the husband's or the adulterer's." Lysias, Orat. 1.

Sect. CXCIII.

One may be injured by thoughts, gestures, words, and deeds.

From what hath been said, it is plain enough that a person may be wronged even by internal actions; *i. e.* by *thoughts* intended to one's prejudice, as well as by external actions, as *gestures*, *words*, and *deeds* (§ 18); whence it follows, that even hatred, contempt, envy, and other such vices of the mind, are repugnant to the law of nature. And that we ought to abstain from all gestures shewing hatred, contempt, or envy, and what may give the least disturbance to the mind of any person. But that hurt, which consists in words and deeds, is accounted greatest (in *foro humano*) in human courts of judicature *.

* Becaufe the author of the law of nature is καρδιογνώστης, *a difcerner of hearts*, he undoubtedly no lefs violates his will, who indulges any thought contrary to his commands, than he who tranfgreffes them by words or deeds: and for that reafon we have obferved above, that the law of nature extends to internal as well as external actions (§ 18). Befides, love being the genuine principle or foundation of the law of nature (§ 79), which does not confift principally in the external action, but in the defire of good to the object beloved, and delight in its happinefs and perfection (§ 80), it muft needs be contrary to the law of nature to hate any perfon, and to delight in his unhappinefs and imperfection: or to have an averfion to his happinefs and perfection, though it fhould confift merely in thought and internal motion, muft be repugnant to that law. Hence our Saviour, the beft interpreter of divine law, natural or pofitive, condemns even thoughts and internal actions repugnant to the law of nature, Matt. v. 22. 28. And this we thought proper to oppofe to thofe who affert, that the law of nature extends to external actions only.

Sect. CXCIV.

The faculty of fpeech diftinguifhes man above the brute creation.

Becaufe a perfon may be hurt by *words* or *difcourfe* (§ 193), it is worth while to enquire a little more accurately into our duties with relation to *fpeech*. For fuch is the bounty of the kind author of nature towards us, that he hath not only given us minds to perceive, judge and reafon, and to purfue good, but likewife the faculty of communicating our fentiments to others, that they may know our thoughts and inclinations. For tho' the brutes, we fee, can exprefs, by neighing, hiffing, grunting, bellowing, and other obfcure ways, their feelings *, yet to man is given the fuperior faculty of diftinctly fignifying his thoughts by words, and thus making his mind certainly known to others.

* Thus a dog expreffes anger by one found, grief by another, love to mankind by another, and other affections by other founds: but he does not diftinctly or clearly exprefs his particular thought, nor can he do it, tho' dogs and many other animals have almoft the fame organs of fpeech

ſpeech with which man is furniſhed. The more imperfect an animal is, the leſs capable is it of uttering any ſound whereby it can give any indication of its ſenſations, as fiſhes, oiſters, for inſtance, and other ſhell-fiſh. And therefore Pythagoras really affronted men's underſtandings when he pretended to underſtand the language of brute animals, and to have had converſation with them, and by this ſhewed either a very fantaſtical turn of mind, or a deſign to impoſe upon others. See Iamblichus's life of Pythagoras, cap. 13.

Sect CXCV.

What diſcourſe is.

Seeing what peculiarly diſtinguiſhes us from the brutes, with relation to ſpeech, conſiſts in our being able clearly to communicate our thoughts to others, (§ 193), which experience tells us we do by articulate ſounds *; *i. e.* by ſounds ſo diverſified by our organs of ſpeech as to form different words, by which all things, and all their affections and properties or modes may be expreſſed; therefore diſcourſe is articulated ſound, by which we impart the thoughts of our minds to others diſtinctly and clearly.

* Human genius hath not reſted in finding certain and determinate names for all things, but hath invented other ſigns to be uſed in place of diſcourſe, when there is no opportunity for it. Thus we have found out the way of communicating our minds to diſtant perſons by the figures of letters ſo diſtinctly, that they do not hear but ſee our words: which is ſo ſurpriſing an invention, that ſome have aſcribed it to God. There is alſo a method of ſpeaking, as it were by the fingers, invented in Turkey by the dumb, and very familiar to the nobles in that country, as Ricaut tells us in his deſcription of the Ottoman empire, cap. 7. 12: Not to mention ſpeaking with the eyes and the feet, upon which there are curious diſſertations by Mollerus Abtorffenſis. Tho' all theſe do not deſerve to be called *ſpeech*, yet they ſupply the place of it; and therefore, whatever is juſt or obligatory with regard to ſpeech, holds equally with regard to them.

Sect.

Sect. CXCVI.

How it ought to be employed.

From this definition is is obvious enough, that the faculty of ſpeech is given us, not for the ſake of God, nor of brutes, but for our own advantage, and that of our kind; and therefore, that God wills that by it we ſhould communicate our thoughts to others agreeably to the love he requires of us: for which reaſon, he wills that we ſhould not injure any one by our diſcourſe, but employ it, as far as is in our power, to our own benefit, and the advantage of others.

* We ſay rightly, that the faculty of ſpeech was not given us for the ſake of God, ſince God without that aſſiſtance intimately knows our moſt ſecret motions and thoughts: nor for the ſake of the brutes, who do not underſtand our diſcourſe as ſuch, or any otherwiſe than they do other ſigns to which they are accuſtomed. And therefore it remains, that it can be given us for no other reaſon but for the ſake of ourſelves and other men. But it cannot be given us for our own ſake, in order to our communicating our thoughts to ourſelves, of which we are immediately conſcious; but that we may inform others what we would have done to us, and in what they may be uſeful to us. And for the ſake of others it is given to us, that we may ſignify to them what it is their intereſt to know, or what may be of uſe to them. Since therefore we ought to love others equally as ourſelves, and what we would not have others to do to us, we ought not to do to others; the plain conſequence is, that we are obliged not to hurt any one by our diſcourſe, but to endeavour to be as uſeful as we can to others by it.

Sect. CXCVII.

We ought to uſe words in their received ſignification.

The deſign of diſcourſe being to communicate our ſentiments to others (§ 196), which is done by articulate ſounds, denominating things, and their affections, modes, qualities, and properties (§ 195); it follows, that being to ſpeak to others, we ought not to affix any meaning to words but what they are intended and uſed to ſignify in common diſcourſe;

or

or if we make uſe of uncommon words, or employ them in a leſs ordinary acceptation, we ought accurately to explain our mind. But no perſon has reaſon to be diſpleaſed, if we uſe words in a ſenſe they have been taken in by thoſe acquainted with languages, or which is received at the preſent time, if the conſtruction of words and other circumſtances admit of it.

Sect. CXCVIII.

No perſon ought to be wronged by diſcourſe.

And ſince God wills that we communicate the ſentiments of our mind to others by ſpeech, agreeably to the love of others he requires of us by his law (§ 196); which love does not permit us to hurt any perſon by our diſcourſe: but it is to injure a perſon, to detract any thing from his perfection or felicity (§ 82): hence it follows, that we ought, not to hide from any one any thing, the knowledge of which he hath either a perfect or imperfect right * to exact from us; not to ſpeak falſhood in that caſe: not to miſlead any perſon into error, or do him any detriment by our diſcourſe.

* *Perfect right* is the correlate to perfect obligation, *imperfect right* to imperfect obligation. The former requires that we ſhould not wrong any perſon, but render to every one his own (§ 174): And therefore every one can as often demand from us by perfect right the truth, as he would be hurt by our diſſimulation, by our ſpeaking falſely, or by our diſguiſing and adulterating the truth: or as often as by compact, or by the nature of the buſineſs itſelf which we have with another, we owe it to him to ſpeak the truth. And ſince the latter obliges us by internal obligation, or regard to virtue, to promote the perfection and happineſs of others to the utmoſt of our power, it is very manifeſt that we are obliged to ſpeak the truth openly, and without diſſimulation, as often as another's happineſs or perfection may be advanced by our diſcourſe. He therefore offends againſt the perfect right of another, who knowing ſnares to be laid for him by an aſſaſſin, conceals it, or perſuades him that the aſſaſſin only comes

to

to him to pay his compliments; as likewiſe does he, who having undertaken the cuſtody of another's goods, knowingly hides the breaking in of thieves, or endeavours to make them paſs for travellers come to lodge with him. He acts contrary to the imperfect right of another, who when one is out of his way, denies he knows the right road, tho' he know it, or directly puts him into the wrong one.

Sect. CXCIX.

We may hurt another by diſſimulation, by lying, by deception.

He who conceals what another has a perfect or imperfect right to demand certain and true information of from him, *diſſembles*. He who in that caſe ſpeaks what is falſe, in order to hurt another, *lies*. Finally, he who miſleads any one to whom he bears ill-will into an error, *deceives* him. Now, by theſe definitions, compared with the preceding paragraph, it is abundantly plain, that diſſimulation, as we have defined it, and all lying and deception, are contrary to the law of nature and nations.

Sect. CC.

When it is allowable to be ſilent, to ſpeak falſly or ambiguouſly.

But ſince we are bound to love others, not with greater love than ourſelves, but with equal love, (§ 94); the conſequence is, that it is lawful to be ſilent, if our ſpeaking, inſtead of being advantageous to any perſon, would be detrimental to ourſelves or to others: and that it is not unlawful to ſpeak falſly or ambiguouſly, if another have no right to exact the truth from us (§ 198); or if by open diſcourſe to him, whom, in decency, we cannot but anſwer, no advantage would redound to him, and great diſadvantage would accrue from it to ourſelves or others; or when, by ſuch diſcourſe with one, he himſelf not only ſuffers no hurt, but receives great advantage.

* Thus, none will blame a merchant, if being asked by ſome over curious perſon how rich he might be, he ſhould not make any anſwer, or ſhould turn the converſation ſome other way. Nor ought a General more to be blamed

who

who deceives the enemy by falſe reports or ambiguous rumours, becauſe an enemy, as ſuch, hath no right, perfect or imperfect, to demand the truth from an enemy as ſuch. Moreover, the prudence of Athanaſius is rather commendable than blameable, who detained thoſe who were purſuing him with ſuch ambiguous converſation, that they knew not it was Athanaſius with whom they were converſing, Theodoret. Hiſt. Eccl. 3. 8. For he could not remain ſilent without danger, and plain diſcourſe would not have been of any advantage to his purſuers, and of great hurt to himſelf. Finally, none can doubt but a teacher may lawfully employ fables, fictions, parables, ſymbols, riddles, in order to ſuit himſelf to the capacity of his hearers, and inſinuate truth into their minds through theſe channels, ſince theſe methods of inſtruction are far from being hurtful to any perſons, and are very profitable to his hearers.

Sect. CCI.

What is meant by taciturnity, what by falſe ſpeech, and what by fiction.

Hence we may infer, that all *diſſimulation* is unjuſt (§ 199), but not all *ſilence:* (by which we mean, not ſpeaking out that to another which we are neither perfectly nor imperfectly obliged to diſcover to him (§ 200;) that all *lying* is unjuſt (§ 199), but not all *falſe ſpeaking* (§ 200); that all *deception* is unjuſt (§ 199); but not all *ingenious* or *feigned diſcourſe* (§ 200). And therefore all theſe muſt be carefully diſtinguiſhed, if we would not deceive ourſelves, and make a falſe judgment concerning them *.

* Amongſt the Greeks the word ψεῦδος was ſomewhat ambiguous, ſignifying both *a lie* and *falſe ſpeech*. Demoſthenes takes it in the firſt ſenſe in that ſaying ſo familiar to him, " That there is nothing by which we can hurt others more than by (ἢ ψεύδη λέγων) lies." Chariclea underſtands by it falſe ſpeech, in that famous apophthegm of his, " That falſe ſpeaking (τὸ ψεῦδος) is ſometimes good, *viz.* when it is in ſuch a manner advantageous to the ſpeaker as to hurt no other body." Heliod. Æthiop. l. 1. c. 3. p. 52. But the word *lie* is not one of theſe ambiguous words, but being always uſed to ſignify a baſe and deteſtable

deteſtable vice, ought to be diſtinguiſhed from falſe ſpeaking, and the other words we have above mentioned.

Sect. CCII.

The ſame holds with reſpect to *truth* and *veracity*. For ſince one is ſaid to be a perſon of *veracity*, who ſpeaks the truth without diſſimulation, whenever one has a perfect or imperfect right to know the truth from us; the conſequence is, that *veracity* always means a commendable quality. On the other hand, ſpeaking *truth* may be good, bad, or indifferent; becauſe it conſiſts in the agreement of words and external ſigns with our thoughts, and one does not always do his duty who lays open his thoughts *.

What truth and veracity mean.

* It is a known apophthegm of Syracides. (*ſapienti os in corde, ſtulto cor in ore eſſe*, a wiſe man's mouth is in his heart, and a fool's heart is in his mouth). A rich perſon who diſcovers his treaſures to thieves tells truth, but none will on that account commend his virtue and veracity: whereas, on the other hand, he would not be reproached with making a lie who kept ſilent to a thief, or turned the diſcourſe another way (§ 200). Hence the ſaying of Simonides, " That he had often repented of ſpeaking, but never of ſilence." And that of Thales, " That few words are a mark of a prudent man." To which many ſuch like aphoriſms might be added.

Sect. CCIII.

Words, by which we ſeriouſly aſſert that we are ſpeaking truth, and not falſly, are called *aſſeverations*. An aſſeveration made by invoking God as our judge, is called an *oath*. Words by which we wiſh good things to a perſon, or pray to God for his proſperity, are called *benedictions*. Words by which we, in the heat of our wrath, wiſh ill to our neighbour, is commonly called *malediction* or *curſing*. When we imprecate calamities upon our own heads, it is called *execration*.

What is meant by an aſſeveration, what by an oath, what by benediction, and what by imprecation.

Sect.

Sect. CCIV.

When it is allowable to use asseverations.

From the definition of an asseveration (§ 203), it is plain that no good man will use it rashly or unnecessarily, but then only, when a person, without any cause, calls what he says into doubt, and he cannot otherwise convince him of the truth whose interest it is to believe it; whence we may conclude, that he acts greatly against duty, who employs asseverations to hurt and deceive any one.

* For since to circumvent and deceive a person, is itself base and unjust (§ 199), what can be more abominable or unjust, than to deceive by asseverations? And hence that form used among the Romans, "As among good men there ought to be fair dealing," "That I may not be taken in and deceived by putting trust in you, and on your account." Cicero, de off. l. 3. 16. For it is base to cheat and defraud any one; and it is much more base to cheat and defraud by means of one's credit with another. See Franc. Car. Conradi de pacto fiduc. exerc. 2. § 4.

Sect. CCV.

When it is allowable to use benedictions, and when imprecations.

Since we desire happiness no less to those we love, and in whose felicity we delight, than to ourselves, it cannot be evil to wish well to another, and pray for all blessings upon him, provided it be done seriously and from love, and not customarily and in mere compliment*. But all maledictions breath hatred, and are therefore unjust, unless when one with commiseration only represents to wicked persons the curses God hath already threatened against their practices. Finally, execrations, being contrary to the love we owe to ourselves, and the effects of immoderate anger and despair, are never excusable; but here, while we are examining matters by reason, certain heroic examples do not come into the consideration, they belong to another chair.

* And therefore many congratulatory acclamations, which on various occasions are addressed to illustrious persons

ſons and men in power, degenerate into flatteries: nay, ſometimes they are poiſon covered over with honey, becauſe at the very time theſe fair ſpeeches are made, the perſon's ruin is deſired, if ſnares be not actually laid for him. Since all this proceeds not from love but hatred, who can doubt of their being repugnant to the law of nature, which is the law of love?

Sect. CCVI.

What is the uſe of an oath?

As to an *oath*, which is an aſſeveration by which God is invoked as a witneſs or avenger (§ 203), ſince we ought not to uſe a ſimple aſſeveration raſhly or unneceſſarily (§ 204); much leſs certainly ought we to have recourſe raſhly or unneceſſarily to an oath; but then only when it is required by a ſuperior as judge; or by a private perſon, in a caſe where love obliges us to ſatisfy one fully of the truth, and to remove all ſuſpicion and fear of deception and falſity. And this takes place with regard to every oath, and therefore there is no need of ſo many diviſions of oaths into *promiſſory* and *affirmatory*, and the latter into an oath for bearing *witneſs*, and an oath deciſive of a *controverſy*: for the ſame rules and conditions obtain with reſpect to them all *.

* Beſides, if we carefully examine the matter, we ſhall find that every oath is *promiſſory*. For whoever ſwears, whether the oath be impoſed by a judge, or by an adverſary, he promiſes to ſpeak the truth ſincerely and honeſtly. And the diſtinctions between oaths about contracts paſt or future, the former of which is called *an oath of confirmation*, and the other *a promiſſory oath*; an oath about the deed of another, and an oath about our own deed, the former of which is called *an oath of teſtimony*, the other *a deciſory oath*, which again, if it be tendered by the judge is called *judicial*, if by the party, without judgment, *voluntary*: theſe and other deciſions belong rather to Roman law than to Natural law, as is plain from their not being in uſe in ſeveral other nations, as the Greeks and Hebrews. See Cod. Talmud. tom. 4. edit. Surenhuſ. Maimonides de jurejurando, edit. Diethmar. Leiden 1706. Selden de Synedr. Heb. xi. 11. Jac. Ly-

 dius

dius de juramento. To which may be added what Petit and other writers on antiquities ſay of the uſe of an oath among the Greeks.

Sect. CCVII.

Who and how.

Since by thoſe who ſwear God is invoked as a witneſs and avenger (§ 203), the conſequence is, that atheiſts muſt make light of an oath, and that it is no ſmall crime to tender an oath to ſuch perſons; that an oath ought to be ſuited to the forms and rites of every one's religion *; and therefore aſſeverations by things not reckoned ſacred, cannot be called oaths; that he is juſtly puniſhed for perjury, who perjures himſelf by invoking falſe gods; nay, that even an atheiſt is juſtly puniſhed for perjury, who concealing or diſſembling his atheiſtical opinions, ſwears falſly by God, ſeeing he thereby deceives others.

* Provided the form doth not tend to diſhonour the true God, becauſe ſuch actions are not excuſable even by extreme neceſſity (§ 160). Hence it is plain, that an oath tendered to a Jew may be ſuited to his religion, becauſe ſuch a form contains nothing which tends to the diſhonour of the true God. But I doubt whether it be lawful for a Chriſtian judge to order a Mahometan to ſwear before him by Mahomet, as the greateſt prophet of the one God, eſpecially ſince the nature of the Mahometan religion is not ſuch, that an oath by the true God, the Creator of heaven and earth, does not equally bind them to truth, as if they at the ſame time made mention of that impoſtor.

Sect. CCVIII.

How an oath ought to be adminiſtred.

Moreover, ſince one ought not to ſwear raſhly, or without being called to it (206); hence it follows, that an oath is made for the ſake, not of the ſwearer, but of him who puts it to the ſwearer; and therefore it ought to be underſtood and explained by his mind and intention, and not according to that of the perſon ſworn; for which reaſon, all

all thoſe equivocations and mental reſervations, as they are called, by which wicked men endeavour to elude the obligation of an oath, are moſt abſurd. Thoſe interpretations of oaths are likewiſe abſurd, which require baſe or unreaſonable things of one, who of his own accord had ſworn to another not to refuſe him any thing he ſhould ask of him *.

* Tho' he be guilty in many reſpects, who takes ſuch an oath, becauſe he does it of himſelf, unneceſſarily and without being called to it (§ 206) ; and becauſe he thus ſwears before hand not to refuſe, without knowing what the perſon may demand, and ſo expoſes himſelf either to the danger of perjury, or of a raſh oath : yet by ſuch an oath no perſon is bound to fulfil what he promiſed by his oath, if the other, taking advantage of it, requires any thing of him that is impoſſible, unjuſt or baſe. For ſince he ſwore voluntarily, and of his free accord, his oath ought without doubt to be interpreted according to his own mind and intention. But no man in his ſenſes can be ſuppoſed to mean, to bind himſelf to any thing which cannot be done, either through phyſical impoſſibility, or on account of legal prohibition. Herod therefore ſinned, Mat. xiv. in promiſing to his daughter by a raſh oath to grant her whatever ſhe ſhould demand of him ; but he was yet more guilty in yielding to her when ſhe deſired John the Baptiſt's head.

Sect. CCIX.

The obligation and effects of an oath.

Again, an oath being an invocation of God, (§ 203), it follows that it ought to be religiouſly fulfilled ; that it cannot be eluded by quibles and equivocations, but that the obligation of an oath muſt yield to that of law : and therefore that it can produce no obligation, if one ſwears to do any thing that is baſe and forbidden by law ; tho' if it be not directly contrary to law, it be abſolutely binding, provided it was neither extorted by unjuſt violence, nor obtained by deceit (§ 107 & 109) : whence is manifeſt what ought to be ſaid of the maxim of the *canoniſts*, " That every oath ought

to be performed which can be ſo without any detriment to our eternal happineſs."

* It comes under the definition of *evaſion*, *cavillatio*, if one ſatisfies the words, but not the mind and intention of the impoſer: the impiety of which is evident. He who thinks of ſatisfying an oath by evaſion or equivocation, deceives another. But to deceive any perſon is in itſelf unjuſt (§ 199): it muſt be therefore much more unjuſt to deceive one by invoking God to witneſs, and as judge and avenger. An oath then excludes all cavils. Hence it is plain that Hatto archbiſhop of Mentz was guilty of perjury, when, having promiſed to Albertus, that he would bring him back ſafe to his caſtle, pretending hunger, he brought him back to breakfaſt, thinking that he had thus ſatisfied his oath. Otto Friſing. Chron. 6. 15. Marian. Scot. ad ann. 908. Ditmarus Merſeb. l. 1. at the beginning, wonders at this ſubtlety of the archbiſhop, and he had reaſon, ſince even the Romans would not have ſuffered a captive to eſcape without ſome mark of ignominy who had by ſuch guile deceived an enemy, Gell. Noct. Att. 7. 18. Of ſuch fraud Cicero ſays juſtly in his third book of offices, cap. 32. "He thought it a ſufficient performance of his oath: but certainly he was miſtaken: for cunning is ſo far from excuſing a perjury, that it rather aggravates it, and makes it the more criminal. This therefore was no more than a fooliſh piece of craftineſs, impudently pretending to paſs for prudence: whereupon the ſenate took care to order, that my crafty gentleman ſhould be ſent back in fetters again to Hannibal."

Sect. CCX.

He who does an injury, is obliged to make reparation.

We have ſufficiently proved that it is unlawful to hurt any one by word or deed, nay even in thought. Now, ſince whoſoever renders another more unhappy, injures him; but he renders one moſt unhappy, who, having injured him, does not repair the damage; the conſequence is, that he who does a perſon any injury, is obliged to make reparation to him; and that he who refuſes to do it, does a freſh injury, and may be truly ſaid to hurt him again; and that if many perſons have a ſhare in

in the injury, the ſame rule ought to be obſerved with regard to making ſatisfaction and reparation, which we laid down concerning the imputation of an action in which ſeveral perſons concur (§ 112 & ſeq.)*.

* Ariſtotle Ethic. ad Nicom. 5. 2. derives the obligation to make reparation from an involuntary contract: Pufendorff of the law of nature and nations, 3. 1. 2. deduces it from this conſideration, that the law againſt doing damage would be in vain, unleſs the law-giver be likewiſe ſuppoſed to will that reparation ſhould be made. But we infer this duty from the very idea of wrong or hurt. For he does not render us more imperfect or unhappy who robs us of any thing belonging to us, than he who having robbed us, does not make reſtitution or ſatisfaction. If therefore injury be unlawful, reparation or ſatisfaction muſt be duty.

Sect. CCXI.

What is ſatisfaction?

By *ſatisfaction* we here underſtand doing that which the law requires of one who has done an injury. Now, every perfect law requires two things, 1. That the injury be repaired *, becauſe a perſon is hurt or wronged. 2. That the injurious perſon ſhould ſuffer for having tranſgreſſed the law by doing an injury, becauſe the legiſlator is leaſed by his diſobedience or tranſgreſſion. And for this reaſon ſatisfaction comprehends both reparation and puniſhment, (Grotius of the rights of war and peace, 2. 17. 22. & 120). The one doth not take off the other, becauſe the guilt of the action for which puniſhment is inflicted, and the damage that is to be repaired, are conjunct in every delinquency. But of puniſhment in another place.

* If damage be done by the action of no perſon, no perſon is obliged to ſatisfaction; for what happens ſolely by divine providence, cannot be imputed to any mortal (§ 106). And hence it follows, that when a proprietor ſuffers any damage in this way, he is obliged to bear it.

For what is imputable to no perſon we muſt ſuffer with patience.

Sect. CCXII.

How it is to be made.

Damage done, is either of ſuch a nature that every thing may be reſtored into its former ſtate, or that this cannot be done. In the former caſe, the nature of the thing requires that every thing ſhould be reſtored into its firſt ſtate, and, at the ſame time, that the loſs ſhould be repaired which the injured perſon ſuffered by being deprived of the thing, and by the expences he was obliged to in order to recover it. In the latter caſe, the nature of the thing requires, that the perſon wronged ſhould be indemnified by as equal a valuation of his loſs as can be made ; in which regard is to be had not only to the real value, but to the price of fancy or affection. Pufendorff hath illuſtrated this doctrine by examples in murder, in maiming, in wounding, in adultery, in rapes, in theft, and other crimes. Puf. of the law of nature and nations, B. 3. c. 1.

REMARKS on this Chapter.

We ſhall have occaſion afterwards to conſider a little more fully with our Author, that natural equality of mankind upon which he founds our natural obligation to mutual love. Let me only obſerve here, that it is at leaſt an improper way of ſpeaking among moraliſts to ſay, " That all men are naturally equal in this reſpect, that antecedently to any deed or compact amongſt them, no one hath power over another, but each is maſter of his own actions and abilities ; and that none are ſubjected to others by nature." For we ought, as in phyſicks, ſo in morals, to reaſon from the real ſtate, frame, conſtitution, or circumſtances of things. And with regard to mankind, abſtractly from all conſideration of inequality occaſioned by civil ſociety, this is the true ſtate of the caſe : 1. " That men are born naturally and neceſſarily ſubject to the power and will of their parents ; or dependent upon them for their ſuſtenance and education. The author of nature hath thus ſubjected us. 2. Men are made to acquire prudence by experience and culture ; and therefore naturally and neceſſarily thoſe of leſs experience and leſs prudence, are ſubjected to thoſe of greater experience and prudence. There is naturally this dependence among mankind. Nay, 3. which is more, the Author of nature (as Mr.

Mr. Harrington ſays in his Oceana) hath diffuſed a natural ariſtocracy over mankind, or a natural inequality with reſpect to the goods of the mind. And ſuperiority in parts will always produce authority, and create dependence, or *hanging by the lips*, as the ſame author calls it. Such ſuperiority and inferiority always did univerſally prevail over the world; and the dependence or ſubjection which this ſuperiority and inferiority in parts or virtues creates, is natural. 4. Induſtry, to which, as the ſame excellent author ſays, *nature or God ſells every thing*, acquires property; and every conſequence of property made by induſtry is natural, or the intention of nature. But ſuperiority in property purchaſed by induſtry, will make dependence, *hanging*, as that author calls it, *by the teeth*. Here is therefore another dependence or ſubjection amongſt mankind, which is the natural and neceſſary reſult of our being left by nature each to his own induſtry." All theſe inequalities, or ſuperiorities and dependencies, are natural to mankind, in conſequence of our frame and condition of life. Now the only queſtion with regard to theſe ſuperiorities, and the right or power they give, muſt be either, 1. "Was it right, was it juſt and good to create mankind in ſuch circumſtances, that ſuch inequalities muſt neceſſarily happen among them?" To which queſtion, becauſe it does not belong immediately to our preſent point, it is ſufficient to anſwer, "That we cannot conceive mankind made for ſociety, and the exerciſe of the ſocial virtues without mutual dependence; and mutual dependence neceſſarily involves in its very idea inequalities, or ſuperiorities and inferiorities: and that as we cannot conceive a better general law, than that the goods of the mind, as well as of the body, ſhould be the purchaſe of application and induſtry; ſo the advantages ariſing from ſuperiority in the goods of the mind, or from ſuperiority in external purchaſes by ingenuity and induſtry, *i. e.* the authority the one gives, and the power the other gives, are natural and proper rewards of ſuperior prudence, virtue and induſtry." 2. Or the queſtion muſt mean, "Does it appear from our conſtitution, to be the intention of our Author, that man ſhould exerciſe his natural or acquired parts and goods for the benefit of his kind, in a benevolent manner, or contrariwiſe?" To which I anſwer, "That as it plainly appears from our conſtitution to be the intention of our Author, that we ſhould exerciſe our natural abilities to the beſt purpoſe, for our own advancement in the goods of the mind and of the body; and that we ſhould improve in both, and reap many advantages by improvement in both, the chief of which is ſuperiority over thoſe who have not made equal advances either in internal or external goods: ſo it as plainly appears from our conſtitution, to be the will and intention of our Author, that we ſhould love one another, act benevolently towards one another, and never exerciſe our power to do hurt, but on the contrary, always exerciſe it or increaſe it, in order to do good." If this appears to be the will of our Maker, from the conſideration of

our conſtitution and condition of life, then to act and behave ſo is right; and to act or behave otherwiſe is wrong, in every ſenſe of theſe words, *i. e.* it is contrary to the end of our make; and conſequently repugnant to the will and intention of our Maker. Now, that we are made for benevolence; and are under obligation by the will of our Maker, to promote the good of others to the utmoſt of our power, will be fully proved, if it can be made out, that we are under obligation by the will of our Maker, appearing from our make and conſtitution, to forgive injuries, to do good even to our enemies, and in one word, to overcome evil by good. If the greater can be proved, the leſſer involved in it, is certainly proved. And therefore, if it can be made appear, that by the law of nature, (in the ſenſe we have defined theſe words) we are obliged to benevolence, even towards our enemies, all that our Author hath ſaid about not injuring one by word or deed, or even by thought; and about the caution and tenderneſs that ought to be uſed in neceſſary ſelf-defence, will be indiſputable. Now, that it appears to be the will of our Author, from our make, that we ſhould be benevolent even to the injurious and ungrateful, muſt be owned by any one who conſiders, that reſentment in us is indignation againſt injuſtice or injury; is not, or cannot be otherwiſe excited in us; and therefore is not in the leaſt a-kin to malice; and that as reſentment is natural to us, ſo likewiſe is compaſſion. For if both theſe paſſions be in us, and we have Reaſon to guide them, as we plainly have, it is clear, that they muſt be intended to operate conjointly in us, or to mix together in their operations. Now what is reſentment againſt injury, allayed or tempered by compaſſion, under the direction of reaſon, but ſuch reſentment as the ſuppreſſion of injuſtice requires, moderated by tenderneſs to the unjuſt perſon? And what is compaſſion, allayed, mixed or moderated by reſentment againſt injuſtice, but ſuch tenderneſs towards the injurious perſon himſelf, as the preſervation of juſtice, and conſequently of ſocial commerce and public good, permits? This argument is fully illuſtrated in my *Chriſtian Philoſophy*, p. 395, *&c.* And therefore I ſhall not here inſiſt any longer upon it. The ſame thing may be proved, and hath been fully proved by moraliſts from other conſiderations. But I chooſe to reaſon in this manner, that we may ſee how reaſonings about duties may proceed in the ſame manner as phyſical reaſonings about the uſes of parts in any bodily frame, or the final cauſe of any particular bodily whole. For if it be good reaſoning to ſay, any member in a certain bodily organization is intended for ſuch an end in that compoſition, it muſt be equally good reaſoning to ſay, a moral conſtitution, in which there is a ſocial and benevolent principle, compaſſion, and many public affections, and no hatred or averſion or reſentment, but againſt injuſtice, together with reaſon capable of diſcerning public good, and delighting in it, is intended by its Author for the exerciſes of ſocial affections; for juſtice; nay, for benevolence, and for commiſerating

even the injurious, as far as public good admits that tenderneſs to take place.

Having mentioned the neceſſity of reaſoning from the frame of mankind, and our condition, in order to infer the will of our Creator concerning our conduct, it may not be improper to add, That there is no difficulty in determining the will of our Creator, even with reſpect to our conduct towards inferior animals, if we ſtate the caſe as it really is in fact, which is, "That ſuch is the condition of mankind by the will of our Maker, that our happineſs cannot at all be procured without employing certain inferior animals in labouring for us; nor even the happineſs of the inferior animals themſelves, in a great meaſure." For that being the caſe, tho' we can never have a right to employ inferior animals for our ſervice by compact, they being incapable of it, yet we have a natural right to it, a right ariſing from the circumſtances of things, as they are conſtituted by the Author of nature. But the right which ariſes from theſe circumſtances, is not a right to torment them unneceſſarily, becauſe not only our happineſs does not require that, but we really are framed by nature even to compaſſionate ſuffering brutes. But we ſhall have occaſion afterwards to ſhew more fully, that a right may ariſe from the nature and circumſtances of things, previous to compact or conſent; or where there cannot be any compact or conſent. Whoever would ſee the true meaning of the precept, *to love our neighbours as ourſelves*, fully and clearly laid open, may conſult Dr. Butler's ſermon already quoted upon the love of our neighbour. That the precept, *Do as you would be done by*, is not peculiar to Chriſtianity, but is a precept of the law of nature, and was known and inculcated by Confucius, Zoroaſter, Socrates, and almoſt all ancient moraliſts, Pufendorff hath ſhewn, and Mr. Barbeyrac in his hiſtory of the moral ſcience, prefixed to his notes on Pufendorff's ſyſtem: ſo likewiſe our Author in the following chapter.

CHAP. VIII.

Concerning our imperfect duties towards others.

Sect. CCXIII.

The order and connexion.

WE think our obligation not to hurt any perſon, and the nature of injury have been ſufficiently cleared and demonſtrated. The next thing would be to explain with equal care our obligation to render to every one his own, and the nature of that duty (§ 175); were not the nature of our hypothetical duties ſuch, that they could not be explained without

without having first considered the nature of our imperfect absolute duties. But this being the case, it is proper to begin with them; and this premonition is sufficient to skreen us against being charged with the crime reckoned so capital among the critics of this age (ne ὕςερον πρότερον) transgressing order designedly, and with evil intention.

Sect. CCXIV.

The foundation and division of imperfect duties.

The source of all these duties is *love of humanity* or *beneficence* (§ 84), by which we cheerfully render him whom we love, not merely what we owe him by strict and perfect right, but whatever we think may conduce to his happiness. But because *humanity* commands us to be as good to others as we can be without detriment to ourselves; and *beneficence* commands us to do good to others even with detriment to ourselves (§ 83); therefore our *imperfect duties* are of two kinds, and may be divided into those of *humanity*, or *unhurt utility*, and those of *beneficence* or *generosity*. Both are, for many reasons, or on the account of many wants, so necessary, that it is impossible for men to live agreeably or conveniently without them.

Sect. CCXV.

Axioms concerning them.

Since there can be no other measure with respect to these duties but the love of ourselves, and therefore we are obliged to love others as ourselves, (§ 93); the consequence is, that whatever we would have others to do to us, we ought to do the same to them (§ 88); whence above, in premising a certain principle to which all our duties to others might be reduced, we laid down this rule, *Man is obliged to love man no less than himself, and not to do to any other what he would think inexcusable if done to himself*, (from which principle we have deduced our perfect duties); *but, on the contrary, to do to others what he would desire others to do to him* (§ 93). Now hence

hence we ſhall ſee that all our imperfect duties may be clearly inferred.

Sect. CCXVI.

Our obligation to the duties which may be done to others without detriment to ourſelves.

First of all, none would have thoſe things denied to him by others which they can render to him without hurting themſelves; wherefore every one is obliged liberally to render ſuch good offices to another; and conſequently it is juſtly reckoned moſt inhuman for one, when it is in his power, not to aſſiſt another by his prudence, his counſel and aid; or not to do all in his power to ſave his neighbour's goods; not to direct a wanderer into the right road; to refuſe running water to the thirſty; fire to the cold; ſhade to thoſe who languiſh with exceſſive heat; or to exact any thing from another to his detriment, which can more eaſily, either without hurting ourſelves or any other, be procured ſome other way. This kind of benignity is ſo ſmall and trivial, that either by law or cuſtom, the duties of this claſs have paſſed almoſt every where into duties of perfect obligation *.

* Thus, among the Athenians, it was reckoned a moſt atrocious crime not to direct one who wandered, into his right road. Hence that ſaying of Diphilus, "Don't you know that it is amongſt the moſt execrable things, not to ſhew one his way." So by the Roman laws, one could by an action compel another, who was neither bound to him by any compact, nor by delinquency, to exhibit a thing. Latona in Ovid. Metamorp. 6. v. 349. appeals to cuſtom,

Quid prohibetis aquas? uſus communis aquorum eſt.

And Seneca, Controv. 1. ſays, "It is barbarous not to ſtretch out our arms to one who is falling, this is the common right of mankind," (*commune jus*) that is, a common right or duty by the conſent of all nations.

Sect. CCXVII.

It extends to thoſe things with which we abound.

It belongs to the ſame claſs of unhurt utility to communicate ſuch things to others as we can, (ſuch

(ſuch is our abundance), ſpare them without any loſs or hurt to ourſelves; and to diſpenſe among others things which would otherwiſe be loſt and periſh with us; inſomuch, that they are very inhuman who ſuffer things to corrupt and ſpoil, who deſtroy in the fire, throw into the ſea, or bury under ground things on purpoſe that no other may be the better for them *.

* This is alſo a very common ſort of humanity, or another very low degree of it. As therefore, they are very cruel and inhuman, who refuſe ſuch good offices to others, ſo they are very unequal prizers of their actions, who expect very great thanks on account of any ſuch good deeds, Terent. And. 2. 1. v. 31. ſays well, "It is not a mark of a liberal caſt of mind, to deſire thanks when one hath merited none." But who thinks the Calabrian did any conſiderable favour to his gueſt? to which Horace alludes, Ep. 1. 7. v. 14.

Non quo more piris veſci Calaber jubet hoſpes.
Tu me feciſti locupletem. Veſcere ſodes.
Jam ſatis eſt. At tu quantumvis tolle. Benigne:
Non inviſa feres pueris munuſcula parvis.
Tam teneor dono, quam ſi dimittor onuſtus.
Ut libet: hæc porcis hodie comedenda relinques.
Prodigus & ſtultus donat, quæ ſpernit & odit.

He is inhuman who can deny ſuch things to thoſe who ſtand in need of them: and he is more than inhuman, who when he gives them, appears to himſelf ſo wonderfully beneficent, that he would have a perſon think himſelf under perpetual and unpayable obligation to him on that account.

Sect. CCXVIII.

What if our humanity would be hurtful to ourſelves?

But ſince we are bound to render ſuch good offices to others from the love we are obliged to entertain towards others by the law of an infinitely good and merciful God (§ 215), and yet none is obliged to love another more than himſelf (§ 93); the conſequence is, that we may deny theſe good offices to others, if we foreſee the doing them may be detrimental to ourſelves or our friends; which, ſince it

it may eaſily happen in a ſtate of nature, where there is no common magiſtracy to protect and ſecure us, if we readily render theſe good offices even to our manifeſt enemies; there is therefore a plain reaſon why the good offices, even of *harmleſs uſe*, may be refuſed to an enemy in that ſtate, as being ill diſpoſed towards us; whereas in a civil ſtate to deny them raſhly to others under that pretext, would be very blamea ble.

* Thus in war we deny our enemies the benefit of watering, and have even a right to corrupt proviſions, that they may be of no advantage to our invaders. But all theſe things we have only a right to do as they are enemies. For otherwiſe, when they cannot hurt us, it is humanity that deſerves praiſe to aſſiſt enemies, e. g. when they are in captivity or in ſickneſs. And ſeeing in a civil ſtate, an enemy cannot eaſily hurt us, whom at leaſt the magiſtrate cannot reduce into order, he is moſt inhuman who refuſes to an enemy, to a ſcelerate, the offices of innocent profit or unhurt utility, ſince he is an object of commiſeration: "*If not the manners, yet the man, or if not the man, at leaſt humanity*," according to that excellent ſaying of Ariſtotle in Diogenes Laert. v. 21. For which reaſon, the inhumanity of the Athenians is ſcarcely excuſable, " who had ſuch an averſion to the accuſers of Socrates, that they would neither lend them fire, nor ſo much as anſwer them when they ſpoke, nor bath in the ſame water which they had uſed, but would order their ſervant to pour it away as polluted and defiled, till impatient of ſuch a miſerable ſtate of reproach, the wretches became their own executioners." Plutarch. de invid. & odio. p. 538.

Sect. CCXIX.

Humanity is due to enemies.

Yea rather, ſince the love which is the ſource of all theſe duties, is due, not for the merits of others, but on account of the equality of nature (§ 88), it is very evident, that even to enemies thoſe things in which we abound, and which we can give them without any hurt to ourſelves, ought to be given. And this humanity is ſo much the more ſplendid

and noble, the leſs hope there is of our ever returning into great friendſhip with the enemy to whom ſuch ſervices are rendered *.

* We know this is inculcated upon Chriſtians, Mat. v. 45. Luke vi. 35; and before their eyes the example of our heavenly Father is ſet, "Who maketh the ſun to ariſe, and his rain to fall upon the juſt and the unjuſt." But that right reaſon, from the conſideration of the equality of human nature, may diſcover this truth, is plain from hence, that Socrates ſet himſelf expreſly to refute this vulgar maxim, "That we are to do good to our friends, and hurt to our enemies." So Themiſtius tells us, Orat. ad Valent. de bello victis. And what could have been wrote by one unacquainted with the ſacred books, more excellent than this paſſage of Hierocles on the golden verſes of Pythagoras, p. 69. "Whence it is juſtly ſaid, that a good man hates no perſon, but is all love and benignity. For he loves the good, and does not regard the evil as his enemies. If he ſeeks out for a virtuous man, in order to aſſociate with him, and loves an honeſt man above all things, yet in his love and goodneſs he imitates God himſelf, who hates no perſon, tho' he delights in the good, and embraces them with a peculiar affection."

Sect. CCXX.

The degrees of relation and affinity ought to be conſidered.

But becauſe this love of humanity, from which theſe duties flow as their fountain or ſource, ought to have prudence for its director, which is that faculty by which things conducive to our own happineſs and that of others is diſcerned; hence it is conſpicuous, that regard ought to be had not only to perſons, but to the neceſſities they labour under; and therefore in like circumſtances, if it be not in our power to ſatiſfy all, greater humanity is due to a good man than to a ſcelerate; more is owing to a friend than to an enemy; more to a kinſman and relative than to a ſtranger; and more to him who is in greater, than to him who is in leſs indigence of our aſſiſtance; and therefore ſo far the illuſtrious Leibnitz defines very juſtly, juſtice to be *the love of a wiſe man* *.

* Hence

* Hence it is that Pythagoras has diſtinguiſhed certain degrees of love in his golden verſes, v. 4. *&c.* which are excellently interpreted by Hierocles, p. 46.

Inde parentis honos ſequitor : tum ſanguinis ordo :
Poſt alii ſunto, virtus ut maxima, amici, &c.

Sect. CCXXI.

Our obligation to beneficence.

That degree of love, which we called above *love of beneficence* (§ 214), is of a ſublimer kind, becauſe it excites us to exert ourſelves to the utmoſt, and even with detriment to ourſelves, to promote the good of others. Now, ſince what we would deſire to be done to us by others we are obliged to do to them (§ 88), and many caſes happen in which we ourſelves would be very unhappy unleſs others ſhould liberally beſtow upon us what we want, and there is none who does not deſire that others ſhould ſo treat him; the conſequence is, that we are obliged, in ſuch caſes, to ſupply others liberally with what they ſtand in need of, even with ſome detriment to ourſelves *.

* We are ſaid to give liberally, not what we lend, or give for hire, but what we beſtow on others, without hope of reſtitution or retribution. If I give that I may receive, ſuch an action is a kind of contract. But if I give without any deſire of, or eye to retribution or reſtitution, this is bounty or liberality. Seneca of benefits, c. 14. ſays, " I will entirely paſs thoſe whoſe good ſervices are mercenary, which, when one does, he does not conſider to whom, but for how much he is to do them, and which therefore terminate wholly in ſelf. If one ſells me corn when I cannot live without buying, I do not owe my life to him, Becauſe I bought it. I do not conſider ſo much the neceſſity of the thing to my life, as the gratuity of the deed, and in ſuch a caſe I would not have got, had I not bought; and the merchant did not think of the ſervice it would do me, but of his own profit: what I buy I do not owe." But tho' benefits ought not to be done with ſelfiſh views, yet none does good to another, without deſiring to bind the perſon he obliges to him by mutual love; and

and therefore the receiver by receiving tacitely obliges himſelf to mutual love.

Sect. CCXXII.

What is meant by beneficent, and what by officious.

A *benefit* is a ſervice rendered to one without hope of reſtitution or retribution; and therefore readineſs to render ſuch ſervices we call *beneficence*; as readineſs to do good offices, to lay on obligation of reſtoring or compenſating by ſervices to one's ſelf is called *officiouſneſs* by Sidon. Apollin. 23. v. 478. But tho' ſuch ſervices be not properly called *benefits*; yet they ought to be highly valued, and gratefully received, if they are greater than to admit of payment, or are rendered to us by one whom the nature of the good office did not oblige to do it *.

* This likewiſe is obſerved by Seneca, c. 15. "According to this way, one may ſay he owes nothing to his phyſician but his petty fee: nor to his preceptor, becauſe he gave him money. But among us, both theſe are greatly reverenced and loved. To this it is anſwered, ſome things are of greater value than what is paid for them. Do you buy from your phyſician life and health, which are above all price; or from your inſtructor in uſeful arts and ſciences, wiſdom, and a well cultivated mind. Wherefore, to them is paid not the value of the thing, but of their labour and their attendance on us; they receive the reward, not of their merit, but of their profeſſion." Afterwards he gives another reaſon why we owe gratitude to thoſe who render us ſuch good offices, cap. 16. "What then? why do I ſtill owe ſomething to my phyſician and preceptor, after I have given them a fee; why have I not then fully acquitted my ſelf? becauſe from being my phyſician and preceptor, they become my friend: and they oblige us not by their art, which they ſell, but by their generous and friendly diſpoſition."

Sect. CCXXIII.

Beneficence ought to proceed

Since therefore beneficence is readineſs to render ſuch offices to others as we have reaſon to think will be ſerviceable to them (§ 222), every one muſt ſee

ſee that they have no title to the praiſe of beneficence, who, as the ſervant in Terence, Hecyr. 5. 4. v. 39. " do more good ignorantly and imprudently, than ever they did knowingly, and with deſign (§ 48)," or who do good with an intention to hurt; or who do good only, becauſe they think the benefit will turn more to their own advantage than to that of the receiver. From all which it is manifeſt, that in judging of benefits the mind and intention of the benefactor are more to be conſidered than the act or effect itſelf.

from inclination to be uſeful to others.

* To illuſtrate theſe concluſions by examples; none will ſay, that a perſon is benefited by one, who not knowing any thing of the matter, delivers him letters with agreeable news; or by one who praiſes him merely to get him out of his place, that he may be lord of the hall; or by one who planted trees for his own pleaſure, when he enjoys the ſhade of them, without or contrary to his intention. To ſuch caſes belongs the elegant fable in Phædrus, 1. 22. of the weaſel, who being catched by a man, when it urged him to ſpare its life, becauſe it had cleared his houſe from troubleſome mice, had this anſwer:

Faceres, ſi cauſſa mei :
Gratum eſſet, & dediſſem veniam ſupplici :
Nunc quia laboras, ut fruaris reliquiis,
Quæ ſint roſuri, ſimul & ipſos devores,
Noli imputare vanum beneficium mihi.

For this fable, according to the interpretation of Phædrus himſelf, ought to be applied to them who ſerve their own ends, and then make a vain boaſt to the unthinking of their merit.

Sect. CCXXIV.

Since benefits flow from love, which is always joined with prudence (§ 83), it is plain that whatever is not agreeable to reaſon is profuſion, and any thing rather than liberality: nor are thoſe offices deſerving of the name of benefits, which proceed from ambition and vain-glory, more than from love, and are beſtowed upon the more opulent, and not the indigent;

Benefits ought to be diſpenſed with prudence.

gent*; upon unworthy perſons preferably to men of merit; or, in fine, which are done contrary to that natural order founded in natural kindred and relation, of which above (§ 220).

* For beſides, that ſuch benefits are ſnatched from the indigent, they are likewiſe not unfrequently baits to catch; and for that reaſon likewiſe they do not merit to be called benefits, Mat. v. 46, 47. Luke vi. 32. Beſides, as to the more opulent, whatever benefit is rendered to them is neither grateful, nor has it the nature of a benefit. Thus we know Alexander the Great mocked at the pretended favour, when the Corinthians offered him the right of citizenſhip, tho' they boaſted of having never made the compliment to any but Hercules and Alexander. Seneca of benefits, I. 13. But the memory of benefits formerly received from one yea: the cuſtoms of the ſtate in which we live, and other reaſons, may excuſe ſuch benefits: and therefore, at Rome none could blame this liberality of clients, becauſe the right of patronage there eſtabliſhed, required ſuch liberality from the clients to their patrons, Dionyſ. Halic. 2. p. 84. Plutarch. Romul. p. 24. Polyb. Hiſt. 6. p. 459. Nor were the Perſians blameable for bringing gifts to their king, ſince there was a law, "That every one ſhould make preſents to the king of Perſia according to his ability." Ælian. var. hiſt. I. 31.

Sect. CCXXV.

Benefits ought to be proportioned to the neceſſity and condition of perſons.

Beſides, becauſe benefits ought to be advantageous to perſons (§ 222), it is evident from hence, that benefits ought to be ſuited to every one's condition and neceſſities; and therefore that thoſe are not benefits which do no good to a perſon; much leſs ſuch as do him great hurt, or at leaſt are attended with conſiderable inconvenience to him*.

* He is not beneficent who gives a hungry perſon a jewel, to a thirſty perſon a fine garment, to a ſick perſon a feaſt. *Beſſus* did not ſurely deſerve to be called a benefactor, who put chains of gold upon *Darius*, Curt. l. 5. cap. 12. Finally, that Roman, who being ſaved from proſcription was carried about for a ſhew in a ludicrous manner, had reaſon thus to reproach his benefactor, and to ſay, "He owed

owed him no obligation for saving him, to make game and a show of him." Seneca of benefits, 2. 11.

Sect. CCXXVI.

The degrees of kindred and connexion are to be considered.

Since that love of humanity and beneficence which binds to render good offices, extends even to enemies (§ 219), it is clear that those have a much better title to our love, who have done us all the kindnesses they had in their power; and that they are the worst of men, nay, more hard-hearted than the most savage brutes, who are not won to love by favours: they are so much the more unjust that it cannot be denied, that by accepting favours, we bind ourselves to mutual love (§ 221).

Sect. CCXXVII.

The obligation to gratitude.

Love to benefactors is called *a grateful mind* or *gratitude*; wherefore, seeing one is obliged to love him from whom he hath received favours, the consequence is, that every one is obliged to shew gratitude in every respect: yet this duty is imperfect, and therefore one cannot be compelled to perform it; an ungrateful person cannot be sued for his ingratitude in human courts, unless the laws of the state have expresly allowed such an *action*. Some such thing we have an example of in Xenophon's institution of Cyrus, 1. 2. 7. p. 9. Edit. Oxon.

* Ingratitude is commonly distinguished into *simple*, of which he is guilty who does not do good to his benefactor to his utmost power: and *pregnant*, of which he is guilty who injures his benefactor. The former, Pufendorff of the law of nature and nations, 3. 3. 17, says, a man cannot be sued for at the civil bar; but mixed ingratitude he thinks not unworthy of civil punishment. But if we may say the truth, in this case the ungrateful person is not animadverted upon as such, but as having done an injury; and he is liable to punishment who does an injury even to a person from whom he never received any favours. However, we readily grant, that an injury is much more atrocious, when it is joined with that basest of vices, ingratitude,

titude. And therefore they are juſtly reckoned more wicked who are injurious to parents, inſtructors, patrons, than thoſe who only wrong ſtrangers, to whom they are under no ſpecial ties.

Sect. CCXXVIII.

The rules relating to it.

Seeing gratitude is love to a benefactor (§ 227), it follows, that one is obliged to delight in the perfection and happineſs of his benefactor; to commend and extol his beneficence by words, and to make ſuitable returns to his benefits; not always indeed the ſame, or equal, but to the utmoſt of his power; but if the ability be wanting, a grateful diſpoſition is highly laudable.

Sect. CCXXIX.

The obligation to the other.

In fine, ſince we are obliged, even to our own detriment, and without any hope of reſtitution or retribution, to do good to others (§ 221), the conſequence is, that we ought much leſs to refuſe favours to any one which he deſires with the promiſe of reſtitution or retribution; and therefore every one is obliged to render to another what we called above *officiouſneſs* (§ 222), provided this readineſs to help others be not manifeſtly detrimental to ourſelves (§ 93).

REMARKS on this Chapter.

It is not improper to ſubjoin the few following obſervations upon our Author's reaſoning in this chapter.

1. When duty is defined to be ſomething enjoined by the divine will under a ſanction, duties cannot be diſtinguiſhed into *perfect* and *imperfect* in any other ſenſe but this: "That ſome precepts of God give a right to all mankind to exact certain offices or duties from every one. But other precepts do not give any ſuch right." Thus the precept of God not to hurt any one, but to render to every one his due, gives every one a right to exact his due, and to repel injuries. But the precept to be generous and bountiful, gives no man a right to exact acts of generoſity and bounty, tho' it lays every man under an obligation to be generous and bountiful, to the utmoſt of his power. So that he who ſins againſt the former is more criminal, or is guilty of a

a higher crime than he who does not act conformably to the other. This is the only ſenſe in which duties can be called, ſome *perfect*, and others *imperfect*, when duty is conſidered, with our Author, as an obligation ariſing from the divine will commanding or forbidding. For all ſuch obligation is equally perfect, equally full. The diſtinction takes its riſe from the conſideration of what crimes do, and what crimes do not admit of a civil action, conſiſtently with the good order of ſociety; and it is brought from the civil law into the law of nature. But it would, in my opinion, be liable to leſs ambiguity in treating of the law of nature, inſtead of dividing duties into thoſe of *perfect* and thoſe of *imperfect* obligation, to divide them into greater or leſſer duties, *i. e.* duties, the tranſgreſſion of which is a greater crime, and duties the omiſſion of which is a leſſer crime: or, in other words, duties the performance of which may be lawfully exacted, nay compelled; and duties the performance of which cannot be compelled or even exacted. But our Author's terms mean the ſame thing, and cannot, if his definitions be attended to, create any ambiguity. However, we may ſee from his reaſoning in this chapter, the neceſſity (as we obſerved in our preceeding remarks) of having recourſe to internal obligation (as our Author calls it) or the intrinſic goodneſs and pravity of actions, in deducing and demonſtrating human duties.

2. Since our Author's reaſoning wholly turns upon the reaſonableneſs of this maxim, " Do as you would be done by; and do not to another what you would not have done by any one to you in like circumſtances." Perhaps ſome may have expected from him demonſtration of the reaſonableneſs of this maxim. Now this truth, which is indeed as ſelf-evident as any axiom in any ſcience, as for inſtance, " That two things equal to ſome common third thing, are equal to one another:" and which therefore, it is as hard to reaſon about as it is to demonſtrate any axiom, for the very ſame reaſon, viz. that it does not in the nature of the thing require or ſtand in need of any reaſoning to prove it: This truth may however be illuſtrated ſeveral ways, in order to make one feel its evidence and reaſonableneſs. As with Puſendorff, law of nature, &c. B. 3. cap. 2. § 4. thus: " It as much implies a contradiction to determine differently in my own caſe and another's, when they are preciſely parallel, as to make contrary judgments on things really the ſame. Since then every man is well acquainted with his own nature, and as well, at leaſt, as to general inclinations, with the nature of other men, it follows, that he who concludes one way as to his own right, and another way as to the ſame right of his neighbour, is guilty of a contradiction in the plaineſt matter: an argument of a mind unſound in no ordinary degree. For no good reaſon can be given, why what I eſteem juſt for myſelf, I ſhould reckon unjuſt for another in the ſame circumſtances. Thoſe therefore are moſt properly ſociable creatures who grant the ſame privilege to others which they deſire ſhould be allowed themſelves;

and those, on the other hand, are most unfit for society, who imagining themselves a degree above vulgar mortals, would have a particular commission to do whatever they please." He observes in another place, B. 2. c. 3. § 13. " For the easy knowledge of what the law of nature dictates, *Hobbes himself commends the use of this rule* (De civ. c. 3. § 26). *when a man doubts whether what he is going to do to another be agreeable to the law of nature, let him suppose himself in the other's room.* For by this means, when self-love, and the other passions which weighed down one scale, are taken thence and put into the contrary scale, 'tis easy to guess which way the balance will turn." He afterwards shews us it was a precept of Confucius, and of Ynca Manco Capace, the founder of the Peruvian empire, as well as of our Saviour. " And in answer to Dr Sharrock, who is of opinion (De off. ch. 2. n. 2.) " That this rule is not universal, because if so, a judge must needs absolve the criminals left to his sentence, in as much as he would certainly spare his own life, were he in their place ; and I must needs give a poor petitioner what sum soever he desires, because I should wish to be thus dealt with, if I was in his condition, &c." He replies, " The rule will still remain unshaken, if we observe, that not one scale only, but both are to be observed ; or that I am not only to weigh and consider what is agreeable to me, but likewise what obligation or necessity lies on the other person, and what I can demand of him without injuring either of our duties." Thus Pufendorff reasons about this principle. But both he and our Author seem to consider it not as a fundamental or primary principle of the law of nature, but rather as a Corollary of that law, which obliges us, *To hold all men equal with ourselves.* But it cannot be so properly said to be a Corollary from that principle, as to be the principle itself in other words. For what is the meaning of this rule, *To hold all men equal with ourselves,* but to hold ourselves obliged to treat all men as we think they are obliged to treat us ? The equality of mankind means equality of obligation common to all mankind, with regard to their conduct one towards another. Now, if any one seeks a proof of the reasonableness of holding all men equal in this sense, that it is reasonable for us to do to others what it is reasonable for them to do, or for us to expect they should do to us in like circumstances ; if any one, I say, should seek a proof of this maxim, he really seeks a proof to shew, that like judgments ought to be given of like cases, *i. e.* that like cases are like cases ; — and if, owning the truth of the proposition, he asks why it ought to be a rule of action, does he not ask a reason why a reasonable rule should be admitted as a reasonable rule ; or why reason is reason, as we had occasion to observe in another remark?

3. But in the third place, that we are made for benevolence, because we have benevolent affections, and our principal happiness consists in the exercise of the social affections, or the social

virtues ;

virtues; and our greatest and best security for all outward enjoyments, and for having and possessing the love of others, is by being benevolent;—that upon these and many other accounts, we are made and intended for benevolence, is as evident as that a clock is made to measure time, and in consequence of the same way of reasoning, viz. the way we reason about any constitution, or any final cause. We see what sad shifts they are reduced to, who would explain away into certain selfish subtle reflexions, all that has the appearance of social, kindly and generous in our frame; and the perplexity and subtlety of such philosophy is the same argument against it, which is reckoned a very good one against complicated, perplexing hypotheses in natural philosophy, compared with more simple ones. (See some excellent observations on Hobbes's account of pity in Dr. Butler's excellent sermon on compassion, in a marginal note.) Who feels not that we are naturally disposed to benevolence, and what is the way in which our natural benevolence operates, and so points us to the proper exercises of it, while Cicero thus describes it: "There is nothing, says he, so natural, and at the same time so illustrious, and of so great compass, as the conjunction and society of men, including a mutual communication of conveniencies, and general love for mankind. This dearness begins immediately upon one's birth, when the child is most affectionately beloved by the parent; from the family, it by degrees steals abroad into affinities, friendships, neighbourhoods; then amongst members of the same state; and amongst states themselves, united in interests and confederacies; and at length stretcheth itself to the whole human race. In the exercise of all these duties, we are farther disposed to observe what every man hath most need of, and what with our help he may, what without our help he cannot attain; so that in some cases the tye of relation must yield to the point of time; and some offices there are which we would rather pay to one relation than to another Thus you ought sooner to help a neighbour with his harvest, than either brother or a familiar acquaintance; but, on the other side, in a suit at law, you ought to defend your brother or your friend before your neighbour, &c." Cicero de fin. l. 5. c. 23. Who feels not that this is the language of nature; that thus our affections work; that thus nature moves, prompts and points us to work? And who can consider this natural tendency or course of our affections without perceiving by his reason, the advantage, the usefulness of this their natural tendency, with regard to ourselves and others equally; and consequently the fitness of our taking care that they should always continue to operate according to this rule, according to this their natural tendency? Or who does not feel that indeed this is the true account of human happiness, the happiness nature intended for us, our best and noblest happiness?

Happier as kinder! in whate'er degree,
And heighth of bliss but heighth of charity.
Essay on Man, Ep. 4.

But if nature points out this course, this regular course of our affections; if it is felt to be the state of mind that alone affords true happiness; and if the general happiness of mankind plainly requires this direction and course of our affections: If, in one word, nature dictates it, and reason must approve of it in every view we can take of it, in what sense can it be denied to be our natural duty and the will of our Creator? And is it any wonder, that this rule of conduct hath been known to thinking men in all ages (as we cannot look into ancient authors without clearly seeing it hath been) since every heart dictates it to itself? This rule, "Do as you would be done by," is a rule of easy application, and it is universal, or it gives an easy, ready and clear solution in all cases. This appears from our Author's preceding and following applications of it to cases: for it is from it alone he reasons throughout all his deductions of duties. And that it is an equal, just, or reasonable rule, cannot be denied without asserting this absurdity, That what is true and just in one case, is not always and universally true and just in all similar cases. Again, that we are made to love mankind, and to live in the exercise of love and benevolence, is plain from our make and frame, and the intention of our Maker thereby discovered to us, according to all the received rules of reasoning about final causes. And therefore the principles upon which our Author builds, are in every view of them beyond all dispute. He now proceeds to enquiries of a more complex nature; but he still continues to argue from the same self-evident truths.

CHAP. IX.

Concerning our hypothetical duties towards others, and the original acquisition of dominion or property.

Sect. CCXXX.

The connection.

WHat hath hitherto been explained, belongs partly to the *love of justice*, and partly to that which we call the *love of humanity and beneficence* (§ 84). From the latter we have deduced our imperfect duties in the preceding chapter; from the former our perfect ones are clearly deducible, which we said, consist in not injuring any person (and this

this we call an *abſolute duty*), and in rendering to every one his due (which we call an *hypothetical duty.)* Now, having treated of *abſolute duty* in the ſeventh chapter, we are now to conſider our *hypothetical duties* with the ſame care and accuracy.

Sect. CCXXXI.

What is meant by our own, by dominion, by poſſeſſion, by property, by community.

That is properly called one's *own* which is in his *dominion*. By *dominion* we mean the right or faculty of excluding all others from the uſe of a thing*. The actual detenſion of a thing, by which we exclude others from the uſe of it, is called *poſſeſſion*. Again, we claim a right to ourſelves either of excluding all others from the uſe of a thing, or of excluding all others, a few only excepted. In the former caſe, the thing is ſaid to be in *property*; in the other caſe, it is ſaid to be in *poſitive communion*, which is either *equal*, when all have an equal right to the common thing; or *unequal*, when one has more, or a greater right than another to that thing. And it again is either *perfect*, when every one has a perfect right to the common thing, or *imperfect*, when none hath a perfect right to it, as in the caſe of the ſoldiers of an army, to whom a certain reward in money is appointed by the prince. But if neither one, nor many have right or deſign to exclude from a thing not yet taken poſſeſſion of, that thing is ſaid to be in *negative communion*; and this communion alone is oppoſite to dominion, becauſe in that caſe the thing is yet under the dominion of no perſon.

* That dominion conſiſts ſolely in the faculty of excluding others from the uſe of a thing, is obvious. For all the other effects of dominion, which are uſually enumerated in the definition of it, may be ſeparated from it, and yet one may remain maſter or owner of it, or have it in his dominion. Thus, e. g. we may obſerve, that the right or faculty of receiving all the profits of a thing by uſufruct, is ſeparated from propriety, while the dominion remains

entire: and it is known, that the faculty of disposing of a thing does not belong to minors, whom none however will deny to have dominion. Whence Seneca of benefits, 7. 12. says, "It is not a proof that a thing is not yours, that you cannot sell it, waste it, &c. For even that is yours, which is yours under certain limitations and conditions." In fine, we find the faculty taken away in certain countries from the owner, of vindicating to himself from a third possessor, a thing lent or deposited, where the law takes place, *Hand muss hand wahren.* Since therefore that only ought to enter into the definition of a thing, which so belongs to its essence that it cannot be absent, but the faculty of excluding others from the use of a thing being taken away, one immediately ceases to have any dominion, it cannot be doubted but this alone completes the definition of dominion. And this I take to be Arrian's definition, when he says, one who hath dominion is, "τὸν τῶν ὑπ' ἄλλων σπουδαζομένων ἢ ἐκκλινομένων ἔχοντα ἐξουσίαν, He who hath those things which others desire or fly from in his power."

Sect. CCXXXII.

The right of man to created things.

Now since reason plainly discovers that men were created by God (127), it is manifest that our Creator must will that we exist. But he who wills the end, must be judged to will the means likewise. And therefore God must have willed that men should enjoy all things necessary to the preservation of their being which this earth produces. Further, God having given evident signs of his particular love to man, by having made him a most excellent creature, it cannot be doubted that he desires and delights in our perfection and happiness (§ 80). And by consequence he must will that we should enjoy even all things which can conduce to render our life more perfect, more satisfactory, more happy, provided we do not abuse them * (§ 90).

* It hath been called into question by some, whether man hath a right to the use of the brutes for the preservation of his life, which cannot be killed without their feeling pain? nay some have denied it, because they thought it

it an injury to the brutes, and not use but abuse of them, to kill them in order to feed upon them, especially since men may sustain their lives without such bloody revelling. Others add, that eating flesh is not wholsome, and renders men cruel and savage. This argument was first urged, we know, by Pythagoras, and afterwarrds by Porphyry in his books περὶ ἀποχῆς. See Scheffer de Philosoph. Italica, cap. 14. But in the first place, this whole hypothesis about injury done to brutes, is founded on another erroneous opinion of the transmigration of souls, or of their having souls in common with us, and therefore a common right with us (κοινῷ δικαίῳ ψυχῆς) as it is called by Pythagoras in Diogenes Laertius, 8. 13. in explaining which Empidocles says in the same author,

Nam, memini, fueram quondam puer, atque puella,
Plantaque, & ignitus piscis, pernixque volucris.

Add. Iamblichus's life of Pythagoras, 24. 108. and Porphyry's life of Pythagoras, p. 188. But it is false that there is any communion of right between us and the brutes (§ 90). And hence it is false, that an injury is done to the brutes. We are not therefore to abstain from things because we can be without them; for God not only wills that we exist, but that we live agreeably; and that use is not abuse, which is not contrary to the will of God. In fine, that unwholesomeness which they alledge, is not sufficiently proved, and most probably, it arises not from the moderate eating of flesh, but gluttony, and the abuse of created things, which we also condemn.

Sect. CCXXXIII.

Since God then hath given to man for his use and enjoyment all things conducive to render his life agreeable (§ 232), he undoubtedly wills that none should be excluded from any use of these things; and therefore, according to the intention of God in the beginning of things, all things were in a state of negative communion, and so were in the dominion of none * (§ 231).

Originally all things were in a state of negative communion.

* And thus not only the sacred records, Genesis i. 28, 29. but even the ancient poets describe the primæval state of mankind, which they have celebrated under the name

of

of the golden age; for then, as Virgil ſays, Georg. I. v. 125.

Nulli ſubigebant arva coloni,
Nec ſignare quidem, aut partiri limite campum
Fas erat: in medium quærebant: ipſaque tellus
Omnia liberius, nullo poſcente, ferebat.

They deny then, that there was at that time any diviſions of land into different properties marked by boundaries, but aſſert that all things were in common, and ſo left to the uſe of all mankind, that none could be excluded from the uſe of them.

Sect. CCXXXIV.

But it was lawful to depart from this ſtate, neceſſity ſo urging.

Whatever God willed, he willed for the moſt wiſe reaſons, and therefore it ought not to be altered by men but in caſe of great neceſſity. But ſince all the divine affirmative laws, ſuch as this is, "That all things ſhould be in common for the common uſe of all mankind," admit of exception in caſe of neceſſity (§ 159); and by neceſſity here is to be underſtood not only extreme neceſſity, but even ſuch as makes it impoſſible to live conveniently and agreeably (§ 158 & 232); the conſequence is, that men might, neceſſity ſo urging them, lawfully depart from that negative communion, and introduce dominion, which is oppoſite (§ 231) to negative communion.

Sect. CCXXXV.

What neceſſity urged men to introduce dominion.

Now it is very evident, that if mankind had been confined to a ſmall number, there would have been no need of any change with regard to the primeval negative community of things, becauſe the fertility of nature would have ſufficed to render the lives of all, if not agreeable, at leaſt commodious or tolerable. But ſo ſoon as mankind was ſpread over the whole earth, and diſperſed into innumerable families, ſome things began not to be ſufficient to the uſes of all, whereas other things continuing

continuing to be, becaufe of their vaft plenty, fufficient for all; neceffity itfelf obliged men to introduce dominion with regard to the things which were not fufficient for the ufes of all (§ 234), leaving thofe things only in their original negative community which are of inexhauftible ufe, or which are not requifite to the prefervation and agreeablenefs of life *.

* And hence the lawyers have pronounced fuch things common by the law of nature, §. 1. Inft. de rerum divif. and that not, " as thofe public things which are the patrimony of a whole people, but as for thofe things which are originally a prefent of nature, and have never paffed into the dominion of any perfon," as Neratius fays, l. 14. pr. D. de adqu. rerum dom. The beft and moft beautiful of things, on account of their abundance, have always remained in the primeval negative communion. Hence Petronius Satyr. c. 6. fays, " What is common, that is in its nature moft excellent? The fun fhines to all; the moon, attended with numberlefs ftars, even guides the wild beafts to their food. What is more beautiful than water? and it is for common ufe." Neither does any one affect dominion over flies, mice, worms, and other things, which are either hurtful, or of no benefit to mankind.

Sect. CCXXXVI.

This inftitution is not unjuft.

Dominion therefore was introduced, and negative community was abolifhed by neceffity itfelf. But that this inftitution of mankind is injurious to none is manifeft, becaufe in negative communion none has a right to exclude another from the ufe of things (§ 231); and therefore it muft be lawful to any one fo to appropriate to himfelf any thing belonging to none, that he could not afterwards be forced by any perfon to yield him the ufe of it, but might detain it to himfelf, and fet it afide for his own ufe *.

* For what none hath a right or intention to exclude me from the ufe of, that belongs to none. But a thing ceafes

ceafes to be none's, fo foon as I apply it to my ufes, and I have refolved to make ufe of my right granted to me by God (§ 232); becaufe fince he hurts and injures me, who endeavours to render me more imperfect or unhappy, (§ 178), he certainly injures me, who endeavours to deprive me of what I have taken to myfelf for the fake of my prefervation, and living agreeably. The fame happens in this cafe, that Arrian. differt. Epict. 2. 4. fays of the theatre, tho' it be pofitively common. "Is not the theatre common to all the citizens? But if one takes a place in it, turn him out of it if you can." And Seneca of benefits, 7. 12. "I have truly a place among the Equeftrian order; but when I come into the theatre, if thefe places be full, I have a right to a place there, becaufe I may fit there; and I have no right to a place there, becaufe all the places are poffeffed by thofe with whom I have my right in common.

Sect. CCXXXVII.

After that things are either pofitively common or in property.

When men, obliged by neceffity to it, have introduced dominion (§ 235), this muft confift either in pofitive communion, or in property (§ 231). Wherefore, from the moment men depart from negative communion, all things are either pofitively common to many, or they begin to be proper to particulars; and community arifes from the refolution of many to poffefs the fame thing undivided in common, and to exclude all others from the ufe of it *. But property takes its rife either from immediate occupancy and poffeffion at firft of a thing belonging to none, or from an after-deed, in confequence of a divifion or ceffion of things pofitively common.

* This, no doubt, was done at firft immediately, when families and tribes began to feparate and difperfe into different parts of the world. For then each family took poffeffion of fome region for itfelf in common, and without divifion for a while, till neceffity urging, they divided the common poffeffion, or by compact gave the liberty to each particular of occupying as much as he wanted. The antients mention feveral nations which in the beginning poffeffed

poſſeſſed whole provinces in common without diviſion, as the Aborigenes in Juſtin, 43. the Scythians and Getar. in Horace, Carm. 3. 4. the Germans in Tacitus, c. 26. the inhabitants of the iſland Lipara, the Panchæans and Vaccæans, Diodorus Siculus, Biblioth. v. 9 & 45.

Sect. CCXXXVIII.

Why it was neceſſary to depart from poſitive community.

Truly, if ſuch were the happineſs of mankind, that all were equally virtuous, we would neither ſtand in need of dominion, nor of any compacts, becauſe even thoſe who had nothing in poſſeſſion, would want nothing neceſſary to their comfortable ſubſiſtence. For in that caſe every man would love another as himſelf, and would cheerfully render to every one whatever he could reaſonably deſire to be done by others to him. And what uſe would there be for dominion among ſuch friends having all in common? But ſince, in the preſent ſtate of mankind, it cannot be expected that any multitude of men ſhould be all ſuch lovers of virtue, as to ſtudy the happineſs of others as much as their own; hence it is evident, that poſitive communion is not ſuitable to the condition of mankind, as they now are, and therefore that they had very good and juſtifiable reaſons for departing from it likewiſe *.

* Whoever mentions the being of ſuch a communion any where among mankind, repreſents at the ſame time theſe men as extremely virtuous. This there is reaſon to ſay of the church of Jeruſalem, Acts iv. 32. Nor did the poets think what they ſay of the community among mankind in the golden age could have been credited, if they had not alſo repreſented them as moſt ſtudious of virtue; who, as Ovid ſays, Metam. 1. v. 90.

vindice nullo,
Sponte ſua, ſine lege, fidem rectumque colebant.

The Scythians beyond the Mæotis, among whom Scymnus Chius tells us this community obtained, are ſaid by him to have been τȣ̀ς σφόδρα, ἐυσεϐεςάτȣς, a moſt pious race. Iamblichus in his life of Pythagoras, § 167, tells us, that Pythagoras derived his community of things from juſtice

justice as its source: But virtue, justice and piety becoming rare and languid amongst men, that this communion could not take place or subsist, is manifest.

Sect. CCXXXIX.

What are the original ways of acquiring dominion or property?

And hence also it is conspicuous how property was introduced, and what are the ways of acquiring property in a thing. For a thing is either still without dominion, or it is in the dominion of some person or persons. Now, in the former case we call the *original* ways of acquiring property with Grotius, those by which we acquire either the very substance of a thing yet belonging to none, or the accretions which may any how be added or accede to it. The first of which is called *occupancy*; the latter *accession*.

Sect. CCXL.

What are the derivative ways?

But if a thing be already in any one's dominion, then it is either in the property of many, or of a particular (§ 231). In the first case, things in common are appropriated by *division* or *cession*; in the latter by *tradition*. Nor is there any other *derivative* way of acquiring dominion, which may not be most conveniently reduced to one or other of these sorts.

Sect. CCXLI.

What occupancy is, and what a thing belonging to none?

Occupancy is taking possession of a thing belonging to none. A thing is said to belong to *none*, which none ever had a right to exclude others from the use of, or when the right of none to exclude others from it, is evidently certain, or when the right of excluding others from the use of it is abdicated by the possessor himself freely; in which last case, a thing is held *for derelinquished*. But seeing none has a right to exclude others from the use of things which belong to none (§ 231), the consequence is, that things belonging to none, fall

to

to the ſhare and right of the firſt occupants. Nor can this be underſtood to extend to things that are loſt, carried off by fraud or force, caſt over board in imminent danger of ſhipwreck, or taken away by brute animals; for in no ſenſe are ſuch things belonging to none, ſince they had owners, and theſe owners never abdicated their right and dominion *.

* Therefore the fiſher Gripus philoſophizes very ſoundly in Plautus, Rud. 4. 3. v. 32. concerning the fiſh he himſelf had caught in the ſea, when he pleads they were his own, becauſe none could juſtly exclude him from the uſe of them:

Ecquem eſſe dices mari piſcem meum?
Quos quum capio, ſiquidem cepi, mei ſunt: habeo pro meis:
Nec manu adſeruntur, neque illic partem quiſquam poſtulat.
In foro palam omnes vendo pro meis venalibus.

But he gives a very bad reaſon, when he claims to himſelf a purſe, which being loſt by ſhipwreck, he had brought out of the ſea in his net:

In manu non eſt mea,
Ubi demiſi rete atque hamum, quidquid hæſit, extraho.
Meum, quod rete atque hami nacti ſunt, meum potiſſimum eſt.

For to this Trachalio anſwers very right, v. 42.

Quid ais, impudens,
Auſus etiam, comparare vidulum cum piſcibus?
Eadem tandem res videtur?

Sect. CCXLII.

Occupancy is made by mind and body at once.

Occupancy being taking poſſeſſion of a thing belonging to none (§ 241), and poſſeſſion being detention of a thing, from the uſe of which we have determined to exclude others (§ 231), it is plain that occupancy is made by mind and body at once, and that intention alone is not ſufficient to occupancy, if another has a mind to uſe his right; nor mere taking poſſeſſion of a thing, without intention to exclude others from the uſe of it; but by the tacite conſent of mankind the declaration of

 intention

intention to appropriate a thing to one's ſelf, joined with certain ſenſible ſigns, is held for occupancy *.

* Thus one is reckoned to have taken poſſeſſion of a field, tho' he hath not walked round every ſpot of it, l. 3. § 1. l. 48. D. & l. 2. C. de adqu. vel amitt. poſſeſſ. if he hath teſtified by ſome ſign, ſuch as cutting a branch from the tree, *&c.* to thoſe preſent, his intention of appropriating that field to himſelf. But ſince theſe ſigns have their effect by tacite convention, they are not arbitrary ; and therefore, he who threw his ſpear into a city deſerted by its inhabitants, ſeems no more to be the occupant of that city than a hunter is of a wild beaſt, which, having flung his ſpear at it, he neither kills nor wounds. And hence may be decided the famous controverſy between the people of Andros and Chalcis, about their right of occupancy with reſpect to the city of Acanthos, the former pleading that their ſpy ſeeing himſelf outrun by the Chalchidian ſpy, threw the ſpear which he had in his hand at the city gate, which ſtuck there ; the other denying that cities could be occupied in this manner by throwing ſpears, and aſſerting their right to the city, becauſe their ſpy had firſt entred into it. The ſtory is related by Plutarch, Quæſt. Græc. 30.

Sect. CCXLIII.

And either in the lump, or by parts.

Moreover, ſince every thing may be occupied which is none's poſſeſſion (§ 241), it will therefore be the ſame thing whether whole tracts of land unpoſſeſſed be occupied by many in lump, or whether particular parts be occupied by particular perſons. The former, Grotius of the rights of war and peace, calls occupying *per univerſitatem*, by the whole ; and the latter, occupying by parcels, *(per fundos)*. But becauſe he who takes poſſeſſion of the whole, is judged to take poſſeſſion of every part, hence it follows, that when any number of men, as a people in an united body, ſeize on ſome deſolate tract of land by the whole, nothing becomes proper to any particular perſon, but all contained in that region, if particular parts be not taken

taken poſſeſſion of by particulars, belongs to the whole body, or to their ſovereign *.

* Hence, in a tract of land, particulars may appropriate each to himſelf a particular part, and yet the whole territory may belong to the people, or the united body. Dio Chryſoſtom in Rhodiaca 31. " The territory is the ſtate's, yet every poſſeſſor is maſter of his own portion."

Sect. CCXLIV.

Whether wild beaſts, fiſhes, birds, be things belonging to none.

None therefore can deny that *hunting*, *fiſhing*, *fowling*, are ſpecies of occupancy, not only in deſart places unpoſſeſſed, but likewiſe in territories already occupied, ſince ſuch is the abundance of wild beaſts, fiſh, and winged creatures, that there is enough of them for all men (§ 235); yet, if there be any good or juſt reaſon * for it, a people may, without injury, claim to themſelves all ſuch animals as are not under dominion (§243) or aſſign them to their ſovereign as his *ſpecial right*; and that being done, it becomes contrary to the law of juſtice for any one raſhly to arrogate to himſelf the right of hunting already acquired by another.

* Many ſuch reaſons, tho' not very proper ones, are accumulated by Pufendorff, of the law of nature, *&c.* 4. 6. 6. The one of greateſt moment is, that wild beaſts, fiſh and fowls, are not every where in ſuch exhauſtleſs abundance that the deſtruction of the whole ſpecies may not be feared, if the right of hunting be promiſcuouſly given to all (§ 235), whence we may ſee why men are nowhere forbid to hunt and kill ſavage beaſts, which are hurtful to mankind; nay, in ſome countries, rewards are offered to thoſe who can, by bringing their heads, ſkins, or talons to the magiſtrate, prove he hath cleared the province from ſuch peſts.

Sect. CCXLV.

What animals may be hunted.

But wherever the right of hunting is promiſcuous, reaſon plainly teaches that this right does not extend to tame animals, becauſe they are in domi-

nion,

nion, nor to creatures tamed by the care of men, while one poſſeſſes them, or purſues them with an intention to recover them, or hath not by clear ſigns manifeſted his deſign to relinquiſh them * : nay, that it does not extend to wild beaſts incloſed in a park, to a fiſh-pond, a warren, a bee-hive, &c. but to thoſe which, as *Caius* elegantly expreſſes it, l. 1. §. 1. de adqu. dom. *Terra, mari, cœlo capiuntur*, are caught in the ſea, air, or land.

* Thus he will hardly be excuſable, by a pretended right of hunting, who ſeizes a ſtag with bells about his neck, tho' wandering, if his owner be known: Nor is he to be defended, who keeps the maſter of a bee-hive, who is purſuing his bees, out of his court, that he may take poſſeſſion of them himſelf; tho' that ſeemed not unjuſt to the Roman lawyers, § 14. Inſt. de rerum diviſione. For tho' a maſter have the right to exclude others from the uſe of his own, yet he who enters our houſe to recover his own, does not uſe ours, but reclaims his own. And how can it be more juſt to keep a perſon out of our court who is purſuing his bees, than to drive a neighbour away from our houſe who comes to reclaim his hens which had flown into our court? Wherefore that law of Plato was much more equal, de legibus, l. 8. "If any perſon follows his bees, and another by moving the air invites them into his ground, let him repair the damage."

Sect. CCXLVI.

When animals fall to the ſhare of thoſe who take them.

Moreover, ſince beſides the intention of excluding others from the uſe of a thing, corporal poſſeſſion is required to occupancy (§ 242); the conſequence is, that it is not enough to wound a wild beaſt, much leſs is it ſufficient to have a mind to ſeize one that ſhall fall by its wound; but it is requiſite either that it be taken alive or dead by the hunters dogs, nets, or other inſtruments; for if neither of theſe be done, any one has a right to ſeize and kill a creature, tho' wounded by another, becauſe it is not yet made property *.

* But

* But there hath always been a great diversity of opinions about this matter; and hence it is, that the laws of countries are so different about it. See the different judgments of Trebatius and other Roman lawyers on this head, l. 5. D. de adqu. rerum dom. The Salic law, tit. 35. § 4. does not permit a wild beast that was so much as but raised by another's dogs to be intercepted by any one. The Langobard law, l. 1. tit. 22. § 4. & 6. adjudges to the seizer the shoulder with seven ribs, and the rest to the wounder. These, and other such like laws among the ancients are collected by Pufendorff of the law, *&c.* 4. 6. 10.

Sect. CCXLVII.

Whether occupancy by war be of this kind?

Another species of occupancy is called *occupancy by war*, by which it is asserted, that persons, as well as things, taken in lawful war, become the taker's by the law of nations, l. 1. §. 1. D. de adqu. vel amitt. poss. But because occupancy can only take place in things possessed by none (§ 241), and things belonging to an enemy can only be by fiction *, and free persons cannot so much as by fiction be deemed to belong to none; it follows, that occupancy by war does not belong neither to the original ways of acquiring, nor to occupancy, but must be derived from another source, even from the right of war itself.

* Pufendorff, of the law of nature, *&c.* 4. 6. 14. thus explains this fiction: "By a state of war, as all other peaceful rights are interrupted, so dominion thus far loses its effect with regard to the adverse party, as that we are no longer under obligation to abstain from their possessions, than the rules of humanity and mercy advise us. In war, therefore, the goods of one party, in respect of the other, are rendered, as it were, void of dominion. Not that men do by the right of war cease to be proprietors of what was before their own; but because their propriety is no bar against the enemy's claim, who may seize and carry away all for his own use." But when things are rendered void of dominion, none has a right to exclude others from the use of them (§ 231); now, an enemy always preserves his right of

of excluding an enemy from the uſe of his things; nor does he any injury to any one, while he fights for his own with all his might. Who then will call ſuch things, things void of dominion? which if it be ſo, an enemy does not loſe the things taken by his adverſe party, becauſe he has not the right of excluding an enemy, but for want of ſufficient force to repel his enemy.

Sect. CCXLVIII.

Of finding.

To occupancy *finding* is properly referred, ſince it conſiſts in taking hold of a thing belonging to none; and there is no doubt that a thing not yet poſſeſſed, or left by its poſſeſſor, falls to the finder, who firſt ſeizes it with an intention of making it his own; wherefore the law of the Stagiritæ, Biblienſes and Athenians, is contrary to the law of nature: "ἃ μὴ ἔθȣ, μὴ ἀνέλῃ." "What you did not place, do not take up," unleſs it be only underſtood of things loſt; Ælian. Hiſt. Var. 3. 45. 4. 1. Diog. Laert. 1. 57. Nor do they leſs err, who adjudge a thing found in common to the finder, and him who ſaw it taken up*. But this right ought not to be extended to things which a people poſſeſs themſelves of by the right of occupancy made by an united body in whole, or hath ceded to their ſovereign as a ſpecial privilege, which may be lawfully done, as we have already obſerved (§ 243).

* It was an ancient cuſtom to demand in common what was found, and it was done by a *formula* called, *in commune*, or among the Greeks κοινὸς Ἑρμῆς, or κοινὸν τῷ Ἑρμῇ, of which *formula* ſee Eraſmus in adagiis: Many things are noted with relation to it by the learned upon Phædrus Fab. 5. 6. v. 3. See likewiſe Plautus Rudent. 4. 3. v. 72. But ſince things in the poſſeſſion of none fall to the moſt early occupant (§ 241), and none has a right to exclude another from the uſe of ſuch things (§ 231); and he, in fine, who only ſeized a thing with his eyes, but does not take hold of it, cannot be ſaid to occupy (§ 242), it is evident that ſuch a one has no right to demand any ſhare of what is found, unleſs the civil laws of a country or cuſtom permits it.

Sect.

Sect. CCXLIX.

And things abandoned, as treasures.

Nor is it less manifest that things belong to the finder which are abandoned by one of a sound mind, and master of his actions, with intention to abdicate them; and therefore scattered gifts, nay, even treasures, whose former owners cannot be certainly known, which are found by accident, unless the people or their sovereign claim them to themselves (§ 243). About which matter various laws of nations are quoted by Grotius of the rights of war and peace, 2. 8. 7. Pufendorff 6. 13. and Hertius in his notes upon these sections; Ev. Otto upon the institutes, § 29. inst. de rer. divis. Yet regard ought to be had to the proprietor of the ground, as having a right to all the profits of it of every sort *. And therefore the emperor Hadrian, justly, and conformably to the laws of natural equity, adjudged one half of a thing found to the finder, and the other to the proprietor of the ground where it was found. Spartian in Hadriano, c. 18. §. 39. inst. de rerum divisione.

* This is so true, that some nations thought the finder was to be preferred, as the Hebrews, Mat. xiii. 44. Selden de jure nat. & gent. See Hebr. vi. 4. the Syrians, the Greeks, and not a few among the Romans. (See Philostrat. vita Apoll. Tyan. 2. 39. de vita Sophist. 2. 2. Plautus Trinum. 1. 2. v. 141. l. 67. Dig. de rei vind. Where a part is granted to the finder, there seems to be no distinction between one hired to dig our ground, and one not hired. For tho' hired workers acquire to us by their hired labour, yet that does not seem a just reason for a distinction, if one hires himself not to search for treasures, but to dig a pit, or for any other like work. See Corn. van Bynkersh. observ. 2. 4.

Sect. CCL.

What accession is.

Another original way of acquiring dominion is *accession*, by which is understood the right of claiming to ourselves whatever additions are made to a

 substance

ſubſtance belonging to us. Now, ſince ſubſtances belonging to us may be augmented either by natural growth, by our own induſtry, or by both conjointly; *Acceſſion* is divided by the more accurate doctors of the law into *natural*, *induſtrious*, and *mixed* *.

* Thus to nature we owe the breed of animals, increments by rivers, a new caſt up iſland, a forſaken channel: To our own induſtry, a new form, any thing added to what belongs to us, mixed or interwoven with it, joined or faſtened to it, by lead or iron, or any other way; writing upon our paper, painting upon our cloath or board, &c. And partly to nature, and partly to induſtry, the fruits of harveſt, theſe being owing conjointly to the goodneſs of the ſoil, and the clemency and favourableneſs of the weather, and to our own ſkill and labour. And therefore the firſt ſort are called *natural* increments, the ſecond *induſtrious* acquirements, and the third *mixed*. For what others add under the title of *fortuitous*, is more properly referred to the occupancy of things belonging to none.

Sect. CCLI.

The foundation of natural acceſſion.

As to *natural* acceſſion, what belongs to us either receives an addition we cannot certainly diſcover the origine and former owner of, or an addition by ſomething known to belong to another. In the firſt caſe, ſince a thing, whoſe maſter cannot be certainly known, belongs to none (§ 241), there is no reaſon why ſuch an increment may not go with the thing to which it hath acceded, and ſo be acquired to us. But in the other caſe, the thing hath an owner, who can by right exclude others from the uſe of it (§ 231); and therefore I have no more reaſon to think ſuch a thing, however it be added to my goods, is acquired to me, than when a ſtrong wind blows the linen of Titius, that were hung out in his garden, into my court *.

* No reaſon can be imagined why an owner, who is well known to be ſuch, ſhould loſe the property of any

thing

thing belonging to him while it ſubſiſts, if he hath neither abdicated his property, nor transferred it to another by any deed: And it would be cruel to take advantage of one's misfortune or calamity to deprive him of his right. If then one continues proprietor or maſter of a thing, which is added by whatſoever chance to our goods, he hath ſtill the right of excluding any other from the uſe of that thing (§ 231); and therefore the dominion of it cannot be acquired againſt his will.

Sect. CCLII.

Of the breed of animals in particular.

From the foregoing moſt evident principles, (§ 251), we may alſo conclude, that *offspring*, or a *birth*, the origine of which is not evident, (which often happens with regard to animals, and likewiſe to perſons born out of lawful marriage) follows the dam or mother as an acceſſory increment, and that Ulpian, l. 24. D. de ſtatu hominum, not without reaſon aſcribes this effect to the law of nature. But this does not appear equal if both parents be certainly known *, unleſs the male be kept at common expence for procreation, as a bull often is in common to many, or when the owner lets his bull or ſtallion to his neighbours for a certain hire.

* Hence with regard to ſlaves, a diviſion of children commonly takes place; ſo that the firſt belongs to the mother's owner, and the next to the father's, and thus the offspring is ſhared by turns between the two maſters. Of this I have diſcourſed in my Element. jur. Germ. 1. 1. 30. where I have quoted examples of it among the Wiſigoths and others, *&c.* From Goldaſt. rerum Alam. Tom. 2. charta 2. & Aventin. Annal. Boic. l. 7. 14, 23. p. 708.

Sect. CCLIII.

Of new iſlands, whether caſt up, or artificial.

Nor is it leſs difficult to determine to whom a new *iſland*, that ſtarts up in the ſea, or in a river, belongs. For ſince it is impoſſible to diſcover with certainty to whom the different particles of earth belonged which have coalited into an iſland (§ 251), it follows, that an iſland muſt be adjudged an acceſ-ſion

sion to the sea or river *; and therefore, if the sea or river belong to no person, the island likewise is without an owner, and must fall to the first occupant. But if, as often happens, either the sea or river belongs to a people or their sovereign (§ 243), that people or sovereign will have a just title to the island. In fine, since a thing which appertains to a known master, cannot be acquired by any person by accession (§ 251), an owner cannot lose his ground which is washed by a river or channel into a new island, as the Roman lawyers have acknowledged, l. 7. §. 4. l. 30. §. 2. D. de adqu. rer. dom.

* There is therefore no reason why a new island should accede to the neighbouring fields upon each side, if it is formed in the middle, or to the one of them to which it is nearest; which however several lawyers have asserted, § 22. Inst. de rer. div. l. 7. § 3. l. 29. l. 30. § 1. D. de adqu. rer. dom. For the particles of earth forming the island come from grounds in a way that it cannot be certainly determined from what possessors they were carried off, and it is more probable that they were washed from more remote than from nearer fields. Besides, the river itself sometimes sweeps along with it, particles washed from the bottom, which at last collecting, form an island, according to Seneca, nat. quæst. 4. 9. This however was the opinion of Cassius Longinus, which his followers afterwards defended as by league and compact. Aggen Urbic. de limit. agr. p. 57. But the Proculiani, whose leader was Labeo, have exploded it in their way, Labeo apud Paullum, l. 65. § 4. D. de adqu. dom. "Si id quod in publico innatum aut ædificatum est, publicum est: insula quoque, quæ in flumine publico nata est, publica esse debet."

Sect. CCLIV.

So likewise by alluvion, and the force of a river.

The same is to be determined of *alluvion*, and ground separated *by the force of a river*. For as to the former, as nothing certain can be known concerning the origine of particles gradually annexed to our ground (§ 251), there is no doubt but what is added to our ground in that manner is accession to

to us; and what is thus added to a public way, or any public ground, accedes to the public *. On the other hand, when the maſter of the ground carried off is known (§ 251), no change can be made in this caſe as to dominion, unleſs the maſter abdicates and leaves what is thus taken away from his poſſeſſion; which in governments is commonly inferred from the not claiming it during a certain time fixed by law, §. 2. Inſt. de rerum diviſ. l. 7. §. 2. D. de adqu. rerum dom.

* And upon this foundation is built the diſtinction of lawyers and meaſurers of ground between *arcifinious grounds*, which are not bounded by any other but their natural limits, and ſuch as are encompaſſed with artificial bounds, and parcelled out by a certain meaſure, as by the number of acres, l. 16. D. de adqu. Dom. l. 1. § 6. D. de flumin. of which difference between lands, ſee Iſidor. orig. 11. 13. Auctores de limitib. p. 203. edit. Guil. Goeſii. Jo. Fr. Gron. ad Grotium de jure belli & pacis, 2. 3. 16. 1. For what lies between artificially limited grounds and a river, it is either public, or the propriety of ſome private perſon. But in neither of theſe caſes, does any thing accede to limited ground.

Sect. CCLV.

By a river's changing its channel and inundation.

In fine, as to a river's *changing its channel*, if the channel it deſerts, as far as can be known, was in the dominion of no perſon, it cannot accede to thoſe who poſſeſs the adjoining lands in proportion to their grounds, as the Roman lawyers thought, l. 7. §. 5. D. de adqu. rer. dom. But becauſe the property of the river of which the channel is a part, is certainly known (§ 251), it will, as a part of the river, be his to whom the river belonged; as, for the ſame reaſon, the new channel, if again deſerted, without doubt belongs no leſs to the firſt maſters, than an overflown ground, after the water retires from it *.

* It

* It is otherwise, if the inundation be perpetual, so that it *becomes now sea where Troy stood*, according to the saying; for then the ground is as it were extinct, and can be of no utility to any one. But of a non-entity, or what can be of no advantage to any person, there can be no dominion, no propriety (§ 235). Whence it follows, that their case is extremely hard, who are still obliged to pay tributes or taxes for lands long ago swallowed up by an inundation, unless, perhaps, they may have deserved it by their negligence in restoring the dikes, tho' even a penalty in that case seems unreasonable and cruel: For why ought things to be burdened with taxes, or imposts to be exacted, when the propriety, the usufruct, the possession or passage are lost? l. 23. de quibus modis ususfr. amit. l. 3. § 17. l. 30. § 3. D. de adqu. possess. l. 1. § 9. D. de itin. actuque priv.

Sect. CCLVI.

Of accession by industry, first axiom.

Let us now consider *industrious* and *mixed* accession, concerning which some lawyers have treated with so much subtlety. And we think, if the things be joined by mutual consent, it cannot be doubted but each is master according to his proportion, and in this case there is a positive community introduced (§ 231). But we are here speaking of an accession made without the other's consent. Now, seeing a master has a right to exclude all from the use of what is his (§ 231), he has a right certainly to hinder any thing from being joined to what is his against his will. Wherefore, since what is added to any thing of ours, either renders it useless, or at least worse, or renders it more valuable and better, because he who renders our goods worse hurts us (§ 178); the consequence is, that he who has rendered our goods either useless or worse by any industrial accession, is obliged, taking the spoilt goods, to repair our damage; and if he did it by deceit, and with evil intention, he is likewise liable to punishment (§ 211).

Sect.

Sect. CCLVII.

Second and third axiom.

But if our goods are rendered better and more valuable by any artificial accession, then there is a great difference when the two things can be separated without any considerable loss, and when they cannot. In the former case, since the master of each part hath a right to exclude all others from the use of what belongs to him (§ 231); but that cannot now be done otherwise than by separating the two things; the consequence is, that in this case the things are to be immediately separated, and to each is to be restored his own part. But, in the other case, the joined things ought to be adjudged to one or other of the two, the other being condemned to pay the value of what is not his to the owner who is thus deprived of it *; and if there be any knavery in the matter, punishment is deserved (§ 211).

* For whosoever intercepts any thing from another, he stands in need of for his sustenance or agreeable living, injures him (§ 190); but he who injures one is bound to satisfaction (§ 210), which, when what is done cannot be undone, consists in making a just estimation of the thing, and paying it (§ 212); wherefore, he who desires to intercept any thing belonging to another person, and to appropriate it to himself, is obliged to pay its just value. Whence this law appears to be very equitable, "That none ought to become richer at the expence or detriment of another."

Sect. CCLVIII.

A fourth axiom, &c.

But since in the last case, the joined things are to be adjudged to some one of the two, there (§ 257) ought to be some good reason why one should be preferred (§ 177): because therefore, there can be no other besides the superior excellence of one of the two things, which is oftner measured by rarity and affection than by utility; hence we infer, that the rule which adjudges *the accessory to its principal*, is not always equal. Justinian himself,

felf, and before him Caius, acknowledged the abfurdity of it in the cafe of a picture, § 34. In. de rer. divif. l. 9. § 2. D. de adqu. dom. And therefore the joined things ought to be affigned to him whofe part is of the greateft price*, either on account of its rarity, or of his affection, labour, care and keeping; and the other ought to be condemned to make an equivalent to him for what was his, if he infifts upon it, and does not rather choofe to make a prefent of it to the other.

* The ancient lawyers did not found in this matter upon any certain natural reafon, and therefore divided into different opinions, as is obferved by Jo. Barbeyrac upon Pufendorff, of the duties of a man and a citizen. The firft who attempted to reduce this affair into order, and to diftinguifh things that had been confounded together, was Chrifti. Thomafius differtat. fingulari, de pretio adfectionis in res fungibiles non cadente, Hal. 1701, where he has by the fame principles moft accurately examined the doctrines of the Roman lawyers concerning acceffion by induftry.

Sect. CCLIX.

What is juft with refpect to fpecification.

Hence we may plainly fee what ought to be determined in the cafe of *fpecification*, by which a new form is given to materials belonging to another. For fince very frequently all the affection or value is put upon the form on account of the workmanfhip or art, and none at all is fet upon the fubftance (§ 258), a new fpecies will rightly be adjudged to him who formed it *; but fo as that he fhall be obliged to make a juft equivalent for the price or value of the materials, and fhall be liable to punifhment, if there be any fraud or knavery in the cafe (§ 256). So Thomafius, in the differtation above quoted, § 43. & feq. Yet for the fame reafon above mentioned, the owner of the fubftance ought to be preferred, if it be rarer and of greater value than the form added to it by another's labour and art: *e. g.* if one fhall make a ftatue or vafe of Co-

rinthian

rinthian braſs, amber, or any precious matter belonging to another, the owner of the materials ſhall have it, but he ſhall be obliged to pay for the workmanſhip, provided the faſhioner acted *bona fide*, *i. e.* without any fraudulent deſign.

* There is no ſolidity in the diſtinction by which Juſtinian propoſed to clear this intricate queſtion, § 25. Inſt. de rer. diviſ. whether the new form could be reduced without hurting the ſubſtance, or not? For there is no good reaſon why, in the former caſe, the owner of the materials, and in the latter the faſhioner ſhould be preferred, eſpecially, ſeeing the matter without the faſhion is frequently of very little value. (See Pufend. of the law of nature and nations, 4. 7. 10.) Yea ſometimes the faſhion, is of a hundred times more value than the materials. Now who will ſay in this caſe, that the form belongs to the owner of the ſubſtance, becauſe the faſhion may be deſtroyed, and the ſubſtance reduced to its firſt ſtate? But ſince the value of the planks can be more eaſily paid than the value of the ſhip made of them, who therefore will adjudge the ſhip to the owner of the planks, becauſe the ſhip can be taken down. If an old ſhip be repaired with another's timber, Julian follows our principle in this caſe, l. 61. D. de rei vind. and yet without doubt the materials can alſo be reduced to their former ſtate, even when a new ſhip is built with planks belonging to another, l. 26. pr. D. de adqu. rer. dom.

Sect. CCLX.

What with regard to adjunction, incluſion, &c.

Again, *adjunction* is no inconſiderable ſpecies of induſtrious acceſſion, when ſomething belonging to another is added to our goods by incluſion, by ſoldering with lead, by nailing or iron-work, by writing, painting, *&c.* Now ſince incloſing is often of ſuch a kind, that the things joined may be ſevered without any great loſs, in ſuch caſes the things may be ſeparated, and every one's own reſtored to him, and this is equal (§ 257): There is certainly no reaſon why the gold may not be reſtored to whom it belongs, when another's precious ſtone is ſet in it, and the gem to its owner. And the ſame holds with regard to ſoldering, faſtening, interweaving,

weaving, and other ſuch like caſes, when the things can be ſeparated without any conſiderable loſs: Otherwiſe the joiner ought to be preferred, becauſe the ſubſtance rarely admits of any price of affection * (§ 258).

* Beſides, it would not ſeldom be an inconvenience to the owner of the materials, if he were obliged to retain them with the acceſſion, and to pay the price of the thing adjoined, eſpecially if it be what he cannot uſe on account of his condition, age, or other circumſtances, *e. g.* if one ſhould add to the veſtment of a plebeian a *laticlave*, or much gold lace, the materials are in ſuch a caſe, as to uſe, rendered truly worſe to him, or quite uſeleſs. But whoever renders our materials worſe or uſeleſs to us, is obliged to take the ſpoilt goods, and to repair our damage; and if there be any fraud or knavery in the caſe, he is alſo liable to puniſhment (§ 256).

Sect. CCLXI.

What as to building upon, &c.

If any one builds upon his own ground with the materials of another perſon, when there was no knavery in the deſign, and the building is of timber, there is no reaſon why, if the miſtake be very ſoon diſcovered, the building may not be taken down, and the timber be reſtored to its proprietor * (§ 257). But if the building be of ſtone, or if the timber would afterwards be uſeleſs to its owner, it will then be moſt equal to ſay, that the builder ſhould have the property of the building, but be obliged to make a juſt ſatisfaction, for the materials, and be moreover liable to puniſhment, if there is any knavery in the caſe (257 and 258). If one build with his own materials upon another's ground, if the building can be taken down without any conſiderable loſs, it ought to be done (§ 257); or what admits of a price of affection ought to be adjudged to the proprietor of the ground (§ 258), unleſs the building be plainly of no uſe to the lord of the ground, in which caſe the

the builder retaining the building to himſelf, is bound to pay the worth of the ground, and if there be any bad intention, he is moreover liable to puniſhment.

* The reaſon why the *Decemviri* forbid timber edifices to be pulled down was, that cities might not be moleſted with ruins, l. 6. D. ad exhib. l. 7. § 10. de adqu. rerum dom. l. 1. D. de tigno juncto, and is merely civil, and has nothing in natural reaſon to ſupport it. Hence many nations, where the houſes were not built of ſtone but of timber, not only allowed but commanded by their laws buildings in this and like caſes to be pulled down. See jus. prov. Sax. 2. 53. and what I have obſerved on this ſubject in my Elements juriſ. Germ. 2. 3. 66. To which I now add the Lombard Conſtitution, 1. 27. 1.

Sect. CCLXII.

As to writing and painting.

There is leſs difficulty as to writing and painting. For ſince thoſe things upon which another ſets no value, are to be left to him who puts a value upon them (§ 258), and the value for the moſt part falls upon the writing and painting, and never upon the cloth or paper, the paper ought to yield to the writing, and the board or cloth to the painting, if the writer and painter will make ſatisfaction for them *. And if the painting and writing have no value, as if one ſhould ſcrible a little upon my paper, or dawb my board with fooleries, even in this caſe, the writer and painter ought to take the thing, and pay the value of the paper or board by the firſt axiom (§ 256).

* It is ſtrange that the Roman Lawyers, ſome of whom agreed to this principle, in the caſe of painting, ſhould not admit it in the caſe of writing. As if it were more tolerable that the writing of a learned man ſhould become an acceſſion to a trifle of paper, than that the painting of Appelles or Parrhaſius ſhould become an acceſſion to a contemptible piece of board. Beſides, when the Roman lawyers compare writing with building upon one's ground, § 23. Inſt. de rerum diviſ. l. 9. D. de adqu. dom. may it

 not

not very reaſonably be asked, why there ſhould not be room for the ſame compariſon with regard to painting? And what likeneſs can there be imagined between the ground upon which one builds, and the paper upon which one writes? The one we ſeldom or never can want without ſuffering very great loſs: The other we do not value, provided we receive ſatisfaction for it, or as much paper of the ſame goodneſs. This is a poetical reſemblance taken from the action of writing, upon which account the Latin writers uſed the phraſe *exarare literas* for *ſcribere.* But ſuch a ſimilitude of things is not ſufficient to found the ſame deciſion about them in law and equity.

Sect. CCLXIII.

With reſpect to confuſion and mixture.

Further, as to the *mingling* of liquids, or the *commixture* of dry ſubſtances, tho' the Roman lawyers have treated of a difference with much ſubtlety, l. 23. §. 5. D. de rei vind. yet there is none. For if things be mixed or confounded by the mutual conſent of parties, the mixed ſubſtance is common, and ought to be divided between them proportionably to the quantity and quality of the ingredients (§ 256). If it be done againſt the will of one of them, then the ſubſtance, which is of no uſe, ought to be adjudged to the mixer, and he ought to make ſatisfaction, and to undergo a penalty if he had any bad or fraudulent intention, (§ 256); but yet, if one would rather have a part of the ſubſtance than the price of his materials, there is no doubt that he now approves the mixture which he at firſt oppoſed, and therefore a proportionable part of the common matter cannot be refuſed to him *.

* For ſubſequent approbation is conſent, tho' it be leſs imputable than command and previous conſent (§ 112): Wherefore, if by an accidental confuſion of our metals, a matter of great value ſhould be produced, like the Corinthian braſs by the burning of Corinth; there can be no reaſon why we may not claim each a ſhare of the common matter: for ſince it would have been common if it had

had been made by our consent (§ 256), and approbation is adjudged consent (§ 112), there is no reason why it should not become common by approbation, and every one have his proportionable share.

Sect. CCLXIV.

About mixed accessions, sowing and planting.

To conclude; by the same principles may we determine concerning *sowing* and *planting*, which were above referred to the *class of mixed accessions*, (§ 250). For trees and plants, before they have taken root, may be severed from the soil without any great loss, and so be restored to their owners (§ 257); but when they have taken root, as likewise seed sown, seeing they cannot easily be separated from the soil, and yet do not admit of a price of fancy or affection, they are acquired to the proprietor of the soil, he making satisfaction for the value of the trees or seed, and the expences of culture (§ 258), unless, in this last case, the proprietor of the soil is willing to leave the crop to the sower for a reasonable consideration *.

* For which the lord of the soil may have just and proper reasons: As for instance, if the ground was ill-dressed or ill-sown, so that he has no ground to expect a good crop: Then the crop would be of little use to him, and the first axiom is in his favour (§ 256).

Sect. CCLXV.

About the fruits of trees in one's neighbourhood.

As to a *tree* in our neighbourhood, he who plants it, consents that a part of its branches should hang over into the court of his neighbour; and the neighbour, who has a right to exclude others from his court, by not doing it, also consents to it; wherefore the accession being made with the mutual consent of both parties, the tree is common, (§ 256); and for this reason, while it stands in the confines, it is common in whole, and when it is pulled up, it is to be divided in common: so that in the former case the leaves and fruits are in com-

mon; and in the latter caſe the timber is to be divided between the two neighbours in proportion *.

* This ſimplicity is preferred by our anceſtors to the ſubtleties of the Roman law, concerning the nouriſhment attracted by the roots of trees, which gradually changes their ſubſtance, l. 26. § 2. D. de adqu. dom. For the nations of a German extraction conſidered the branches of trees more than their roots, as we have ſhewn in our Elem. of the German law, 2. 3. 69.

REMARKS on this chapter.

The queſtions in this chapter, however intricate they may appear at firſt ſight, or as they are commonly treated by the doctors of law, are in themſelves very ſimple and eaſy. Nothing more is neceſſary than to ſtate them clearly, or in the ſimpleſt terms, in order to diſcover on which ſide the leaſt hurt lies. Our Author's diviſions and definitions are exceeding diſtinct: And all his determinations turn upon this ſimple principle he had in the preceeding chapters fully cleared, "That no injury ought to be done; and injuries that are done ought to be repaired." He ſets out in this chapter, as good order and method requires, by inquiring into the nature and origine of dominion and property. And tho' I think he hath handled this curious queſtion, which hath been ſo ſadly perplexed by many moraliſts, better than moſt others, yet ſomething ſeems to me ſtill wanting to compleat his way of reaſoning about it. Our Locke, in his treatiſe on Government, book 2. c. 4. as Mr. Barbeyrac hath obſerved in his notes on Pufendorff of the law of nature and nations, b. 4. c. 4. hath treated this queſtion with much more perſpicuity and accuracy than either Grotius or Pufendorff. The book being in every one's hands, I ſhall not ſo much as attempt to abridge what he ſays on the head. The ſubſtance of it is contained in this ſhort ſentence of Quintilian, Declam. 13. "Quod omnibus naſcitur, induſtriæ præmium eſt." "What is common to all by nature, is the purchaſe, the reward of induſtry, and is juſtly appropriated by it." Let us hear how our Harrington expreſſes himſelf upon this ſubject (the original of property) in his art of law-giving, chapter 1. at the beginning, in his works, p. 387 "The heavens, ſays David, even the heaven of heavens are the Lords, but the earth has he given to the children of men: yet ſays God to the father of theſe children, in the ſweat of thy face ſhalt thou eat thy bread, Dii laborantibus ſua munera vendunt. This donation of the earth to man, comes to a kind of ſelling it for induſtry, a treaſure which ſeems to purchaſe of God himſelf. From the different kinds and ſucceſſes of this induſtry, whether in arms, or in other exerciſes of the mind or body, derives the natural equity of dominion or property; and from the legal

eſtabliſhment

eſtabliſhment or diſtribuion of this property (be it more or leſs approaching towards the natural equity of the ſame) proceeds all government." Now, allow me to make ſome very important obſervations upon this principle, which, as ſimple as it appears, involves in it many truths of the laſt importance, in philoſophy, morality and politics. 1. That man is made to purchaſe every thing by induſtry, and induſtry only, every good, internal or external, of the body or mind, is a fact too evident to be called into queſtion. This hath been long ago obſerved. When Mr. Harrington ſays, " Nature or God ſells all his gifts to induſtry," he literally tranſlates an ancient Greek proverb: Θεοὶ τἀγαθὰ τοῖς πόνοις πωλοῦσι, (ſee Eraſmi adagia) as did the Latins in their many proverbial ſentences to the ſame purpoſe, " Labor omnia vincit:" " Omnia induſtriæ cedunt," &c. See Virg. Georg. 1. v. 121, &c. 2. But as ancient and evident as this obſervation is, yet none of the ancient philoſophers ever had recourſe to it in the celebrated queſtion, " Unde bonis mala, &c." *i. e.* about the promiſcuous diſtribution of the goods of fortune (as they are commonly called) in this life; tho' this fact contains a ſolid refutation of that objection againſt providence, and from it alone can a true anſwer be brought to it. Mr. Pope in his *Eſſay on Man*, ep. 4. v. 141, &c. (as I have taken notice in my *Principles of Moral Philoſophy*, part 1. chap. 1. and chap. 9. and part 2. chap. 3.) is the firſt who hath given the true reſolution of this ſeeming difficulty from this principle, that according to our conſtitution, and the frame of things, the diſtribution of goods internal or external, is not promiſcuous; but every purchaſe is the reward of induſtry. If we own a blind fortuitous diſpenſation of goods, and much more, if we own a malignant diſpenſation of them, or a diſpenſation of them more in favour of vice than of virtue, we deny a providence, or aſſert bad adminiſtration. There is no poſſibility of reconciling bad government with wiſdom and goodneſs; or irregularity and diſorder with wiſdom and good intelligent deſign, by any future reparation. But the alledgeance is falſe; for in fact, the univerſe is governed by excellent general laws, among which this is one, " That induſtry ſhall be the purchaſer of goods, and ſhall be generally ſucceſsful." And that being the fact, the objection which ſuppoſes promiſcuous, fortuitous, or bad government, is founded upon a falſity in fact. In fine, there is no way of proving providence, but by proving good government by good general laws; and where all is brought about according to good general laws, nothing is fortuitous, promiſcuous or bad. And not to mention any of the other general laws in the government of the world, conſtituting the order according to which effects are brought about; and conſequently the means for obtaining ends to intelligent active creatures; what better general law can we conceive with regard to intelligent active beings, than the general law of induſtry; or can we indeed conceive intelligent agency and dominion without ſuch a law? Are not the two in-

inseparable, or rather involved in one another? But where that law obtains, there is no dispensation or distribution properly speaking; for industry is the sole general purchaser, in consequence of means uniformly operative towards ends. But having elsewhere fully insisted upon this law of industry, in order to vindicate the ways of God to man; let me observe, 3. in the third place, Mr. Harrington is the first who hath taken notice, or at least fully cleared up the consequences of this general law of industry with respect to politics, that is, with respect to the natural procreation of government, and the natural source of changes in government. Every thing hangs beautifully and usefully together in nature. There must be manifold mutual dependencies among beings made for society, and for the exercise of benevolence, love and friendship; that is, there must be various superiorities and inferiorities; for all is giving and receiving. But dependence, which supposes in its notion superiority and inferiority, must either be dependence in respect of internal, or in respect of external goods; the former of which Mr. Harrington calls *hanging on the lips*, and the other *hanging on the teeth*. Now the law of industry obtaining amongst men placed in various circumstances (and all cannot be placed in the same) will naturally produce these dependencies. A greater share of wisdom and virtue will naturally procreate authority, and the dependence on the lips. [This perhaps is the meaning of that ancient saying of Democritus mentioned by Stobæus, serm. 27. "φύσει τὸ ἄρχειν οἰκήιον τῷ κρείσσονι," "Authority falls naturally to the share of the better, more excellent or superior."] And a greater share of external goods, or of property, naturally begets power, and the other dependence on the teeth. And hence it will and must always hold as a general law, That dominion will follow property, or that changes in property will beget certain proportional changes in government: and this consequently is the natural seed, principle or cause of procreation and vicissitude in government, as Mr. Harrington has demonstrated fully and accurately. I only mention these things here, because we shall have occasion to have recourse to them afterwards, when our Author comes to treat of government. The conclusion that more properly belongs to our present purpose is, 4. in the fourth place, It must necessarily have happened soon after the world was peopled, that all was, must have been appropriated by possession and industry: and therefore, at present, our business is to determine how, things being divided and appropriated, the duties of mankind stand. But it is clear, 1. in the first place, that suppose the world just beginning to be peopled, or suppose a considerable number of men just cast ashore upon a desart country (setting aside all compacts and regulations previously agreed upon) every one will have a right to the purchase of his industry; to the fruits of his labour; to improve his mind, and to all the natural benefits and rewards of that culture; and to the fruits of his skill, ingenuity and labour, to get riches,

riches, with all the natural benefits and rewards of them; but yet every one will be obliged, in consequence of what hath been already said of the law of love and benevolence, to exercise his abilities, and to use his purchases in a benevolent way, or with tender regard to others. This must be the case with regard to our right and obligation, previous to all compacts, conventions or regulations. 2. And where lands are already appropriated, and civil government settled, this is a true principle still, that one has a right to all the purchases of his industry, with respect either to external or internal riches, (if I may so speak) consistent with the law of benevolence, or the law of not injuring any one, but of doing all the good to every one in our power; and hence it is, that every one in formed society hath a right to his purchases by the arts of manufacture and commerce, *&c.* Tho' a state, to fix the balance of dominion or of government, may fix the balance of property in land, and likewise make regulations about money, (as in the Commonwealths of Israel, Lacedemon, Athens, Rome, Venice, &c. in different manners) in consequence of the natural connexion between the balance of property and the balance of dominion: Tho' this may be done in forming or mending government by consent, yet even where an Agrarian law obtains, this principle must hold true and be untouched, that every one has a right to the purchases of his industry, in the sense aboved limited: For otherwise, there would be no encouragement to industry, nay, all must run into endless disorder and confusion. 3. And therefore universally, whether in a state of nature, or in constituted civil governments, this must be a just, a necessary principle, that industry gives a right to its purchases, and all the benefits and rewards attending them. 4. And therefore, fourthly, it can never be true, that a person may not, as far as is consistent with benevolence, endeavour to have both power and authority. If we consider what would be the consequences of denying this principle, that is, of setting any other bounds to the purchases of industry but what the law of benevolence sets, we will soon see that this must be universally true. And if we attend to our frame, and reason from it to final causes, as we do in other cases, it is plain that there is in our constitution naturally, together with a principle of benevolence, and a sense of public good, a love of power (of *principatus*, as Cicero calls it in the beginning of his first book of offices) without which our benevolence would not produce magnanimity and greatness of mind, as that desire of power would, without benevolence and a sense of public good, produce a tyrannical, overbearing and arrogant temper. Some moralists do not seem to attend to this noble principle in our nature, the source of all the great virtues, while others ascribe too much to it (as Hobbes), and consider it as the only principle in our nature, without taking our benevolence and sense of public good, which are as natural to us, into the account, (See what I have said on this head in my *Principles of Moral Philosophy*)

Philosophy.) But both principles belong to our constitution; and therefore our virtue consists in benevolent desire of, and endeavour to have authority and power in order to do good. 5. It is in consequence of this principle, that it is lawful to have dependents or servants, and that it is lawful to endeavour to raise ourselves, or to exert ourselves to encrease our power and authority. The great, sweet, the natural reward of superiority in parts and of riches, and consequently the great spur to industry, is the dependence upon us it procreates and spreads. And why should this noble ambition acknowledge any other bounds but what benevolence sets to it: Any other limits but what the Author of nature intended should be set to it, or rather actually sets to it, by making the exercises of benevolence so agreeable to us, as that no other enjoyments are equal to them in the pleasure they afford, whether in immediate exercise, or upon after reflection; and in making mankind so dependent every one upon another, that without the aid and assistance of others, and consequently without doing what he can to gain the love and friendship of mankind, none can be happy, however superior in parts or in property he may be to all about him. Every man stands in need of man; in that sense all men are equal; all men are dependent one upon another; or every man is subjected to every man. This observation is so much the more necessary, that while some moral writers assert, that man has a right to all things and persons to which his power of subjecting them to his use can extend or be extended; others speak of our natural equality in such a manner as if nature had not designed any superiorities among mankind, and as if all desire of, or endeavours after power or authority were unlawful; which last must result in asserting, that all culture of the mind, and all industry are unlawful, because the natural consequence of the one is superiority in parts, and the natural effect of the other is superiority in property; while the other terminates in affirming there is no distinction between power and right, or between power rightly and power unreasonably applied, *i. e.* no distinction between moral good and ill, *i. e.* no distinction between reasonable and unreasonable; which difference must remain, while there is such a thing as public good or benevolence, or such a thing as reason, as hath been already fully proved. 6. If the preceeding principles be true, due attention to them will lead us through most of our Author's succeeding questions about derivative acquisitions and succession. Because the effect of property, which makes it the great reward of industry, is a right to dispose of our own in our life, or at our death, which admits no limitations but what benevolence sets to it; in consequence of which right and duty, succession to him who dies without making a disposition of his estate, ought to take place in the way a wise man, directed by benevolence, must be presumed to have intended to dispose of his own at his death, *i. e.* according to the natural course in which benevo-

lence

lence ought to operate and exert itſelf, already taken notice of. For when the will of a perſon is not declared, his will ought to be inferred from his duty. We ſhall therefore for ſome time have but little occaſion to explain or add to our Author.

CHAP. X.

Of derivative acquiſitions of dominion or property made during the life of the firſt proprictor.

Sect. CCLXVI.

Transition to derivative acquiſitions.

DOminion being acquired, a change ſometimes happens, ſo that one acquires either property or dominion in a thing, neither of which he before had; and ſuch *acquiſitions* we called above, (§ 240), *derivative*. Now, ſeeing the thing in which we acquire property was before that common: the thing in which we for the firſt time acquire dominion, was before that the property of ſome perſon: as often as we receive our own proper ſhare of a common thing, there is *diviſion*; as often as we acquire the whole thing in property, there is *ceſſion* *; and as often as another's property paſſes by his will into our dominion, there is, as we called it above (§ 240), *tradition*, or transferring.

* The term *ceſſion*, is ſometimes taken in a larger acceptation, ſo as to ſignify all transferring of rights or actions from one to another. But ſince in that ſenſe it may be comprehended under *tradition*, we uſe it here in a more limited ſignification, and mean by it, *the transferrence of right and dominion common to many, to one of the aſſociates made by the conſent of the reſt*. Thus, *e. g.* if co-heirs transfer their whole title of inheritance to one of the coheirs, they are ſaid to have *ceded* their title or right to him.

Sect. CCLXVII.

By them is made alienation neceſſary, voluntary, pure, or conditional.

In all theſe caſes, what was ours ceaſes to be ours any longer in whole or in part, and paſſes into the dominion or property of another perſon; and this

this we call *alienation*, which, when it proceeds from a prior right in the acquirer, is termed *necessary*; when from a new right, with the consent of both parties, it is called *voluntary* *. But the effect of either is, that one person comes into the place of another, and therefore succeeds both to his right in a certain thing, and to all the burdens with which it is incumbered. Alienation is called *pure*, when no circumstance suspends or delays the transference of the dominion; and when the transference is suspended, it is called *conditional* alienation.

* Thus the alienation of a thing common to many, which is made when one of the associates demands a division, is necessary, because he who insists upon a division has already a right in the thing. In like manner, the alienation of a thing pledged to one is necessary, because it is done by virtue of the right the creditor had already acquired in that thing. On the other hand, the alienation of houses, which, one who is to change his habitation, sells, is voluntary, no person having a right in them. Thus is the division in the Roman law to be explained, l. 1. D. de fund. dot. l. 2. § 1. D. de rebus eorum qui sub tut. l. 13. l. 14. D. fam. ercisc. and elsewhere frequently.

Sect. CCLXVIII.

And that either for the present time, or for a time to come.

Voluntary alienation cannot be understood or take place otherwise than by the consent of both parties: but there may be consent either for a *present* alienation, so that the dominion may be transferred from us to another in our own life, or for a *future* alienation, so that another shall obtain the possession of what is ours after our demise: and this consent to a future alienation, is either actual, or it is inferred from the design and intention of the person *. Now by the first of these is what is called *testamentary succession*; and by the latter is what is termed *succession to one who dies intestate*. We shall now treat of *present* alienation, and in the succeeding chapter we shall consider *future* alienation.

* We

* We therefore refer to future alienation, that possession of our goods which devolves upon a person after our death. If this be done by ourselves truly willing it, such a will is called a *testament*, and succession by virtue of such a will is called *testamentary succession*. But if it be inferred from the design and intention of the defunct, that he willed his inheritance to pass to certain persons, preferably to all others, this is *succession to an intestate*. Now, against both these ways of succession it may be objected, that no person can will any thing at a time when he cannot will at all; and that alienation cannot be made in this manner by a person while he lives, because he does not transfer neither right nor dominion to heirs while he lives; nor by a dead person, because, what he himself does not possess, he cannot transfer. And for these reasons, many very learned men deny that wills are of the law of nature, as Merill. obs. 6. 25. Thomas. not. ad tit. inst. de test. ord. p. 173. Gothofr. de Coccei. diss. de testam. princ. part. I. §. 22. & seq. If these arguments conclude against the foundation of wills made by the dying person's real declaration of his will, *i. e.* testaments, in the law of nature, they conclude more strongly against succession to intestates; and therefore all this doctrine we have now been inculcating concerning *future alienation* is a chimera. But as we easily allow that these arguments prove wills, as defined in the Roman law, not to proceed from the law of nature. (See my dissertation de testam. jure Germ. arct. limitibus circumscripta, § 3. so we think they do not conclude against all sorts of future alienation and succession. And what the law of nature establishes concerning them, shall be enquired in the following chapter.

Sect. CCLXIX.

What division is, and why we may demand it.

The transition from community to property is made by *division* (§ 266), which is an assignation to any of the associates of his competent part of the whole in positive community. Now seeing any associate or sharer can exclude all but his fellow associates or sharers from the use of the thing common to them (§ 231); the consequence is, that any of the associates may demand the use of the thing according to the share belonging to him, and therefore may

may demand a division; and the others, if they should oppose a division, are so much the less to be heard, that positive community doth very ill suit the present state of mankind * (§ 238).

* For since such a communion can only subsist among men endowed with great virtue, and it must become inconvenient in proportion as justice and benevolence wax cold and languid (§ 238), how can it hold long in our times? Which of two associates does not envy the other? Who is so careful about a common thing as his own? How apt is one to hinder another when he would medle with a common thing? Who does not endeavour to intercept a part of his associate's profits? Hence a thousand animosities and contentions, as Aristotle has demonstrated, in opposition to the Platonic communion, Polit. 2. 2. So that the Romans had reason to pronounce partnership and communion the mother of discord, and to give power to any associate to demand a division, l. 77. § 2. D. de legat. 2.

Sect. CCLXX.

How it may be done whether the subject be divisible or indivisible.

A subject is either easily *divisible* into parts, or it is *indivisible*; either because in the nature of the thing, or by laws and customs, it cannot be divided into parts. If therefore an associate demand a division of a thing in its own nature divisible, nothing is more equal than to divide it into as many parts as there are associates, and to commit the matter to the decision of lot. But if the thing be indivisible, it is either to be left to one of the associates, who can pay, and bids most for it, or to whom age or chance gives a preference, who, a valuation being made, is to satisfy the rest; or it is to be sold to the best advantage, and the price is to be divided proportionably among the sharers; or they are to have the use of it alternately, each in his turn.

* Thus we know the land of Palestine was divided among the Hebrews by lot, it having been separated in parts according to the number of their tribes. On the other hand,

hand, it often happens among co-heirs, that one of them, either with the confent of the reft, or by the decifion of lot, buys at a certain price the whole indivifible inheritance, and gives every one of the reft his fhare of the price. It likewife fometimes happens, that none of the co-heirs being rich enough to be able to fatisfy the reft, the inheritance is fold to a ftranger upon the beft terms, and the co-heirs divide the price. Finally, Diether. in contin. thefauri Befold. voce *Mutfchirung*, p. 417. Wehner obferv. pract. ibidem, p. 370, have obferved, that the alternate ufe of a common thing hath fometimes been agreed to by illuftrious brothers, which is in fome places called *Die Mutfchirung*. We have an inftance of it in the family of Saxony in Muller. in Saechfl. annal. p. 203.

Sect. CCLXXI.

When equality is to be obferved in divifion of things perfectly common.

Moreover, becaufe with regard to a common thing all may have equal right, or fome one may have more right than others (§ 231); it is evident that divifion is either *equal* or *unequal*. In the firft cafe, all are called to equal fhares, and in the fecond, to unequal fhares. Now, fince the natural equality of mankind obliges every one not to arrogate any prerogative to himfelf above any other without a juft reafon, in things belonging to many by perfect right (§ 177); it is manifeft that divifion ought to be equal, and that none ought to claim any preference, unlefs his right to it can be clearly proved *.

* Such a pre-eminence may be due to one by law, by compact, and by the laft-will of the former poffeffor, but not on account of greater ftrength or power, which Hobbes however feems to admit of, as giving a juft prerogative above others in divifion, (de cive, c. 3. 15). For if fuch a reafon be allowed to be juft, the divifion of the lion in the fable is moft fair and equal, Phæd. fab. 1. 5. who being to divide the prey with his fellow hunters, reafoned in this manner; " I take the firft fhare as called *lion*; the fecond as being ftronger you will give me; the third fhall follow me becaufe I am fuperior to you all, and woe be to him who dares to touch the fourth. Thus did

did his injuftice carry off the whole booty." Whoever can call this a fair and juft divifion, and he only, will grant what Hobbes afferts concerning a natural lot (fortem naturalem) as he calls fuperior power.

Sect. CCLXXII.

Whether it ought likewife to be obferved in the divifion of things imperfectly common.

Thefe rules belong to *perfect* community. But there is likewife an *imperfect* community, as often as none of the partners hath a perfect right to the thing (§ 231). Now, when by the bounty of another any thing becomes thus common to many perfons, it is at his option to give equal fhares, or to give more or lefs according to merit*. And in this cafe it would be moft unjuft for any one to complain that a perfon of lefs merit is put upon an equal footing with him (Mat. xx. 12, 15), or to take upon him to judge rafhly of his own merit; or to think benefits conferred upon this or the other perfon, may be pled as precedents.

* And this is that diftributive (διανεμητικὴ) juftice which ought to attend all thofe virtues which purfue the intereft of others; as liberality, compaffion, and rectoreal prudence, (the prudence of magiftrates in conferring dignities, &c.) Grotius of the rights of war and peace, 1. 18. who juftly remarks, that this juftice does not always obferve that comparative proportion, called *geometrical proportion*; and that therefore Ariftotle's doctrine on this head, is one of thofe things that often not always takes place, Grotius ibidem, n. 2. Nor is this opinion of Grotius overturned by Pufendorff of the law, &c. 1. 7. 9. becaufe he fpeaks of the diftribution of things owing to many of good defert by perfect right, as by promife or pacts. Then what Arrian fays is abfolutely true, ep. 3. 17. "Such is the law of nature, that he who excels another is in a better condition in refpect of what he excels in, than one who is worfe or inferior." But in matters proceeding from mere good-will, this law of nature can hardly be pled; nor could thefe veterans juftly complain of the emperor Hadrian, whom he ordered to rub one another in the bath, tho' fome days before he had made a prefent of fervants and money to one of their companions, whom he

faw

saw rubbing himself against the marble, Spartian Had. c. 17. because benefits are not to be wrested into examples.

Sect. CCLXXIII.

What is cession of a thing in common?

When a thing in common to many is resigned by the rest to one of the sharers, this is called *cession*. Wherefore, since in this case one succeeds into the place of all the others, the consequence is, that he succeeds into all their rights to that thing, and also into all the inconveniencies and burdens attending it (§ 267). And hence the Roman lawyers justly inferred that the same exceptions have force against the person ceded to, which would have had force against the ceder, l. 5. c. de her. vel act. vend.

Sect. CCLXXIV.

The obligation of the partners to make good.

Since, whether the thing in common be divided, or whether it be ceded to one of the sharers, this seems to be the nature of the deed, that those who get the thing by division or by cession, acquire the right of excluding all others from the use of that thing; (§ 231) it is manifest that in both cases the associates oblige themselves, that he to whom the thing is transferred, shall not be hindered from taking possession of it; and therefore oblige themselves to warranty, and to repair all his loss, if it be evicted by another with right, and without the possessor's fault; since they have their shares safe and entire, while the other hath got a thing with an encumbered or burdened title.

* Thus the doctrine of eviction, which hath found place likewise in tradition or transferring, flows from natural equity, tho' many things be added to it by the civil law for clearing it, with respect to the form and effect of it, *e. g.* as when it requires that one should transfer to another in his own name; that the possessor should inform the transferrer of the suit in time; that the thing be evicted for a cause preceeding the contract; and not by violence, but by right, *&c.*

For

For every one may difcern at firft fight, that all thefe conditions proceed from natural equity.

Sect. CCLXXV.

What tradition or delivery is, and if neceffary to the transference of dominion?

We proceed now to *tradition*, by which an owner who has the right and will to alienate, transfers dominion to another, accepting it for a juft caufe. I fay *dominion*. For tho' the Roman law orders the thing itfelf and its poffeffion to be transferred, and does fcarcely allow any right in a thing to arife previoufly to delivery : l. 20. C. de pact. yet fuch fubtlety cannot be of the law of nature *, as is juftly obferved by Grotius of the rights of war and peace, 2. 6. 1. 2. 2. 8. 25. and Pufendorff of the law of nature and nations, 4. 9. 6 : and the Roman lawyers themfelves acknowledge, " That nothing can be more agreeable to natural equity, than that the will of an owner willing to transfer his goods to another, fhould take place and be confirmed." § 40. Inft. de rer. divif. l. 9. D. de adqu. rer. dom. Whence we conclude, that the will of an owner concerning transferring his dominion to another, whether expreſly declared, or deducible from certain figns, is fufficient to transfer his dominion to another without delivery.

* Nor did the Romans themfelves anciently require that in every cafe. Delivery was only neceffary with refpect to things (nec mancipi) of which one had not the full poffeffion, as of provincial farms, Simplic. inter rei agrar. fcript. p. 76. Things (mancipi) of which one had the property and full poffeffion, were alienated (per æs & libram), fo that the conveyance and title being made, the dominion was immediately acquired. Varro de lingua lat. 4. Therefore, from the time that Juftinian took away the diftinction between *res mancipi* and *nec mancipi*, and the *dominium Quiritarum* and *bonitarium*. l. un. C. de nudo jure Quirit. toll. & l. un. C. de ufucap. transform, this law again prevailed, that dominion fhould be transferred without delivery or putting in poffeffion.

Sect.

Sect. CCLXXVI.

How it is done.

Since therefore the will of the owner to transfer his dominion to another, is equivalent to delivery, and is a valid transferrence of his dominion to another (§ 275), it follows, that it muſt be equal, whether one abſent, by interveening letters or words, or preſent, by giving the thing from hand to hand, or by inducting him into it, whether by long or ſhort hand, or by certain ſymbols, according to the uſage of the province (§ 242), or in whatever way he delivers it; ſo that nothing hinders but that a right may be conveyed or transferred to another without delivery, or by a *quaſi-delivery*.

* That ſymbolical delivery was not unknown to the Romans, appears from l. 1. § pen. D. de adqu. poſſ. l. 9. § 6. D. de adqu. dom. l. 74. D. de contr. empt. And the nations of German origine have been more acute in this matter: For they, in delivering conveyances and inveſtitures, made uſe of almoſt any thing, a ſtalk of a tree, a rod, a turf, a branch, a ſtraw of corn, a ſhrub, a glove, and other ſuch things. See my Elem. juris Germ. 2. 3. 74. & ſeq. to which belongs the *Scotatio* Danica, c. 2. 10. de conſuet. of which Strauchius Amœnit. jur. can. ecl. 5. and alſo Gundlingliana part. 7. diſſ. 4.

Sect. CCLXXVII.

Who has a right thus to transfer dominion.

But ſince he only who hath dominion can transfer it or alienate (§ 275), it is plain that tradition can have no effect, if it be made by one, who either by law, convention, or any other cauſe, hath no right to alienate; much leſs, if it be made by one who is not himſelf maſter of the thing; for none can convey a right to another which he himſelf has not *. But, on the other hand, it is the ſame in effect, whether the maſter himſelf transfers his right immediately by his own will, or by his order and approbation.

* Yet ſuch a tradition, if made to one without his knowledge that it is ſo, conſtitutes an honeſt poſſeſſor till the true owner claims his own. Grotius of the rights of war and peace, 2. 10. and Pufendorff of the law of nature and nations, 4. 13. 6. & ſeq. endeavour to ſhew what ſuch a poſſeſſor is obliged to do in point of reſtitution, what profits he may retain, and what he ought to reſtore, by a multitude of rules. We ſhall treat of this matter afterwards in its own place expreſly (§ 312), and ſhall there ſhew, that the whole affair is reducible into two rules, 1. An honeſt poſſeſſor, during the time that the true owner doth not appear, is in his place, and therefore has the ſame rights that the owner would have, were he in poſſeſſion. 2. When the true owner appears, he, if the thing ſubſiſts, is obliged to reſtore it with its exiſting profits; and if the thing does not ſubſiſt, he is only obliged to make reſtitution, ſo far as he hath been made richer by enjoying it.

Sect. CCLXXVIII.

By transference dominion is not transferred for every cauſe.

Becauſe alienation ought to be made for a juſt cauſe (§ 275); but it is evident, from the nature of the thing, that by a juſt cauſe muſt be underſtood one ſufficient for transferring dominion; therefore dominion cannot paſs to another if a thing be delivered to one in loan, in truſt, or letting; much leſs, if it be delivered to him on requeſt and conditionally, or upon any terms revocable at the pleaſure of the deliverer; yea, that no cauſe is ſufficient, if he, to whom a thing is delivered, does not fulfil his bargain.

* For when alienation is made to a perſon upon condition that he ſhall do ſomething, it is conditional. But becauſe the condition ſuſpends the transferrence of dominion, the conſequence is, that if the other does not perform what he promiſed, the dominion is not transferred, and the tradition becomes of no effect. Hence the Romans pronounced things bought and delivered not to be acquired to the buyer till the price was paid, or other ſatisfaction was made to the ſeller, § 41. Inſt. de rerum diviſ. Hence Varro ſays, de re ruſtica, 2. 2. "A herd ſold does not change its maſter till the money be paid." So Quintilian,

Declam. 336. "By what right can you claim the thing which you have not paid the price of?" So Tertullian de pœnitentia. "It is unreasonable to lay your hands on the goods, and not to pay the price."

Sect. CCLXXIX.

Nor does one always deliver with that design.

Besides, we said, in order to transfer, one must deliver with the design and intention of transferring dominion (§ 275). From which it is plain, that tradition cannot be made by infants, by madmen, by persons disordered in their senses, and other such persons, who are presumed not to know what is transacted: nor is it valid, if the owner gives a thing to one with the intention of lending, depositing, pawning it, or with any such like design; as likewise, that any one may reserve or except whatever right he pleases in transferring a thing; and that in this case, so much only is transferred as the alienator intended to transfer.

Sect. CCLXXX.

The origine of full, and of imperfect dominion.

Whence it is easy to conceive the origine of *imperfect* or *less full dominion*. For since by that is understood nothing else but dominion, the effects of which are inequally shared between two persons; it is highly probable that its origine is owing to transferrence, with exception, or with reservation of a part of the dominion; which being done, there are two masters, one of whom acquires the right of excluding all others from reaping and using the fruits and profits of the thing, and of taking them to himself; the other has the right either of concurrence with respect to the disposal of it, or of exacting something, by which the acknowledgment of his dominion may be evidenced *.

* The last kind of less full dominion, the lawyers of the middle ages called *directum*, the former they called *prius utile*; not so elegantly indeed, but by terms received at the bar and in the schools, and which therefore it is not

now time to discard. But the one may be called the *superior (dominus superior vel major)* the other the *inferior master (dominus minor)*, after the example of the Romans, who called the *patremfamilias*, *herum majorem*, and the *filiosfamilias*, *heros minores*, Plaut. Capt. 3. 5. v. 50. Trinum 2. 2. 53. Asinar. 2. 66.

Sect. CCLXXXI.

The various species of it.

Since the nature of the (dominium utile) or dominion with respect to the use, is such, that the superior owner reserves to himself the right of concurrence with regard to the disposal of the thing, or the right of exacting something in acknowledgment of his superior dominion (§ 280); the consequence is, that tho' there may be various kinds of less full dominion, yet the whole matter in these cases depends on the agreement of the parties. However, if one stipulates with the possessor of the thing delivered to him for homage and services, and that the thing be not alienated without his consent; hence arise *(feudum)* the right of *fief* or *fealty*; if he stipulates that an annual tribute shall be paid in acknowledgment of his superiority; hence arises *(jus emphyteuticum)* the right of *holding in fee*. Finally, if he stipulates for a ground-rent, hence arises *(jus superficiei)* the right of *ground-rent* *; and these are the principal kinds of dominion with regard to use in any nations.

* Of holding in fee we have an example, Gen. xlvii. 26. according to Josephus, Antiq. 2. 7. Tho' Hertius thinks the lands of Egypt were rather made censual, or paid a land-tax, ad Puffend. jus nat. &c. 4. 8. 3. But if he place the difference between holding in fee and censual, in this, that in the former the possessor has only the dominion of use, and in the latter full dominion, it may be clearly proved, that the Pharaoh's of Egypt had a part of the dominion. For the Words of the Patriarch Joseph are, Gen. xlvii. 23. " This day I have bought you and your lands to Pharaoh." Of the *(jus superficiarium)* or the right of ground-plots, there is a remarkable instance in Justin. Hist. 18. 5. Concerning the origine of fiefs the learned

learned are much divided, tho' they be common throughout all Europe. That there are many other ſorts of leſs full dominion among the nations of German extract, I have ſhewn in my element. juris Germ. 2. 2. 23. & ſeq.

Sect. CCLXXXII.

If not the thing itſelf, and the dominion of it, but a certain uſe only be conveyed, he who receives it, acquires a *ſervitude* upon a thing belonging to another; and if the uſe be reſtricted to the perſon and life of him who is to have the uſe, it is *perſonal*; and if it be annexed to the eſtate itſelf, the uſe of which is conveyed, it is *real*. Since therefore in all theſe caſes juſt ſo much right is transferred as the transferrer willed to transfer (§ 279), it follows, that in theſe caſes likewiſe the matter comes to be intirely an affair of an agreement between parties; and therefore, almoſt all the ſubtleties to be found in the doctors about ſervices are of poſitive law *.

* Hence the known tenets, that ſervice conſiſts not in doing, but in ſuffering or not doing; that it is indiviſible, that its cauſe ought to be perpetual, that becauſe the thing is to be uſed and enjoyed without hurting its ſubſtance, uſufruct does not take place, where there is nothing to be uſed or enjoyed: That there is a great difference between uſufruct, uſe, habitation, and the labour of ſervants; that ſome of theſe rights are loſt by change of ſtate, and ſome not: All theſe are of ſuch a nature that right reaſon neither preciſely commands them, nor oppoſes them, but they may be variouſly fixed and altered by pacts and conventions.

Sect. CCLXXXIII.

What right of pawn and mortgage, &c.

If a thing is delivered by the owner to his creditor, ſo that the deliverer continues to have the dominion, but the creditor has the poſſeſſion for his ſecurity, then the thing is ſaid to be *in pawn*. If it be delivered in theſe terms, that the creditor ſhall likewiſe have the fruits of it by way of intereſt,

it is called *jus antichreticum*. Finally, if the right of pawn be conveyed to a creditor without delivering the money, we call it *hypotheca*, *mortgage*. As therefore in the former cases the creditor has a right, the debt not paid, not only to retain the thing pawned, but also to dispose of it, and deduct from the price what is due to him; so, in the latter case, the creditor may prosecute his right of possession of what is pledged to him for his security, *i. e.* attach it; and then detain it until his debt be paid, or even dispose of it for his payment.

('Tis not improper to take notice here, that this sort of mortgage called *Antichresis* in the Roman law, is nearly the same with that which is termed *vivum vadium* in the English law; which is, when a man borrows a sum of money of another, and maketh over an estate of lands unto him, until he hath received the said sum of the issues and profits of the lands, so as in this case neither money nor land dieth, or is lost. And therefore it is called *vivum vadium*, to distinguish it from the other sort of mortgage called *mortuum vadium*, Coke 1. Instit. fol. 205. Domat's civil law, *&c.* by Dr. Strahan, T. 1. p. 356.)

Sect. CCLXXXIV.

How dominion passes to the accepter.

To conclude; we said, that by transferring, dominion passes to him who *accepts* of the transference (§ 275). But we *truly accept*, when we testify by words or deeds our consent that a thing transferred should become ours, and we are *presumed* to accept, whenever, from the nature of the thing, it cannot but be judged that we would not refuse or despise the thing one would transfer to us. In like manner, a thing may be *transferred* by the will of the transferrer, either expresly declared, or presumable from certain signs (§ 275). The most certain sign is gathered from his end and intention who hath acquired a thing, and hath bestowed care in keeping and preserving it *.

* *But*

* But the end and intention of men in acquiring and managing with great care, is always, not only that they may not want themſelves, but that it may be well with theirs when they are dead and ſtand in need of nothing. Hence Euripides in Medea, v. 1098.

Sed quibus in ædibus eſt liberorum
Dulce germen, eos video curis
Confici omni tempore,
Primum quidem, quo pacto bene ipſos educent.
Et unde victum *relinquant liberis.*

And in Iphigenia in Aulide. v. 917.

Res eſt vehemens parere, & adfert ingens deſiderium :
Communeque omnibus eſt, ut laborent pro liberis.

Sect. CCLXXXV.

Tranſtion to ſucceſſion by will, and to inteſtates.

Since therefore every one has a right to transfer his goods to others, and that alienation may be made upon any conditions (§ 267); the conſequence is, that it may be made upon this condition, that another may obtain, after the alienator's death, the dominion and poſſeſſion of a thing. Now, ſince this will may be truly declared, or can be certainly inferred from the intention of the acquirer; and ſince, in neither of theſe caſes, the real and expreſs acceptance of the other perſon to whom the transference is made, is neceſſary (§ 284); the former comes under the name of *ſucceſſion to a laſt-will or teſtament*; and the latter is the genuine foundation of *ſucceſſion to a perſon who dies inteſtate.*

CHAP. XI.

Of derivative acquiſitions by ſucceſſion to laſt-will and to inteſtates.

Sect. CCLXXXVI.

How a teſtament is defined by the Roman lawyers.

A *Teſtament*, in the notion of Civilians, is a ſolemn declaration of one's will concerning the tranſition of his inheritance and all his rights to another

another after his demiſe. And therefore, while the teſtator is alive, no right paſſes to his heirs; nay, not ſo much as any certain hopes of which they may not be fruſtrated; but the teſtator, while he lives, may alter his intention, and tearing or deſtroying his former will, make a new diſpoſition, or die without a will *.

* Hence theſe known maxims of law, That the will of a teſtator is ambulatory till his death: That the laſt will alone is valid, being confirmed by death; or as Quintilian, Declam. 37. expreſſes it, "That teſtament alone is valid after which there can be no other," and ſeveral other ſuch; yea, ſo far does this liberty with regard to teſtaments extend, that it is ſaid none can deprive himſelf of the liberty of changing by any clauſe of renunciation, nor even by confirming his former teſtaments with an oath, l. ult. D. leg. 2. Grotius de jure belli & pacis, 2. 13. 19. Leyſer. medit. ad Pand. ſpec. 43. n. 6. & 7.

Sect. CCLXXXVII.

Such a teſtament is not of the law of nature. Firſt argument.

But that ſuch a teſtament is not known to the law of nature is evident. For tho' right reaſon eaſily admits that ſolemnities ſhould be added to ſo ſerious an action, which is obnoxious to ſo many frauds; yet it implies a contradiction, to ſuppoſe a perſon to will when he cannot will, and to deſire his dominion to paſs to another, then, when he himſelf has no longer any dominion. This is ſo abſurd, that the Romans owned the contradiction could not be removed but by mere fictions *.

* For ſince a teſtator neither tranſacts any affair with his heir when he diſpoſes of his effects, nor the heir with the teſtator, when he acquires; and therefore, in neither caſe does any right paſs from the one to the other; many things were feigned by lawyers, always very ingenious in this reſpect, to reconcile theſe inconſiſtencies. Hence they feigned the moment of teſtament-making to be the ſame with the very inſtant of dying, and the inſtant of death to be the ſame with the moment of entering upon a ſucceſſion, bringing

bringing it back by fiction to the inſtant of death, l. 1. C. de 55. eccl. l. 54. D. de adqu. vel amitt. hered. l. 193. D. de reg. jur. Beſides, they feigned the inheritance not entered upon to be no perſon's, but to repreſent the perſon of the deceaſed, § 2. Inſt. de hered. inſt. l. 31. § ult. D. eod. l. 34. D. de adqu. rer. dom. Ant. Dadin. Alteſerra de Fict. jur. tract. 4. 2. p. 143. Jo. Gottfr. a Coccei. de teſtam. princip. part. 1. § 24.

Sect. CCLXXXVIII.

Another argument.

Add to this, that no reaſon can be imagined why the ſurvivers ſhould hold the will of the defunct for a law, eſpecially when it very little concerns one, whatever his condition be, after death, whether Dion or Thion enjoys his goods *: yea, the laſt judgments of dying perſons often proceed rather from hatred and envy than from true benevolence; and in ſuch caſes, it ſeems rather to be the intereſt of the deceaſed that his will ſhould not take effect, than that his ſurvivers ſhould religiouſly fulfil it. See our diſſertation de teſtam. jure Germ. arct. limit. circumſcript. §. 5.

* Hence Seneca of Benefits, 4. 11. ſays very elegantly "There is nothing we ſettle with ſuch religious ſolemn care as that which nowiſe concerns us." As this very grave author denies that theſe laſt judgments belong to men; ſo in the ſame ſenſe Quintilian Declam. 308, calls them a will beyond death. Since therefore the Civilians do not allow even a living perſon to ſtipulate, unleſs it be the intereſt of the perſon ſtipulating, § 4. Inſtit. de inut. ſtip. how, pray, can the ſame Roman lawyers before the validity of the wills of deceaſed perſons, when it is not for their intereſt? We readily grant that the ſouls of men are immortal, (which we find urged by the celebrated Leibnitz, nov. method. juriſp. p. 56.) but hence it does not follow, that ſouls delivered from the chains of the body retain the dominion of things formerly belonging to them, much leſs that they ſhould be affected with any concern about them.

Id cinerem & Manes credis curare ſepultos?
Virg. Æn. 4. v. 92.

Sect.

Sect. CCLXXXIX.

What with regard to the testaments in other nations.

Since therefore the law of nature scarcely approves of testament-making, as described by the Roman laws, *i. e.* as Ulpian elegantly defines it, tit. 20. " A declaration of our mind solemnly made to this end, that it may take place validly after our decease," (§ 286) ; the consequence is, 1. That it no more approves like customs of other nations ; and therefore, 2. That testaments of the same kind among Greeks or Barbarians, are no more of the law of nature and nations than those * of the Romans ; and for the same reason, 3. No nation hath accommodated their manners in this respect more to the simplicity of the law of nature than the Germans where there was no testament ; (*heredes successoresque sui cuique liberi, & nullum testamentum* ; Tacitus de mor. Germ. c. 20.)

* We find, from the time of Solon among the Athenians, a similar kind of testament, consisting in will on one side, with regard to what ought to be done after death, Plutarch. in Solone, p. 90. and among the Lacedemonians from the times of the Ephor Epitadeus. Plut. in Ægid. & Cleom. p. 797, and among other Greeks, who all agreed, in this matter, in the same practice, as Isocrates tells us, in Æginet. p. 778. There are likewise examples of such testaments among the Egyptians, as of Ptolomy in Cæsar de bello civil. 3. 20. Hirt. de bello Alex. cap. 5. Attalus King of Pergamos, in Florus, Hist. 2. 20. Hiero of Sicily, of whom Livy, 24. 4. and finally among the Hebrews themselves, of whose way of making wills, see Selden de success. ad leg. Heb. cap. 24. But that it was not of ancient usage among them,and that it owed its rise to the interpretations of their doctors, may be proved, amongst other arguments, by this consideration, that there is not a word in their language for a testament, and therefore they gave it a Greek name. See our Dissertation de testamentif. jure Germ. arct. limit. circumscript. § 6.

Sect. CCXC.

What with regard to Grotius's definition.

This being the caſe, Grotius gave a new definition of a *teſtament*, (of the rights of war and peace, 2. 6. §. ult.) he defines it thus; "Alienation to take place at the event of death, before that revocable, with retention of the right of uſe and poſſeſſion." But as this definition does not quadrate with what we commonly call *teſtament*, and is faulty in ſeveral reſpects; (Ziegler. ad Grotium, 2. 6. Pufend. de jure nat. & gent. 4. 10. 2. and the illuſtrious Jo. Gottfr. de Coccei. ibid. §. 4. & ſeq.) ſo it does not follow that teſtament-making is of the law of nature, becauſe that law does not diſallow of alienation at the event of death, revocable before that event, with retention of the right of poſſeſſing and uſing.

Sect. CCXCI.

What diſpoſition with regard to ſucceſſion after death is lawful by the law of nature.

But tho' the arguments above-mentioned plainly ſhew, that teſtament-making, according to the Roman law, is not of the law of nature, yet they are by no means repugnant to all diſpoſitions with reſpect to future ſucceſſion (§ 268) *. Let us therefore enquire what theſe are which are approved by the law of nature. And I anſwer, they are nothing elſe but pacts, by which dying perſons transfer a poſſeſſion itſelf, with the dominion to others; or men in good health give others the right of ſucceeding to them at the event of their death. For ſince we can diſpoſe of our own, not only for the preſent, but for the future (§ 268), we may certainly make a pact for transferring to another what belongs to us, either to take place at preſent, or at our death *.

* And in the earlieſt ages of the world men diſpoſed of their goods in no other way than this. So Abraham, having no children, had deſtined his poſſeſſions to his ſteward Eleaſar, Gen. xv. 3. no doubt, by ſome ſucceſſory, pact, or donation to take place at his death. The ſame Abra-

ham,

ham, his wife Sarah being dead, having children by Kethura, distributed, while he was in health, part of his goods by donation, and gave the residue to Isaac, Gen. xxv. 5, 6. Thus Cyrus also at his death, in the presence of Cambyses, gave his eldest Son the kingdom, and to the younger the lordships of the Medes, the Armenians and Cadusians, Xenoph. Cycrop. 8. 7. 3. Mention is made of a division and donation made by parents amongst their children upon the approach of death, Gen. xlviii. 22. Deut. xxi. 16, 17. 1 Kings, i. 35. Syrac. xxxiii. 24. and examples of it among the Francs are quoted by Marculf. Form. 1. 12. 2. 7.

Sect. CCXCII.

What successory parts are valid.

Since every one therefore hath a right to transfer his goods for the present or for the future, at the event of his death (§ 291); the consequence is, that there is no reason why pacts about succession may not be pronounced agreeable to the law of nature *. But, on the contrary, they ought to be deemed valid by the best right, whether they be reciprocal, or obligatory on one side only; and whether they be acquisitive, preservative, or remunerative; for as to dispositive pacts, that they bind the contracters, but not him whose heritage is disposed of, is evident, because he hath made no pact about his own.

* The Roman law does not approve of them, but pronounces them contrary to good manners, and liable to very fatal consequences, l. ult. c. de pact. But the objections taken from the desire of one's death, that may thus be occasioned, do not lie stronger against such compacts than against donations in view of death, which are valid by the Roman law. Nor are those sad effects which Rome once suffered by legacy-hunters, an argument of any repugnancy between such pacts relative to succession after death and honesty, because neither testament nor any other human institution, is proof against the abuse of wicked men.

Sect.

Sect. CCXCIII.

How one may dispose of his inheritance.

Besides, since such is the nature of all transfers of property, that any one may except or secure to himself any part of, or any right in his own he pleases, in which case, so much only is transmitted as the owner willed to transmit (§ 279); it is evident, that it is at the option of the owner to transfer the possession to his heir by pact at once; or the right only of succeeding to his estate after his death; to transfer either revocably or irrevocably *; with or without any condition; in whole or in part; so that there is no natural opposition between testate and intestate, as Pomponius seems to have imagined, l. 7. D. de reg. juris.

* Thus Abraham transferred an irrevocable right to his Sons by Kethura. And Telemachus in Homer's Odyss. B. 17. v. 77. transferred a revocable one to Piræus,

We know not yet the full event of all:
Stabb'd in his palace, if your prince must fall,
Us, and our house, if treason must o'erthrow,
Better a friend possess them than a foe:
Till then retain the gifts.

Sect. CCXCIV.

Whether an heir be obliged to accept of the heritage destined for him.

But because a thing may be accepted, not only actually but presumptively, when from the nature of the thing it cannot but be concluded, that one will not refuse what another designs to transfer to him (§ 284); it must therefore be the same in effect by the law of nature, whether one be present and declares his consent, or being absent, so that he cannot accept verbally, there is no ground to apprehend that the liberality of another will be disagreeable to him *; especially, if the inheritance designed for him be very profitable. There is however this difference between these cases, that in the former the heir acquires a valid and irrevocable right,

right, unleſs the owner hath expreſly reſerved to himſelf the faculty of revoking; whereas in the latter, there is liberty to revoke till acceptation be made: And whereas an heir having declared his conſent, cannot renounce the heritage he hath accepted, he whoſe conſent is preſumed, may enter upon or refuſe the heritage transferred to him, as he thinks proper.

* This whole matter is admirably illuſtrated by the chancellor of our college, my beloved collegue Jo. Petrus a Ludewig, in a diſſertation wrote with great judgment and erudition, de differentiis juris Romani & Germanici in donationibus, & barbari adnexus, acceptatione. Hal. 1721, where he hath ſhewn by impregnable examples and arguments, that neither the nature of donation, nor the Juſtinian, nor the Canon, nor the German law, requires acceptation made by words or other ſigns, and hath ſolidly refuted all objections.

Sect. CCXCV.

The foundation of ſucceſſion to one who dies inteſtate.

But if an owner can really and truly will that his goods may be transferred to one after his death (§ 291), there is no reaſon why as much ſhould not be attributed to one's will, preſumed from his end and intention, as to one's will expreſſed by words or ſigns (§ 268). Now we have already ſhewn, that it is not the end and intention of thoſe who acquire any thing, and take care of their acquiſitions, that they ſhould after their death be held for things relinquiſhed to the firſt occupant; but that they ſhould be advantageous to thoſe whom they love and wiſh well to (§ 284). But hence we may juſtly conclude the ſucceſſion to belong to them, preferably to all others, for whoſe ſake chiefly the defunct acquired and took care of his acquiſitions with ſo much concern and ſollicitude *.

* This is ſo true, that nothing ordinarily is ſo vexatious and tormenting to men as the thoughts of their eſtate's falling

ling to men they hate, after their death, and when, as the Poet has it,

Stet domo capta cupidus ſuperſtes,
Imminens lethi ſpoliis, & ipſum
Computet ignem.

Nothing is more certain than what Pindar ſays in a paſſage quoted by Puſendorff on this ſubject (of the law of nature and nations, 4. 11. 1.) " Riches which are to fall into the hands of a ſtranger, are odious to the dying perſon.

Sect. CCXCVI.

Axioms relating to it.

But becauſe this is not a duty of perfect obligation, but rather a ſpecies of humanity, which pays regard to perſons and ties or connexions, and therefore prefers relatives to ſtrangers (§ 220); hence we have reaſon to infer, that relatives exclude all ſtrangers from ſucceſſion, and that among relatives thoſe of the nearer degrees are preferable; and that many of the ſame line and degree have equal rights to ſucceſſion *.

* For tho' it be not always true, that kindred are dearer to one than ſtrangers: yea, ſo far is it from it, that love amongſt brothers is very rare: yet ſince, if the defunct had been of that opinion, nothing hindered him to have diſpoſed of his eſtate as he pleaſed, and to have left it to whom he liked beſt (§ 291); and he choſe rather to die without making ſuch a diſpoſition; he cannot but be judged not to have envied the inheritance of his goods to his relatives, whom natural affection itſelf ſeems of choice to call to the ſucceſſion. But one is nearer, not only in reſpect of degree, but likewiſe in reſpect of line. For Ariſtotle hath juſtly obſerved, that natural affection falls by nature upon the deſcending line, and failing that upon the aſcending line, and failing both theſe upon the collateral, Nicomach. 8. 12. Hence Grandchildren, tho' in the ſecond degree, are nearer than a parent, and a great grandfather, tho' in the fourth degree, is nearer than a brother, &c.

Sect. CCXCVII.

The succession of children.

Since of relatives the more remote are excluded by the nearer (§ 296), but none can be reckoned nearer to one than children are to their parents; therefore they are justly preferred in succession to their parents before all others, and that without distinction of sex or age *: For as to the preference given in some countries to males, and to the first-born, that, because it is making an unequal division among equals, proceeds from civil law, pact, or some other disposition; and so it is not of the law of nature (§ 271).

* But if the thing be indivisible, there is no doubt it may (ceteris paribus) be left to the first-born, on condition that he make satisfaction to the rest (§ 270). The first-born are wont to have a special prerogative, if the heritage be indivisible; especially if it be a crown or sovereignty. Cyrus in Xenophon says elegantly, "This also I must now declare to you, even to whom I leave my kingdom, lest that being left doubtful, should occasion disquiets. I love you, my sons, both with equal affection: But I order that the eldest should govern by his prudence, and do the duty of a general, when there shall be use or occasion for it, and that he should have, in a certain suitable proportion, the larger and superior use of my demesnes." Tho' the affections of kings be equal towards all their children; yet the nature of government itself seems to require, that sons should be preferred in succession to sovereignty to daughters, and amongst them the eldest to the younger, insomuch that it is become, as Herodotus says, a received law in all nations, l. 7. p. 242. and what is done against this rule, is, according to the ancients, against the law of nations. See Justin. Hist. 12. 2. 24. 3. Liv. 40. 9.

Sect. CCXCVIII.

Legitimate children only succeed to the father,

But if in succession to parents children be justly preferable to all others (§ 297), and this may be concluded from the presumed will of parents, (§ 295); the consequence is, that it ought to be certainly

certainly known who is the child. But because that cannot be ascertained except in the case of lawful marriage; hence we infer, that legitimate children only, even posthumous ones, and not illegitimate ones, or bastards, succeed to a father; but that all children succeed promiscuously to a mother; tho' none will deny that a father may take care of his illegitimate children in his disposition.

but to the mother even illegitimate children succeed.

Sect. CCXCIX.

Besides, it may be inferred from the same will of parents (§ 295), that the succession of descendents extends not only to children of the nearest, but of the more remote degrees; and therefore that grandsons and grandaughters are admitted to inherit, as well as sons and daughters; and that not only if there be no children of the first degree, but if they concur with them; so that the right of representation, by which children of the remoter degrees succeed into the room of their parents, and receive their portion, is most agreeable to the law of nature.

How grandchildren succeed.

* And this is the foundation of the succession of children of the first degree, *in capita*, by heads, and those of remoter degrees, *in stirpes*, by descent. That this is consonant to the law of nature appears even from hence, that if contrariwise, all should succeed *in capita*, the condition of the surviving children would be rendered worse by the death of a brother or sister, and the condition of grandchildren would be bettered by the death of their parents, and so there would be no equality among them. For if the father were worth a hundred pieces, and had four children, each would get twenty five pieces. Now suppose one of the four, contrary to the course of nature, to have died before the father, leaving seven grandchildren to him: in that case, if all succeeded *in capita*, each would get ten pieces; and thus by the brother's death, the three children of the first degree would have lost forty five pieces, and the seven grandchildren would have gained as much by the untimely death of their father. But since no reason can be

assigned why the death of a brother should diminish the patrimony of the surviving brothers or sisters, and add to that of the grandchildren; no reason can be given why both should be admitted to succession equally *in capita*.

Sect. CCC.

What if none other exist?

From the same rule, that the nearest of many relatives are to be preferred (§ 296), it follows, that grandchildren are to be preferred both to the parents of the grandfather, tho' nearer in degree, and to his brothers and sisters, tho' equal in degree. For one is to be judged nearer, not only in respect of degree, but chiefly in regard to line (§ 296) *. But whether natural equity in this case calls grandchildren to succession by heads, or by descent, may be easily understood from what hath been said in the preceding scholium.

* For no reason can be brought, why the condition of one issue should be bettered and another worsted by the untimely death of parents; which must however be the case, if the grandchildren surviving their parent should be admitted by heads: Because, suppose a man worth a hundred pieces to have four sons, and to have by the first, one, by the second, two, by the third, three, and by the fourth, four grandchildren alive; if the sons had survived they would have received each twenty five pieces, and have consequently transmitted each to his children as much. But if they dying, the grandchildren be admitted to succession by heads, each would get ten pieces, and thus the one grandchild by the first son would lose fifteen pieces, the two by the second five, and the three by the third would gain five, and the four by the fourth would gain fifteen. But if this be unreasonable, it must be unreasonable to admit grandchildren in this case to succession by heads.

Sect. CCCI.

Succession in the ascendent line.

Since, failing the line of descendents, the nearest is the ascendent (§ 296), hence it is plain, that the mournful succession to their children is due to the progenitors *, and in such a manner, that the

the nearer in degree excludes the more remote, and thoſe of the ſame degree come in equally. Nor does the law of nature in this caſe ſuggeſt any reaſon why the inheritance of children ſhould be divided among many of the ſame degree according to lines; ſo that theſe, and like caſes, muſt rather be left to the determination of civil laws.

* This is ſo agreeable to right reaſon, that whereas the divine law eſtabliſhed this order of inheritance, that the ſons ſhould ſtand firſt, the daughters next, then the brothers, and in the fourth place the uncles by the father's ſide, Num. xxvii. 8. & ſeq. Philo remarks, that ſomething ought here to be ſupplied by right reaſon. "For it would be fooliſh (ſays he) to imagine, that the uncle ſhould be allowed to ſucceed his brother's ſon, as a near kinſman to the father, and yet the father himſelf be abridged of that privilege. But in as much as the law of nature appoints (*where by the law of nature Philo undoubtedly underſtands the order of nature*) that children ſhould be heirs to their parents, and not parents to their children, Moſes paſſed this caſe over in ſilence as ominous and unlucky, and contrary to all pious wiſhes and deſires, leſt the father and mother ſhould ſeem to be gainers by the immature death of their children, who ought to be affected with moſt inexpreſſible grief: Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preſervation of decency and order, and for the continuing the eſtate in the ſame family." Nor do the Talmudiſts reaſon otherwiſe about ſucceſſion in the aſcendent line. See Selden de ſucceſſ. in bona def. ad leges Hebr. cap. 12. where this matter is fully and accurately handled.

Sect. CCCII.

Succeſſion of collaterals.

It follows from the ſame principle (§ 296), that failing both the aſcending and deſcending line, the ſucceſſion to inteſtates devolves on the collateral kindred, according to the degree of nearneſs in which they ſtand; nor is there any reaſon why the *right of repreſentation* ſhould take place among collaterals *; much leſs is there any reaſon why duplicity of ties, or the origine of the goods ſhould

make any difference. In this case, many of the same degree equally divide the inheritance: nor is there any difference how far they may be removed from the defunct, seeing it was in his power to appoint another heir, if he had no mind they should be made happy by his estate.

* For since succession belongs preferably to those for whom the defunct chiefly acquired and managed with care (§ 295), and experience shews us, that affection is commonly no less ardent towards the remoter than the nearer descendents: Hence it is justly concluded, that grandfathers had no inclination to take from their grandchildren what was due to their parents; and on account of this presumed inclination or will, they ought to succeed to the rights of their parents. On the other hand, the same experience teaches us, that with respect to collaterals, affection diminishes every remove, and therefore it does not follow that a brother's son, *e. g.* should come into the same place with the uncle as his brother. Hence there is no reason why a brother's son should concur with brothers in succession.

Sect. CCCIII.

Much is here left to civil legislators.

So far does right reason acknowledge the right of succession in kindred. But because it is obvious to every one, that all these things belong rather to the permissive than to the preceptive part of the law of nature, much must here be left to civil legislature, to fix and determine by their laws, as the end and interest of their states may require (§ 18.) And hence it is easy to give a good reason why legislators have thought the surviving wife should be taken care of; and why there is no branch of law almost in which civil laws and statutes so much differ, as with regard to succession to intestates.

Sect. CCCIV.

Whether any heirs be necessary?

Seeing this whole right of succession proceeds from presumed will (§ 285); but he, whose consent is presumed, may enter upon an inheritance, or

or renounce it as he pleaſes (§ 294), it muſt be evident to every one, that *neceſſary* heirs are unknown to the law of nature *. And therefore that no perſon is heir to an inteſtate by unalterable right, but becomes ſuch by his conſent, declared by words or deeds.

* That reaſon is quite a ſtranger to heirs neceſſary, voluntary and extraneous, is plain, becauſe it knows nothing of the reaſon lawyers had in their view in making ſuch diſtinctions. Firſt of all, this quality and difference of heirs belongs chiefly to teſtamentary heirs, to which, as we have already obſerved, the law of nature is a ſtranger (§ 287), becauſe to one who dies inteſtate, no ſervant ſucceeds as neceſſary heir. Again, a teſtament among the Romans was a ſort of private law. And they thought a teſtator could indeed give law to his ſervants and children, whoſe duty and glory it was to obey their will, but not to ſtrangers not ſubject to their power. Hence they called thoſe *neceſſary* and theſe *voluntary* heirs, (Elem. ſec. ord. Inſt. § 95.) But ſince the law of nature knows nothing of all this, it cannot poſſibly know any thing of this difference with reſpect to heirs.

Sect. CCCV.

How heirs ſucceed to the rights and obligations of the deceaſed.

Now, when one determines to ſucceed to another, nothing is more equal, than that he ſhould be adjudged to ſucceed to all his rights and burdens (§ 267); whence it follows, that an heir, whether by the real diſpoſition of the deceaſed, or by his preſumed will, acquires all his rights, which are not extinguiſhed by his death; and that he has no reaſon to complain, if he be bound to ſatisfy all his obligations, as far as the inheritance is ſufficient *.

* Not therefore, *in ſolidum*, in whole. For ſince there is no other reaſon why an heir is obliged to fulfil what the defunct was bound to do by buying or hiring, and to pay his debts, but becauſe he hath acquired his goods, no reaſon can be imagined why he ſhould be bound farther then the inheritance is ſufficient to anſwer. Beſides that

rigour of the Roman law, by which an heir ſucceeded to all the obligations of the defunct, turns upon a fiction, that the heir and the defunct are the ſame perſon, l. 22. D. de uſucap. l. 14. C. de uſufr. Novell. 48. præf. Ant. Dadin. Alteſerra de fiction. jur. tractat. 1. cap. 20. p. 48. Now ſince the law of nature knows no ſuch fiction, it cannot know that which follows from it alone.

CHAP. XII.

Concerning the rights and duties which ariſe from property or dominion.

Sect. CCCVI.

A threefold effect of dominion.

DOminion is the right of excluding all others from the uſe of ſomething (§ 231). But when we exclude others from the uſe of a thing, we pretend to have the ſole right of uſing it. Hence the firſt effect of dominion is the *free diſpoſal* of a thing; *i. e.* the right or faculty of granting any one the uſe of it; nay, of abuſing it, and of alienating it at his pleaſure. Again, from what we can juſtly exclude others, that we retain to ourſelves with that intention, and therefore *poſſeſſion* is amongſt the effects of dominion. Finally, we alſo exclude others from the uſe of a thing, when, being in another's poſſeſſion, we reclaim it. But to reclaim a thing in another's poſſeſſion, being to endeavour to *recover* it, it follows, that one of the nobleſt effects of dominion is the right of *recovering* our own from whomſoever poſſeſſing it.

* All theſe effects of dominion are acknowledged by the Roman law. For what is ſaid by Caius, l. 2. D. ſi a par. quis man. "That it is unjuſt for men not to have the liberty of alienating their goods," it is to be underſtood of free diſpoſal. In like manner Paullus infers, from the right of poſſeſſion belonging to the lord or maſter only, l. 3. § 5. D. de adqu. vel amitt. poſſeſſ. "That many cannot poſſeſs

posseſs the ſame thing in whole; and that it is contrary to nature that you ſhould poſſeſs what I poſſeſs. That two can no more poſſeſs the ſame thing, than you ſhould occupy the ſame place in which I am." All belonging to the reclaiming of a thing, which is the principal action ariſing from dominion, is well known. Hence it is among the paradoxical themes of diſpute, " That the lord of timber cannot recover it, if it be joined, § 29. Inſt. de rer. diviſ.

Sect. CCCVII.

Hence the owner has the right to uſe the profits.

Since therefore the owner has a right to *apply* his own to any uſe whatſoever (§ 306), the conſequence is, that he has a right to enjoy all the profits ariſing from the thing itſelf, and from its acceſſions and increments, as far as theſe can be acquired by the proprietor (§ 250); and therefore to reap all the fruits, and either to conſume or ſhare them with others, or to transfer them to others upon whatſoever account. Nay, becauſe the yearly fruits and profits of things may be increaſed by art and careful management, nothing hinders a maſter from altering the thing, and ſo rendering it more profitable, provided he do not by ſo doing deprive another of his right.

* This right belongs to the maſter only, as is plain when we conſider the right of uſufruct, of uſe, of loan, of hire, all which, becauſe they are exercſed about a thing belonging to another, do not include the right of changing a thing at pleaſure, tho' all of them include the right of reaping the fruits. Therefore the right of taking the profits may be common to the maſter with others, but the faculty of changing the thing, *i. e.* the principal or ſubſtance, is proper to the maſter only, nor can he who has the right of uſe, uſufruct, loan or hire, claim it without his permiſſion.

Sect. CCCVIII.

As likewiſe of corrupting or ſpoiling it.

Since he hath likewiſe the right of abuſing (§ 256), *i. e.* of conſuming, or of deſtroying the thing and its fruits, Donat. ad Terent. Andr. prolog.

prolog. v. 5. the consequence is, that the master may destroy the thing which is his own, provided he do it not with that intention that another may thereby receive detriment *. For tho' such a spoiling of our own goods, which may be beneficial to others, be repugnant to the love of humanity (§ 217); yet he does not violate expletive justice, who, in consequence of his having dominion, abuses his own, and without any necessity urging him so to do, corrupts it.

* For if any corrupts his own with an intention to hurt another, he does it with a design to injure another, and by doing hurt to him, really injures another. But it being the first and chief principle of natural law, not to hurt any one (§ 178), the consequence is, that he acts contrary to the law of nature who spoils his own goods with such an intention. And to this class belongs the wickedness of those who poison their flowers to destroy their neighbour's bees, Quinct. Declam. 13.

Sect. CCCIX.

As likewise of alienating them.

Because the free power or right of a master to dispose of his own comprehends likewise the right of alienation (§ 306), it may easily be understood, that an owner can abdicate his dominion, and transfer it to another, either now, or for a time to come, and grant any other advantage by it, or right in it, to any person; and therefore give it in use, usufruct, mortgage, pledge, as he will, provided no law, no pact, no other more valid disposition stand in his way.

Sect. CCCX.

Since possession also is one of the effects of dominion (§ 306), it is plain that the owner can take possession of what belongs to him, and defend his possession against every one, even by force; and that it makes no difference whether one possesses by himself or by another; yea, that possession once acquired,

acquired, may be retained by an abſent perſon, and by will merely, while another hath not ſeized it *.

* For poſſeſſion is the retention of a thing, from the uſe of which we have determined to exclude others (231). As long therefore as we have determined to exclude others from the uſe of a thing, ſo long we have not relinquiſhed it (§ 241): Wherefore, ſuch a thing is not without a maſter, and none has a right to ſeize it. But what none hath a right to ſeize, I certainly retain the poſſeſſion of, even tho' at diſtance, by my will merely.

Sect. CCCXI.

The right alſo of recovering it.

Finally, the right of *recovering* a thing being among the effects of dominion (§ 306), it cannot but be that we may uſe our right againſt any poſſeſſor of what is ours; nor does it make any difference as to the reſtitution, whether one detain what is ours from us honeſtly or fraudulently; nor whether he be known to us or a ſtranger; becauſe we do not reclaim the thing on account of any deed of his; but becauſe we have a right to it. Beſides, ſince to reclaim and recover a thing is not the ſame as to redeem it; it is manifeſt, that when an owner recovers his own, he is not bound to reſtore the price; tho' equity doth not permit that one ſhould be inriched at another's expence (§ 257), or that he ſhould refuſe the neceſſary and uſeful expences laid out upon a thing by the poſſeſſor *.

* To which caſe, without all doubt, belong the expences, without which the maſter himſelf could not have recovered his own from robbers, eſpecially if the poſſeſſor redeemed it with intention to have it reſtored to its owner, Pufend. law of nature, *&c.* 4. 12. 13. at which paragraph Hertius in his notes has brought an excellent example from Famian. Strada's Decades de bello belgico, l. 7. ad annum 1572. " When the merchants of Antwerp had redeemed merchandize of above a hundred thouſand pieces in value, from a Spaniſh ſoldier, who had plundered the city of Mechlin, for twenty thouſand, the owners

owners got them back, upon reftoring that fum, becaufe they could not have recovered the goods with lefs expence."

Sect. CCCXII.

How far he may recover the acceffions and fruits.

Since the owner can claim to himfelf all the acceffions and fruits of his own goods (§ 307), it may be enquired, whether an honeft poffeffor be obliged to reftore to the owner reclaiming his own, all the acceffions, and all the fruits, nay, all the gain he hath received from another's goods? We conceive thus of the matter in a few words. He who honeftly, and with a juft title, poffeffes a thing, as long as the true owner is not known, has the right of excluding all perfons from the ufe of what he poffeffes. But he who has this right is in the room of the owner (§231), and therefore enjoys all the fame rights as the owner; yet, becaufe he is not the true mafter who poffeffes a thing honeftly, there is no reafon why he fhould defire to be inriched to the lofs of the true owner; as there is none, on the other hand, why the mafter fhould claim to himfelf the fruits not exifting, which were not owing to his care and induftry *.

* For a natural acceffion to a thing, the mafter of which is not known (§ 241), belongs to none, and fo goes to the firft occupant. Since therefore the honeft poffeffor has feized the fruits which he produced by his own care and induftry, there is no reafon why they fhould be taken from him. And therefore the Juftinian law not abfurdly fays, "That it is agreeable to natural equity and reafon, that the fruits which an honeft poffeffor hath gathered, fhould be his for his care and labour." Nor is the cafe different with regard to civil fruits. For they, in like manner, when they are received having no certain mafter, and the true mafter of the fubftance producing them, having had no trouble about, belong alfo to an honeft poffeffor, fo long as the true mafter does not appear.

Sect. CCCXIII.

The accessions and the fruits belong to the master.

Becaufe neither ought to be inriched at the other's lofs (§ 312), the confequence is, that even the acceffions ought to be reftored to the mafter reclaiming his own thing, and therefore he hath a right to demand the exifting and hanging fruits *, the expences laid out upon them being deducted; becaufe the mafter would be inriched to the detriment of the honeft poffeffor, if he fhould take to himfelf the fruits upon which he had beftowed no care.

* This Grotius grants (of the right of war and peace, 2. 8. 23. and 2. 10. 4.) but only with refpect to natural fruits. But fince even the induftrial fruits are acceffions to the principal of an owner, who is now known, no reafon can be imagined why an honeft poffeffor fhould claim them to himfelf. But the mafter can by no means refufe to repay expences, becaufe he would otherwife demand fruits which he did not produce by his care and induftry (§ 312). Whence the Hebrews thus proverbially defcribed a hard auftere man, " One who reaps where he did not fow, and gathers where he did not ftraw, Mat. xxv. 24. Luke xix. 21.

Sect. CCCXIV.

The fruits gathered and confumed to the poffeffor.

But fince a natural acceffion to a thing, the owner of which is not known, goes to the firft occupant as a thing belonging to no body, the fame is to be faid of the civil fruits (§ 212); confequently, the fruits gathered ought to be left to an honeft poffeffor, who beftowed his labour and care about them, unlefs he be made richer by them * (§ 212.)

* The Civilians follow this principle in demanding an inheritance, l. 25. § 11. & § 15. l. 36. § 4. l. 40. § 1. D. de hered. petit. But in reclaiming a thing, they adjudge indifcriminately the reaped fruits to an honeft poffeffor, and make no account of the matter, whether he be enriched by them or not, l. 4. § 2. D. fin. regund. l. 48. pr. D. de adqu. rer. dom. But the reafon of this difference is merely civil, and not founded in natural law. For

in

in ſuing for heritage, as being an univerſal action, the price is deemed to ſucceed into the room of the thing, not in ſingular actions. But the law of nature does not make theſe diſtinctions; and therefore it is moſt equal that thoſe received fruits ſhould be indiſcriminately reſtored to the true owner, by which one is made richer. And that this is now the practice obſerved in courts, is obſerved by Stryk. Uſ. hod. Digeſt. 6. 1. 12.

Sect. CCCXV.

Whether an honeſt poſſeſſor be obliged to pay the value of a thing conſumed, periſhed, or alienated.

From the ſame rules, that an honeſt poſſeſſor is in the room of the owner, but yet cannot inrich himſelf at the detriment of another (§ 312); we infer, that he is no more obliged to make reſtitution to the owner, if he infraudulently conſumed the thing, than if it had periſhed in his poſſeſſion by chance; but that he is obliged, if he ſell the thing he acquired without paying any price, or a ſmall price, for a greater price, becauſe he would be richer at another's coſt, if he kept the profit to himſelf. On the other hand, this obligation ceaſes, if the owner hath already received the value of his thing from another; partly becauſe in this caſe an honeſt poſſeſſor is indeed made richer, but not at the coſt of the owner; and partly becauſe the owner has a right not to ſue for gain, but only for loſs.

Sect. CCCXVI.

What a fraudulent poſſeſſor is obliged to reſtore.

Becauſe all this belongs to honeſt poſſeſſors only; and, on the other hand, becauſe fraudulent poſſeſſors are neither in the room of the owner, nor have they the right of uſe, on this ſcore, that the owner is not known to them; and therefore none of theſe reaſons, why one may enjoy any advantage by a thing, or its fruits, takes place; hence it is plain, that they are ſtrictly bound not only to reſtore what is exiſting, but to refund the value of things conſumed or alienated; and much more,

of

of all the fruits they have, or might have reaped from them, and likewife to run all rifks *.

* For tho' accidents be regularly imputable to no perfon (§ 106), yet this rule does not take place if it was the agent's fault that any accident happened (§ ibidem), becaufe then there is default as well as accident. Now, a fraudulent poffeffor could and ought to have reftored the thing to its true owner, and if he had done it, he would have prevented its perifhing in his hands. He is therefore obliged to anfwer for all accidents; whence the Roman lawyers have rightly determined, that a thief and robber are anfwerable for all chances, becaufe they are always the caufe why a thing is not in the poffeffion of its owner, *(quia femper in mora fint)* l. 8. § 1. D. de condict. furt.

Sect. CCCXVII.

The effects of dominion are fometimes reftricted by civil laws.

Now thefe are the rights which arife plainly from dominion; but fince it belongs to civil law to adjuft indifferent actions to the intereft of each people or ftate (§ 18); and it is frequently the intereft of a ftate, that no member fhould make a bad ufe of his goods (Inftit. § 2. de his qui fui vel alieni juris funt,) it is no wonder that dominion is fometimes confined within narrower limits by governors of ftates, and that fometimes the liberty of difpofal, fometimes the right of taking poffeffion, and fometimes the right of recovering, is either wholly taken away from owners, or not allowed to them but under certain reftrictions *.

* Thus we find the civil law taking the free difpofal of their goods from pupils, mad perfons, prodigals, minors. The fame law does not allow a legatee, tho' owner of the thing left to him in legacy, to take poffeffion, and gives the heir a prohibition againft him, if he goes to feize at his own hand. (Interdictum quod legatorum) tot. tit. D. quod legat. Again, it is known that he, whofe timber another hath joined, tho' he be the owner of the materials, and doth not lofe his dominion, yet he cannot recover the timber when joined, by the laws of the twelve tables, § 29. Inft. de rerum divif. l. 7. D. de adqu. rerum dom. So

that

that there is almoſt no effect of dominion which the civil laws ſuffer to remain always and wholly ſafe and entire, if the public good of the common-wealth require it ſhould not: For this magiſtrates juſtly account the ſupreme law in all thoſe matters, which belong to the permiſſive part of the law of nature. Becauſe, ſince any one by the law of nature may renounce his permiſſive rights (§ 13), a people may alſo renounce them, and hath actually renounced them by ſubmitting themſelves to the laws enacted by the ſupreme power under whoſe authority they have put themſelves.

Sect. CCCXVIII.

Sometimes by the pacts and diſpoſitions of the firſt owners.

And becauſe an owner has the liberty of diſpoſing of his goods in his life, or in the proſpect of death (§ 268), and then juſt as much is transferred to another, as he who alienates willed to transfer, (§ 279), it is plain the effects of dominion may be reſtricted by the pact and diſpoſition of the former owner *, and in this caſe the poſſeſſor can arrogate no more to himſelf than he received from the former owner, unleſs he in whoſe favour the reſtriction was made, voluntarily quit his right, ceaſe to exiſt, or loſe his right by a juſt cauſe.

* Thus ſometimes the right of reaping all advantage from a thing is circumſcribed within narrower limits by the diſpoſition of the former owner, as, *e. g.* if he hath given another the uſufruct, any right of ſervice, or hath pawned it (§ 282). Sometimes the liberty of diſpoſing, deſtroying, and alienating is taken from the maſter, as when the dominion or right of uſe merely is given him (§ 279); or when the thing is burdened with ſome fiduciary bequeſt, &c. An uſufruct being conſtituted, even the right of poſſeſſion, which could not otherwiſe be refuſed to the owner, is reſtricted; as when the right of uſe is given to one, the direct or ſuperior lord has neither the right of poſſeſſing the thing, nor of claiming what appertains to the right of uſe.

Sect. CCCXIX.

A proprietor ought not to be hurt by any one in the use of his own.

Hitherto we have only treated of rights arising from dominion or property. Now since right and obligation are correlates, and therefore a right being constituted an obligation is constituted (§ 7); the consequence is, that as many rights as dominion gives to an owner, just so many obligations does it lay others under with regard to the owner. Because therefore an owner hath the liberty of disposing (§ 306), they injure him who hinder him in disposing or enjoying the fruits of his own *: They also do him damage who corrupt or spoil the fruits and accessions of his property. And in general, since he who intercepts or corrupts any thing that tends to the perfection or happiness of another certainly wrongs him (§ 82), but none ought to be wronged (§ 178); hence we may justly conclude, that none ought to have his free disposition of his own disturbed or hindered; that none ought to have his goods damaged; and therefore, if any thing of that kind be done, the author of the injury is bound to make reparation, and is moreover liable to punishment.

* For the Roman lawyers define *an injury* to be not only any wrong done to a person by words or deeds, but any action by which one is hindered from the use either of public things, or of what is his own, or by what one arrogates to himself any degree of liberty in disposing of what belongs to another. Thus by the leg. Cornel. he is guilty of injury who enters another's house forcibly, l. 5. pr. D. de injur. he who hinders one to fish in the sea, or to draw a drag-net, to bath in public baths, to sit on a public theatre, or to act, sit, or converse in any other place, or who does not permit us to have the use of what is our own, l. 13. § 7. D. eod.

Sect. CCCXX.

Nor directly nor indirectly

Seeing possession belongs to the rights of property (§ 306), the consequence is, that it is our duty to suffer

intercept or hinder his possession.

suffer every one to possess his own quietly and unmolested, and not to deprive any one of his possession against his will directly or indirectly. And that if any one can be proved to have done any such thing, he is bound as an injurious person, to repair all the damage he has done, and is moreover liable to condign punishment.

Sect. CCCXXI.

It is done directly by theft, rapine and violent ejection.

One carries off another's possession directly, either by open force, or by taking it away clandestinely. The latter is called *theft*. The former, if the thing be moveable, is called *rapine*; and if it be immoveable it is called *force*, or *violent ejection*. *Theft* is therefore taking away another's goods in a clandestine manner, without the knowledge and against the will of the owner, to make profit of them *. *Rapine* or *robbery* is bearing off a moveable thing by violence, against the owner's will, to make profit of it: And *force* is ejecting one violently out of his possession of an immoveable thing.

* If a thing be carried away to affront one, or by way of contumely, it is called an *injury*; if it be carried away in order to spoil it, it is called *damage*. Thus in Homer, Iliad. A. v. 214. Minerva says that Chryseis was taken from Achilles ὕβριος εἵνεκα, to rub an affront upon him. It was therefore an injury, and not theft or robbery. And he is more properly said to have damaged than to have stollen, who, as Horace says, Serm. 1. 3. v. 116.

Teneros caules alieni infregerit horti.

But without doubt Cacus was guilty of theft properly so called,

Quatuor a stabulis præstanti corpore tauros
Avertit, totidem forma superante juvencas,
Atque hos, ne qua forent pedibus vestigia rectis,
Cauda in speluncam tractos, versisque viarum
Indiciis, raptos saxo occultabat opaco.

Virg. Æneid. 8. v. 207.

Tho'

Tho' the ancients thought theft might be said of immoveables (l. 38. D. de usurp. & usucap. Gell. Noct. Attic. 11. 18. Plin. Hist. nat. 2. 68. Gronov. observ. 1. 4. p. 42.) yet this application of the word is inconvenient, and therefore we do not use it in that sense.

Sect. CCCXXII.

Indirectly by defrauding.

One is said to take away another's possession *indirectly*, who by fraudulent words or deeds is the cause of his losing it; and this we call *defraudation*. Now since one is likewise hurt in this manner, but none ought to do to another what he would not have done to himself (§ 177); it is self-evident, that they are no less guilty than thiefs and robbers, who, by insidious words, cheat one out of his goods *; or by moving boundaries, using false weights and measures, and other such knavish practices, adventure to take off any thing from one's estate.

* For all these crimes agree in one common end, this being the design of the thief, the robber and the defrauder, to bereave others of their goods. They agree also with regard to the motive or impelling cause, *viz*. knavery. They agree likewise in the effect, which is making one poorer. Nay the defrauder is sometimes worse than the thief or robber in this respect, that he circumvents one under the mask of friendship, and therefore cannot be so easily guarded against as a thief or robber. They are therefore, with good reason, joined together by that excellent teacher of morals, Euripides in Helena, v. 909. who there says, " God hates force, and commands every one to possess the purchase of his own industry, and not to live by plunder. Base and unjust riches are to be renounced with contempt." To which unjust and base riches belongs more especially, as every one will readily acknowledge, whatever one knavishly cheats others of.

Sect. CCCXXIII.

What is another's ought to be restored to him.

The last right which belongs to the lord of a thing, *viz*. *the right of recovering it*, must found

an obligation *to restore what belongs to another to its owner*. But hence we conclude, that every one, into whose hands any thing belonging to another comes without his fault, is obliged to take care that it be restored to its owner * ; and therefore, that it ought not to be hid or concealed, but that public notice ought to be given of it, that the owner may have it again, upon making his right to it appear, Deut. xxii. 1. l. 43. § 4. D. de furt. and that the possessor ought to be much more ready to restore it, if the author claim it, or publickly advertise his having lost it. But in both cases equity requires partly that the restitution should not be made at the expence of an honest possessor, and partly that he may not be made richer at another's cost (§ 312.)

* But even this obligation to restitution does not always take place, because sometimes right reason dissuades from restitution, sometimes the civil laws free the possessor from all obligation to restitution. An example of the first case is a madman claiming his sword deposited by himself; of which Seneca of benefits, 4, 10. Cicero de offic. 1. 10. 3. 25. And like examples are adduced by Ambros. de offic. 1. ult. To the last exception belong *usucapion* and *prescription*. For that these are unknown to the law of nature, seems most certain and evident; because time, which is a mere relation, can, of its own nature, neither give nor take away dominion. And, as we observed above, our dominion cannot otherwise pass to another than by tradition or transferring. Whence it is plain, that one can neither acquire dominion without some deed of the proprietor, nor can the proprietor lose it without some deed of his own. Wherefore *usucapion* and *prescription* owe their origine to civil laws, which introduced both for the public good, l. 1. D. de usurp. & usucap. partly to put a period to the trouble and danger of contests, Cicero pro Cæcin. c. 26. partly to excite men who are indolent and neglectful, to reclaim their goods in due time, by giving them to see the advantages of vigilance above negligence; so that the observation of Isocrates is very just in Archidam. p. 234. " All are persuaded that possessions, whether private or public, are confirmed by long prescription,

tion, and justly held as patrimonial estate." But it does not follow, that whatever many are persuaded of is therefore a precept of the law of nature. And this it was proper to mention, that none may be surprized that we have taken no notice of *usucapion* and *prescription* in treating of property or dominion.

Sect. CCCXXIV.

What if the true owner do not appear.

But if the true owner do not appear to claim a thing, it is understood to be no body's, and therefore it justly falls to the honest possessor * (§ 241.) And tho' those who have assumed to themselves the direction of consciences, commonly exhort to give things to the poor when the owner of them does not appear; yet he cannot be called unjust, who, making use of his right, takes to himself a thing morally free from dominion. See Nic. Burgund. ad consu. Flandr. l. 2. n. 1.

* Besides, the master of a thing alone has the right of excluding others from the use of it. Since therefore the master does not appear, none has this right; and, for this reason, nothing hinders why an honest possessor may not retain it to himself. But because in many countries things free from dominion of any value may be claimed by the people or prince (§ 242), it is plain, that in such countries, where that custom or law prevails, an honest occupant ought to offer things, the master of which is not known, to the magistrates, and may expect from them μήνυτρον, the reward of telling (Grotius of the rights of war and peace, 2. 10. 11.)

REMARKS on this Chapter.

We have not had occasion for some time to add to our Author, or to make any remarks on his reasonings. And indeed the reason why I choose to translate this Author into our language, is because there is seldom any occasion to add to what he says, and almost never any ground of disputing against him, so orderly, clear, just and full, is his method of proceeding in this most useful of all sciences. But because *usucapion* and *prescription* are usually treated of at greater length by writers on the laws of nature and nations than our Author does; and because this is a proper occasion to explain a little upon the distinctions that are commonly made

by moralists about the dictates of the law of nature and right reason, or conformity to them, let me subjoin the following observations.

1. First of all, it is proper to observe the difference which the Roman law makes between *prescription* in general, and that kind of it which they distinguished by the name of *usucapio*. By *usucapio* they meant the manner of acquiring the property of things by the effect of time. And prescription had also the same meaning; but it signified moreover the manner of acquiring and losing all sorts of rights and actions, by the same effect of the time regulated by law. See l. un. C. de usucap. transf. & Inst. de usucap. and Domat's civil law, in their natural order, T. 1. p. 485. But writers on the law of nature have now very seldom occasion to make use of the word *usucapio*; that of *prescription* being now common by usage, both to the manner of acquiring the property of things, and to that of acquiring and losing all sorts of rights by the effect of time. 2. The chief reasons assigned by the Roman law for the first introducing of property by prescription, are, as Pufendorff of the law of nature and nations hath observed, book 4. cap. 12. § 5. "That in order to the avoiding of confusion, and cutting off disputes and quarrels, it is of great consequence to the public welfare, that the proprieties of things should be fixed and certain amongst the subjects, which would be impossible, should perpetual indulgence be allowed to the negligence of former owners, and should the new possessors be left in continual fear of losing what they held. (Ne scilicet quarundam rerum diu & fere semper incerta dominia essent, l. 1. ff. de usurp. & usucap.) Again, trade and commerce could not otherwise subsist in the world. For who would ever contract with another? who would ever make a purchase, if he could never be secured in the quiet possession of any thing conveyed to him? Nor would it be a sufficient remedy in this case, that if the thing should be thus challenged by a third party, the person from whom we receive it should be obliged to make it good; for after so long a course of time, thousands of accidents might render him incapable of giving us this satisfaction. And what grievous commotions must shake the commonwealth, if at so vast a distance of years, so many contracts were to be disannulled, so many successions were to be declared void, and so many possessors to be ejected? It was therefore judged sufficient to allow such a time, as large as in reason could be desired, during which the lawful proprietors might recover their own. But if through sloth and neglect they suffered it to slip, the *Prætor* might fairly reject their too late importunity. And tho' it might so happen, that now and then a particular person lost his advantage of recovering his goods, utterly against his will and without his fault, only because he was unable to find out the possessor, yet the damage and inconvenience arising from that general statute to some few private men, is compensated by the benefit it affords to the public." It was a judicious reflexion of Aratus of Sicyon

Sicyon in Tully's offices, l. 2. c. 23. "He did not think that possessions of fifty years should be disturbed, because in so long time many things in inheritances, purchases and portions, might be held without an injury to any." 3 Now from the nature of property acquired by prescription, *i. e.* by the effect of time regulated by law, and the reasons upon which the utility, or rather necessity of it is founded, it is plain on the one hand, that whatever is not subject of commerce, cannot be the object of prescription, such as *liberty*; so prime, so essential a blessing; a blessing so much dearer than life, that none can ever be presumed so much as tacitely to have consented to be a slave! Liberty, a blessing, a right in the nature of things unalienable; or to renounce which is contrary to nature, and the will of the author of nature, who made all men free! *Public places, goods belonging to the public*, &c. So, on the other hand, whatever is the object of commerce may be the object of prescription, *i. e.* property in it may be acquired by the effect of time. As every man who is otherwise capable of acquiring dominion, is likewise capable of prescribing; so by this right of prescription we may acquire dominion over both sorts of things, moveable and immoveable, unless they are particularly excepted by the laws. But moveable things may pass into prescription sooner than immoveable, for this reason, that immoveables are judged a much greater loss than moveables; that they are not so frequently made the subject of commerce between man and man; that it is not so easy to acquire the possession of them, without knowing whether the party that conveys them be the true proprietor or the false; and consequently, that they are likely to occasion fewer controversies and suits. Plato's rules for the prescription of moveables are these: "If a thing of this kind be used openly in the city, let it pass into prescription in one year; if in the country in five years: if it be used privately in the city, the prescription shall not be compleated in less than three years. If it be thus held with privacy in the country, the person that lost it shall have ten years allowed him to put in his claim, de leg. l. 12." As for the prescription of immoveables, the constitution of Plato's commonwealth was not acquainted with it. It is proper to observe here, that by the civil law prescription has not only respect to property; but it destroys other rights and actions when men are not careful to maintain them, and preserve the use of them during the time limited by the law. Thus a creditor loses his debt for having omitted to demand it within the time limited for prescription, and the debtor is discharged from it by the long silence of his creditor. Thus other rights are acquired by a long enjoyment, and are lost for want of exercising them. See Domat's civil law, &c. T. 1. book. 3. t. 7. § 4. 1. and the Roman laws there quoted. And all the long reasonings in *Thomasius de perpetuitate debitorum pecuniariorum*, and in *Titus*'s *observations on Lauterbach, obs*. 1033, and elsewhere, quoted by the very learned Barbeyrac on Pufendorff, of the law of nature

and nations, book 4. cap. 12. 1. to ſhew how far preſcription is of natural right, and what civil law adds to it, do not prove, that the law of nature does not permit, nay require, that a time ſhould be limited, even for claiming rights, upon the elapſing of which, rights and actions, and what the lawyers call incorporeal things, are preſcribed. No one ever pretended, that the law of nature fixed a time which gave a title by preſcription with regard to things corporeal or incorporeal. But if ſecurity of property and commerce require, that ſuch a time ſhould be fixed, where there is property and commerce, then the law of nature or right reaſon requires that a time preſcribing be fixed ſo far as ſecurity of property and commerce, and quiet poſſeſſion by honeſt induſtry require it, whether with reſpect to corporeal or incorporeal things. Let me juſt add upon this head, that whereas it was ſaid above, that things out of commerce cannot be preſcribed, yet by the civil law one may acquire or loſe by preſcription, certain things which are not of commerce; but it is when they are connected with others, of which one may have the property. They are acquired by their connection with ſuch other things. See Domat ibidem. Now, if here alſo it be ſaid, that the law of nature knows no ſuch diſtinction: the anſwer is, that the law of nature or right reaſon acknowledges every diſtinction which the public utility of a ſtate requires, in order to prevent confuſion and quarrels, and to render honeſt induſtry ſecure in the enjoyment of its juſt acquiſitions. For, 4. whatever diſtinctions moral writers have made about belonging or being reducible into the law of nature, directly or indirectly, immediately, remotely, or abuſively; this is plain, that in order to determine what the law of nature or right reaſon ſays about a caſe, the circumſtances of the caſe muſt be put. For in the ſcience of the law of nature, as well as other ſciences, however general the rules or canons may be, yet in this ſenſe they are particular, that they only extend to ſuch or ſuch caſes, ſuch or ſuch circumſtances. Now, if we apply this general poſition to the preſent queſtion, it will appear that preſcription is of the law of nature, in the ſame ſenſe that teſtamentary ſucceſſion, or ſucceſſion to inteſtates is of the law of nature, *viz.* That right reaſon is able to determine with regard to preſcription, in like manner as with regard to the others, ſome general rules which equity and public, common ſecurity require to be ſettled about them, where any number of men live in commerce, and property is eſtabliſhed, that induſtry may have due liberty and ſecurity. Teſtamentary ſucceſſion, and ſucceſſion to inteſtates, as we have found them to be regulated by right reaſon, may be detrimental in ſome caſes to the public, becauſe in ſome caſes, it may be more the intereſt of the public that any other ſhould ſucceed to an eſtate than the heirs according to theſe general rules with regard to ſucceſſion, by or without teſtament. But notwithſtanding ſuch detriment that may in ſome caſes happen to the public, general rules about ſucceſſion are neceſſary; and none are fitter to be ſuch than thoſe which moſt encourage induſtry,

duſtry, by beſt ſecuring the poſſeſſor in his right of diſpoſing of his own, the great motive to induſtry; and thoſe which determine ſucceſſion in the way it is propereſt for the general good, that men's affections ſhould operate towards others. In like manner, whatever detriment may ariſe in certain caſes from the general rule, that time ſhould give a title by preſcription; yet the general rule ought to obtain, becauſe it is the beſt general rule that can be conceived, the leaſt inconvenient, or rather the beſt for the ſecurity of commerce and property, being the beſt encouragement to honeſt induſtry, by giving the ſecureſt poſſeſſion of its honeſt acquiſitions. In fine, if we aſk what the law of nature ſays about ſucceſſion, or preſcription, or any thing elſe, we muſt put a caſe or enumerate the circumſtances; and therefore, we muſt either aſk what it requires about them where men are in a ſtate of nature, or where men are under civil government. If we confine the queſtions of the law of nature to the former caſe (tho' there be diſtinctions to be made even in that caſe, as will appear afterwards) yet we limit the ſcience too much, and render it almoſt uſeleſs: But if we extend it to what right reaſon requires under civil government, we muſt, in order to proceed diſtinctly, define the principal end of the civil conſtitution, and its nature, before we can anſwer the queſtion; which will then be twofold. Either, 1. What that particular conſtitution requires, in conſiſtency with its end and frame, with regard to preſcription, for inſtance, or any other thing? Or, 2. Whether the end and frame of that conſtitution requiring ſuch and ſuch rules about preſcription for inſtance, or ſucceſſion, or any other thing, be a good end, and a good frame, *i. e.* whether all the parts of it, conſidered as making a particular conſtitution, do make one conſonant to the great general end of all government, *public happineſs?* Thus, if we attend to the neceſſity of thus ſtating the meaning of what is called determination by natural law, we will eaſily ſee that what is urged from the laws in the Jewiſh commonwealth againſt preſcription, does not prove that right reaſon does not require that every ſtate ſhould make ſome regulation with regard to the effect of time, as to ſecurity in poſſeſſion. For tho' the divine law, which prohibited perpetual alienations for ſeveral reaſons, aboliſhed by that means preſcription, yet the letter of this law being no longer in force, where alienations which transfer the property for ever are allowed, the uſe of preſcription is wholly natural in ſuch a ſtate and condition, and ſo neceſſary, that without this remedy every purchaſer and every poſſeſſor being liable to be troubled to all eternity, there would never be any perfect aſſurance of a ſure and peaceable poſſeſſion. And even thoſe who ſhould chance to have the oldeſt poſſeſſion, would have moſt reaſon to be afraid, if together with their poſſeſſion they had not preſerved their titles. See Domat's civil laws, *&c.* T. 1. p. 483. God, for reaſons ariſing from the conſtitution of the Jewiſh republic, forbad the perpetual alienation of their immoveable eſtates (and not of their goods in general, as ſome objectors againſt preſcription urge) but all their

laws concerning usury, conveyances, and other things, were necessarily connected together, and with their Agrarian law, (as we shall see afterwards). And therefore there is nothing in the law of Moses that condemns prescription as an unjust establishment; and we can no more infer it from hence to be such (as Barbeyrac well observes, ibidem) than we may conclude that the perpetual alienation of lands is odious, and not conformable to natural right. But not to insist longer on this head, it is not only evident that the law of nature for the security of property and the encouragement of industry requires, that a time should be regulated for the effect of possession as to prescribing, in all states which admit of alienations and commerce; but that it requires that this time should be the most equal that can be fixed upon, all the circumstances of a particular state being considered, with regard to the non-disturbance of honest industry, *i. e.* the properest to prevent unjust dispossession on either side, *i. e.* either with respect to the first or the last possessor. And therefore, 4. There is no difficulty with regard to the following general maxims about it. 1. That prescription may affectually proceed, 'tis requisite that the party receiving the thing at the hands of a false proprietor, do obtain this possession by a just title; and consequently, that he act in this matter *bona fide*, with fair and honest intention. For this is necessary to just possession. " A man doth not become a just possessor of a thing barely by taking it to himself, but by holding it innocently." Detaining is otherwise, as Tacitus expresses it, *diutina licentia*, a long continued injustice. Upon this head Pufendorff observes, that according to the civil law, 'tis enough if a man had this uprightness of intention at his first entring on the possession, though he happens afterwards to discover, that the person who conveyed it to him was not the just proprietor. But the canon law requires the same integrity throughout the whole term of years, on which the prescription is built. But Barbeyrac justly takes notice in his notes, " That the maxim in the civil law is better grounded than that of the canon law. And the artifice of the clergy consists not so much in this, that the determinations of the Popes require a perpetual good intention in him that prescribes, as in this, that they will have the goods of the church look'd upon as not capable of being alienated, either absolutely, or under such conditions as will make all prescriptions void." 2. Another necessary condition is, that it be founded on constant possession, such as hath not been interrupted, either *naturally*, as if the thing hath returned in the mean while to the former owner, or hath at any time lain abandoned or forsaken: or *civilly*, as if the owner had been actually engaged at law with the possessor for the recovery of what he lost; or at least by solemn protestations hath put in a salvo to his right. 3. That the space of time during which the prime possessor holds the thing, shall be reckoned to the benefit of him that succeeds in the possession, provided that both the former and the latter first entered upon it

with

with honeſt minds, and upon a juſt title. For otherwiſe the prime poſſeſſor ſhall not be allowed to make over his time to the next holder, and conſequently, if the former come to the poſſeſſion by diſhoneſt means, the time he paſſed in it ſhall not be computed towards the preſcription of the latter, tho' he, for his own part, obtained the poſſeſſion fairly and juſtly. See Pufendorff, ibidem. 4. Preſcription does not run againſt minors. And if one that is major happens to have a right undivided with a minor, the preſcription which could not run againſt the minor, will have no effect againſt the major. And the ſame reaſon for which preſcription does not run againſt minors, hinders it likewiſe from running againſt thoſe whom a long abſence diſables from purſuing their rights; which is to be underſtood not only of abſence on account of public buſineſs, but alſo of other abſences occaſioned by accidents, ſuch as captivity. See Domat's civil law, ibidem. And for the ſame reaſons, it is highly agreeable to reaſon, that the time during which a country hath been the ſeat of war, ſhall not avail towards preſcription. But with regard to minority, it is remarked by Pufendorff ibidem, that there may be a caſe in which the favour of poſſeſſion ſhall overbalance the favour of majority. As for inſtance, ſuppoſe it ſhould ſo happen, that when I want only a month or two of compleating my preſcription, and it is morally certain that the ancient proprietor will not within that ſpace give me any trouble about the title, and if he ſhould then deceaſe leaving an infant heir, it would be unreaſonably hard, if after five and twenty years poſſeſſion, I ſhould be thruſt out of my hold for want of thoſe two months, eſpecially if it be now impoſſible for me to recover damages of him from whom I received what is thus challenged, as I might have done, had the diſpute happened before the goods devolved on the minor. See this ſubject more fully diſcuſſed than it can be done in a ſhort note, by Pufendorff and Grotius. It is ſufficient for our purpoſe to have taken notice of theſe few things relative to preſcription; and to have obſerved once for all, that unleſs the determinations of the law of nature be confined to ſignify the determinations of right reaſon with regard to a ſtate of nature, (a very limited ſenſe of the law of nature, in which it is hardly ever taken by any writer) every deciſion of right reaſon concerning equity, juſtice, and neceſſity or conduciveneſs to the public good of ſociety, or of men having property and carrying on commerce, is a deciſion of the law of nature. Whatever reaſon finds to be the beſt general rule in this caſe is a law of nature; and in this ſenſe, preſcription is of the law of nature, *i. e.* reaſon is able to ſettle ſeveral general rules about it in conſequence of what commerce, the ſecurity of property, and the encouragement of induſtry make neceſſary. So that where reaſon is able to make any ſuch deciſions, it is an impropriety to ſay, that thing is not of the law of nature, becauſe ſome forms and modes relative to it muſt be determined and ſettled by convention, or by civil conſtitution; as the particular

cular ſpaces of time, for inſtance, with regard to preſcription of moveables and immoveables, *&c.* muſt be. For if right reaſon requires, that time ſhould have a certain effect with regard to property, then is preſcription of the law of nature, which by its definition is the acquiſition or addition of a property, by means of long poſſeſſion. But indeed we may ſafely ſay, that the law of nature is an abſolute ſtranger to the debates among lawyers, whether preſcription ſhould be defined with Modeſtinus *adjectio*, or *adeptio* with Ulpianus; for all ſuch diſputes are mere verbal wranglings, grievouſly cumberſome to right reaſon and true ſcience.

CHAP. XIII.

Concerning things belonging to commerce.

Sect. CCCXXV.

How men began to want many things.

AFter men had departed from the negative communion of things, and dominion was introduced, they began to appropriate uſeful things to themſelves in ſuch a manner, that they could not be forced to allow any one the uſe of them, but might ſet them aſide wholly for themſelves, and their own uſe (§ 236). But hence it followed of neceſſity, that all men had not the ſame ſtock, but that ſome abounded in things of one kind, which others wanted; and therefore one was obliged to ſupply what was wanting to himſelf either by the labour of another, or out of his proviſion. Yea, becauſe every ſoil does not produce every thing *, neceſſity forced men to give to others a ſhare of the things in which they abounded, and which they had procured by their own art and induſtry, and to acquire to themſelves what they wanted in exchange; which when they began to do, they are ſaid to have inſtituted *commerce*.

* To this purpoſe belongs that elegant obſervation in Virgil, georg. 1. v. 54.

This ground with Bacchus, that with Ceres ſuits,
That other loads the trees with happy fruits.

A fourth

A fourth with graſs, unbidden decks the ground,
Thus Tmolus is with yellow ſaffron crown'd.
India black ebon and white ivory bears,
And ſoft Iduma weeps her od'rous tears.
Thus Pontus ſends her beaver ſtores from far,
And naked Spaniards temper ſteel for war.
Epirus for the Elian chariot breeds,
(In hopes of palms) a race of running ſteeds.
Thus is th' original contract; theſe the laws
Impos'd by nature, and by nature's cauſe.

To the ſame effect does this poet ſing at greater length, georg. 2. v. 199. & ſeq. Compare with theſe paſſages, Varro de re ruſtica, 1. 23. Ovid. de arte amandi, 4. v. 578. and above all, Seneca, ep. 87. who having quoted the paſſage of Virgil above cited, adds, " Theſe things are thus ſeparated into different provinces, that commerce amongſt men might be neceſſary, and every one might want and ſeek from another." Ariſtotle urges the ſame origine and neceſſity of commerce, Nicomach. 5. 8. Polit. 1. 6.

Sect. CCCXXVI.

The neceſſity of commerce.

Indeed if all men were virtuous, none would have reaſon to fear any want. For every one would then liberally give to thoſe who wanted of what he had in abundance (§ 221). But ſince the love of mankind *hath waxed cold*, and we live in times when virtue is praiſed, and ſtarves, there was a neceſſity of deviſing that kind of commerce, by which another might be obliged, not merely by humanity and beneficence, but by perfect obligation, to transfer to us the dominion of things neceſſary or uſeful to us, and to aſſiſt us by their work and labour.

Sect. CCCXXVII.

That could not be done but by contracts.

By *commerce* therefore we underſtand the exchange of uſeful things and labour, ariſing not from mere benevolence, but founded on perfect obligation. But ſince by commerce either work is performed, or dominion and poſſeſſion is transferred, which obligation ought to be extorted from none without

without his knowledge, and againſt his will (§ 320); the conſequence is, that commerce requires the conſent of both parties. Now, that conſent of two perſons concerning the exchange of neceſſary work, or things which is not of mere humanity and beneficence, but of perfect obligation, is commonly called *a contract*; and therefore it is obvious, that commerce cannot be carried on without the intervention of contracts *.

* This is obſerved by Iſocrates, except. adv. Callimach. p. 742. "There is ſuch a force in pacts, that many affairs among the Barbarians, as well as Greeks, are tranſacted by them. Upon the faith of them we bargain, and carry on commerce. By them we make contracts with one another; by them we put an end to private feuds or public war. This one thing all men continue to uſe as a common good."

Sect. CCCXXVIII.

Moſt of them ſuppoſe the price of labour and things fixed.

From the nature of commerce, as it hath been defined (§ 327), it is evident, that it will rarely happen that one will communicate his goods or labour with another gratuitouſly; but every one will deſire ſomething to be returned to him, which he thinks equivalent to the goods or labour he communicates. Wherefore, thoſe who would commute things or labour one with another, muſt compare things together; which compariſon cannot otherwiſe be made, than by affixing a value to things, by means of which an equality can be obtained and preſerved. But a quantity, moment, or value affixed to goods and labour, by means of which they may be compared, is called *price*. And therefore moſt contracts cannot take place without affixing or ſettling *price* *.

* Hence by the Greeks not only pacts and contracts, but all kinds of commerce are called *συμβολά's*, *σύμβολα*, *συμβόλαια*, *συμβολαια κοινωνικα*, from the verb *συμβάλλειν*, which ſignifies to bring together and compare. For thoſe who

who are to interchange goods or labour, compare them together, every one aſſigns a certain value to his goods or work, and ſo demands a proportional return. Thus, *e. g.* if we fix the proportion of gold to ſilver to be as eleven to one, we affix to each metal a moral quantity or price; which being done, nothing is more eaſy than to exchange theſe metals, and keep equality. But we ſay moſt contracts ſuppoſe the price of things determined, not all. For ſome are gratuitous, and therefore contracts are rightly divided into *onerous*, when the burden on both ſides is equal; *beneficent*, when one obliges himſelf to do any thing to another gratuitouſly; and *contracts of chance*, in which fortune ſo reigns, that one may receive what is done by another ſometimes with, and ſometimes without any onerous title.

Sect. CCCXXIX.

Price is either vulgar or eminent.

This compariſon is inſtituted either between goods and work by themſelves, or a common meaſure is applied, by which all other things are valued. In the firſt caſe, *vulgar* or *proper price* takes place, or the value we put upon goods and labour compared amongſt themſelves. In the latter caſe, there is a common meaſure by which we eſtimate all things that enter into commerce, which is called *eminent price* *; ſuch as is money amongſt us. But in both caſes equality is required.

* Hence Ariſtotle juſtly defines money; " A common meaſure to which all things are referred, and by which all things are eſtimated," Nicomach. 9. 1. And hence all things which enter into commerce are ſaid to be purchaſable by money. This alone is reprehenſible, that men ſhould eſtimate things by money, which do not enter into commerce; ſuch as, juſtice, chaſtity, and conſcience itſelf. And againſt this venality the antient poets have ſeverely inveighed. Horat. ſerm. 2. 3. v. 94.

Omnis enim res,
Virtus, fama, decus, divina humanaque, pulchris
Divitiis parent: quas qui conſtruxerit, ille
Clarus erit, fortis, juſtus, ſapienſve etiam, & rex,
Et quidquid volet.

So

So Propertius, 3. 10.

Aurea nunc vere ſunt ſæcula, plurimus auro
Venit honos, auro conciliatur amor.
Auro pulſa fides, auro venalia jura,
Aurum lex ſequitur, mox ſine lege pudor.

Many ſuch like paſſages are to be found among the antients, as in Petronius's ſatyricon, c. 137. and in Menander, of whom we have this elegant ſaying concerning a rich man preſerved;

Opta modo, quidquid volueris: omnia evenient:
Ager, domus, medici, ſupellex argentea,
Amici, judices, teſtes: dederis modo.
Quin & deos ipſos miniſtros facile habebis.

Sect. CCCXXX.

How vulgar or proper price is fixed.

That in the earlier times of the world men knew nothing but the *proper* price of things, is plain, becauſe eminent price could not have been inſtituted without the conſent of many; but every one impoſed vulgar price upon his own work and goods at his pleaſure. But ſince that is done with intention, and in order to purchaſe by them what one wants from another (§ 325); it is plain, that regard ought to be had in fixing the price of goods and labour to others from whom we want certain things; and therefore they ought to be eſtimated at ſuch a rate, as it is probable others will be willing to purchaſe them *.

* For if we ſuppoſe the Arabians to eſtimate their incenſe and ſpiceries at ſuch a price, that they would not give above one dram of them for ſix hundred buſhels of corn, they would never get corn at that price, becauſe none would exchange it upon ſo unequal terms, nor would others get their ſpices; and thus there would be a ſtop to commerce, for the ſake of which price is deviſed. Since therefore the means ought to be as the end, the conſequence is, that price ought to be fixed ſo that commerce can be carried on; and for this reaſon, in ſettling it regard ought to be had to others from whom we would purchaſe any thing.

Sect.

Sect. CCCXXXI.

What circumstances ought to be attended to in fixing it.

Now, ſince work or things ought to be valued at ſuch a price as it is probable others from whom we want any thing will purchaſe them; it is obvious, that ſometimes the neceſſity and indigence of others will raiſe the price of things *; and ſometimes the ſcarcity of the thing will raiſe it; and that regard ought likewiſe to be had to workmanſhip, the intrinſic excellence of the thing, the labour and expence beſtowed upon it, the danger undergone for it; and, in fine, to the paucity or multitude of thoſe who want the goods or labour, and various other ſuch circumſtances.

* It is true indeed, that the moſt neceſſary things have not always the higheſt price, kind providence having ſo ordered it, that the things which we can leaſt diſpenſe with the want of are abundant every where; and thoſe things only are rare and difficult to be found, which are not neceſſary, and which nature itſelf does not crave, as Vitruvius juſtly philoſophizes, Architect. 8. præf. But if neceſſity be joined with ſcarcity, *e. g.* if there is every where a dearth of corn, the price of it riſes very high, as experience tells us. And then happens, as Quintilian ſays, declam. 12. "In magna inopia, quidquid emi poteſt, vile eſt." "In great ſcarcity, what can be bought is cheap." The ſeven years famine in Egypt was an inſtance of this, Gen. xlvii. 14. & ſeq.

Sect. CCCXXXII.

What is called price of affection.

It may be objected, that men are accuſtomed to put an immenſe value upon their own goods, a much greater certainly than any one will purchaſe them at, whether it be that the author renders them precious, or their rarity, or ſome remarkable event which they recal to our memory. But ſince we are now treating of the duties which ought to be obſerved in commerce, and that kind of price is not commonly conſidered in commerce, but only

ly in repairing damages * (§ 212), it is evident that this price does not deftroy our rule.

* Fancy or affection is of fuch a nature, that it cannot pafs from one to another; and therefore it will be no motive to one to purchafe a thing from me at a greater price, becaufe it is agreeable to me on account of its ferving to recal fomething to my memory that gives me pleafure. But this however is but generally true: for fometimes in commerce even this price is confidered; as when, 1. The affection to a thing is common on account of the author or artift, or of its fingular beauty and rarity. Hence the ftatues of Phidias, and the more finifhed pictures of Apelles or Parrhafius, fold at a higher than the vulgar or proper price, becaufe they deferved the common efteem of all mankind. 2. If the purchafer has a greater affection to a thing than the poffeffor; *e. g.* if my poffeffion would greatly better another's, and he therefore defire, like him in Horace, who thus fpeaks, ferm. 2. 6.

O fi angulus ille
Proximus accedat, qui nunc denormat agellum!

Sect. CCCXXXIII.

Why eminent price was invented.

But fince commerce was inftituted among men that one might fupply his wants out of another's ftock or labour (§ 326), and price was devifed for no other reafon but that equality might be obtained in the exchange of goods or labour (§ 328); it could not but happen very often, that one might not have a very great abundance of what another might want, that one might defpife what another would defire to exchange, and that the value of things which perfons might defire to commute, might be fo uncertain and variable, that fome of the parties muft run a rifk of lofs; and that the things to be exchanged might be of fuch a bulk, that they could not be commodioufly tranfported to diftant places, or could not be taken proper care of in the journey.—All which inconveniencies not being otherwife avoidable, neceffity itfelf at laft devifed fome eminent

price

price that all would receive, and the proportion of which to goods could eafily be determined *.

* This is obferved by Paullus JC. l. 1. D. de contra empt. who defcribes the origine of buying and felling as above. Ariftotle likewife gives much the fame account of the matter, ad Nicomach. § 8. and Polybius 1. 6. upon which paffages Perizonius hath commented with much erudition, de ære gravi § 2. p. 6. & feq. as has Duaren. upon that of Paullus animad. 1. 6.

Sect. CCCXXXIV.

Its neceffary qualities.

The end of money, or eminent price, requires that the matter chofen for that purpofe be neither too rare, nor too common, nor ufelefs, and in itfelf of no price *; that it be eafily divifible into fmall parts, and yet not too brittle; that it may be eafily kept and laid up, and eafily tranfported to any diftance; becaufe, if it was too fcarce, there would not be a fufficient quantity of it to ferve the ufes of mankind; and if it was too common, it would be of no price or value, in which cafe, it would not be received by all; if it could not be eafily divided into any portions, equality in commerce could not be obtained by it; and yet, if it was too brittle, it would eafily wear out by ufe, and thus its poffeffors would be impoverifhed. In fine, if it could neither be conveniently kept, nor eafily tranfported, the fame inconvenience which rendered commerce difficult before the invention of it, would ftill remain (§ 333).

* Wherefore Ariftotle juftly calls Money, Nicomach. 5. 8. " a furety, which if one carries along with him he may purchafe any thing." Whence Pufendorff of the law of nature and nations, v. 1. 13. juftly reafons thus: " As we accept a man of known credit and value, and not every common fellow for a furety, fo no man would part with his goods, which perhaps he had acquired with great labour and induftry, for what he might meet with any where, as a handful of duft and fand; it was neceffary

 there-

therefore, that money ſhould conſiſt of ſuch a matter, as might be convenient for keeping, and by reaſon of its ſcarcity, ſhould have the value of many things crowded and united with it."

Sect. CCCXXXV.

Why the nobler metals are uſed to this purpoſe.

But becauſe theſe properties belong to no other matter but the more precious kinds of metals, as gold, ſilver and braſs; theſe metals are therefore applied to this uſe, and hence coined money of various weights and ſizes hath ſeemed to moſt civilized nations the propereſt ſubſtance to anſwer the ends of commerce. If any people hath thought fit to give an eminent price to any other matter *, it hath been done out of neceſſity, and for want of money, and with this intention, that the ſcarcity or difficulty being over, every one might receive ſolid money for the ſymbolical; or ſuch money hath only been uſed by a nation within itſelf, and was not proper for carrying on commerce with foreign nations.

* Thus the Carthaginians uſed inſtead of money ſomething I know not what, faſtened to a bit of ſkin, and marked with ſome public ſtamp, Æſchin. dialog. de divit. c. 24. p. 78. edit. Petri Horrei. The Lacedemonians an uſeleſs lump of iron, idem ibid. p. 80. Plutarch. Lycurg. p. 51. other nations uſed ſhells, Leo Afr. l. 7. others grains of corn, kernels of fruit, berries, lumps of ſalt, Pufendorff. § 1. 13. Examples of paper, leather, lead, and other things made uſe of for money in beſieged towns, are to be found (not to mention inſtances from more modern hiſtory) in Polyænus Strategem. 3. 10. and there Maſuic. p. 274. Seneca de beneficiis, 5. 14. But all ſuch money uſed in barbarous nations, is capable of carrying on but a very ſmall trade among themſelves. And ſymbolical money uſed in public calamities, is really to be conſidered as tickets or bills, which the ſupreme magiſtrate obliges himſelf to give ready money for, when the diſtreſs is over. Thus Timotheus is ſaid by Polyænus to have perſuaded merchants to take his ſeal for money, to be received upon returning it.

Sect.

Sect. CCCXXXVI.

What price is to be put on money.

Tho' it belong to the ſupreme power in a ſtate to fix the value of money (as we ſhall ſhew afterwards in the proper place); yet, as with reſpect to vulgar or proper price, regard ought to be had to others from whom we would have any thing in exchange (§ 330); ſo it is evident, that a value ought to be put upon money, at which it is probable other nations, with whom we are in commerce, will not refuſe it; and therefore the value of it ought to be regulated according to that proportion of one metal to another, which is approved by neighbouring civilized nations, unleſs we would fright other nations from having any commerce with us, or be ourſelves conſiderable loſers.

* For if we put too high a value on our money, foreign nations will either not care to have commerce with us, or they will raiſe the price of their commodities in proportion to the intrinſic value of our money. But if we put a leſs value on our money than neighbouring nations, nothing is more certain, than that our good money will remove to our neighbours, and their bad money will come to us in its room, ſo that none will know what he is worth. Hence it follows, in the more civilized nations, the proportion of gold to ſilver varying according to times, and being ſometimes as twelve, ſometimes as eleven, ſometimes as ten to one, the price of gold muſt be ſometimes higher and ſometimes lower. (See our diſſertat. de reduct. monet. ad juſt. pret. § 24.) Wherefore the Arabians could not but be great loſers, who, according to Diodorus Siculus, Bibliothec. 3. 45. received for braſs and iron an equal weight of gold; or, as Strabo, Geogr. 16. p. 1124. paid for braſs three times the weight of gold, for iron twice the weight, and for ſilver ten times the weight, partly through their ignorance of arts, and partly through their indigence of thoſe things which they bartered for it, that were more neceſſary to them. See what is related of the Peruvians by Garcillaſſ. de la Vega dans l'hiſtoire des Yncas, 5. 4. p. 425.

Sect. CCCXXXVII.

The most antient of all contracts before the invention of money was bartering.

That we may now come to the *contracts*, by means of which commerce is carried on (§ 327), it is obvious to every one, that one kind of contracts took place while the proper price of things only was known, and money or eminent price was not yet in use (§ 330), and that after money was invented another kind took place, and that some were known both after and before money was in use. Among those which took place before money was in use, the first and principal is *bartering*. For in the first ages of the world commerce was only carried on by exchanging or bartering commodities and labour; and therefore bartering is the most antient of contracts; and it continued still to be in use in many nations, after money was in use, as well as where no price was yet put upon gold, silver, and brass*.

* So it was among our ancestors the ancient Germans, Tacitus de moribus Germ. c. 5. who observes, that in his time the Germans who lay nearest to the Roman provinces, had conceived some desire of money. Justin, hist. 2. 2. relates the like of the Scythians. Pomponius Mela of the Satarchi, a People in the European Scythia, de situ orbis, 2. 1. Strabo of the Spaniards, Geogr. 3. p. 233. The same is yet practised by several nations in Asia, Africa and America: And it is the less to be wondered at with respect to barbarous countries, since the Greeks and Romans, long after the invention of money, carried on commerce in no other way but by barter. We have a noted example of it among the Greeks in Homer, Iliad 7. v. 482. and among the Romans in Plin. nat. hist. 18. 3. 33. 1.

Sect. CCCXXXVIII.

How many sorts there are of it.

Bartering is giving something of our own for something belonging to another; which, because it may be done two ways, *i. e.* either with, or without estimating and putting a certain price upon the things

things exchanged, it therefore follows, that when no eſtimation is made, is is called *ſimple bartering*; and when an eſtimation is made, and price fixed, it is called *eſtimatory bartering*. The former is ſomewhat like mutual donation, and the latter ſomewhat like buying and ſelling, l. 1. C. de permut. l. 1. § 1. D. de contr. emt. For tho' Pufendorff of the duties of a man and a citizen, 1. 15. 8. aſſerts that mutual donation is quite a different buſineſs from bartering, becauſe it is not neceſſary that equality ſhould be obſerved in it, yet there is no difference in this reſpect; for neither is equality obſerved in *ſimple bartering* *.

* For in it, each of the contracting parties eſtimates not his own but the other's; and not at the juſt price others would put upon it, but according to his fancy; and ſo there is in ſuch a contract no equality of goods, but of affection or fancy only. Becauſe as often as the affection of the acquirer is greater than that of the poſſeſſor, regard is had in commerce, as we have already ſaid (§ 332), to price of affection. The commerce between Glaucus and Diomedes in Homer, exchanging their arms, furniſhes us with an example, Iliad 2. v. 236.

Aurea æreis, centena novenariis, &c.

Of which barter Maximus Tyrius, Diſſert. Platon. 23. very elegantly obſerves, "Neither did he who received the gold get more than he who got the braſs. But both acted nobly, the inequality of the metals being compenſated by the deſign of the exchange."

Sect. CCCXXXIX.

What is juſt with reſpect to ſimple barter.

Becauſe *ſimple barter* is ſomewhat like mutual donation, and it is not neceſſary that equality ſhould be obſerved in it (§ 338), it is plain neither of the contracting parties can have any reaſon to complain of being wronged, unleſs the other uſe force or guile (§ 322. and 321.) nor is ſuch a contract null on account of injury, except when he who exchanges a more precious thing for a thing of no value, has not the

the free difpofal of his goods (§ 317); and more efpecially, if the thing thrown away in fuch a manner, be of fuch a kind that it cannot be alienated without doing fomething bafe, unlefs the accepter himfelf be perchance guilty of equal bafenefs.

* Hence it may be doubted, whether the exchange made by Jacob and Efau, the latter of whom fhamefully fold his birth-right for pottage, Gen. xxv. 29. would have been valid *in foro humano.* For tho' Efau was very blame-worthy in fetting fo fmall a value upon the prerogative God had favoured him with, and he be on that account very juftly called by the apoftle, Heb. xii. 6. *a profane perfon*; yet Jacob acted no lefs bafely in taking advantage of his brother's hunger, to defraud him of fo great a privilege (§ 322). For what Efau could not fell without a crime, that his brother could not buy without a crime; and it was his duty to diffuade his brother from fuch folly, and not to abufe his weaknefs. But many things of this fort are admirable in their typical fenfe, which are fcarcely defenfible by the rules of right reafon.

Sect. CCCXL.

What is juft with regard to eftimatory permutation.

In *eftimatory* permutation or barter, fince here a price is put upon the things to be exchanged, (§ 338), equality ought certainly to be obferved, and neither ought to wrong the other; nor is the barter valid if either be circumvened, unlefs the injury be of fo little moment that it be not worth minding *.

* For the vulgar or proper price of things is either legal or conventional; the former of which is fixed by law, or the will of fuperiors, the latter by the confent of the contracting parties. Now, feeing the former is fixed, and confifts, as it were in a point, but the latter is uncertain, or admits of fome latitude; in the former cafe one is juftly thought to be wronged who does not receive the full price; in the latter cafe, the damage ought to be of fome confideration to invalidate the contract *in foro humano.* " For, as Seneca fays of benefits, 6. 15. what's the matter

ter what be the value of a thing, if the price be agreed upon between the buyer and the feller? The price of every thing is temporary. When you have highly praifed things, they are juft of fo much value and no more than what they may be fold for." Hence in formed governments, we may obferve that a contract is only annulled when the injury is enormous, as by the Roman law, when one of the parties was wronged above half the price, l. 2. C. de refcind. vendit.

Sect. CCCXLI.

Of the contracts, I give that you may do: I do that you may give; I do that you may do.

But men not only barter commodities, but likewife work for work, or work for other confiderations; whence thefe contracts, *I give that you may do*; *I do that you may give*, *and I do that you may do*; which being of the fame kind and nature with barter, or reducible to barter, *fimple* or *eftimatory* (§ 338), the fame rules already laid down concerning them (§ 338) muft, it is evident, be obferved in thofe contracts. For either one's work is eftimated with refpect to another's work or goods, (which kind of negotiation is called, not unelegantly, by Ammian. Marcell. hift. 16. 10. *pactum reddendæ viciffitudinis*) or work for goods is done without any eftimation *. And in the former cafe equality ought to be obferved, and damage of any confiderable moment ought to be repaired; but in the latter all complaints about wrong or hurt are to no purpofe.

* Such was the promife of Agamemnon in Homer, Iliad. 10. v. 135.

If gifts immenfe his mighty foul can bow,
Hear all ye Greeks, and witnefs what I vow:
Ten weighty talents of the pureft gold,
And twice ten vafes of refulgent mold;
Seven facred tripods, whofe unfully'd frame,
Yet knows no office, nor has felt the flame;
Twelve fteeds unmatch'd in fleetnefs and in force,
And ftill victorious in the dufty courfe, &c.

All this to pacify Achilles.— Whence it is plain, that it was a practice for one to ftipulate with one for ineftimable

services, and to promise him for them whatever he thought would be most agreeable, without any regard to equality.

Sect. CCCXLII.

Contract of loan.

There are other contracts by which commerce was carried on before the invention of money, *viz.* all gratuitous ones, by which, what before was only owing to one by imperfect right, or by mere love and benevolence, became due to him by perfect right, such as a contract of loan. For since we are obliged to what was called (§ 228) *officiousness*, we are likewise bound to accord to one who may want it, the use of any *commodity* belonging to us not consumable, with his obligation to restore it; *i. e.* to lend, or give in loan *. But the love of mankind becoming cold, it could hardly be hoped that one would do this service to another spontaneously (§ 326), and therefore necessity forced men to invent a kind of contract, by which men might be obliged by perfect right thus to grant the use one to another of their not consumable goods.

* Loan therefore is a perfect obligation to allow another the use of something belonging to us, on condition of his restoring it to us in specie, gratis. And hence it is plain, that in natural law a loan scarcely differs from (precarium) what is granted to one upon his asking it, between which there is however some difference in civil law. Hence also may this question easily be decided, "Whether a contract of loan derives its essential obligation from the consent of the contracting parties, or from the delivery of the thing?" For tho' by the law of nature, consent alone to the use of a thing obliges (§ 327); yet it is not a loan till the thing be delivered; because he to whom the promise of a loan is made, before he hath received the thing thus promised, is not obliged to restore it in specie: it is only a pact or agreement about a loan. But that there is a difference between these two is plain from hence, that the borrower, by loan, is obliged to restore the thing, but by a compact about lending, he who promises to lend is obliged

to

to give the thing in loan: ſo that different obligations ariſe from theſe two negotiations.

Sect. CCCXLIII.

The duties of the borrower.

Now, becauſe the uſe of a thing is granted by loan, on condition of the borrower's reſtoring it in ſpecies * (§ 342), the former is obliged not only not to apply the thing borrowed to other uſes than thoſe for which it was given, but likewiſe to apply it to theſe uſes with the greateſt care and concern; and therefore, when the uſe is over, or when the proprietor re-demands it, to reſtore it to him in ſpecies, and if it hath ſuffered any damage by his fault, to repair it; but he is not bound to make up fortuitous damages, unleſs he had voluntarily ſo charged himſelf * (§ 106); nor can he demand for any expences he may have laid out upon it, unleſs they exceed the hire to be paid for the letting of ſuch a thing.

* Grotius of the rights of war and peace, 2. 12. 13. was the firſt who diſtinguiſhed here, whether a thing would have periſhed in like manner in the hands of its proprietor or not; in the latter of which caſes, at leaſt, he thinks the loſs ſhould fall upon the borrower: And Pufendorff of the law of nature and nations, 5. 4. 6. is of the ſame opinion: So likewiſe Mornac, ad l. 1. C. commod. But ſince accidental or fortuitous events, ariſing merely from providence, are imputable to no perſon (§ 106), they certainly cannot be imputed even to a borrower. Nor is the divine law repugnant to this ſentence, Exod. xxii. 14. For it cannot be underſtood otherwiſe than when the borrower is in fault. See Jo. Clerici Comment. in Exod. p. 110.

Sect. CCCXLIV.

The contract of depoſite.

Again, the love of humanity obliges every one to promote the good of others to the utmoſt of his power (§ 216); but ſince we have only an imperfect right to demand ſuch good offices, it is often our intereſt to ſtipulate with others, in order to their

being

being obliged by a perfect right to take the cuſtody of our things depoſited with them; and this is the intention of the contract of *depoſite* or *charge*, by which we underſtand a perfect obligation upon another to keep gratis our things intruſted to his faith, and to reſtore them to us upon demand in ſpecies *.

* Nothing was more ſacred among the ancients than this contract, becauſe the deponent repoſes the greateſt truſt and confidence in the truſtee; and nothing can be more baſe than to deceive a friend under the mask of friendſhip (§ 322). Hence the religious veneration paid to ſuch truſts, not only among the Hebrews, of which ſee Exod. xxii. 7. and Joſephus's antiquities of the Jews, 4. 8. 38; but among the Greeks likewiſe, and ſeveral other Pagan nations, as we may learn from the ſtory of Glaucus in Herodot. 6. 87. and from Juvenal, Sat. 13. v. 15. who there calls it *depoſitum ſacrum*. Hence it is not to be wondered, that the ancients pronounced ſuch terrible curſes againſt thoſe who dared to refuſe to give back their charge; and looked upon them as no leſs infamous, and equally to be puniſhed with thieves. See what is ſaid on this ſubject by Gundlingius in Gundlingianis, part. 2. diſſ. 8.

Sect. CCCXLV.

The duties of the truſtee.

It is plain from the definition of a *charge*, (§ 344), that the truſtee is obliged to the moſt watchful cuſtody of his charge, not ſo much as to untie it, or take it out of its cover, much leſs apply it to his uſe, without the maſter's conſent; in which caſe, the contract becomes not a charge, but contract of loan or uſe. And that the truſtee is obliged to reſtore the thing intruſted to his keeping to its owner whenever he calls for it, unleſs right reaſon diſſuade from ſo doing (§ 323); and conſequently he is not only bound to make ſatisfaction, but is likewiſe worthy of ſevere puniſhment, if knowingly and guilefully he refuſes to reſtore it, more eſpecially, if it was lodged in his truſt in a caſe of diſtreſs *.

* For becaufe regard is had to all circumftances in imputation (§ 113), therefore fuch a crime is fo much the more vile and odious, in proportion as he is more inhuman, who not only cheats under the cloak of friendfhip (§ 322), but cruelly adds affliction to the afflicted. This is warmly urged by Hecuba againft Polymneftor, who, when Troy was deftroyed, killed Polydorus, fon to Priam, that he might have the gold entrufted with him to himfelf, Hecub. v. 1210, & feq. Euripides.

Sect. CCCXLVI.

The contract of commiffion.

Again, the love of humanity ought to excite every one to affift another as readily as himfelf (§ 216); but becaufe one cannot be fure of that from another, there is need of a contract, by which we may oblige one to manage our bufinefs which we have committed to him diligently, without any reward *. Now this contract we call *commiffion*, as when one without his knowledge, undertakes another's bufinefs, or orders and manages it for him voluntarily gratis, he is faid *negotia gerere*, to take another's bufinefs upon him of his own accord.

* It is a true and folid remark of Noodt, in his probabilia, 1. 12. that a mandate or commiffion in ancient times, had not perfect obligation, but that the proxy or perfon commiffioned, was only bound by the laws of humanity and friendfhip, to the diligent and honeft execution of his commiffion : and that the fymbol ufed was giving the hand ; whence it is not unlikely that this contract was called *Mandatum*, Ifidor. orig. 4. 4. You may fee examples of thus giving hand to proxies in Plautus Capt. 2. 3. 82. where the youth fays,

Hæc per dextram tuam, te dextera retinens manu,
Obfecro, infidelior mihi ne fuas, quam ego fum tibi.

And in Terence Heaut. 3. 1. v. 84.

Cedo dexteram : porro te idem oro, ut facias, Chreme.

Anciently therefore, this whole bufinefs depended upon integrity, and not laws, till benevolence becoming very cool among mankind, neceffity obliged them to make it a contract, that thus the proxy might be laid under a perfect obligation

obligation of executing his commiſſion diligently. And the caſe is the ſame with regard to all the other gratuitous contracts.

Sect. CCCXLVII.

The duties of a proxy.

Wherefore, ſince a proxy undertakes another's buſineſs *committed* to his care (§ 346), but it depends upon the maſter's pleaſure what, and how far to commit; it is plain, that the perſon giving the commiſſion, either gives him full power to do all as he ſhall judge proper, or circumſcribes the perſon commiſſioned within certain limits; or at leaſt, by way of counſel, ſuggeſts to him what he would have him do. In the ſecond caſe therefore, the proxy cannot exceed the bounds of his commiſſion. In the firſt, he is only obliged to anſwer for knavery. In the third, that he may expede his commiſſion by doing ſomething equivalent. But, in all theſe caſes, the procurator or proxy is obliged to render account of his management, in conſequence of the very nature of a commiſſion *.

* To this belongs that noted paſſage of Cicero, pro Q. Roſc. c. 38. "Why did you receive a commiſſion, if you was either reſolved to neglect it, or to make your own advantage of it? Why do you offer your ſervice to me, and yet oppoſe my intereſt? Get away: I will tranſact the affair by another. You undertake the burden of an office to which you think yourſelf equal: an office which does not appear heavy to thoſe who have any degree of weight or ſufficiency in themſelves. Here there is a baſe violation of two moſt ſacred things, faith and friendſhip. For one does not commiſſion another unleſs he have confidence in him, nor does one truſt a perſon except he have a good opinion of his integrity. None therefore but the moſt abandoned villain would both violate friendſhip, and deceive one who could not have been hurt had he not truſted to him."

Sect. CCCXLVIII.

As likewiſe of him who

He alſo who takes *another's buſineſs* upon him without commiſſion, without being called to do it, of

of his own accord, and gratis (§ 346), by ſo doing binds himſelf to manage it to the beſt advantage, and to beſtow all poſſible care about it, and therefore to render account, and to ſtand to all the loſſes that may happen by his fault.

takes another's buſineſs upon him uncalled.

* To the cauſe or author of a deed are it and all its effects imputable (§ 105). Since therefore, he who takes upon him another's buſineſs is the author of the adminiſtration (§ 346), to him are all the conſequences of the adminiſtration juſtly imputable. But the conſequences of adminiſtration are giving account and repairing damages incurred by the fault of the adminiſtrator. And therefore he who takes upon him the adminiſtration of another's buſineſs is obliged to give account, and to make reparations for damages proceeding from any fault in him. So that there is no need of deriving this obligation, with the lawyers, from feigned or preſumed conſent, ſince ſuch an adminiſtrator as hath been deſcribed, by his own deed in undertaking another's buſineſs, tacitely indeed, but truly obliges himſelf to all that hath been ſaid.

Sect. CCCXLIX.

The duties of a lender, a deponent, a perſon giving a proxy, and of one whoſe buſineſs is managed by another without commiſſion.

Theſe then are the contracts which took place, money or eminent price not being yet found out: and with regard to them all, we have one thing yet to obſerve, which is, that becauſe in the three laſt, one obliges himſelf to give and do ſomething gratuitouſly, but not to ſuffer any hurt on another's account, in them therefore no one ought to ſuffer by his good offices, and conſequently he who lends is obliged to reſtore to the borrower expences that are not immoderate (§ 343), and the deponent is obliged to reſtore to the truſtee all neceſſary charges; and the perſon giving a commiſſion, or the perſon whoſe affair is undertaken and managed without his commiſſion, is obliged to reſtore neceſſary or uſeful charges; and they are all of them bound to repair all the damages that may have been incurred for their ſake, or on account of managing their affairs

fairs by the borrower, the truſtee, the proxy, or the voluntary undertaker, without their fault *.

* We ſay thoſe damages ought to be repaired which a proxy hath ſuffered by managing another's affairs. For it is not enough that he hath incurred any accidental damage on occaſion of his having undertaken another's buſineſs: becauſe none being obliged to anſwer for accidents, a perſon giving commiſſion to another is not. Wherefore, if a proxy, while he is expeding his commiſſion, is robbed by highwaymen, or falls into a dangerous ſickneſs, the loſs he may thus providentially ſuffer is not to be imputed to his conſtituent. "For ſuch accidents, ſays Paullus, l. 26. § 6. D. mandati, are imputable to fortune, not to commiſſion." See Grotius of the rights of war and peace, 2. 14. 13. But it is otherwiſe with reſpect to one commiſſioned by a prince to do ſome public buſineſs in a foreign country. For he to whom the glory of obeying is the chief reward, ought to be indemnified by the public. See Hubert. Eunom. ad l. 26. D. mandati. Pufendorff of the law of nature and nations, 5. 4. and Hert. de lytro, 2. 10.

Sect. CCCL.

The contracts which took place after the invention of money, buying, ſelling, renting, hiring.

We now go on to another kind of contracts which began to take place when money was invented, the chief of which are *buying* and *ſelling*, *renting* and *hiring*. The firſt is a contract for delivering a certain thing for a certain price. The ſecond is a contract for granting the uſe of a certain thing or labour at a certain rate or hire. But as the *price in buying* is the value of the thing itſelf in money, ſo *hire* is the *value* of the uſe of a thing, or of labour in money; and therefore, from the very definitions, it is plain that buying and ſelling, renting and hiring, now-a-days, require payment in money, and in that are different from bartering, and the other contracts defined above; "*I give that you may give; I give that you may do; I do that you may give, and I do that you may do* *." Yet they all agree in the chief points, and have almoſt all the ſame common properties or effects.

* For

* For tho' eſtimatory barter bears ſome affinity to buying and ſelling (§ 338), yet it really differs from it in this reſpect, that in ſelling, money intervenes, but in eſtimatory barter, an eſtimated thing is given for another thing. Whence it is very manifeſt, what ought to be determined concerning the ancient controverſy between the Sabiniani and the Proculiani, whether price in buying and ſelling could only conſiſt in money, or might conſiſt in other things. Upon which ſee, beſides the learned commentators upon § 2. de empt. vend. inſtit. V. C. Gottf. Maſcou. de ſect. Sabin. & Procul. 9. 10. 1. & ſeq.

Sect. CCCLI.

The ſeller is obliged to tell the qualities of the thing he ſells to the buyer.

Since therefore this is the nature of the contract *buying* and *ſelling* (§ 351), that a thing is delivered at a certain price; the conſequence is, that the buyer and ſeller ought equally to know the thing; and therefore the ſeller ought not only to point out to the buyer all its qualities, all its imperfections, faults or incumbrances, which do not ſtrike the eyes and other ſenſes *; but he is likewiſe bound to ſuffer him to examine it with his eyes, and by all other means; ſo that of things belonging to the taſte, the ſale is not perfect till they are taſted; and of others which ſtand in need of other trials, the ſale is not perfect till the trial hath been made: And therefore, if what Euripides ſays be true with reſpect to any contract, it certainly holds with regard to this chargeable one, " Light is neceſſary to contractors." Cyclop. v. 137.

* There are faults and imperfections which are ſo glaring, that it would be needleſs to point them out; ſo that if one is deceived with reſpect to ſuch faults, he deſervedly ſuffers by his own blindneſs and heedleſſneſs; to which caſe belongs the conteſt between Marius Gratidianus and C. Sergius Orata in Cicero, off. l. 3. 16. But the Roman laws, that men might be more firmly bound to do this good office one to another, ordained that all the faults ſhould be told in ſelling which were known to the ſeller, and appointed a puniſhment for thoſe who hid any, or did not diſcover them. " For tho' the twelve tables, ſays Cicero, ordered

ordered no more than this, that the ſeller ſhould be bound to make good thoſe faults, which were expreſly mentioned by word of mouth in the bargain, and which whoever denied was to pay double damages, the lawyers have appointed a puniſhment for thoſe, who themſelves do not diſcover the faults of what they ſell: For they have ſo decreed, "That if the ſeller of an eſtate, when he made the bargain, did not tell all the truth in particular, that he knew of it, he ſhould afterwards be bound to make them good to the purchaſer," de off. 3. 16. The ſame author, c. 12. diſputes, "Whether an honeſt merchant bringing, when corn was ſcarce at Rhodes, a large quantity thither from Alexandria, and withal knowing, that a great many ſhips, well laden with corn, were in the way thither from the ſame city, was bound to tell the news to the people of Rhodes, or might lawfully ſay nothing of it, but ſell his own corn at the beſt rates he could? of which queſtion ſee Grotius of the rights of war and peace, 2. 12. Pufendorff of the law of nature and na tions, 5. 3. 4.

Sect. CCCLII.

Neither of the parties ought to be wronged.

Hence it is alſo plain, that equality between the thing ſold and the price paid, ought to be obſerved (§ 329); and therefore every injury ought to be repaired, whether it be done by guile or force, or be occaſioned by a juſtifiable miſtake *. Yet here we ought to call to mind what was before obſerved, that the wrong ought to be of ſome conſiderable moment, becauſe here price does not conſiſt as it were in a point, but admits of ſome latitude, and it would juſtly be reckoned being too ſharp, and opening a door to endleſs ſuits and contentions, to reſcind a contract for every ſmall loſs (§ 340).

* If it ſhould be invincible, involuntary and inculpable (§ 107): For otherwiſe, if one buys any thing at a certain price, which he hath not ſeen nor ſufficiently examined, his error ought to fall on himſelf, if the ſeller uſed no guile to deceive him, (which we know Laban did to Jacob in buying his wife, Geneſis xxix. 23.) becauſe he

ſuffers

ſuffers juſtly for his miſtake, who might not have miſtaken, had he not been ſupinely negligent.

Sect. CCCLIII.

To whom the loſs and gain belong before delivery.

It is diſputed to whom the *loſs* and *gain* belongs while the *thing ſold* is not delivered; whether it immediately paſſes to the buyer ſo ſoon as the price is agreed upon, or whether it ſtill belongs to the ſeller while the thing is undelivered? What the Roman law has determined in this caſe is well known; nor will any one expect that we ſhould inſiſt long upon the reaſons of that deciſion. To us, who are now only enquiring into the determination of the law of nature, it ſeems incontrovertible, that the owner or maſter is to ſtand all chances (§ 211); nor does it appear leſs certain to us, that what proceeds from delay or fault, is not mere chance; and therefore he, who by any deed damages another, is obliged to repair that damage (§ 211). Whence it follows, that becauſe the buyer may, by the law of nature, be maſter of the thing bought without delivery (§ 275), the riſk, after the ſale is compleated, immediately falls upon the buyer, unleſs the ſeller be guilty of any delay in delivering it, or ſome other fault *.

* Pufendorff's opinion (of the law of nature, *&c.* 5. 5. 3.) is much the ſame, but more obſcurely told, where he diſtinguiſhes whether a certain day was fixed for the delivery or not, and if fixed, whether it be elapſed or not. For he thinks it moſt equal that the ſeller ſhould run the risk till the term is elapſed; but that, the term being elapſed, if the thing periſhes, it periſhes to the buyer. But ſince the buyer is maſter, by the law of nature, without delivery, and the term being elapſed, it may not be always the ſeller that is in delay, but that may often be the fault of the buyer; we think in general the risk belongs to the buyer, in whoſe power it was to have received the thing immediately, upon paying down the price. But if he hath fulfilled the conditions of the contract on his ſide, or if he is ready to fulfil them, the ſeller who delays the delivery,

deservedly runs the risk, whether a certain term for delivery was agreed upon or not.

Sect. CCCLIV.

Whether the decision of the Roman law is agreeable to the law of nature?

Now, because the buyer immediately becomes master or proprietor even before delivery, and therefore ought to stand to all chances (§ 353); the consequence is, that the doctrine of the Roman lawyers concerning the risk of a thing sold is true, but is not so consistent with their own principle, which denies that the dominion passes to the buyer without delivery; that since the proprietor hath the right of all the fruits, accessions, and other advantages of what is his own (§ 307), he hath also a right to all the gains of a thing sold to him; but so, that this rule shall then only take place, if the buyer hath any way satisfied the seller for the price *; because otherwise he would, at the same time, have the thing and the price, and thus he would be made richer at another's detriment (§257.)

* But not only he seems to have given satisfaction as to the price, who hath paid the money, but he also to whom the seller trusts, having, *e. g.* stipulated to himself an annual interest. For tho' this is the most simple kind of contract, in which the price being paid down, the thing is immediately delivered, *i. e.* if men merchandize *Græca fide*, which was the only kind of commerce Plato allowed in his commonwealth de legibus, l. 11. yet that cannot always be done, and experience shews us, that commerce consists more in credit than in ready money.

Sect. CCCLV.

When the risk belongs to the seller.

But since a thing justly perishes to the loss of the seller when he is guilty of delay in delivery, or of any other fault (353), it is manifest that the buyer is exempt from all risk, if the seller, when he offers him the price, refuses to give him full possession of the thing sold, or cannot do it; and likewise, if it can be proved to have been owing to

to the ſeller's fault or negligence, that the thing ſold periſhed either in whole or in part.

Sect. CCCLVI.

The ſeller owes warranty to the buyer.

Buying and ſelling is done on purpoſe that a thing may be delivered for a certain price (§ 278). But ſince he who transfers dominion to another for an onerous cauſe, as, for a certain price, is obliged to warranty (§ 274), the ſeller muſt be obliged to warrant the buyer, if the thing be evicted from him upon account of any cauſe antecedent to the contract; but not, if, after the ſale, ſomething ſhall then happen, on account of which one is deprived of his property, or if it be taken from him by accident, or by ſuperior force *.

* Truly, what happens by ſuperior force happens by accident; wherefore, ſince when the contract of buying and ſelling is perfected (§ 353), the owner muſt ſtand all chances, even when a thing ſold is carried off from the buyer by chance or ſuperior force, he cannot ſeek warranty or reparation from any perſon. Moreover, there is no doubt, but, as other pacts added to this contract ought to be valid; ſo the buyer and ſeller may agree that there be no warranty, but that the thing may be entirely at the buyer's riſk. Such a pact was added to the ſelling of the girl by Sagariſtio in Plautus, in Perſa, 4. 4. v. 40.

Prius dico: hanc Mancupio *nemo tibi dabit, jam ſcis?*
Do. *Scio.*

Sect. CCCLVII.

Other pacts may be added to this contract.

Moreover, becauſe buying and ſelling is a contract, (§ 350); but a contract requires the conſent of both parties (§ 327), it is manifeſt, that in buying and ſelling all turns upon agreement; and therefore any other pacts may be added to it by conſent, provided they be not abſurd, unjuſt, or fraudulent; as for inſtance, *addictio in diem,—lex commiſſoria,—pactum de retrovendendo,—pactum protomiſeos,—pactum de evictione non præſtanda,—pactum*

 de

de pœna in casum pœnitentiæ præstanda, and such others *.

* The definitions of these pacts are known from the civil law. *Addictio in diem*, is a pact which gives the seller leave to accept of any better bargain that shall offer itself by such a day, which may be done two ways. First, when the bargain is compleated, but upon condition that it shall be null, if better terms offer themselves: Or, secondly, if it be only agreed, *de futuro*, that it shall be a bargain, if better offers are not made. *Lex commissoria*, makes void the bargain, if the price be not paid by such a day. We have an example of it in Cornelius Nepos in the life of Atticus, c. 8. *Pactum de retrovendendo*, is an agreement, that upon tender of the price at any time, or by such a certain day, the buyer shall be obliged to restore the goods to the seller or his heirs. Such is that sale in Livy, 31. 13. and that in Julius Capitolin. in Marco c. 17. *Pactum protomiseos*, is the privilege of the first refusal, that is, if the buyer be hereafter disposed to part with the commodity, he must let the seller, or his heirs, have the first refusal, at the same rate he would sell it to another. The nature of the rest is obvious from the terms by which they are expressed. [*Eviction* is the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, because of the right which a third person has to it; so that *pactum de evictione non præstanda*, is an agreement between the seller and the buyer, that the former shall not be obliged to warrant the buyer against all danger of being evicted or troubled in his possession of the thing sold. Warranty being a consequence of the contract of sale, there is a first kind of natural warranty, which is called *warranty in law*, because the seller is obliged to it by law, altho' the sale make no mention of it. And it being in our power to augment or diminish our natural engagements by covenants, there is a second kind of warranty, which is a warranty by deed or covenant, such as the seller and buyer are pleased to regulate among themselves. *Pactum de pœna incasum pœnitentiæ præstanda*, is an agreement to pay a fine, in case of repenting and not standing to the bargain.]

Sect. CCLVIII.

As likewise exceptions and conditions.

From the same principle we infer that a seller may *except* something for himself in the sale, and that

that either party may add to the bargain any *condition* not repugnant to honeſty and good manners, as likewiſe appoint a day, before which the thing is to be delivered, and the price paid *. Nay, that they may alſo agree, that the price not being paid, the property ſhall remain for ſome time with the ſeller, or that the buyer, retaining ſome part of the price in his hands, for which he is to pay intereſt, may be thus ſecured againſt eviction; that acceſſions ſhall go with the principal, that ſome fixed things may be carried off, that the thing ſold ſhall be let at a certain rate to the ſeller, &c.

* Nay the ſale may be ſo agreed upon, as that a certain term of years agreed upon being run out, the thing ſold ſhall then return to the ſeller or his heirs, and yet the buyer ſhall not redemand the price paid. Eſtates are often ſold in this manner. See Pufendorff, law of nature, *&c.* 5. 5. 4.

Sect. CCCLIX.

Buying by cant or auction.

Beſides, we conclude from the ſame principle, that tho' buying and ſelling requires equality, (§ 352); yet, by the conſent of both parties, a ſale may be agreed upon which ſhall not be null on the account of any inequality whatſoever. Such are *auction*, when the price is not fixed by the ſeller, but by the higheſt of contending bidders: *emptio ſub haſta*, which is nothing elſe but a more ſolemn auction, inſtituted by public authority: *emptio per averſionem*, when things of different value are not rated ſeparately, but ſold together: and *emptio ſpei*, when the purchaſe is no certain thing, but hope and expectation only, on which, by agreement of the parties, a price is laid. In all which contracts, ſince equality is not required, by conſequence neither of the parties can complain of injury in theſe caſes, unleſs there be ſome knavery on either ſide, or the thing produced by the event was not thought of by the contracters.

* And hence we may decide the famous suit between the fishers and the Milesian youth, who had bought the cast of a net from them, occasioned by the fortune of the cast, the fishermen having drawn out a golden tripod in their net, each party contended this unexpected treasure was theirs, and the oracle very absurdly adjudged it to the wisest.

De tripode ex Phœbo quæris, Milesia pubes?
Huic tripodem addico, cui sit sapientia prima.

Laert. 1. 28. Val. Max. 4. 1. But it is plain that the tripod belonged to the fishermen, if its owner was not known (§ 324), notwithstanding the contract, the Milesian youth having only had regard in the contract to what fish should be caught, and not to golden tripods, of which neither of the parties could have any thoughts. See l. 8. § 1. D. de contr. empt. l. 11. § ult. & l. 12. D. de act. empt.

Sect. CCCLX.

Of letting and hiring.

The other contract which took place after the invention of money, is *letting* and *hiring* (§ 350): For tho', according to the Roman law, in letting farms a part of the fruits was paid for the rent, which was called *quanta* *, l. 21. 6. loc. conduct. and thus this contract could take place before money was in use; yet there is no reason why it may not be referred to the contract, " *I give that you may give*;" because in this case the use of the thing is not compared with money or eminent price, but with the proper or vulgar price of the fruits; and therefore the value of fruits not being always the same, but higher or lower according to the plenty or scarcity of the season, one year the proprietor might be a loser, and another year the tenant.

* For if the lord of the mannor stipulate to himself a certain portion for his rent, that bargain hath the nature of partnership, as will appear from the definition of these contracts, when we come to treat of them. Moreover, letting a fruitful farm for a certain share of the fruits, is not a contract of renting and hiring, as is plain from this consideration,

confideration, that the latter is an onerous contract, in which equality is required (§ 324); but in the former it cannot obtain. For if one fhould ftipulate to pay for the ufe of a farm for fix years, every year fo many meafures of grain, it may happen that in one year of great plenty, when corn is very abundant and cheap, the rent fhall be moderate, and proportioned to the ufe of the farm, but another year of fcarcity it fhall be immoderate on the account of fcarcity and dearnefs. And therefore, we have already faid, that renting and hiring requires that the price be paid in money (§ 350).

Sect. CCCLXI.

The duties of the landlord.

Becaufe *renting* and *hiring* is a contract for the ufe of a thing, or labour at a certain rate or hire; the confequence is, that he who lets ought to grant the ufe of a thing, or the labour contracted for, to the perfon who hires it; and therefore, if, by his fault, or by accident, it happens that he who hires cannot have the ufe of the thing hired, or cannot perform the labour promifed, the ftipulated hire juftly diminifhes in proportion *. Yea, fometimes the leffor may be fued to the value; and the fame holds, if the landlord fhould expel, without a juft caufe, the tenant before his leafe is out.

* This equity was acknowledged by all the ancients, as by Sefoftris king of Egypt, who, if any part of the land was wafhed away by the force of the river, ordered the rent to be proportionably diminifhed, Herodot. l. 2. p. 81. edit. Steph. Nor did the Romans obferve lefs equity in this affair, according to Polybius, hift. 6. 15. and among them Cæfar, by Sueton's relation, cap. 20. But it is manifeft, that here likewife ought to be underftood a confiderable lofs, and not a very fmall one, feeing the barrennefs of one year is often compenfated, efpecially in farms, by the plenty of a fucceeding year; and it is unreafonable that the tenant fhould have all the advantages, and yet refufe to bear the fmalleft fhare of lofs.

Sect. CCCLXII.

And of the tenant.

In like manner it is the tenant's duty to pay in due time the ſtipulated rent, to uſe what he hath the uſe of as another's, to be returned in ſpecie, like an honeſt man, to make up damages owing to his fault; and not to deſert the farm while his leaſe is yet unexpired, unleſs he be forced to it by juſt cauſes, as the incurſion of an enemy, the fear of a plague, and other ſuch dangers. For ſince the landlord is obliged to deliver him the thing ſafe and ſound, to indemnify him, and not to turn him out before his time is expired (§ 361); it is moſt equal, that what he would not have another do to him, he ſhould not do to another; and, *vice verſa*, what he would have another do to him, that he ſhould do to another (§ 88); eſpecially ſince in this chargeable contract equality ought in juſtice to be obſerved (§ 329).

Sect. CCCLXIII.

Of pacts which may be added to this contract.

But this contract alſo depends wholly upon conſent (§ 327); and therefore it is plain that ſeveral pacts may be annexed to it, provided they be conſiſtent with good morals *; and therefore that it may be with, or without conditions, and for a certain time. And ſince tacite conſent is held for real conſent; hence we may infer, that *tacite re-hiring* is valid, if the firſt leaſe being elapſed, neither party renounces the contract; and that in this caſe it is juſt that the ſame terms ſhould take place as in the former engagement.

* Hence it is, that eſtates are often let out on ſuch conditions that in renting and hiring very little remains of the nature of ſuch a contract. Hence perpetual leaſes, hence irregular ones, by which at once the dominion, and all hazards, are devolved upon the leſſee; of which we have an inſtance quoted from Alfenus Varus by Corn. van Bynkerſhoek, obſerv. 8. 1. & ſeq. ad legem 31. D. locati. There is ſuch a contract among the Germans, of which I have

have treated Element. juris Germ. 2. 14. § 105, after Tabor, who has given us a dissertation on this subject.

Sect. CCCLXIV.

Of the loan of consumable commodities.

Now those are the contracts which began to take place after money was in use; we are therefore, in the next place, to consider those contracts which could have place either before or after money was found out. The chief of which is the contract of loan, *mutuum*; by which we understand granting the use of consumable things, on condition that as much shall be restored in kind *. For since not only money, but every consumable commodity may be credited in this manner, it is plain that this contract had place before men had acknowledged money for a common measure of things, and it is now most frequent.

* We call those consumeable things which we can number, measure or weigh. And this is the nature of them, 1. That they cannot be used without being abused or consumed. 2. That they may be returned either in kind or in species, l. 2. § 1. D. de rebus cred. *i. e.* if I owe a hundred guineas, my creditor will own himself satisfied whether I return him the same guineas I received from him, or others of the same kind. And hence it is plain what is meant by the same kind: it means the same in quantity and quality. But thence follows another property of consumeable commodities. 3. *viz.* That with respect to them as much is the same, Nor, 4. do they (as Thomasius has observed de pretio adfect. in res fung. non cad.) admit of a price of fancy, unless they be very scarce, so that as much in kind cannot easily be found. Thus, tho' at Rome Falernian wine was a consumeable commodity, yet a price of fancy fell upon Trimalchion's Opimian wine of a hundred years old, Petronius Arbit. Satyric. cap. 34.

Sect. CCLXV.

The dominion of the thing credited is transferred to the debtor.

It is plain, from the definition of this contract, (§ 364), that the debitor has the power of abusing the thing credited to him; and therefore the creditor

tor has abdicated his right of excluding the debtor from the uſe of it; and thus he hath, only upon condition of receiving as much from the debtor, transferred to him all his right; but to transfer the right of excluding others from the uſe of a thing, is to transfer dominion (§ 231); wherefore this contract is an alienation, by which the dominion of the things credited paſſes intirely to the debtor.

* It is well known what a buſtle Alexius a Maſſalia, *i. e.* Claudius Salmaſius, has made about this affair, endeavouring to turn the defenders of this Theſis into ridicule. But all his weapons borrowed from the civil law, and much ſtronger ones, have been turned againſt him by Wiſſenbachius, Fabrottus, and other learned men, inſomuch that the ſubject is now exhauſted. But the principles here laid down ſhew, that right reaſon is not againſt the Civilians in this matter, and does not favour Salmaſius. It is true that the creditor does not alienate the quantity, but preſerves it ſafe to himſelf, by obliging the debtor to return him the ſame in kind: But the dominion of the ſpecies credited, and all the risks, paſs undoubtedly to the debtor, as Salmaſius himſelf, being puſhed to the utmoſt extremity, is forced by his adverſaries to own.

Sect. CCCLXVI.

The debtor's obligation.

From the ſame definition we infer, that the debtor is obliged to return as much, not only in quantity, but in quality; and therefore, if it be money that is lent to him, and its intrinſic value ſhould afterwards be augmented or diminiſhed, regard is to be had to the time when the contract was made; and accordingly ſo much ought to be diminiſhed as the money has roſe, or ſo much ought to be added as the money has fallen. Moreover, the debtor ought not to delay paying; nor is he delivered from his obligation by the periſhing of the conſumeable commodity he received from his creditor, nor by any accidental event *.

* For

* For ſince the dominion of a conſumeable commodity is transferred to the debtor (§ 365), but he who has the dominion muſt ſtand chances (§ 211), the creditor cannot be freed from his obligation, if, *e. g.* the wine lent him ſhould turn into vinegar, or the money lent ſhould be ſtoln from him, or be loſt by any other accident. Much leſs then will poverty excuſe a debtor from payment, if he has ſquandered away his eſtate, or, like an idle drone, lives at another's expence, and wantonly conſumes on his pleaſures the gains of another's ſweat and labour. For this is a moſt peſtiferous race, ready to engage in the vileſt ſchemes. And they who have waſted their own ſubſtance muſt needs covet that of others. See Saluſt. Catil. cap. 20.

Sect. CCCLXVII.

Whether uſury be allowable by the law of nature?

But tho' this contract be in its nature gratuitous, (as well as commodatum, of which above, *i. e.* loan of not conſumeable things); yet the love of mankind waxing cold, it hath become cuſtomary for creditors to ſtipulate a reward to themſelves for what they lend to their debtors; which, if it conſiſt in paying monthly or yearly a certain proportion of the ſum lent, as 3, 4, or 5 per cent. it is called *intereſt* or *uſury*, tho' that laſt term is often taken in a bad ſenſe for exorbitant intereſt, by which creditors reduce their debtors to the laſt dregs. Concerning uſury, it is a celebrated queſtion, that has been ſeverely agitated by learned men, whether it be agreeable to the law of nature for creditors to ſtipulate with debtors for it.

* We need not inſiſt long upon the hiſtory of this controverſy, which was revived in Holland the laſt century. We are ſaved this labour by Noodt de fœnore & uſuris, 1. 4. Martinus Schook exercit. var. p. 430. and Thomaſ. not. ad Lancellot. 4. 7. not. 275. p. 2024. the laſt of whom hath given us a full hiſtory of the riſe of this diſpute, and of the managers on both ſides of the queſtion. It muſt however be acknowledged, that moſt of the learned who have wrote upon this ſubject have been more taken up about the divine poſitive law than the law of nature; ſo

so that very little advantage is to be reaped from them by students of natural law.

Sect. CCCLXVIII.

What is to be affirmed here.

But since, 1. It is not unjust to communicate our goods with others, not gratuitously, but for a hire (§ 328). 2. Since one often makes great gain by the use of another's goods, while, in the mean time, the creditor suffers loss or inconvenience by the want of them; but none ought to inrich himself at the detriment of another (§ 257). 3. Besides, since he runs a great risk who lends his goods to another on these terms, that he may consume or abuse them, it is not unreasonable that the creditor should exact a hire from the debtor in proportion to the risk (§ 331).—From all these considerations, we think it may be justly concluded, that a pact about interest with one who may make gain of our money, is not contrary to the law of nature *. And tho' interest ought to be proportioned to the gain which the debtor may, in all probability, make of the sum; yet it is not iniquous that it should be augmented in proportion to the risk, the scarcity of money, and other circumstances (§ 331), as the custom of *bottomry* shews us, dig. l. 22. tit. 2. de nautico fœnore.

* To this doctrine it is in vain objected, as, 1. "That money is a barren thing, and therefore that usury, as a kind of offspring, ought not to be required for it." For it is a barren thing in a physical sense, but not in a civil sense; for in commerce the double, and very often more, is gained by it, Mat. xxv. 16. 17. Or, 2. "That loan of inconsumeable things is gratuitous, and therefore loan of consumeable goods ought to be so too." For he who lends an unconsumeable thing suffers less inconvenience, and runs less risk than a creditor who transfers to his debtor the dominion of a consumeable thing, with the power and right of abusing it. Or, 3. That God hath prohibited such pacts, Exod. xxii. 25. Lev. xxv. 37. Psalm xv. 5. Luke vi. 34." For God proscribed such pacts

pacts from the Israelitish common-wealth, so far only that an Israelite could not exact interest from an Israelite; they were permitted with strangers, Deut. xxiii. 19. 20. But the law of nature makes no difference between fellow citizens and strangers. See Jo. Selden de jure nat. & gent. See Heb. and Jo. Cleric. ad Exod. xxii. 25. p. 112.

Sect. CCCLXIX.

What is meant by pledge, mortgage, and in antichretic pact.

Another contract of this kind is *pawn* or *pledge*, by which we understand an obligation to deliver something to a creditor for the security of what he lends or credits. For if a thing, especially if it be in its nature immoveable, be not delivered, but yet the creditor hath a right constituted to him in it, of taking possession of it, in case the debt be not cancelled, that transaction between the creditor and debtor is called *hypotheca*, *mortgage*. Again, if it be agreed that a creditor should receive the fruits of a thing delivered to him for the security of what he hath credited, in lieu of interest, this invention is termed *pactum antichreticum* (§ 283.)

Sect. CCCLXX.

What is just about a pawn.

From the definition of a *pawn*, it is plain that it ought to be the debtor's own; and therefore he deserves punishment who pawns any thing belonging to another, whether lent to him, deposited with him, or hired by him. That the creditor ought not to use a pawn, if it may be rendered worse by use, but to preserve it with as much care as his own goods, and to return it to the debtor, when the debt is cleared. Finally, since the owner regularly runs risks * (§ 211), the consequence is, that the risk of the pawn belongs to the debtor, and that perishing by accident, he is notwithstanding obliged to pay his debt.

* By the law of Germany in the middle ages, when a pawn perished by chance, the debtor was freed from all obligation to pay his debt, jus prov. Sax. 3. 5. Sometimes it

it was provided by a ſpecial pact, that the risk ſhould belong to the creditor, as in Pontan. hiſt. Dan. l. 9. ad annum 1411. But becauſe that proceeded from this ſingular principle of the Germans, that the creditor got the dominion of the pawn, of which ſee our Elem. jur. Germ. l. 2. 11. §. 319. the reaſons given in this ſection do not permit us to attribute theſe things to the law of nature.

Sect. CCCLXXI.

What is juſt about mortgage.

From the definition of *mortgage* (§ 369), we infer, that it can ſcarcely conſiſt in moveables, which a debtor may eaſily alienate and transfer to a ſtranger without his creditor's knowledge; but it conſiſts chiefly in immoveables, as houſes, lands, cities and territories *; and likewiſe in larger ſtocks of moveable things, which are not eaſily tranſported from place to place, as large libraries; yea, in rights and actions likewiſe, if great advantage accrue from them to the poſſeſſor. But whatever is thus pledged to a creditor, his right in it continues, to whomever it may be transferred; for otherwiſe his *hypotheca* would be without effect.

* This we add on account of what Puſendorff ſays of the law of nature, *&c.* 5. 10. 16. " In the ſtate of nature ſuch mortgages are needleſs; for if the debtor refuſes payment, the poſſeſſion of the mortgage aſſigned in ſecurity, muſt be detained by force of arms. But in that ſtate, even without ſuch a particular aſſignment, it is lawful to ſeize on any thing that belongs to the debtor." But examples of ſuch mortgages are not wanting even among independent nations, as Hertius has ſhewn in his notes upon this paſſage of Puſendorff, p. 738. & ſeq. who elegantly replies to Puſendorff's argument, that this mortgage may be of great uſe, if the town thus pledged ſhould fall into a third perſon's hands. Moreover, we readily grant, that independent nations do not raſhly ſatisfy themſelves with ſuch ſimple mortgages, but do at leaſt ſtipulate the right of keeping a gariſon in theſe cautionary towns, as Elizabeth queen of England did in the 1585, when the Hollanders put ſeveral towns into her hands, Em. Meteran. Rer. Belg. l. 13. and the other Belgic annaliſts for that year.

Sect. CCCLXXII.

What is just about the pactum antichreticum.

From the definition of the *pactum antichreticum*, (§ 369), it is obvious that it can only take place in pawning things which yield increaſe; and ſince the fruits are in lieu of intereſt, they ought not greatly to exceed that meaſure of intereſt which we have found to be moſt agreeable to equity. The creditor, in this caſe, is not liable to accidents, unleſs it be ſo agreed; and therefore if the creditor, on account of barrenneſs, or any public calamity, does not receive the value of the intereſt due to him, the debtor is obliged to make it up.

Sect. CCCLXXIII.

What is common to all theſe conventions.

This is in common to all theſe contracts, that being deſigned for the ſecurity of the creditor, (§ 369), the creditor, if the debtor be tardy in his payment, has a right to alienate the pawn or mortgage, and deducting his principal and intereſts, is obliged only to refund the overplus to the debtor, unleſs there be an acceſſory pact, *lex commiſſoria*; by which it is ſtipulated, that the pawn, if not relieved within a certain time, ſhall be left to the creditor for his principal and intereſts. For tho' the more recent Roman laws did not allow of ſuch a pact*, l. un. C. Theodoſ. de commiſſor. reſcind. l. ult. C. de pact. pign. and that might have been juſtly done on account of the exorbitant avarice of creditors; yet it does not follow from hence, that the law of nature, which permits every owner to alienate his own on whatſoever conditions, does not allow of ſuch a pact (§ 309), which Hertius hath ſhewn, by many examples, to have been in uſe amongſt princes and independent nations, in his notes upon Pufendorff, 5. 10. 14. p. 737.

* The more ancient laws among the Romans adhering more ſtrictly to the ſimplicity of the law of nature, are not contrary to this commiſſory pact; yea, while the republic

public was yet free, it was looked upon as lawful, as appears from a paſſage in Cicero's epiſtles, epiſt. ad famil. 13. 56. quoted by Hertius, and before him by Jac. Gothofred. ad l. un. Theodoſ. de commiſſ. reſcind. (Philotes Alabandenſes ὑποθήκας Cluvio dedit : hæ commiſſæ ſunt). But the terrible ſeverity of creditors, by which debtors were unmercifully ſqueezed, being forced to pawn, in this manner, things of much greater value than the debt, at laſt obliged the emperors to proſcribe this pact, as exceeding detrimental to debtors.

Sect. CCCLXXIV.

Of ſuretyſhip.

The third contract which may take place before and after money is invented, is *ſuretyſhip*; *i. e.* an obligation a perſon comes under to pay another's debt, if he does not. For if one binds himſelf not merely to pay, the other failing, but conjointly with him *in ſolidum* for the whole debt, he is debtor, and the obligation of both is equal. Again, he who, with the conſent of the creditor, delivers a debtor from his obligation, and takes it upon himſelf, is called *expromiſſor*, *Bail*. All theſe contracts, as well as that of pawn or mortgage, are contrived for the ſecurity of creditors, and afford an ample proof of the decay of benevolence among mankind *.

* For if benevolence prevailed, as it ought to do, among mankind, a creditor would not diſtruſt a debtor, nor would a debtor allow one thought of defrauding his creditor to enter into his mind ; and thus there would be no occaſion for pawns or ſureties. But now that men are become ſo ſuſpicious and diffident, that they will not believe unleſs they ſee, this is an argument of the decline of benevolence, and of the prevalence of perfidy among men. This is allowed by Seneca in a moſt beautiful paſſage (of benefits, 3. 15).

Sect. CCCLXXV.

For what things it is lawful to be ſurety.

Moreover, from the definition of *ſuretiſhip*, (§ 374), it is plain that there is no place for ſuretiſhip, which is a ſubſidiary ſecurity, unleſs the debt

debt be ſuch that it may be as conveniently paid by another as by the principal debtor; and therefore ſuretiſhip for condemned perſons, tho' ſome antient nations admitted it, is contrary to right reaſon *. But yet there is no reaſon, when the crime may be expiated by a mulct, why another perſon may not interpoſe in behalf of the criminal, and oblige himſelf to pay the mulct, if the criminal fail.

* Pufendorff, 5. 10. 12. hath brought many inſtances of it among the Greeks; and Hertius in his notes on Puſendorff, ibidem, p. 735, produces ſtatutes approving of ſuch ſureties. But as for others who pretend to juſtify this kind of ſuretiſhip by examples in the ſacred writings, they are eaſily refuted, Gen. xlii. 37. For every one may perceive that obligation of Reuben to have been fooliſh, eſpecially ſeeing he did not pledge his own head, but the lives of his innocent children; and beſides, it was not for a condemned perſon, but for his brother Benjamin's return out of Egypt. Whence it is not probable that the pious and prudent Jacob accepted of the offered ſecurity, Gen. xliii. 9. Juda offers ſecurity, but not for a condemned criminal, nor does he pledge his life. Finally, 1 Kings, xx. 39. there no perſon pawns his life for a guilty criminal, but the cuſtody of a captive is demanded under the peril of death. So that there is nothing in the ſacred writings to juſtify this cuſtom among the ancients.

Sect. CCCLXXVI.

The obligation of ſureties.

As to the obligation of ſureties, it is plain, from the definition (§ 374), that they oblige themſelves to the ſame which the creditor has a right to exact from his debtor, and therefore it is unjuſt for a creditor to ſtipulate more to himſelf from a ſurety than from the debtor; that the obligation of a ſurety is ſubſidiary, and therefore that by the law of nature a ſurety does not ſtand in need of the *ſingulari beneficio ordinis vel excuſſionis*, as it is called in the civil law; but may then be ſued, when it clearly appears that the principal debtor has not

wherewith to pay *. Many ſureties engaged for the ſame perſons and debts, are only bound proportionably, unleſs they have voluntarily and expreſly bound themſelves for the whole; and therefore the benefit of diviſion is due to them by the law of nature, as being proportionably bound, unleſs one's fellow-ſureties be inſolvent, and one could not but know they were ſo.

* A contrary opinion hath prevailed in many nations, who thought that recourſe might be had to the ſurety before the principal debtor. Concerning the Hebrews, ſee Prov. xx. 16. xvii. 18. As for the Greeks, that ſaying of Thales is well known, "Be ſurety, and ruin is at your heels." The ancient Germans had likewiſe ſuch a proverb. See Schilt. Exercit. 48. 21. The ſame rigour was alſo obſerved by the Romans, till Juſtinian introduced the beneficium ordinis vel excuſſionis, novella 4. But ſince a ſurety only accedes as a ſubſidiary ſecurity on failure of the principal, if he might be immediately ſued, there would be no difference between the Surety, the Expromiſſor or Bail, and the Principal debtor. It is therefore agreeable to right reaſon, that he who is bound as a ſubſidiary ſecurity, ſhould not be ſued before the diſcuſſion of the principal debtor. So Cicero Epiſt. ad Attic. 16. 15. "Sponſores adpellare, videtur habere quamdam δυσωπίαν."

Sect. CCCLXXVII.

Of the ſolidity among two or more debtors.

When two or more become debtors of one and the ſame *thing* (§ 374), it is evident, that every one of them being obliged to the creditor for the whole debt, the creditor may exact the whole debt from either of the two he pleaſes *; and when any one of them pays the debt, the other is diſcharged from his obligation to the creditor, but not with reſpect to his fellow-ſurety; for he who paid for him (§ 346) did his buſineſs, and therefore ought to be indemnified by him (§ 349).

There is therefore no place here for the diviſion of an obligation. But becauſe if both who are bound in ſolidity be ſolvent, and both may eaſily be ſued, there is no juſt cauſe

cause why the creditor ſhould preſs one, and extort the whole ſum from him alone; humanity does not allow one ſo rigorouſly to proſecute his right, as to preſs any one ſingly, but commands us to have recourſe to both. For ſurely humanity doth not permit us to demand any thing from any other which we can obtain otherwiſe, without detriment to ourſelves or any other (§ 216).

Sect. CCCLXXVIII.

As to an expromiſſor or bail.

Again, from the definition of an *expromiſſor* or *bail* (374), we infer, that his obligation is the ſame with that of the principal debtor, inſomuch that the latter, bail being accepted by the creditor, is free; and therefore neither can this kind of ſurety plead the diſcuſſion of the principal debtor before him; nor can the creditor, if he cannot recover his debt from this ſurety, any more have recourſe to the principal debtor whom he hath once freed, but he muſt depend upon this ſurety alone for it, upon whoſe faith he had relieved his debtor.

Sect. CCCLXXIX.

The contract of partnerſhip.

The next contract which may take place either where money is, or is not in uſe, is *partnerſhip*, as it may plainly do, ſince it is nothing elſe but ſharing among many the profit or loſs that may ariſe from joint ſtock or labour *: for commodities and labour may be communicated either before or after money is in uſe.

* We are therefore here treating of community in conſequence of the conſent of partners. But becauſe conſent may be either tacit or expreſs, and both have the ſame effect (§ 275), the conſequence is, that partnerſhip may be contracted by tacite conſent, *i. e.* by deed, Hert. diſſ. de ſocietate facto contr. Now, ſince either all goods and labour, or a certain ſhare only, or ſome particular goods and labour, may be joined, partnerſhip may be either univerſal, or general, or particular. Grotius of the rights of war and peace, 2. 12. 24. hath juſtly remarked, that univerſal and general partnerſhip have ſomething of chance in them; but that

in particular or ſingular partnerſhip, equality ought to be obſerved.

Sect. CCCLXXX.

What is juſt with reſpect to partnerſhip.

Becauſe in *univerſal* partnerſhip all things, in *general* partnerſhip ſome things only are common; ſo that theſe contracts ſomewhat depend upon chance (§ 379); the conſequence is, that amongſt ſuch partners the loſs and gain muſt be common, but the contribution may be very unequal; and therefore ſuch a partner hath no reaſon to complain if his fellow-partner expends more than him, when his neceſſities require it; yea, a partner is obliged to pay his proportion of debt contracted by his fellow-partner; for which reaſon, it cannot be doubted that it is highly reaſonable that every one of ſuch partners ſhould ſhare of the gain made by any one of them; and that he who has a right to the gains, ought to bear his ſhare of the loſs, damages, or inconveniencies.

Sect. CCCLXXXI.

What in ſingular partnerſhip.

But ſince in *ſingular* or particular partnerſhip equality ought to be obſerved (§ 380), which however is not always obſerved in the contribution; it follows, that the equality in dividing loſs and profit cannot be *arithmetical*, but muſt be *geometrical**. And therefore he who hath contributed more ſtock or labour, ought to have a proportionably greater ſhare of profit and loſs than he who contributes leſs. But ſeeing any one can grant to any other whatever advantages he pleaſes with regard to his own goods (§ 309), it is undeniable that partners may agree one with another in any manner; and may obſerve, in dividing loſs and gain, either arithmetical equality, or any inequality, unleſs, by the knavery of one or other of them, the diviſion degenerates into that of the lion in the fable, Phæd. Fab. 1. 6.

* Some

* Some have ſaid, that arithmetical equality ought to be obſerved here, as among brethren; and thus they interpret, l. 6. l. 29. l. 80. D. pro Soc. and other Roman laws, Connan. Comment. jur. civ. 7. 19. 5. Huber. Prælect. ad tit. Inſt. de ſocietate. But this fraternity of partners is a fiction, to which the law of nature is a ſtranger; and beſides, in this caſe the profit ariſes from joint ſtock and labour; wherefore, nothing can be more juſt than that loſs and gain ſhould be ſhared proportionably to ſtock and labour. So Ariſtotle rightly decides the matter, ad Nicom. 8. 16.

Sect. CCCLXXXII.

Whether one partner may quit the partnerſhip againſt the other's will?

In fine, ſince partnerſhip is formed by conſent, and by way of convention (§ 379), this rule of the Roman law can hardly be deduced from the principles of the law of nature, *viz.* "That any one may quit partnerſhip, provided he do it not fraudulently, nor at an improper time *." The whole matter rather turns upon the conditions of the agreement; and therefore, if the partnerſhip was contracted for perpetuity, it ought to be perpetual; if for a time only, it is but for the time fixed; unleſs one of the partners be injurious to the others, and do not fulfil the articles of agreement; in which caſe, it is moſt juſt that the others ſhould have the right of renouncing the partnerſhip even before the time agreed upon in the contract.

* This may be proved from the very reaſons brought by ancient lawyers. For ſometimes they give this reaſon, "That community is the mother of diſcords, l. 77. § 20. D. de legat. Sometimes they ſay, "It is a natural vice to neglect what is in common, l. 2. C. quando & quibus quarta pars. To which ſome add another reaſon, "That reſpect is had in the choice of a partner to his abilities and induſtry; and therefore, if either partner does not anſwer his co-partner's hope and expectation, with regard to his honeſty and diligence, the other hath a right to renounce the partnerſhip." But buying and ſelling, renting and hiring often produce as much diſcord, in which contracts they allow no place for changing one's mind, or repenting.

And houſes let, are often no leſs neglected than houſes in common to many, and yet it is not allowable to break ſuch a contract before the time is out. Again, he who hires one to work for him, hath regard to the skill, honeſty and induſtry of the perſon he hires, and yet he cannot break his contract before the time is expired. If therefore this rule takes place in other contracts, why may it not be allowed to take place likewiſe in partnerſhip, l. 5. C. de obl. & art. " As every one is at liberty to contract or not contract, ſo none can renounce the obligation he hath once come under, without the conſent of his party."

Sect. CCCLXXXIII.

Of donation.

Let us add *donation*, by which we underſtand a promiſe to transfer ſomething of ours to another gratuitouſly. From which definition, it is plain that it may be made with or without conditions; and therefore in view of death. So that *donations* are juſtly divided into *donations among the living*, and *donations in proſpect of death.* And a donation among the living obliges to deliver the thing promiſed, and leaves no room to the donor to revoke his promiſe. But from what was ſaid above, it is evident, that he who receives the donation cannot demand warranty from the donor, if the thing be evicted (§ 274), and that he is obliged to ſhew gratitude to his benefactor by words and deeds on all occaſions (§ 222).

Sect. CCCLXXXIV.

Some corolaries about contracts in general.

To conclude; with regard to all contracts in general, it is to be obſerved, that becauſe they conſiſt in conſent (§ 327), they can only be formed by thoſe who are not incapable, by nature or by law, of conſenting. Again, becauſe they were deviſed for the ſake of commerce (§ 327), they muſt be about things which may be in commerce honeſtly, and with the permiſſion of the laws; and therefore contracts about impoſſible or baſe things, or things exeemed by the laws from commerce, are null: but

but as many things are exeemed by positive laws from commerce, which naturally are subjects of it, so positive laws may likewise permit contracts about several things which are not subjects of commerce, according to the laws and manners of other nations *.

* For example, with us it is base and to no purpose to pawn dead bodies. But the laws of the Egyptians permitted pawning of dead bodies, and denied burial to children if they neglected to relieve such pledges by paying their parents debts, Diod. Sicul. Bibl. 1. 93. On the other hand, it is unnatural and abominable to pawn wives and children, as was permitted in the kingdom of Pegu, because it must be attended with most miserable consequences. And therefore the Romans judged him worthy of banishment, who knowingly accepted in pawn a free-born child from his father, l. 5. D. quæ res pign.

REMARKS on this chapter.

It seems necessary to add a little to what our Author hath said in this chapter concerning usury, to shew at one and the same time, the true state of the case with regard to the forbidding of usury in the Israelitish commonwealth, and how civil laws may confine and alter natural rights, consistently with the law of nature. And here all we have to do is to copy a little from our excellent politician Mr. Harrington, in his prerogative of popular government (p. 245.)

Mr. Harrington, who hath shewn at great length, that property must have a being before empire or government, or beginning with it must still be first in order, because the cause must necessarily precede the effect, reasons thus: " Property comes to have a being before empire two ways, either by a natural or violent revolution: natural revolution happens from within, or by commerce, as when a government erected upon one balance, that for example, of a nobility or a clergy, through the decay of their estates, comes to alter to another balance; which alteration in the root of property, leaves all to confusion, or produces a new branch or government, according to the kind or nature of the root. Violent revolution happens from without, or by arms, as when upon a conquest there follows confiscation. Confiscation again is of three kinds, when the captain taking all to himself, plants his army by way of military colonies, benefices or Timars, which was the policy of Mahomet; or when the captain has some sharers, or a nobility that divides with him, which was the policy introduced by the Goths and Vandals; or when the

the captain divides the inheritance, by lots or otherwiſe, to the whole people; which policy was inſtituted by God or Moſes in the commonwealth of Iſrael. Now this triple diſtribution, whether from natural or violent revolution, returns, as to the generation of empire, to the ſame thing, that is, to the nature of the balance already ſtated." Mr. Harrington having fully proved theſe points, or that property is the natural cauſe of government, and that changes in it muſt make proportional changes in government, it follows from hence, that unleſs the balance of property be fixed, empire or government cannot be fixed, but will be continually altering as the balance of property varies; but property in land can only be fixed by an Agrarian law. Now theſe principles being laid down, the following truths concerning money, and the methods of regulating it in governments will be manifeſt, namely, "That the balance in money, as Mr. Harrington expreſſes it, may be as good or better than that of land in three caſes: Firſt, where there is no property of land yet introduced, as in Greece during the time of her ancient imbecility; whence, as is noted by Thucydides, *The meaner ſort, through a deſire of gain, underwent the ſervitude of the mighty.* Secondly, in cities of ſmall territory and great traffic, as Holland and Genoa, the land not being able to feed the people, who muſt live upon trade, is over-balanced by the means of that traffic, which is money. Thirdly, in a narrow country, where the lots are at a low ſcantling, as among the Iſraelites; if care be not had of money in the regulation of the ſame, it will eat out the balance of land. For which cauſe, tho' an Iſraelite might both have money, and put it to uſury, (Thou ſhalt lend [upon uſury] to many nations, Deut. xv. 6. and xxiii. 19.) yet might he not lend upon uſury to a citizen or brother. Whence two things are manifeſt. Firſt, that uſury in itſelf is not unlawful: And next, that uſury in Iſrael was no otherwiſe forbidden, than as it might come to overthrow the balance or foundation of the government. For where a lot, as to the general, amounted not perhaps to four acres, a man that ſhould have a thouſand pounds in his purſe, would not have regarded ſuch a lot in compariſon of his money; and he that ſhould have been half ſo much in debt, would have been quite eaten out. Uſury is of ſuch a nature, as, not forbidden in the like caſes, muſt devour the government. The Roman people, while their territory was no bigger, and their lots, which exceeded not two acres a man, were yet ſcantier, were flead alive with it; and if they had not helped themſelves by their tumults, and the inſtitution of their tribunes, it had totally ruined both them and their government. In a commonwealth whoſe territory is very ſmall, the balance of the government being laid upon the land, as in Lacedemon, it will not be ſufficient to forbid uſury; but money itſelf muſt be forbidden. Whence Lycurgus allowed of none, or of ſuch only as being of old or uſeleſs iron, was little better, or if you will, little worſe than none. The prudence of which

which law appeared in the neglect of it, as when Lyſander, General for the Lacedemonians in the Peloponneſian war, having taken Athens, and brought home the ſpoil of it, occaſioned the ruin of that commonwealth in her victory. The land of Canaan, compared with Spain or England, was at moſt but a Yorkſhire, and Laconia was leſs than Canaan. Now, if we imagine Yorkſhire divided, as was Canaan, into ſix hundred thouſand lots, or as was Laconia into thirty thouſand, a Yorkſhireman having one thouſand pounds in his purſe, would I believe, have a better eſtate in money than in land: Wherefore, in this caſe, to make the land hold the balance, there is no way but either that of Iſrael, by forbidding uſury, or that of Lacedemon, by forbidding money. Where a ſmall ſum may come to over-balance a man's eſtate in land; there, I ſay, uſury or money, for the preſervation of the balance in land, muſt of neceſſity be forbidden, or the government will rather reſt upon the balance of money, than upon that of land, as in Holland and Genoa. But in a territory of ſuch extent as Spain or England, the land being not to be overbalanced by money, there needs no forbidding of money or uſury. In Lacedemon merchandize was forbidden; in Iſrael and Rome it was not exerciſed; wherefore, to theſe uſury muſt have been the more deſtructive; but in countries where merchandize is exerciſed, it is ſo far from being deſtructive, that it is neceſſary; elſe that which might be of profit to the commonwealth, would ruſt unprofitably in private purſes, there being no man that will venture his money but through hope of ſome gain; which, if it be ſo regulated, that the borrower may gain more by it than the lender, as at four in the hundred, or thereabouts, uſury becomes a mighty profit to the public, and a charity to private men: In which ſenſe, we may not be perſuaded by them, that do not obſerve theſe different cauſes, that it is againſt ſcripture. Had uſury to a brother been permitted in Iſrael, that government had been overthrown: But that ſuch a territory as England or Spain cannot be over-balanced by money, whether it be a ſcarce or plentiful commodity, whether it be accumulated by parſimony, as in the purſe of Henry VII. or preſented by fortune, as in the revenue of the Indies. For in general this is certain, that if the people have clothes and money of their own, theſe muſt either riſe (for the bulk) out of property in land, or at leaſt, out of the cultivation of the land, or the revenue of induſtry; which, if it be dependent, they muſt give ſuch a part of their clothes and money to preſerve that dependence, out of which the reſt ariſes, to him or them on whom they depend, as he or they ſhall think fit; or parting with nothing to this end, muſt loſe all; that is, if they be tenants, they muſt pay their rent, or turn out. So if they have clothes or money dependently, the balance of land is in the landlord or landlords of the people. But if they have clothes and money independently, then the balance of land muſt be in the people themſelves, in which

which case they neither would, if there were any such, nor can, because there be no such, give their money or clothes to such as are wiser, or richer or stronger than themselves. So it is not a man's clothes and money or riches, that oblige him to acknowledge the title of his obedience to him that is wiser or richer, but a man's no clothes, or money, or his poverty. Wherefore, seeing the people cannot be said to have clothes and money of their own, without the balance in land, and having the balance in land, will never give their clothes or money or obedience to a single person, or a nobility, tho' these should be richer in money, in such a territory as England or Spain, money can never come to overbalance land. Henry VII. tho' he missed of the Indies, in which, for my part, I think him happy, was the richest in money of English princes. Nevertheless, this accession of revenue did not at all preponderate on the king's part, nor change the balance. But while making farms of a standard he increased the yeomanry, and cutting off retainers he abased the nobility, began that breach in the balance of land, which proceeding ruined the nobility, and in them that government. The monarchy of Spain, since the silver of Potosi sailed up the Guadalquiver, which in English is, since that king had the Indies, stands upon the same balance in the lands of the nobility on which it always stood." See Mr. Harrington himself. What hath been now quoted from him is sufficient to shew in what manner we ought to reason about the regulation of money in a state. There will be occasion afterwards to consider the natural causes of government more fully. But it is plain from what was said in a former remark, 1. That superior wisdom and virtue will naturally create authority. And that, 2. Property alone can give or create power, and will naturally produce it. And therefore, 3. That empire will follow the balance of property: And by consequence, 4. There is no natural mean of fixing government, but by fixing the balance upon which it depends. Wherefore, 5. That is a proper regulation of money with respect to the preservation of a government, which is necessary or proper to fix the balance upon which the nature of that government depends or turns. But, 6. Men have a natural right to form themselves into any form of civil government proper to promote their greater happiness; and consequently, to make any regulations necessary or proper to that effect. Thus the Lacedemonians had a right, for the preservation of their government, to forbid money, and the Israelites to forbid usury. And thus our government has a right to regulate the interest of money as the nature and end of our government, *i. e.* as the greater good in our government requires. If it be asked what the law of nature says about money in a state of nature, the answer is obvious; it requires that commerce be carried on with or without money, in an honest candid way; so as none may be made richer at the detriment of others; and allows bartering, buying, letting and hiring, and other contracts, all imaginable latitude or liberty

within

within the bounds of honesty, the general dictates of which, with regard to all contracts, are sufficiently explained by our Author.

CHAP. XIV.

Concerning pacts.

Sect. CCCLXXXV.

The difference between pacts and contracts.

THO', by the law of nature, there be no difference between *pacts* and *contracts*, both deriving their subsistence and force from consent; yet it may be said, that *contracts*, according to the antient way of speaking, related to commerce about goods and labour (§ 327); and *pacts* to other things and deeds, which are not matters of ordinary commerce *. Thus, *e. g.* tho' free persons of either sex are not in commerce, yet among them agreements are made about marriage, to be celebrated either immediately, or some time after; and both these agreements, the former of which is called *betrothing*, the other *full marriage*, come under the title of *pacts*.

* Pufendorff, law of nature, *&c.* 5. 2. 4. has acknowledged this difference. And tho' the Roman writers, because they use the words in another sense, and make another distinction between contracts and pacts, do not always make use of the word *contrahere* in speaking of things in commerce, or the word *pascisci* in speaking of things out of commerce; (for they say *contrahere nuptias*, l. 22. D. de ritu nupt. and *pacisci ab aliquo numos*, Val. Max. 9. 4. 2.) yet the word *contractus* is seldom or never used by them but to signify an agreement about things in commerce. This is so true, that the civilians (contra Donell. comm. juris, 13. 18.) deny *marriage* to be a *contract*, because it relates to persons and their inseparable union, which are not things in commerce. We may therefore admit this difference between *contracts* and *pacts*.

Sect. CCCLXXXVI.

Why pacts are neceffary.

Now, fince men cannot live comfortably and agreeably, except they render one to another thofe duties of *humanity* and *beneficence* which we have already defined (§ 214); and yet benevolence is become fo cold and languid amongft men, that we can hardly depend upon one another's humanity and beneficence for them (§ 326); and befides, thefe are duties not of perfect, but imperfect obligation, * (§ 122), and therefore duties which cannot be extorted from the unwilling: for thefe reafons, there is no other fecurity for our obtaining them but another's obligation to us by his confent; and therefore we ought thus to fecure to ourfelves the performance of thofe good offices by others to which we would have a perfect right. Now, this confent of two or more to give, or do any thing which could not be otherwife exacted from them by perfect right, but was due merely in confequence of the law of humanity and beneficence, is called a *pact*.

* The hiftory of Abraham and Abimelech furnifhes us with an example. The law of humanity and beneficence required, commanded both of them, Abraham efpecially, an upright pious man, who had received many favours from Abimelech, to behave kindly and gracioufly towards one another: natural reafon obliged Abraham to gratitude: And yet we read, Genefis xxi. 23. that they bargained or covenanted friendfhip the one with the other. And thus the ancients obliged one another by covenants to perform what they were previoufly obliged to by the law of humanity and beneficence.

Sect. CCCLXXXVII.

Such pacts ought to be fulfilled. A firft argument to prove it.

Nor can it be queftioned that fuch pacts ought to be faithfully fulfilled. For fince he who promifes any thing, declares his mind, whether by words or other figns; and words are fo to be ufed, that the perfon we fpeak to may not be deceived

ceived (§ 196); the consequence is, that all fraud, all lying, all falshood ought to be far removed from those who deliberately make covenants or pacts; and therefore that nothing ought to be held more sacred than keeping faith, or more detestable than perfidy *.

* For as by pacts we in some measure supply our indigence; and we make covenants or pacts with others, that they may be obliged to render us those good offices of humanity and beneficence, which we can hardly expect from them without such pacts; it is plain that human life, and all the interests of social commerce, depend upon fidelity in fulfilling them. Therefore Cicero says justly, pro Q. Roscio comœdo, c. 6. "To break one's faith is so much the more base and attrocious, that human life depends upon faith." Hence unlying lips have always been reckoned a noble quality, as Euripides expresses it in Iphig. in Taur. v. 1064.

Καλόν τι γλωσσ', ὅτῳ πίςις παρῇ.

A faithful tongue is a beautiful thing.

Sect. CCCLXXXVIII.

A second argument.

There is a second reason which every one will own to be of no less weight. And it is this, the love of justice is the source of all the duties we owe to one another (§ 173), and this love commands us not to do to others what we would not have done by them to ourselves (§ 177). But surely none would desire to be deluded by the promises and pacts of another. It is therefore our duty not to deceive any one by our pacts or promises; not to defraud one, by making him trust to our fidelity; but faithfully and conscientiously to perform what we engage to do *.

* We do not here use this argument, "That civil society could not subsist without faith and honesty." For tho' this argument proves the necessity of pacts, and of faithfulness amongst mankind, and Cicero hath elegantly demonstrated this necessity from this consideration, "That without some share of this justice, without faith and pacts among

among themſelves, even thoſe who live by villainy and wickedneſs could not ſubſiſt." Yet we have already ſhewn, that the origine of moral obligation is not to be derived from this principle of ſociality (§ 75): And therefore we have rather choſen to give theſe two reaſons in the preceding ſections derived from our firſt principle of *love*.

Sect. CCCLXXXIX.

Pacts of ſeveral ſorts.

Pacts are either *unilateral* or *bilateral*. By the former, one party only is bound to the other; by the latter, both parties mutually oblige or engage themſelves one to another; and therefore this latter kind of pacts includes in them a tacite condition, that one is to perform his promiſe, if the other likewiſe fulfils the pact on his ſide. Both however are either *obligatory* or *liberative*. By the former, a new obligation is brought upon one or other, or upon both. By the latter, obligations formerly conſtituted are taken off. Again, pacts may be of a mixed kind; ſuch are thoſe by which former obligations are annulled, and new ones are conſtituted at the will of the parties covenanting. Of this kind principally, it is evident, are *novations* and *tranſactions* about doubtful or uncertain affairs. But there is one rule for them all, which is, that they ought to be faithfully and religiouſly kept, eſpecially if one hath not promiſed with an intention to lay himſelf under a ſtrict obligation *.

* This we add, in oppoſition to thoſe who aſſert, that there is a perfect and an imperfect promiſe; the former of which they define to be a promiſe, wherein the promiſer not only deſigns to be obliged, but actually transfers a right to another, to exact the thing promiſed from him as a debt: And the latter they define to be a promiſe wherein the promiſer deſigns indeed to be obliged, but not in ſuch a manner as that the thing promiſed may be exacted from him by the perſon to whom he promiſes it. To which kind they refer this way of promiſing, " I have purpoſed to give you ſuch a thing, and I deſire you may credit me." As likewiſe, the promiſes of great or complaiſant

plaisant men, when they promise one a vote or a recommendation, Grotius of the rights, &c. 2. 2. 2. Pufendorff of the law of nature, *&c.* 3. 5. 5. But, 1. Such promises are often not pacts, but words or asseverations only, which Grotius and Pufendorff themselves distinguish from pacts: Yea, sometimes, they are but preparations to pacts, or what is called treaties. 2. It is a contradiction to say, one wills to promise, and yet does not will to give a right to exact from him. It is a fiction, by which, if it be admitted, I know not what pacts and promises may not be basely eluded, after the example of the Milanese, who being reproached with perjury, answered, "We swore indeed, but we did not promise to keep our oath." Upon which answer, when Radevicus de gestis Friderici I. l. 2. c. 25. relates it, he justly says, "A suitable answer indeed, that their discourse might be of a piece with their profligate manners; and that they who lived perfidiously and infamously, might speak as wickedly as they lived, and their discourse might be as impure and villainous as their actions." 3. Finally, tho' the promises of great men should sometimes be imperfect with respect to exaction, it does not follow from hence, that they are imperfect in respect of obligation.

Sect. CCCXC.

By the law of nature, naked or bare pacts oblige perfectly.

Hence we infer, that by the law of nature there is no difference between pact and stipulation; and therefore that Franc. Connanus, in his comment. 1. 6. is mistaken, when, to exalt the excellence of the Roman laws, he denies that by the law of nature obligation arises from promises, as long as they are simple agreements, and are not converted into contracts. His arguments have been sufficiently refuted by Grotius of the rights of war and peace, 2. 2. 1. and Pufendorff of the law of nature and nations, 3. 5. 9. We shall only add, that Connanus speaks not in so high a strain of the natural obligation of bare pacts as the Romans themselves did, who never denied their perfect obligation, tho' they did not grant an *action* upon them for particular reasons *.

* According to the Romans, one was perfectly obliged by a bare pact; and they looked upon him who broke his word with no less contempt than other nations. Besides, they did not think the obligation imperfect which arose from such bare promises as were not confirmed by stipulation, when there was place for compensatio, l. 6. D. de compens. *constituto*, l. 1. § pen. D. de pecun. const. *novatio*, l. 1. fin. D. de novat. *fideijussoribus & pignoribus*, l. 5. D. de pign. *exceptio.* l. 7. § 5. l. 45. D. de pact. l. 10. l. 21. l. 28. C. eodem: Whence even what a promiser paid by mistake, could not be recovered *condictione indebiti*, l. 19. D. de cond. indeb. most of which cases are of such a nature that they can hardly be brought under the notion of imperfect obligation. The Romans only refused to grant an action upon bare pacts, because they had contrived a certain *civil* method which they ordered to be used in agreements or pacts, *viz. stipulation.* Wherefore, as in several countries the laws do not grant an action upon the pawning of immoveable things, unless the pawn be registered in the public acts, and yet these laws do not detract from the perfect obligation of pawn, which exerts itself in other ways; so neither did the Romans think that pacts did not produce a perfect obligation, because they did not grant an action upon bare pacts.

Sect. CCCXCI.

Express and tacite pacts.

A pact being the mutual consent of two or more in the same will or desire (§ 386); *i. e.* an *agreement* of two or more about the same thing, the same circumstances; the consequence is, that this internal consent must be indicated by some external sign. But such signs are words either spoken or written, and deeds; the former of which make express, the latter tacite consent (§ 284); and therefore it is the same, whether persons make a pact by express, or by tacite consent, provided the deed be such as is held to be significative of consent by the opinion of all mankind, or of the particular nation *; nay, consent is sometimes justly inferred, from the very nature of the business, if it be of such a kind, that a person cannot be imagined to dissent (§ 284).

* Hence

* Hence by the Roman law, a nod was reckoned consent, l. 52. § ult. D. de obl. & act. Quintilian. declam. 247. Nay, submission and silence were reckoned consent, l. 51. pr. D. locat. l. 11. § 4. 7. D. de interr. in jure fac. and elsewhere, which we likewise admit to be true, unless there be some probable reason why one might, tho' he did not assent, rather choose to be silent, than to testify his dissent by words or deeds, *e. g.* if a son, afraid of a cruel father, being asked by him, whether he would marry Mavia whom he hated, should be silent, he cannot be thought to have consented. For what if a son, when such a father bids him go hang himself, should say nothing, would he therefore be deemed to have consented?

Sect. CCCXCII.

Who can, and who cannot make pacts.

It is plain from the definition of a pact as requiring consent (§ 391), that they cannot covenant who are destitute of reason, and therefore that the pacts of mad persons are null, unless they were made in an evidently lucid interval from their madness; as likewise the pacts of infants, and of all whose age cannot be supposed capable of understanding the nature of the thing; or of such persons, whose minds are disturbed by their indisposition; or of persons in liquor, even tho' their drunkenness be voluntary *; or finally, of those who promised any thing to another, or stipulated any thing from another to themselves in jest.

* For tho' in other cases, an action done in drunkenness be imputed to one whose drunkenness was voluntary (§ 50), yet here another sentence must be pronounced, and the degrees of drunkenness must be distinguished. For either the promiser was quite drunk, or only a little in liquor. Now, if he was quite drunk, that could not but be perceived by the party bargaining with him; and therefore, the latter either acted knavishly, or at least he is blameable for covenanting with such a person; so that there is no reason why, when the person has recovered from his drunkenness, such a contracter should have any right to demand the fulfilment of such a promise. But if the person be not quite drunk, his promise must be obligatory, because he

was not quite incapable of judging what and to whom he promiſed.

Sect. CCCXCIII.

Of pacts made by miſtake or ignorance.

From the ſame principle it follows, that pacts made thro' ignorance or miſtake are unvalid, if this fault of the underſtanding was culpable, vincible and voluntary (§ 107); but not, if it be of ſuch a nature, that the moſt prudent perſon is liable to it; (§ 108), as, if the covenanting perſons had different perſons and objects in their view; or if either of them was miſtaken about the perſon, or object, or any circumſtances of it which could not eaſily be known, and which, had he known, he would not have made the pact *.

* By theſe rules may all the caſes be reſolved that are uſually put upon this head. Thus, for inſtance, the pact will not be valid, if one promiſed to eſpouſe a virgin, who is afterwards found to be pregnant, becauſe the moſt prudent perſon might have miſtaken in this caſe: Nor is the contract of marriage valid, if Afrania be betrothed to one in miſtake, inſtead of Tullia whom he had in view, but did not know her name; becauſe not having the ſame perſon in view, they did not conſent to the ſame thing: In fine, if Tullia after betrothment is found to be Epileptical, or liable to any other hideous diſeaſe, the betrother ſhall not be bound in ſuch a caſe, becauſe he was ignorant of, or in an error about a circumſtance which he could not eaſily diſcover, and which, if he had known, it is not probable he would have deſired the marriage.

Sect. CCCXCIV.

Of fraud or knavery.

Much leſs ſtill is a pact valid if one be led into it by the fraud or knavery of the other; or in which one is involved, and by which one is wronged by another's cunning and deceitfulneſs; becauſe he cannot be deemed to have conſented, who was ſo blinded or deluded by another's artful miſrepreſentations, that he had quite a different opinion of the perſon or object when he covenanted, than he afterwards found

found to be the caſe *. On the other hand, there is no reaſon why a pact ſhould be null when a third perſon induces one to make it without the other's knowledge, tho' in this caſe it be indiſputable, that the perſon by whoſe fraudulence the pact was made, is obliged to repair the damages of the perſons whom he hath thus injured.

* Hence none will ſay, that Jacob's marriage with Lea was valid by the law of nature, ſince it was brought about by the fraudulence of Laban, Gen. xxix. 22. Nor was the cuſtom of the country, by which Laban pretended to exculpate himſelf, ſufficient to excuſe him, or to oblige Jacob to ſubmit, and ſuffer himſelf to be ſo maliciouſly deceived by his father-in-law. For that cuſtom was not obligatory; and if it really had been received as a law, Jacob ought to have been pre-admoniſhed of it, and Laban ought not to have promiſed Rachel to Jacob, but to have acquainted him, who was a ſtranger, that by the cuſtoms in Syria, the younger ſiſter could not be betrothed before her elder ſiſter. This tranſaction was therefore full of knavery, nor could it have been valid, had it not ſeemed better to Jacob, who was a ſtranger, to put up the injury, than to involve himſelf in an ambiguous ſuit.

Sect. CCCXCV.

Of force and fear.

And ſince nothing can be more repugnant to conſent than force and fear; nor can an action be imputed to one, if he was forced to it by one who had no right to force him (§ 109); hence it is clear, that one is not bound by his promiſe to a robber, or to any one who unjuſtly uſes violence againſt him. But a pact is not invalid, if it be made with one who had a right to uſe violence; and much leſs is a pact null, if not he to whom the promiſe is made, but a third perſon, without his knowledge, uſed violence, or was the cauſe of the pact *. Nor is a pact invalid, if the perſon forced to it, afterwards freely conſents and confirms his promiſe, becauſe he then becomes obliged, not by his firſt promiſe

promiſe extorted from him by force and fear, but by his after voluntary conſent (§ 109).

* For ſince imputability ceaſes, if one be neither the cauſe nor doer of a thing (§ 105), but in this caſe, he to whom a promiſe is made, is neither the author nor cauſe of the violence by which the other was forced to promiſe, the violence cannot be imputed to him. Thus, *e. g.* if any perſon in imminent danger from robbers or pirates, ſhould hire a convoy at a high price, it would be in vain for him to pretend to his convoy, when the hire is demanded, that he promiſed it in fear of robbers. So Seneca decides the matter, Controv. 4. 27.

Sect. CCCXCVI.

The conſent of the parties ought to be mutual.

Moreover, ſince a pact conſiſts in the conſent of two or more to the ſame thing (§ 386), it is very plain that this rule muſt hold not only in bilateral, but likewiſe in unilateral pacts; and therefore a promiſer is not bound, unleſs the other ſignify that the promiſe is agreeable to him. But this may be juſtly preſumed, either from the condition of the perſon to whom the promiſe is made; or from the nature of the thing promiſed; or from antecedent requeſt, provided, in this laſt caſe, the ſame thing that the other had demanded be promiſed.

Sect. CCCXCVII.

What with regard to impoſſible things.

Again, becauſe pacts are made about ſomething to be performed (§ 386), but impoſſible things cannot be performed, and therefore the omiſſion of them is imputable to none (§ 115); the conſequence is, that pacts about things abſolutely impracticable are null: no obligation ariſes from them, unleſs the thing, at the time the pact was made, was in the power of the promiſer, and he ſhall afterwards deſtroy, by his own fault, his power to fulfil his promiſe; or unleſs one fraudulently promiſed a thing not abſolutely impoſſible, but which he knew to be impracticable with regard to him (§ 115).

Sect.

Sect. CCCXCVIII.

What with regard to immoral things.

And ſince thoſe things are juſtly reckoned among *impoſſibles*, which, tho' not impoſſible in the nature of things, yet cannot be done agreeably to the laws and to good manners (§ 115); hence it is evident, that pacts and promiſes contrary to the laws of juſtice and humanity, or even to decency, modeſty and honour, (and which, for that reaſon, we ought to be judged not to be capable of doing, as Papinianus moſt juſtly and philoſophically ſpeaks, l. 15. D. de condit. inſtit.) are not valid. A perſon is not obliged to fulfil a promiſe by which he engaged to commit any crime; nor is he who promiſed to pay one a reward for perpetrating any crime bound by ſuch a promiſe; and therefore all pacts about baſe and diſhoneſt things, whether unilateral or bilateral, are of no effect.

* For it is manifeſtly contradictory, that the law of nature ſhould confirm pacts contrary to itſelf; that it ſhould at the ſame time prohibit a pact, and command it to be fulfilled; or that a pact ſhould be at one and the ſame time null, and yet obligatory. And therefore, a pact is departed from without perfidy, which could not be fulfilled without committing a crime. Nor does he deſerve the character of faithful, who performs what he cannot do without incurring guilt. And for this reaſon the nurſe gives an excellent anſwer to Dejanira, when ſhe would have her to promiſe ſilence.

Præſtare, fateor, poſſe me tacitam fidem,
Si ſcelere careat, interim ſcelus eſt fides.
Seneca in Herc. Oeteo. Act. 2. v. 480.

Sect. CCCXCIX.

What with regard to detrimental promiſe.

Hence again we infer, that one is not obliged to perform promiſes, the fulfilment of which would manifeſtly be detrimental to the other, tho' this other ſhould urge the fulfilment of the promiſe to his own ruin. For ſince we are forbid to injure any perſon by the law of nature (§ 178), and none

can make pacts contrary to the law of nature, (§ 398), no pact by which another is hurt can be valid; and he who keeps such a promise, even to one who insists upon the fulfilment of it, is no less deserving of punishment, than he who hurts one against his will, and by force *.

* Nor can the maxim, *volenti non fieri injuriam*, be opposed to this doctrine. For we have already shewn, that this maxim does not take place when it is unlawful to consent. But it is unlawful to consent to what God hath prohibited by right reason, or by his revealed will. For this reason, tho' Saul being wounded, had begged the young man to slay him, yet he was so far from escaping unpunished for consenting to this request, that David ordered him to be put to death as guilty of Regicide, 2 Sam. i. 15, &c.

Sect. CCCC.

What with respect to pacts about the deeds and things of others.

Besides, because we make pacts about those things which we desire to have a perfect right to exact from others (§ 386); but those things can neither be done, nor given, which are not at our disposal, but subject to the dominion of another person; we have therefore reason to deny that one can make a valid pact about things belonging to others, without commission from the owner, or even about his own things, to which any other hath already acquired some right by a prior pact. He indeed who hath engaged to use all his diligence to make another give or do, is obliged to fulfil that promise *. Yea, he is obliged to answer for the value of it, if he hath engaged himself to get another to give, or do a thing to any one; but he to whom a third person hath made such a promise, hath no right to exact the thing or deed, thus promised to him, from the person to whom it belongs to dispose of it. See Hertius de oblig. alium datur. facturumve.

* For since he hath promised no more than his help and diligence, the other hath no right to exact more from him.

And

And in general, as often as one ſtipulates ſomething to himſelf, which he knew, or might have known not to be in another's power; ſo often is the Promiſſor diſcharged from his promiſe, by uſing all his diligence. This is elegantly expreſſed by Seneca of benefits, 7. 13. "Some things are of ſuch a nature, that they cannot be effectuated; and in ſome things it is to do them, to have done all that one could in order to effectuate them. If a phyſician did all in his power to cure one, he hath done his part. Even tho' a perſon be condemned, an advocate deſerves the reward of his eloquence, if he exerted all his skill. And praiſe is due to a General, tho' he be vanquiſhed, if he exerted all due prudence, diligence and courage."

Sect. CCCCI.

What with regard to conditional pacts, &c.

From the ſame principle, that promiſe to give or do conſiſts in the conſent of both parties (§386), it manifeſtly follows, that it depends upon the parties to make a pact *with*, or *without conditions*, and any agreement with regard to *time* they pleaſe; and that theſe circumſtances ought to be obſerved by the perſons engaging, provided what regards the condition truly makes the effect of the pact depend upon an uncertain event; *i. e.* provided it be truly a *condition*. Whence it is plain, that what is promiſed under what is called *an impoſſible condition*, is not obligatory, ſince ſuch an additional clauſe hardly deſerves to be termed *a condition* *: and thoſe who have promiſed or ſtipulated what they foreſaw could not be done, muſt be deemed either to have been in jeſt, or to have been mad: in the firſt of which caſes, they muſt be judged not to have conſented; and in the other of which they muſt be judged not to have had it in their power to have conſented (§ 392).

For a condition is a certain circumſtance expreſſed by the ſtipulating parties, by which the effect of the pact is ſuſpended, as by an uncertain event. But ſeeing *impoſſible* does not mean an uncertain event, but an event which it is certain cannot happen, it is plain that ſuch a circum-

ſtance does not ſuſpend the effect of a pact, and therefore it is not a condition. Miltiades therefore cavilled, when he required the Lemnians to ſurrender their city according to their pact, becauſe, coming from home he had arrived at Lemnos by a north wind, Nepos, Miltíad. c. 1. and 2. For the Lemnians meant Athens: nor could Miltiades underſtand the Lemnians in any other ſenſe, ſince he at that time had no home but at Athens. The condition was impoſſible, and therefore rendered the pact null; eſpecially ſeeing the Lemnians might eaſily have been perceived by Miltiades to have ſpoken in jeſt and to banter him.

Sect. CCCCII.

What with regard to a baſe condition.

But ſince baſe and diſhoneſt things are juſtly reckoned amongſt impoſſibles (§ 115), and what is promiſed upon an impoſſible condition is null and void, (§ 401); and ſince in general it is unlawful to make pacts about baſe or diſhoneſt things (§ 398); hence we may juſtly infer, that baſe and diſhoneſt conditions render a pact null *; and that he who promiſed upon ſuch a condition is not bound to fulfil his promiſe; but that if it be fulfilled, he is juſtly liable to puniſhment for having done a crime; as is the other party likewiſe, being, by making ſuch a condition, the moral cauſe of that crime (§ 112).

* For a particular reaſon, the Romans held conditions, whether phyſically or morally impoſſible, in teſtaments, as not written, not exiſting, § 10. Inſt. de her. inſt. l. 1. l. 19. D. de condit. Inſt. l. 8. & l. 20. D. de condit. & dem. For as it ſeemed abſurd to indulge jeſting and trifling to a teſtator in ſo ſerious an affair; ſo neither could the omiſſion of an impoſſible action be deemed fraud in an heir, ſince he could never have conſented to it (§ 115). And hence by the Roman law they would have got their legacies which were left to them by Eumolpus in Petron. Sat. cap. 91. tho' they had not fulfilled the condition. "All who have legacies by my teſtament, except my children, ſhall only have them upon condition that they cut my body into pieces, and eat it up publickly." But ſince, in our opinion, the law of nature knows no other laſt-wills beſide thoſe which are done by way of pact (§ 291), all that hath been ſaid of pacts is applicable

applicable to laſt-wills; ſo that the law of the Thebans was abſurd, which ordered ridiculous conditions to be performed, as that one who had flattered a woman in order to be her heir, ſhould carry her naked corps beſmeared with oil upon his ſhoulders.

Scilicet elabi ſi poſſet mortua, credo,
Que nimium inſtiterat viventi.

Hor. Serm. 2. 5.

Sect. CCCCIII.

Whether one may not promiſe and covenant by another?

Moreover, ſince one may aſſiſt another, or promote his advantage by means of a mandate, or by undertaking his buſineſs without a commiſſion (§ 346), we muſt conclude, that it is the ſame whether one promiſe and make a pact in perſon, or another do it for him by his order. But ſince he who undertakes another's buſineſs without a commiſſion from him, is obliged to manage it to his advantage (§ 348), which he does not do, who is liberal of another's goods, and gives any thing of another's away without the owner's conſent (§ 400); the conſequence is, that he who undertakes another's buſineſs without a commiſſion, may ſtipulate to that perſon; (ſo that this rule in the Roman law is not agreeable to natural equity, " That none can ſtipulate to another, unleſs he be under ſubjection to him, § 4. Inſt. de inut. ſtip.) but he cannot promiſe for him without his knowledge; and ſuch a promiſe does not bind the owner.

Sect. CCCCIV.

What hath been ſaid of pacts extends likewiſe to contracts.

Finally, becauſe, as we obſerved in the beginning of this chapter, there is no diſtinction, by the law of nature, between pacts and contracts, both deriving all their ſubſiſtence and force from conſent (385), it is evident, that all the rules which have been laid down in this chapter, do no leſs belong to contracts than to pacts; and that one does not proceed in a wrong method, who deduces the nature

nature of contracts from the nature of pacts, and ſo begins by conſidering the latter.

CHAP. XV.

By what means obligations ariſing from pacts and contracts are diſſolved.

Sect. CCCCV.

General axioms.

WE have already proved that pacts ought to be religiouſly fulfilled, and that nothing is more ſacred than one's pledged *faith* (§ 387); but by *faith* is meant nothing elſe but the performance of promiſes and pacts; (and therefore Cicero de off. 1. 6. juſtly, tho' not exactly according to etymological rules, ſays, "Fidem appellatam, quia fiat, quod dictum eſt.") Hence then we infer, that thoſe who covenant have then attained to their end, when they have ſatisfied the terms of their covenant, and what was agreed upon is done. But the end (which according to the philoſophers, is firſt in intention, and laſt in execution) being obtained, or being of ſuch a nature that it cannot be obtained (§ 397), the obligation ariſing from a promiſe or pact muſt ceaſe *.

* The civil law diſtinguiſhes between the ways by which obligation is removed *ipſo jure*, in the nature of the thing, and the ways by which it is taken off by *exception*. When the obligation is cancelled by any deed of the parties contracting, as by paying, compenſation, acquittance, *&c.* then it expires *ipſo jure* by the nature of the thing. But if it be diſſolved on the account of equity, it is ſaid to be removed by an *exception*. But tho' we do not think this diſtinction quite idle, or without foundation, (upon which ſee an excellent diſſertation by Hen. Cocceius de eo quod fit ipſo jure) yet it will eaſily be granted to us, not to be of the law of nature, by thoſe who are acquainted with the judiciary affairs of the Romans, and the reaſon which induced them to make this diſtinction.

Sect. CCCCVI.

Of the first way by payment.

Since an obligation arifing from a pact or promife ceafes when it is fulfilled, and that which was agreed upon is done (§ 405); the confequence is, that it ceafes by payment, which is nothing elfe but the natural performance of the thing promifed or agreed upon. But it is the fame thing to him who is to be paid, by whom he be paid, provided the thing itfelf which was owing to him, or, (if it be a confumeable commodity) the equivalent be paid to him (§ 364); becaufe thus the obligation to him is naturally difcharged. So, for the fame reafon, it is evident, that he who is under an obligation by his pact, is not delivered from that obligation when another offers to fulfil it for him, if it be of fuch a nature as not to admit of being performed by another in his room *.

* This happens as often as a perfon's quality or virtue engaged one to make a pact with him. And therefore, if *Titia* be obliged by contract of marriage to marry *Sempronius*, fhe is not freed from this obligation, tho' *Sulpicia* fhould be ever fo ready and willing to fulfil the contract in her ftead, becaufe *Sempronius* chofe *Titia* for her age, her figure, her perfonal good qualities, and it is not the fame to him whom he efpoufes. On the contrary, to a lender it is the fame, whether he receive the book he lent from the perfon who borrowed it, or from another with whom he had nothing to do: And it is the fame to a creditor, whether he receive his money and intereft from his debtor, or from a third perfon unknown to him, becaufe thus the thing in obligation is naturally performed.

Sect. CCCCVII.

What, and to whom payment ought to be made.

From the fame principle we infer, that the fpecies is to be reftored, if the ufe or cuftody only of an inconfumeable thing was granted; and the fame in kind and quantity, if the ufe of a confumeable thing was granted; that one thing cannot be obtruded upon a creditor for another againft his will;

and

and much leſs can he be forced to accept of a part for the whole; or to take payment later, or in another place than was agreed upon in the contract *; becauſe, in all theſe caſes, the thing in obligation is not naturally performed (§ 307). Further, it is plain, from the ſame principle, that we are to pay to no other but our creditor, provided the laws allow him to receive payment, or to him to whom he has ceded his right, or given commiſſion to receive payment; for otherwiſe, tho' the thing in obligation is performed, yet it is not fulfilled to him to whom one is debtor by the contract (§ 406).

* For tho' neceſſity may require ſome indulgence to a debtor, and tho' the laws of humanity may often oblige a creditor to remit a little of his rigour, we are here ſpeaking of right; and by it pacts and contracts ought to be punctually and faithfully performed. "For, as Cicero ſays, Off. 2. 24. nothing cements or holds together in union all the parts of a ſociety, as faith and credit, which can never be kept up, unleſs men are under a neceſſity of honeſtly paying what they owe one to another."

Sect. CCCCVIII.

The ſecond way, Compenſation.

Again, becauſe obligation ceaſes when a contract is fulfilled, and with reſpect to conſumeable things as much is held for the ſame (§ 364); the conſequence is, that obligation is removed by *compenſation*, which is nothing elſe but balancing debt and credit, both of which have a certain value, one with another *.

* There is yet another reaſon: For ſince he is paid who gets what was owing to him (§ 406), and he to whom a conſumeable thing was owing, gets it when he gets as much (§ 363); it follows, that in ſuch a caſe, he who any way receives as much as was owing, is paid; and therefore, compenſation is but a ſhort way of paying; and it is moſt reaſonable that it ſhould have the ſame effect as payment.

Sect.

Sect. CCCCIX.

What is just with regard to it.

From the definition of compensation it is plain, that it can only take place among those who are mutually owing one to another, and therefore that another's debt to me cannot be obtruded upon my creditor. Compensation has place with respect to consumeable things, which, since they do not regularly admit of price of fancy, have always a certain value; but species cannot be compensated by species, nor a thing of one kind by a thing of a different kind, nor personal performances by like performances, because all these things admit of a price of affection, and are of an uncertain value. In fine, compensation, even by unequal quantities, amounting to the sum, holds good, tho' it does not appear reasonable to desire to compensate a clear debt by one not so clear or contended for *.

* Much less does he act justly, who would compensate a clear debt by this consideration, that he hath abstained from injuring his creditor by unjust violence, because in this case plainly there is no mutual obligation. It was therefore a very odd way of compensation by which Vitellius satisfied his creditors, Dion. Cass. Hist. l. 65. p. 735. "When he went into Germany he was so embroiled in debt, that his creditors would scarce dismiss his person upon any security; but a little after, when he was made Emperor, and returned to Rome, they hid themselves. And he ordering them to be brought before him, told them that he had restored them safety for their money, and demanded back the bonds and instruments of contract." As if a robber could reckon it for credit to a traveller, that when he had it in his power to murder him, he had only robbed him, without shedding one drop of his blood.

Sect. CCCCX.

A third way, Acquittance.

Moreover, since every one can abdicate his own right (§ 13), an obligation may likewise be dissolved by acquittance or voluntary remission, by which we understand a creditor's voluntary renouncing

ing his right of exacting a debt. And since it is the same whether one manifests his will by words, or other signs (§ 195), it is also the same whether one renounces his right to a debt by words or by deeds, as by giving up, tearing or burning the bond, provided some other intention of the creditor be not evident, or the bond be not destroyed by the creditor, but by another without his order, or be not rather accidentally lost, destroyed or effaced, than by the will of the creditor *.

* Thus the Romans might justly say, that their taxes and other fiscal debts were remitted to them, when Hadrian with that design burnt all their bonds and obligations, that by such a stupendous liberality he might win the affections of the people, Spartian. Had. cap. 6. But a debtor would most absurdly conclude so, if his creditor should deliver him his bond in order that it might be drawn up in a new and better form, or if his bond was burnt by accidental fire. And hence we may see, why it hath always been pronounced most iniquitous in the Roman people, for one plunged in debt, *novas tabulas postulare*, *i. e*, to demand a remission of his debt from the magistrates or tribunes of a turbulent genius. For thus the acquittance came not from the creditors, but from magistrates profuse of what did not belong to them, and whose office and duty it was to render justice to creditors, instead of liberating debtors against the will of creditors. This practice, of most pernicious example, was first put in use by Sylla, Liv. Ep. l. 88. And that Cataline expected the same, and that the people expected the same from Cæsar is manifest, tho' men of that turbulent spirit were then disappointed, Salust. Catil. cap. 21. Cæsar de bello civili, 3. 1. Sueton. Jul. cap. 42. Plutarch. Solon. p. 86.

Sect. CCCCXI.

A fourth way. Mutual disagreements.

Moreover, since any one may resign his right, and remit a debt due to him (§ 410), it follows, that both parties in a bilateral contract, may by mutual agreement dissolve their contract, especially, *since nothing is more natural, than that a thing may be dissolved in the way it was formed*, l. 35. D. de reg. jur.

jur. But ſo, that this manner of diſſolving an obligation cannot have place, if the poſitive laws ordain a contract to be indiſſolveable: ſuch as matrimony now is amongſt Chriſtians, which among the Romans, might, as is well known, be diſſolved by conſent.

Sect. CCCCXII.

Whether obligation be diſſolved by treachery?

But becauſe the obligation of a bilateral contract can only be diſſolved by mutual conſent (§ 411), the will of one of the parties does not diſſolve it; and therefore the treachery of either party does not diſſolve the contract, as Grotius of the rights of war and peace, 3. 19. 14. and Pufendorff of the law of nature and nations, 5. 11. 9. ſeem to think. For even he who does not fulfil his part, remains obliged to do it, becauſe he cannot liberate himſelf by his own ſingle will from an obligation, which can only, as hath been ſaid, be diſſolved by mutual conſent, and the other has a right to compel him to fulfil his pact; tho' if the latter will not uſe his right *, then the obligation ceaſes on both ſides, becauſe it is now removed by the conſent of both (§ 411).

* But either can do that, if the other will not fulfil the pact. For in every bilateral contract, this condition is ſuppoſed, that the one is obliged to perform what he promiſed, if the other performs his part (§ 379). If one therefore does not ſatisfy his promiſe, the condition fails upon which the obligation depended (§ 401), and therefore the obligation of both ceaſes.

Sect. CCCCXIII.

The fifth and ſixth way. The term elapſed, and the condition not fulfilled.

But ſeeing any circumſtance may be added to a pact, and theſe circumſtances muſt be obſerved (§ 401), it is evident that an obligation being conceived *ex die*, *i. e.* ſo that what is promiſed cannot be demanded till a certain day, it cannot be demanded before that time fixed: But if it be conceived *in diem*, within the compaſs of a certain time, then

then when that day comes, the obligation is diſſolved *ipſo jure* *. And the condition upon which the effect of a pact depended not taking place, obligation is diſſolved for the ſame reaſon, unleſs one being ready to fulfil his part of the pact, is hindered either by his party or a third perſon, without whom the pact could not be fulfilled.

* Therefore, this rule of the Roman lawyers hath too much of ſubtlety in it, *viz.* ex contractu ſtricti juris non poſſe ad tempus deberi, *&c.* § 3. Inſt. de verb. oblig. l. 4. pr. D. de ſerv. l. 44. § 1. D. de obl. & act.

Sect. CCCCXIV.

The ſeventh manner.

Beſides, there are obligations which are contracted with an eye to a certain perſon, and his qualities; but theſe are of ſuch a nature, that they cannot be performed by other perſons (§ 406) : And therefore it is clear, that theſe obligations cannot paſs to heirs and ſucceſſors, and that they expire with the death of the promiſer. Something like this we obſerved with reſpect to the obligation of a betrother, and of one who accepteth of a commiſſion or truſt. But this way of obligation's being diſſolved, does not belong to other obligations, which can be fulfilled out of the goods of the perſon obliged; becauſe theſe, as admitting of performance in the room of the perſon obliged, are juſtly tranſmitted to heirs, as we have ſhewn in its proper place (§ 305).

Sect. CCCCXV.

The eight change of ſtate.

The caſe is the ſame, if we are bound to perform any thing as being in a certain ſtate. For it is the ſame, as if the promiſe had been made upon condition this ſtate ſhould continue. And therefore the condition failing, the obligation likewiſe ceaſes (§ 413 :) Thus he who contracted as a manager, his adminiſtration being at an end, is no more bound,

bound, the obligation being ſolely founded upon his ſtate as adminiſtrator, l. ult. D. de Inſtit. act. l. 26. C. de adm. tut. But this is only true of obligations ariſing from pacts or poſitive law, and not of thoſe which ariſe from the law of nature *.

* Thus the ſpecial duties owing to a city by one as conſul, ceaſe ſo ſoon as one ceaſes to be conſul. Thus likewiſe the duties of a ſon, as far as they proceed from poſitive law, ceaſe, ſo ſoon as the ſon is no longer under paternal power. But the duties to which the law of nature binds him, ſuch as obedience, reverence, gratitude, remain after emancipation, nor can they be refuſed to parents by children no longer under paternal power.

Sect. CCCCXVI.

The ninth.

Moreover, ſince the obligation ceaſes if the end be ſuch as cannot be obtained (§ 406), he muſt be delivered from his obligation who promiſed the ſpecies itſelf, if it be quite loſt by accident, unleſs he promiſed it for a certain value, or as it were in part of payment; and the firſt obligation be not removed by renovation. Beſides, ſince impoſſibility is no excuſe, if one be in fault or delay, it is evident that he ought to bear the loſs who is in fault or delay; and therefore, all that was ſaid above concerning the riſks in buying and ſelling takes place and might be repeated here (§ 353).

Sect. CCCCXVII.

The tenth, novation and delegation.

In fine, ſince one may pay by another (§ 407), and remit an obligation to another (§ 411), and parties may depart from a pact by mutual conſent, and introduce a new obligation, which laſt kind of agreement we called above *a mixed pact* (§ 389), it follows, that any one may remit to another his former obligation, and accept a new one from him in its place, which is called *renewal* or *novation*; or if it be about matters ſubject to contention and diſpute, *tranſaction*, and that a creditor may remit

a debtor, upon condition that another, whom he approves of, be ſubſtituted in his place, which is called *delegation*, and that novation ought to be made in expreſs words, or by the moſt evident ſigns, and that delegation muſt be done with the united conſent of all concerned in the affair; and, in fine, that there is a great difference between delegation and ceſſion, by which a creditor transfers an action againſt his debtor to another, without his debtor's knowledge, and againſt his will.

REMARKS on this Book.

Our Author may perhaps be thought by ſome to have mentioned ſeveral caſes; as for inſtance, with regard to alluvion, caſting up of iſlands, &c which are rather curious than uſeful. But let me anſwer to ſuch objections againſt our Author, (Grotius, Puſendorff, and other writers on the *law* of nature,) 1. That of as little uſe as theſe queſtions may appear to us, they were not ſo in other countries, ſuch as Egypt, where, as Strabo obſerves, Geograph. l. 17. p. 1139. edit. Amſt. "They were obliged to be particularly exact and nice in the diviſion of their lands, becauſe of the frequent confuſion of boundaries, which the Nile, by its overflowing occaſioned, taking from one part, and adding to another, changing the very form and look of places, and entirely concealing thoſe marks that ſhould diſtinguiſh one man's property from another's. For which reaſon, there was a neceſſity for their often making new ſurveys, *&c.*" And it is ſo ſtill in Holland and other countries, in ſome meaſure; nay ſome ſuch caſes may and do happen in every country, where there are large and impetuous rivers, *&c.* 2. But however rarely any ſuch caſes may happen, yet as one cannot be an expert, ready natural philoſopher, without having run through many poſſible caſes, and determined how gravity, elaſticity, or any other phyſical powers, would operate in theſe circumſtances according to their laws of working; and therefore, ſuch exerciſe is by no means uſeleſs, but highly uſeful: So for the ſame reaſon, one cannot be ready and expert in the moral ſcience, ſo as to be able readily to determine himſelf, or adviſe others how to act upon every emergency, without having practiſed himſelf in reſolving all, or very many poſſible caſes, *i. e.* in determining what is requiſite in ſuch and ſuch caſes, in order to do the leaſt harm, and render every one his due. Thus, it is evident, muſt one prepare himſelf for being able to judge readily what ought to be the general rules of juſtice in ſtates with regard to different caſes. Thus alone can one prepare himſelf for judging of caſes in enacting, abrogating or mending laws. And indeed the proper way of ſtudying the laws of any particular country, is by comparing them

them all along with the dictates or the laws of nature concerning the same cases, in an orderly way, proceeding from simple to more and more complex cases gradually. Whence it is evident, that one well versed in the knowledge of natural law, can never be at a loss to find out what ought to be the general positive law in certain cases, and how positive law ought to be interpreted in cases, which, tho' not expressly excepted in a law, which must be general, yet are in the nature of things excepted. 3. The same thing holds with respect to the duties of societies, one towards another, for the laws by which particular persons ought to regulate their conduct in all pacts, covenants, bargains or contracts, under whatsoever denominations they are brought by the doctors of laws, are the very rules by which societies ought likewise to regulate their conduct one towards another; societies being, as we shall find our author himself observing afterwards, moral persons. Whence it follows, that the former rules or laws being determined, it cannot be difficult to fix or determine the latter. And indeed our Author having fixed the former in such a manner, that there was almost no occasion to differ from him, and but very little occasion to add to him; in following him while he deduces aud fixes the other in the succeeding book, there will be very little need of our adding any remarks, except in the affair of government, that not having been distinctly enough handled by any writer of a system of the law of nature and nations, for this reason that, as we have already had occasion to observe, none of them has ever considered government in its natural procreation, or its natural causes. Nor do I know any author by whom that hath been done but our Harrington, tho', as he himself shews, the principles upon which he reasons were not unknown neither to ancient historians, nor to ancient writers on morals and politics. It will not therefore be a disadvantage to young readers, for whom this translation, with the remarks, is chiefly intended, in order to initiate them into this useful science, if we, upon proper occasions, in the following book concerning the laws of nations, add a few things to set the more important questions about government in a clear light. On this subject, we of this nation, and we only, dare write freely. For our happy constitution is the blessed effect of thinking freely on this matter; and it must last uncorrupted, unimpaired, while we continue to exercise the right to which we owe it: A right without the exercise of which men are not indeed men. For who will say that slaves, who know not the price of liberty, or who know not that they are slaves, deserve to be called men!

The end of the first book.

ERRATA.

PAge 44. § 66. l. 7. for *communication* read *commination*. p. 61. l. 12. for *another* read *to others*. p. 62. l. 9. read *can be*. p. 64. l. 45. for *to him* read *to man*. p. 67. l. 15. read *and a*. p. 130. § 184. l. 2. read *lays ſnares*. p. 143. § 203. l. 8. for *is* read *are*. p. 176. § 240. l. 2. for *in the property of many* read *in the community of many*. l. 3. for *or* read *and*. p. 190. l. 7. for *the other* read *he*. l. 8. for *to him* read *to the other*. l. 10. for *the other* read *him*. p. 199. l. 42. for *would* read *could*. p. 214. l. 3. for *money* read *pawn*. p. 239. ſchol. l. 4. for *what* read *which*. p. 279. § 361. l. 7. for *or cannot* read *or that he himſelf cannot*.