

OF THE  
LAW  
OF  
*Nature and Nations.*

Eight BOOKS.

Written in *Latin* by the Baron  
PUFENDORF, Counsellor  
of State to His late *SWEDISH*  
Majesty, and to the present King  
of *PRUSSIA*.

*Translated into* ENGLISH.

The *Second Edition* carefully Corrected, and Compared  
with Mr. *Barbeyrac's* French Translation; With the  
Addition of his Notes, and Two Tables; the One of  
the Names of the Authors, the Other of the most  
Material Things, that are contained either in the  
Book or Notes.

O X F O R D :

Printed by L. Lichfield, for A. and J. Churchill, R. Sare, R. Bonwicke, W. Freeman,  
T. Goodwyn, M. Wotton, J. Walthoe, S. Manship, J. Nicholson, R. Parker,  
B. Tooke, and R. Smith. MDCCLXX.



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TO THE  
RIGHT HONOURABLE  
Sir *Nathan Wright*, Knt.  
LORD-KEEPER  
OF THE  
Great Seal

OF  
ENGLAND,

One of the LORDS of Her MAJESTY's most Honourable  
PRIVY-COUNCIL, &c.

*My Lord,*

**T**HE Author and Subject, here Presented to Your Lordship, have, in Themselves, the best of Claims to so Great a Protection: For, neither can *He*, whose known Capacity, Industry and Integrity, render'd Him the Ornament of His own Profession, and of His Prince's Council, apply Himself with more Success, than to One, who has risen, by the same Steps, to a Nobler Eminence of Honour and Employment; nor ought any other, than the Guardian and Dispenser of Publick Equity, be Acknowledg'd as the Patron of the *Law of Nature and Nations*. But the Ambition of this Address was alike needful, in respect  
of

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*The Epistle Dedicatory.*

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of the Translators; as an Occasion of acknowledging the Influence, which they feel from Your Lordships Authority, with regard both to their Function and their Studies: Your Lordship esteeming it no less worthy a Part of Your Character and Office, to Support the most Primitive Church, and the most Regular Universities; than to Preside over the Justice of the Wisest State, or to Direct the Policy of the Happiest Reign. I am,

*With all Duty and Respect,*

*Your Lordships most Obliged*

*Humble Servant,*

BASIL KENNETT.

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THE  
P R E F A C E.

**I**T is a Dilemma frequently urged against Versions of this kind, that when a Subject lies remote from Vulgar Consideration, Persons of Learning will pursue the Knowledge of it in the Learned Languages, while Others must remain equally Strangers to it in all. Which yet abates, proportionably, of its Force, according as either the Original Performance has been less fortunate in Style; or as the Improvements of a Modern Tongue have been able to extend themselves to the abstrusest Reasonings, and to speak even of Philosophy with the Advantages of Eloquence. As there is a Concurrence, of these two Conditions, to justify the present Attempt; so the second of them, which, thro' Personal Inability, may have been impair'd, seems yet to be recompens'd, by a peculiar Weight and Prevalency in the first. For the Commendation of our Author's Judgment hath scarce been more Universal, than the Censure of his Composition; which tho', by All, acknowledg'd to be expressive, yet to most appears so difficult and discouraging, that they sometimes fancy the Sense to have broken its way thro' the Phrase, and to have left these Irregularities, as the Tokens of its Violence. It is true, He has not fail'd in the very Entrance of His Work, to apologize for this Defect of Ornament; but the Plea He offers is, what may better excuse the necessary Roughness of a Subject, than the particular Unhappiness of a Writer. Another visible Disadvantage there was, which call'd for Relief. Our Author having publish'd the first Draught of this great Undertaking in the Year MDCLX, with the Title of *Elementa Jurisprudentiæ*, having also employ'd the Labour and Collections of Twelve Years, in bringing it to its present Method and Name, was not content to have drawn together all Assistances, which were of direct and immediate Use, from the Stores of Morality, Politicks and Law; but engaged Himself in a longer and wider Search, running thro' the whole Circle of Philological Authors, Ancient and Modern, and disposing, under the Heads of His Work, the most remote Examples, and Illustrations. Hence every Page came to be loaded, not only with numerous Citations at large, but with disorderly Marks of Addition, Reference, Comparison, and the like: as if the Confusion of a swelling Margin had run over, and discharg'd it self upon the Text. Thus the Periods were frequently disjointed, the Argument interrupted or obscured, and the greatest part of the main Body thrown into the disagreeable Figure of a Common-Place.

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## THE PREFACE.

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Some Endeavours have been here applied towards the lessening of both these Imperfections. In respect of Style, it is hoped, that the Mettal, how rude soever and incapable of being polish'd to exact Beauty, yet after a second melting, may appear less deform'd, and may pass into more General Use. But 'tis beyond Doubt, that the other Inequality has been farther rectified, by our casting under the Page the needless and mis-shapen mass of Foreign Supplies: which it might have been no unpardonable boldness utterly to have pared away; but that we ought to be cautious of practising upon an Author, and to take care, least by cutting off an Excrescency, we should endanger the Life of a Design.

Custom has not so far prevail'd over Decency, as to engage the Translators in proclaiming the Justice of their Choice, and Merit of their Author. Much less would they ground his Character on the invidious Argument of Comparison. To contend with the admired Names of Grotius, Selden, and the Right Reverend the present Lord Bishop of Peterborough, is what He ought to decline in point of Modesty, if not of Safety. Yet this seems to have fallen out to his Advantage, that no One of those great Men attempted a compleat Body of Moral, or Political Doctrine. The First chose rather to insist on Authorities, taken from the Historians, Civilians and Canonists, than on Philosophical Deductions, from the Nature of Men, and the Reasons of Things. The Second entred no farther into this Subject, than as the Jewish Institutions directed His View. My Lord of Peterborough, having overthrow'n the deceitful Fabrick of a late Treacherous Builder, and settled the Science of Morality, on its truest and deepest Foundations, left the Superstructure to be rais'd by Inferior Hands. Thus, while each had a particular Boundary to his own Enquiries, All contributed to the Perfection of our Author's System: in which, as He abstains not from grateful Remembrances of these, and other Learned Benefactors, so He now teaches the Publisher of this Translation most gladly to acknowledge the Favour and Assistance of his Friends; of whom Two especially, the Reverend Mr. Percivale, and the Reverend Mr. Itchiner, by entirely rendring the Fifth and Eighth Books, have, with the same Kindness, accepted a Part in his Burthen, and allow'd him a Share in their Reputation and Success.

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O F T H E  
L A W of N A T U R E  
A N D  
N A T I O N S.

B O O K I.

*Containing the Preliminary Parts of that Knowledge.*

C H A P. I.

*Of the Origine and the Variety of MORAL ENTITIES.*

**I**T was the Business of the *First and Highest Philosophy* (1), and that by which alone it could fully answer the Design of its Name, and Institution, to deliver the most Comprehensive Definitions of Things, and to rank them agreeably under their proper Classes, subjoining the General Nature and Condition of every sort of Beings. Now as the Series of *Natural Things* hath been fairly enough regulated by those, who have hitherto apply'd themselves to the adorning of that *Science*, so it is evident, that Men have not been equally solicitous about constituting the *Entia Moralia*, or *Moral Entities*, nor treated them with that Respect which their Dignity requir'd. Many Authors seem never so much as to have thought on them; others only touch them lightly over, as idle Fictions of no use or moment in the World. When, at the same time, it was highly expedient, that they should be fully understood by Mankind, who are endu'd with the Power of producing them, and through whose whole Lives and Conducts their Force and Activity is diffus'd. This Reflection obligeth us to premise somewhat on a part of Knowledge generally neglected; so far as shall seem requisite to illustrate our Principal Under-

taking. Especially least our Definitions of Moral Things should, either upon account of their Obscurity, or of their Novelty, prove a Stop to the Reader, who perhaps in Common Treatises hath rarely met with the like Terms. And here, if those who have been bred up in the nicer Delicacies of Letters, shall disdain our Endeavours of this kind, and cast a censorious Frown on Words unknown to Ancient Eloquence; we only petition them for this Favour, that as we often pardon the Impertinencies of their over-scrupulous Exactness, so they would be pleas'd to grant us the like Toleration, whilst we profess a closer regard to the (2) strict Severity of Things, than to the exterior Ornaments of Speech. For how to express our selves with more Advantage about these Matters we are yet to seek; unless by tedious Circumlocutions we would leave them more obscure and more perplex'd than we found them. Against the Charge of Novelty *Tully* himself will be our Advocate: *New Names* (says (a) he) *are to be apply'd to new Things: nor is this to be wonder'd at by any Man of ordinary Knowledge, when he considers, that in every Art and Craft, not vulgarly understood, there is a variety of Terms coin'd for that particular Subject.* And

(1) *The Metaphysics, which is called the first Philosophy, because most other Sciences depend upon it, and borrow their general principles from it: And the highest, in respect of its Object, since it treats about God, Angels, and the separate Soul, &c.*

(2) *Cicero de Finib. l. 3. c. 5. Whatever is spoken of weighty Matters clearly and plainly, is well said: but to study to set off such things by an ornamental way of speaking, is childish.*

(a) *Vide de Finib. l. 3. c. 1.*

then giving Examples in the Liberal and Mechanick Arts, he concludes; *A Philosopher of all Men hath an especial Right to this Priviledge; for Philosophy is the Art of Life, and he that would undertake to explain its Rules, cannot, from the common Currency of words, find Stock enough to answer his Occasions* (a). But he that can upon no account digest such Harshness of Style, is left at his Liberty to turn out of these rougher Tracts, and to pass immediately to a Field of more Smoothness and Pleasure.

II. All the Beings which compose this Universe, as they consist of such Principles as were by the most Wise Creator temper'd and fitted for the producing of each particular Essence; so they have every one of them their proper *Affections*, arising from the Disposition and Aptitude of their Substance, and exerting themselves in agreeable Actions, according to that Portion of strength which their Divine Author and Founder hath imprinted on them. These *Affections* we now usually call *Natural*, since the term *Nature* hath been extended so far as to denote, not only the General Mass of Things, but also the Modes and Acts flowing from the internal Force of their Constitution, by which is produc'd that infinite Variety of Motions which turns and manages all the Business of our World. Those Things which exercise their Operations, either without any Sense at all, or with pure down-right Sense, or with such as is assisted by very imperfect Reflection, are guided by the sole Instinct of Nature, and are unable to govern their Actions by any Rules or Modes of their own Invention. But Man, who besides his excellent Form and most accurate Contexture of Body, fitting him for the noblest and the quickest Offices of Life and Motion, is endu'd with a singular Light of Understanding, by the help of which he is able most exactly to comprehend and to compare Things, to gather the Knowledge of Obscurities from Points already settled, and to judge of the Agreement which Matters bear to each other; and hath also the Liberty of exerting, suspending, or moderating his Actions, without being confin'd to any necessary Course and Method: Man, we say, is farther invested with the Priviledge of inventing and applying new Helps to each Faculty, for the more easy Regulation of its Proceedings. To consider what numberless Modes and Notions have been introduc'd for the Assistance of the *Understanding*, and for prevent-

ing the Confusion which might arise from the undistinguish'd Vastness of its Objects, is the Province of another sort of Enquirers. Our Business is to declare, how, chiefly for the Direction of the *Will*, a certain kind of Attributes have been impos'd on Natural Things and Motions; whence there springs up a peculiar Agreement and Conveniency in the Actions of Mankind, a grateful Order and Comeliness for the Ornament of Human Life. And these Attributes are call'd *Moral Entities*, because the *Manners* and the Actions of Men are judg'd and temper'd with relation to them; and do hence assume a Face and Habit different from the horrid Stupidity of the dumb Creation.

III. We may define our *Moral Entities* to be *Certain Modes superadded to Natural Things and Motions, by Understanding Beings; chiefly for the guiding and tempering the Freedom of Voluntary Actions, and for the procuring of a decent Regularity in the Method of Life.* We call them *Modes*, because we conceive *Ens*, or *Being* in general, to be more conveniently divided at large, into *Substance* and *Mode*, than into *Substance* and *Accident*. And as *Mode* is contradistinguish'd to *Substance*, so it is manifest, that *Moral Entities* have no self-subsistence, but are founded in Substances and in their Motions, and do only affect them after a certain manner. Of *Modes*, (1) some flow as it were naturally from the things themselves, (2) others are superadded by the Intervention of an Intelligent Power. For whatever is endu'd with Understanding, can from the reflex Knowledge of Things, and from comparing them with one another, form such Notions as may prove very serviceable in the Direction of an agreeable and consistent Faculty. *Moral Entities* are of this kind; the Original of which is justly to be referr'd to Almighty GOD, who would not that Men should pass their Life like Beasts, without Culture and without Rule; but that they and their Actions should be moderated by settled Maxims and Principles; which could not be effected without the Application of such Terms and Notions. But the greatest part of them were afterwards added at the Pleasure of Men, as they found it expedient to bring them in, for the polishing and the methodizing of Common Life. And from hence the End of them is plainly to be discover'd, which is not, like that of Natural Beings, the Perfection of the Universe, but the particular Perfection of

(a) We find *Manilius* using the like Excuse: Lib. III. V. 39. &c.

*Ornari res ipsa negat, contenta doceri.  
Et si qua externa referantur nomina lingua,  
Hoc operis, non vatis erit: non omnia secti  
Possunt, & propria melius sub voce notantur.*

Nor hope sweet Verse and curious Turns to find:  
I'll leave thy Passions, and instruct thy Mind.

To the same purpose, *V. Lucret. lib. 1. V. 137. & Horat. Art. Poet. V. 48. & seq.*

*Si forte necesse est  
Indiciis monstrare recentibus abdita rerum,*

And though some Words of foreign stamp appear,  
Seem harsh, untun'd, uneasy to thy Ear,  
This is the Subject's, not the Writer's Fault:  
Some things are stiff, and will not yield to Thought.  
I must be plain: and if our Art hath found  
Expressions proper, it neglects the sound.

Mr. Creech.

*Fingere cinctutis non exaudita Cethegis  
Contingat: dabiturque licentia sumpta pudenter.*

(1) For Instance, *The Figure of a Body, which is really inherent in it; and therefore called an Internal Mode.*

(2) Such are *Moral Entities, which are not in the things themselves, but depend upon the Operation of the Mind; and are therefore called External Modes.*

Human

Human Conduct, as Superior to Brutal, in being capable of regular Beauty and Grace: that thus in so inconstant a Subject, as the Motions of Men's Minds, an agreeable Elegance and Harmony might be produc'd.

IV. As the Original way of producing Natural Entities is by *Creation*, so the manner of framing Moral Entities cannot be better express'd than by the Term of *Imposition*. For these do not proceed from Principles ingrafted in the Substance of Things, but are added, at the Pleasure of Intelligent Creatures, to Beings already perfect in a Natural Sense, and to the real Productions of those Beings; and consequently obtain their whole Existence from the Determination of their Authors. The same Power assigns them such and such Effects, which when it sees convenient, it can destroy without causing any Natural Alteration in the Subject to which they were apply'd (1). Hence, their Force and Ability of Operation doth not consist in this, that they can by their internal Efficacy produce any Natural Motion or Change in Things, without the Intervention of other Causes; but, partly in shewing Men, how they ought to govern their Freedom of Action, and chiefly in making them capable of receiving Benefit or Injury, and of exercising several Works towards other Persons, with some peculiar Effect. And the Efficacy of Moral Entities, produc'd by Almighty God, flows from this Principle, that he, by his Right of Creation, hath the Power of circumscribing, within proper Limits, that Liberty of Will with which he indulg'd Mankind, and when it grows refractory, of turning it which way soever he pleaseth, by the Force of some threatned Evil: Men likewise were empower'd to give a Force to their Inventions of the same kind; by threatening some Inconvenience, which their Strength was able to make good, against those who should not act conformably to them.

V. Since then *Moral Entities* were instituted for the Regulation of Men's Lives, to which End it is necessary, that those who are to observe this Rule should bear some settled Relations to one another, should govern their Actions by a fixt Method; and, lastly, should act with determinate Respects and Titles about such Goods and Possessions as the Occasions of Life require; we may hence conceive them to be principally inherent, 1<sup>st</sup>, in *Men*; 2<sup>ly</sup>, in the *Actions* of Men; and 3<sup>ly</sup>, after a sort (2), in *Things*; which Nature, either by her own Strength, or with the Assistance of Human Industry may produce. But though it would be no Absurdity to state their Division according to these three Heads or Subjects, yet it seems a more exact Method to make the Classes of Natural Entities our Patterns in digesting the Moral. Not only because the former have more engag'd the Studies of Philosophical Men, and being compar'd with the latter, cast a considerable share of their own Light and Evidence upon them; but likewise because our Under-

standings are so immers'd in Corporeal Images, as to be hardly capable of apprehending such Moral Beings any otherwise than by their Analogy to those of Nature.

VI. Now though *Moral Entities* do not subsist of themselves, and for that reason ought not, in general, to be rank'd under the Clats of *Substances*, but of *Modes*; yet we find many of them to be conceiv'd in the manner of Substances, because other Moral Things seem to be immediately founded in them, just as Quantities and Qualities inhere in the real Substance of Bodies. Farther, as Natural Substances suppose some kind of *Space*, in which they fix their Existence, and exercise their Motions; so in Allusion to these, *Moral Persons* are especially said to be in some *State*, which in like manner contains them, and in which they perform their Operations. Hence a *State* may not improperly be defin'd a *Moral Entity*, fram'd and taken up, on account of the Analogy it bears to *Space*. And as *Space* seems no Principal and Original Being, but is devis'd, to be, as it were, spread under other Things, to hold and to sustain them in some particular manner; so the several *States* were not introduc'd for their own sakes, but to make a Field for *Moral Persons* to exist in. Yet there is indeed this difference between *State* and *Space*, that the latter is a kind of immoveable Substance, extended primarily, and of it self, and which might still subsist if all the Natural Things, which now fill it, were remov'd: But *States*, (and all other *Moral* Beings, consider'd *formally* as such) obtain no higher Condition than that of *Modes* or Attributes; so that upon taking away the Persons suppos'd to be in such a *State*, the *State* it self is in manifest Danger of losing its own Existence.

VII. There are two sorts of *Spaces*, one according to which things are said to be *in a place*, which the Logicians call *Ubi*, as *here, there, &c.* and another according to which they are pronounc'd to be *in time*, which they call *Quando*, as *Yesterday, to Day, to Morrow, &c.* In the same manner we may conceive a double Notion of *State*, one which denotes a *Moral Ubi*, and bears an Analogy to *Place*; another which includes a Respect to Time, signifying the Application of some Moral Effect to Persons existing in such a Time. The former *State*, which hath a Relation to *Place*, may be consider'd either Undeterminately, as it results only from (3) Moral Qualities; or Determinately, as it supposeth a Dependance on (3) Moral Quantities, and on Comparison. The *State* of Man consider'd undeterminately, is either *Natural* or *Adventitious*. We use the word *Natural*, not because such a *State* flows from the internal Principles of Human Essence, antecedent to the Power of Imposition, but because it was impos'd by GOD himself, not by Man, and affects us immediately upon our Nativity. We are wont to consider the Natural State of Man, either *absolutely*, or *with relation*

(1) See the last Section of this Chapter.

(2) See what the Author says Section 16.

(3) From the 17. to the 23. Section of this Chapter, the Author shews what he means by Moral Qualities and Quantities.

to other Men. The former Notion, 'till we can find a more convenient Term, we may express by the word *Humanity*, importing that Condition in which Man is plac'd by his Creator, who hath been pleas'd to endue him with Excellencies and Advantages in a high Degree above all other Animate Beings (a). Of which State this Principle is a direct Consequence, that Man ought to be a Creature acknowledging and worshipping his Divine Author, and Admiring his Works; and that 'tis expected that he should maintain a Course of Life far different from that of Brutes. To this *State* is oppos'd the Life and the Condition of Irrational Animals.

Since then the very being a Man is a *State*, obliging to certain Duties, and giving a Title to certain Rights, it cannot be out of the way to consider the precise point of Time, at which particular Persons may be said to enter on such a *State*. And this we conceive ought to be fix'd on the very first Moment, when any one may be truly call'd a Man, though he as yet want those Perfections which will follow his Nature in a longer Course: that is, whensoever he begins to enjoy Life and Sense, though his Mother hath not yet deliver'd him into the World. Now because the *Obligations* cannot be fulfill'd by him, without he understand his own Nature and the Ways of Working, they for that Reason do not actually exert their force, 'till he is able to square his Actions by some Rule, and to distinguish them by their proper Differences. But the *Rights*, on the contrary, date their Validity from the very beginning of our Being, in as much as they engage other Persons, already arriv'd at the full use of Reason, to such and such Performances towards us, and may turn to our Benefit, even whilst we are incapable of apprehending the Favour. Hence, it being a general Right and Privilege of all Men not to be Hurt by Others, if the Body of a *Fœtus* in the Womb should suffer any unlawful Violence, the Injury is not only done to the Parents, but to the Child; who, we suppose, may in his own Name demand Justice on that score, when he is grown up to Knowledge of the Action. But before the Imperfect Materials have acquir'd an Human *Form* in the Womb, if any one should dissipate or destroy them, he can't properly be term'd Injurious with regard to that senseless Mass; though he hath indeed broken the Law of Nature, by intercepting a Member of Human Society, and hath done an Injury to the Commonwealth, and to the Parents, by depriving them of their promis'd Citizen and Off-spring.

The *Natural State* of Man, consider'd with relation to other Men, is that which affects us upon the bare account of an Universal Kindred, resulting from the Similitude of our Nature, antecedent to any Human Act or Covenant, by which One Man is render'd peculiarly obnoxious to the power of Another. According to which Sense, those Persons are said to live in a *State of*

*Nature*, who neither obey one Common Master, nor are at all subject one to the other, nor have any acquaintance by the means of Benefits, or of Injuries. To which may be added a third Notion of a *Natural State*, as it abstracts from all Inventions and Institutions brought in, either by Human Industry, or by Divine Revelation, for the Grace and the Conveniency of Life.

The *Adventitious State* is that which obligeth Men at, or after their Birth, by the Authority of some Human Constitution; the Divisions of which will be better settled hereafter.

But we ought to observe, by the way, that there's no Reason why People should imagine a State of Nature in the Sense, but now deliver'd, to be a thing that never was, or can be in the World; because there was never any Set of Men joyn'd together barely by that Similitude of Nature, as it abstracts from Consanguinity; *Eve* being knit to *Adam* in the Conjugal Tie, and all their numerous Descendants being closely united and ally'd by the Communion of Blood and Race. For we must know, that the Bond arising from nearness of Birth, doth by degrees wear out, amongst Persons remov'd at a great distance from the Common Stock, nor is esteem'd of any farther force, when once got beyond the reach of those several Appellations and Terms which Mankind have invented to express it by. And therefore such a *State*, though it did not appear at the Commencement of Human Race, arose afterwards in a longer Tract of Time, when the Memory of the Universal Root, and the Sense of the Relation springing from it, were sunk out of the Thoughts and Minds of Men.

VIII. But although every State supposeth, in the Person whom it affects, a respect and disposition towards others, in as much as it is attended with some Right, or some Obligation, neither of which we can conceive without an Object to imploy their force upon; yet some kinds of States do more expressly include and denote a relation towards other Men, whilst they signify the manner and process by which the Mutual Business of Mortals is on both sides manag'd and transacted. Of this sort the most signal and material are *Peace* and *War*, which two *States*, *Libanius* says, comprehend all the Affairs, and all the Conduct of Life, *Peace is that State by which Men live quietly together, without the disturbance of Violence or Injuries, and voluntarily discharge their Mutual Duties, as Matters of necessary Obligation.* *War*, on the other hand, is a *State of Men mutually engag'd in offering and repelling Injuries, or endeavouring forcibly to recover their Dues.* *Peace* may be divided into *Common* and *Particular*; the former such as is maintain'd amongst Men by Duties flowing purely from the Law of Nature; (1) the latter such as derives its force from express Covenants and Leagues, binding both sides to agreeable Performances: This again is branched into *Internal* and *Ex-*

(a) Cicero Off. 1. c. 28. Nature hath given us a Person and Character to sustain, in a Degree of Excellence far above any other Creatures.  
(1) See Book the VIII. Chap. IX. Sect. 2, 3. &c.

*ternal*, the one between Members of the same Commonwealth, the other regarding Persons of different Countries and Governments, whether as Common Friends, or as Special Confederates and Allies. A *Common* or Universal War engaging all Mankind at the same time, is an impossible Supposition; this being a direct Consequence of the state of Beasts. *Particular War* is either *Internal* and Civil, or *External*; that between Members of the same, *this* between those of different Communities. When the *Acts* of War are suspended, though the *State* still continue, such a Cessation is call'd a *Truce* (1).

IX. *States* are said to be consider'd *determinately*, when we measure them according to the high or low degree of Esteem which attends them, or accounting as they are reckon'd more or less honourable. For since peculiar *Rights* and *Obligations* accompany each *State*, every one obtains a larger share of Splendor and Credit, either as its *Rights* are more numerous and more forcible; or as its *Obligations* are directed towards the performance of such Works as require a singular ability of Parts and Wit. On the other hand, those which demand only dull Pains and Labour of Body, are in very little Value and Repute.

X. The latter sort of *State*, which, in our General Division, we settled with relation to Time, in conjunction with some Moral Effect, may be divided, *first*, into *Seniority* and *Juniority*; both which are consider'd, either with respect to the duration of Human Existence, and are then call'd *Age*, the degrees of which are *Infancy*, *Childhood*, *Puberty*, *Youth*, *Manhood*, *fix'd Age*, *Declining*, *Old*, and *Decrepit Age*: or, with regard to some adventitious State, according as a Man hath continued a longer, or a shorter time in it. *Secondly*, Into *Plen-age* (2), when One is presum'd able by his own Strength and Discretion to manage his Affairs; and *Non-age*, when a Person hath need of a *Tutor*, or *Guardian*, because he is suppos'd, upon the account of weakness of Judgment, incapable of dextrously prosecuting his own business. The limits of this *State* are different, according to the various Constitutions and Customs of Nations.

Different from *Non-age*, is what we may call an *Age capable of mediated Guile*; the bounds of which it is likewise impossible to assign. *Alian* in his *Various History* (a) relates a very remarkable way of discovering such an early Deceit. A Boy, having taken up a Golden Plate, dropt out of *Diana's* Crown, was indicted in Court: The Judges order'd a pack of trifling Play-things to be laid upon the Board, and amongst these a Plate of Gold, and bid the Boy chuse which he lik'd best; who again laying hands on the Gold, was condemn'd as guilty of the former Sacrilege.

XI. Before we proceed to other Matters, it seems necessary for us to observe, that, through

Scarcity of words we are frequently compell'd to express by the same term, the *State* it self, and the *Attribute* proper to such a *State*; though they are really distinct, and form different Conceptions in our Minds (b). Thus, to give an instance, *Liberty* is us'd as well for a *State* with analogy to *Space*, as for a *faculty of working* with resemblance to an *Active Quality*. And so *Nobility*, sometimes expresseth a *State*, sometimes an *Attribute*, or *Affection* of the Person in such a *State*, in the manner of a *Passive Quality*. So likewise the word *Truce* denotes both the *State* of Peace, and the Manner of Settling it.

Nor must we forget to hint, that as one Person may be at the same time engag'd in several *States*, provided that the *Obligations* of those *States* do not interfere with one another, so the *Obligations* adhering to one particular *State*, may, according to different Parts, be deriv'd from different Principles. And therefore he that only collects the *Obligations* flowing from a single Principle, and omitts the rest, doth not presently form a distinct *State* incapable of other *Obligations*, besides those which he hath taken notice of. Thus he that gathers several parts of the Office of Priests purely from the Holy Scriptures, doth not in the least deny, but that they are likewise bound to such Performances as the Constitutions of particular Governments shall farther enjoyn. So we that profess in this Work to treat only of those Duties of Men, which the Light of Reason shews to be necessary, do not at all pretend that there ever was, or now is, or ought to be, such a *State* in which those *Obligations* only should prevail, exclusive of all others. Nay, it would be almost a needless Disquisition to search, whether such a State of Men was once so much as likely to have been in the World. For the Assertion, which some so confidently lay down, could never yet be clearly made out, That *if Man had continued in his Primitive Holiness, the Law of Nature alone, as it govern'd him at first, so should have continued its sway, except that one or two Positive Commands might probably have been added to it*. We may justly question, whether Mankind, although untainted with Sin, should have always pass'd their Time in the Compass of a single Garden, sustaining themselves with the Fruits of Spontaneous growth, and not have cultivated and adorn'd their ways of living, by Industrious Management, and by Variety of Arts and Inventions. For what prejudice could it have been to their Original Innocence and Integrity, if upon the Multiplication of Human Race, they had divided into separate Societies in the forms of Commonwealths? And what Notion can we frame of such Societies, without the Addition of *Positive Laws* and *Constitutions*?

XII. *Moral Entities*, fram'd with Analogy to

(1) Vide Grot. de Jur. B. & P. l. 3. c. 21. (2) Vide l. III. c. IV. f. 5. (a) Lib. 5. cap. 16.

(b) Senec. de Benef. l. 2. c. 34. There is a vast multitude of things which have no peculiar words fix'd upon them; and these we express not by proper, but by foreign and borrow'd Names.

Substances; are call'd *Moral Persons* (1); which are either particular Men, or several joyn'd in one Body by some Moral Tie, consider'd with the State and Office which they maintain in Common Life. *Moral Persons* are either *Simple*, or *Compound*. The *Simple*, according to the difference of their Posts and Employments, are either *Publick*, or *Private*; as their Duty is immediately apply'd, either to the Benefit of Civil Society, or to the particular Advantage of every Private Member. *Publick Persons*, by the general Custom of the Christian World, are divided into *Civil* and *Ecclesiastical*. The former are either *Principal*, or *Inferior*. Of *Principal Persons*, some administer Affairs with a *Supreme Power*; others either execute some part of the Administration by Commission from the Supreme Power, who are properly call'd *Magistrates*, or else assist with their Advice and Counsel in the Management of the Commonwealth. The *Inferior* perform a less Noble Service to the Community, and act under the *Magistrates*, with respect to their Publick Capacity. In War the Officers, whether of higher or lower Commissions, answer to Magistrates, and are assisted, in Subordination, by the Common Soldiers. We reckon Men of that Profession amongst *Publick Persons*, in as much as they are authoriz'd by the Supreme Power, either immediately or mediately, to bear Arms in the Service of the Commonwealth.

There is likewise a peculiar Species of *Politick Persons*, which we may stile *Representatives*, because they sustain the Character of other Persons: such as, being invested with the power and authority of acting by Another, do in his room transact Business with the same force and validity, as if he himself had manag'd it. Of this kind are *Legates*, *Vicars*, *Burgesses*, &c.

A new distinction hath been brought in of late, between Ministers of a Representative Character, who are *Ambassadors* properly so call'd; and Ministers of the second Order, as *Envoys*, or *Residents*, who do not, like the former, express the full Power and Grandeur of their Masters (a).

With resemblance to these Publick Representatives, Tutors and Guardians are concern'd for Private Persons, as they manage Affairs in behalf of the Pupils or Minors given them in charge.

On this Point Mr. *Hobbes* (b) is mistaken, when he will have it frequently to happen in Communities, that a Man shall bear the Person of an Inanimate Thing, which therefore is it self not properly a Person; as suppose of a Church, a Hospital, a Bridge, &c. For there appears no Necessity of introducing a *Fiction of Law*, to constitute Persons by whom any of these should be represented. It being more Natural to say in plain Terms, that particular Men are impower'd by the Community, to collect the Revenue, settled for the preserving of such Places, or Things; and to carry on and sustain any *Suits* that shall

arise on those Accounts.

The Variety and Division of *Ecclesiastical Persons* is obvious to every Man, according to the particular Religion in which he hath been bred up. Nor can any Man of Letters be at a loss to apprehend what kinds of *Persons* are founded in the Management of Schools.

*Private Persons* are of a vast latitude and extent; yet their principal differences may be taken first from their Business, Craft, or Trade, which employs their Pains, and exhibits their Livelihood: and these are, either Creditable and Genteel, or such as seem to carry in them more Baseness, or Drudgery. Secondly, From the Condition, or, as we may say, the *Moral Situation* which any one obtains in a Community; in which respect one is a Citizen, with more or less Privileges; Another a Sojourner, and a third a Stranger. Thirdly, From the Place in a Family, upon which account one is said to be a Householder, which may comprehend the Person of a Husband, a Father, and a Master; another is call'd a Wife, another a Son, another a Servant: These may pass for the ordinary Members of a Family; the extraordinary are Guests and Lodgers. Fourthly, Upon account of Race and Birth; whence arise *Nobles*, (divided into different degrees in different Countries) and *Plebeians*. Fifthly, From Sex and Age, whence come the differences of Men and Women, and the distinctions founded in Childhood, Youth, Manhood, and Old-Age. For though the diversity of Sex, and Number of Years, are not of external Imposition, yet in the method of a Social Life, they involve some kind of Moral Notion; in as much as different Actions are becoming in different Sexes, and Persons of various Ages require a various Treatment and Application.

XIII. A *Compound Moral Person* is then constituted, when several Individual Men are so united together, that what they will or act by virtue of that Union, is esteem'd a single Will, and a single Act, and no more. And this is suppos'd to be done, when the particular Members submit their Wills to the Will of one Man, or of one Council, in such a manner as to acknowledge, and to desire others to acknowledge, for the Common Act and Determination of them All, whatever that Man, or that Council shall decree or perform, in Matters which properly concern such an Union, and are agreeable to the end and the intention of it. Hence it comes to pass, that whereas in other Cases, when many Men will or act any thing, we conceive so many distinct Wills and Acts as there are in number *Natural Persons*, or *Human Individuals*; yet when they close, and form a *Compound Person*, they are suppos'd to have but a single Will, and every Action which they perform is construed as one only, although a number of *Natural Individuals* concur in its production. And hence such a *Compound Person* doth and ought to ob-

(1) The Roman Lawyers ordinarily restrain'd the word *Person* to those that were Free: Hence it was that they ranked their Slaves amongst the Goods they possess'd.

(a) Vide *Memoirs touchant les Ambassadeurs*, p. 542.

(b) *Leviath.* cap. 16.

tain some particular Goods and Rights which none of the Members, in their private and separate quality, can claim or arrogate to themselves.

Here also we must remark, that as Natural Bodies continue *the same*, although in length of Time, by slow and silent degrees they receive a considerable alteration from the various accessions and desertions of their Particles; so by the particular Succession of Individuals, the Identity of the *Compound Person* is not injur'd: unless at one and the same time such a Change should arrive, as would entirely take away the Nature and Constitution of that United Body. On which Point we shall be more large in another part of our Work.

*Compound Moral Persons*, or Societies, may, after the manner of *single Persons*, be divided into Publick and Private. And the former again are subdivided into *Sacred* and *Civil*. Of the *Sacred*, some we may call *General*, as is the *Catholic Church*, and likewise any particular Church, whether comprehended within the Bounds of such a Nation, or distinguish'd from others by Publick Forms of Confession. Others *peculiar*, as are Councils, Synods, Consistories, Presbyteries, &c. *Civil Societies* are also either *General*, as a *Commonwealth*, of which there are many Species, as Simple, Compound, Regular and Irregular; or *particular*, as a Senate, an Order of Knights, a Tribe, a Parliament, &c. Armies may be called *Military Societies*, and consist of *Legions*, or Regiments, Troops, Cohorts, Companies, &c.

Amongst *Private Societies* we do not only reckon *Families*, but all the Colleges, or Corporations in a Kingdom, or a City, as those of the Merchants, of the Artificers, and the like. To make a minute Catalogue of every Species we think unnecessary to our present Design.

XIV. Concerning the Nature of *simple Moral Persons*, we have this farther to observe, That as one and the same Man may be in several *States* together, provided they do not clash with each other, so he may sustain several *Persons* together, upon Supposition that the Duties attending those *Persons* may be perform'd together by him. For though upon a natural account One cannot be both a Husband and a Wife, both a Son and a Daughter; nor in a Moral Consideration, at the same time, a Master and a Servant, a Judge and a Prisoner, a Party and Witness;

yet nothing hinders why the same Man may not be, (for Example) at home a Householder, a Senator in Parliament, an Advocate in the Halls of Justice, and a Counsellor at Court. In as much as those particular Offices do not require and engage the whole Man; but may, at different times, be all conveniently administr'd (a). And upon this Principle the wiser Heathens undertook to defend *Polytheism* (b), which they knew well enough was contrary to Reason: for their Excuse was, they only conceiv'd such a Number of Persons in the same Supreme Being, as might answer the Variety of Operations which proceeded from his Essence and Nature (c).

It's very plain from the Name and the Notion of *Imposition*, that when a Man enters on the Capacity of a new *Person*, there is no Natural Change produc'd in him, no Generation of new Natural Qualities, no Augmentation of old ones: but whatever accrues to him from this Relation, is comprehended within the Sphere of *Moral Things*. So when a Man's declar'd Consul, he is made ne'er the Wiser, nor when he lays down his Office doth he lay down any of his Parts with it. Though some have observ'd, that the Splendor of Men's Dignity hath frequently a strong Influence on their Actions, and that many Men have made very different Figures in a Publick, and in a Private Station. But we may reckon these Fancies amongst the common Deceptions of Sight, occasion'd by gaudy Pomp and Show. The Case being much the same, as when Country People imagine the Name and Title of *Doctor* to have some share in the Force and the Success of a Prescription (d). Except indeed, that some kinds of Parts and Dispositions are rouz'd and enliven'd by Business; and on the contrary, lye dormant in a State of Ease (e). Yet there is no Question to be made, but that when God Almighty imposeth a peculiar Charge and *Person* on any Man, he can, and often doth induce him with extraordinary Qualities, beyond the Measure of Moral Acquirements; as is evident from the Holy Scriptures (f).

From what hath been offer'd on this Subject it appears, that the *Jews* heretofore attributed too large Effects to their *Regeneration*, by which the new *Person* of a *Profelyte of Justice* was impos'd on a Gentile: as when they affirm'd, that there was no force remaining in his former Kindred; that he ought not to esteem, or use as Relations, his Brethren, Sisters, or Parents; nor his

(a) Cicero, Off. lib. I. c. 30. *We must understand, that we are by Nature invested, as it were, with two Persons, or Capacities, one Common to Mankind, on account of our being partakers of Reason, and of that Excellence by which we surpass the Beasts: the other proper to particular Men. A third is cast upon us by Time or Chance: A fourth we undertake and accommodate to our selves by our own Judgment.*

Idem de Oratore. *I sustain Three Persons at the same time; mine Own, the Adversary's, and the Judge's.*

(b) Senec. de Benef. l. 4. c. 7. *There may be so many Appellations of GOD, as there are Employments.*

(c) Maxim. Tyrius, Dissert. 23. *The GODS are one in Nature, though many in Name. But we, such is our Ignorance, assign them different Titles, according to the different Helps and Favours which they afford Mankind.*

(d) ———— *Purpura vendit  
Cassidicum, vendunt amethystina; convenit illis,  
Et strepitu & facie majoris vivere census. Juv. Sat. 7. P. 135. &c.*

(e) Vide Corn. Nep. Alcibiad. c. 1.

(f) Vide Exod. III, IV. Deut. XXXIV. 9. 1 Sam. X. 6, 9. Mat. X. 1, 19, 20.

Children begotten in his first Condition (a). The Cause of this Error was their absurd Belief, that a new Soul was infus'd into the *Profelyte*.

XV. It may not be amiss, in the last place, to observe, that Men sometimes frame a kind of Shadows, or Images of *Moral Persons*, for the representing of them in Sport and Jest. Whence it came to pass, that the term of *Person* hath been peculiarly challeng'd by the Stage. The Effence of a *Feigned Person* consists in this, that the Habit, Gesture, and Speech of another *real Person* be handsomly express'd: Thus the whole Procedure bears only a Countenance of Mirth, and whatever such a fictitious Actor says or does, leaves no *Moral Effect* behind it, and is valu'd only according to the Dexterity and Artifice of the Performance. For which Reason we may, by the way, justly wonder, why *Peter*, Bishop of *Alexandria*, approv'd of the *Baptism* which *Athanasius*, when a little Boy, had administred to one of his Play-fellows (b).

But the *Imposition*, which produceth true *Moral Persons*, is allow'd no such Liberty; but ought always to presuppose such Qualities as may contribute to the solid Use and real Benefit of Human Life: And he that in constituting Persons hath not a regard to these Endowments, is to be esteem'd an extravagant Buffoon, and a vain Insulter over Mankind. Thus *Caligula* might have made a *Consul* of the most Wicked, or of the most Senseless Wretch in *Rome*, provided the Man had been a free Citizen, and could at least have perform'd the Common and Formal Part of that Office: But to design his Horse *Incitatus* the same Honour, was a Pitch of Madness, and of insipid Raillery: nor a less Impudence than when he set him up for a Master of a Family, and gave him a House and Furniture; where there was good Entertainment provided for Guests invited in the Name of the Beast (c). An equal Madness was it, as well as a horrid Impiety, that many of the Ancients, to flatter their Princes, their Founders of States, and other Worthies, rank'd them after their Death in the number of the Gods (d). And what to think of the Canonization amongst the Modern Papists, no Man of Sense is at a loss.

XVI. As to *Things* consider'd as they are the Object of Law (1), there seems to be no occasion of ranking them under the Head of *Moral Entities*. For though *Men* are conceiv'd as different *Persons*, upon account of their different State or Office, yet *Things* do not raise such distinct Notions in us, with reference to their Owners, whether Our selves or Others, or whether the *Propriety* be yet uncertain. When at first some things fell under particular Right and Dominion, and others were left exempt, we must not fancy, that they themselves acquir'd any new Qualities; it seems rather, that upon intro-

ducing this Propriety of Things, a Moral Quality arose amongst Men, of which the *Men* were the *Subjects*, and the *Things* only the *Terms*: For, as during the Primitive Communion of Goods, any Man had a Right of applying to his proper Use, what equally belong'd to All; so when once Masters or Owners were constituted, there sprung up a *Right* in each particular Master of disposing how he pleas'd of his Own, and an *Obligation* in all other Masters to abstain from his Possessions. But the *Things* themselves obtain'd nothing hence, but an extrinsecal denomination, as they make the Object of such a Right, and of such an Obligation. So when certain Things are said to be Holy or Sacred, no Moral Quality of Holiness inheres in the Things; only, an Obligation is laid upon Men to treat them in such a particular manner: and when that Obligation ceaseth, they are suppos'd to fall again into promiscuous and ordinary Use. Yet if, still, any Man will positively maintain, that there are some *Things*, as well as *Persons*, which should be call'd *Moral*, he must take care so to explain himself, that he may be understood to attribute this *Morality* to the Things not *formally*, as if it were *inherent*, but only *objectively*, as it is *terminated* in them.

XVII. Thus much of those *Moral Entities* which are conceiv'd with Analogy to *Substance*. We are now to enquire about those that are really and formally *Modes*, and pass in our Notion as such. *Modes* may be conveniently enough divided into *Modes of Affection*, and *Modes of Estimation*: According to the former, we suppose *Persons* to be affected in such and such a manner; according to the latter, both *Things* and *Persons* may be rated and valu'd. The former fall under the Name of *Quality*, the latter of *Quantity*; if we take both those Terms in the most extended Sense. *Qualities*, so far as concerns our Business, may be divided into *Formal* and *Operative*. *Formal Qualities* are such as do not tend, nor are directed towards any Act or Work, but agree and are joyn'd with the Subject, in the manner of pure and naked *Forms*: whence we may likewise call them *Simple Attributes*. *Operative Qualities* are, either *Primitive*, or *Derivative*. By the *Primitive* a Thing is conceiv'd fit and able for such an Act: they are divided into Internal, and External, and may be term'd *Moral Passive Qualities*. The *Derivative* are those which proceed from the *Primitive*, and are the *Acts* themselves, as the former were the *Powers*.

XVIII. Among *Moral Attributes*, *Titles* have a considerable place, which are apply'd for the distinction of Persons in Civil Life, with reference to their *State* and their Esteem. They are chiefly of two sorts. Some directly signify the degree of the Rate and Value, which Persons bear

(a) Vide Selden de J. N. & G. l. 2. c. 4.

(b) Sozomen, l. 2. c. 17. Add the Argument of the Bishops of *Minorca* in the Council of *Trent*, by Father Paul, B. 2. concerning the Intention of the Minister in the Celebration of the Sacrament.

(c) Sueton. Calig. c. 55.

(d) See *Tiberius's* Speech in *Tacitus*, An. IV.

(1) The different Distinctions of things with reference to Law, will be explain'd in the 4th and 5th Books.

in common Account, together with the Qualities peculiar to Men of that Rank: but the State it self they only denote indirectly and by the by, and that either more clearly, or more obscurely, according as such a Title is usually attributed to fewer, or to more *States*. Of this kind are those Honorary Epithets, commonly prefixed to the Names of Great Persons, as Marks of General Respect: as, *the most Serene, the most Eminent, the most Illustrious*: the signification of which rises higher, or falls lower, according to the Condition of the Substantive to which they are joyn'd. Other *Titles directly* signifie some particular State, or some peculiar Seat and Place in a *State*, but *indirectly* denote that degree of Value and Repute which usually accompanies such a *State*: as are the Names of *Moral Persons*, of those especially who fill any Post of Honour. Now these Titles are not consider'd, as they are only Notions representing to one Man's Understanding the State and Office of another, but as by virtue or human Imposition they declare the Power and Authority of the Person that enjoys them. So that 'tis not a vain Contention about empty Ceremonies, when Men frequently have such hot Disputes and Quarrels about *Titles*: because upon the denial of a Title, we are suppos'd at the same time to deny the *State*, the Office, the Power and the Rights, which such a *Title* generally expresses or includes. But here we must be sure to observe, that the Imposition of most *Titles* is not perpetual and uniform; but in different Countries, and in the same Country at different times admits of very large alterations. Thus the *Titles* of the first kind which we mention'd, (or the Honorary Epithets) made use of by our Ancestors, how mean and little do they sound to the Ears of our own Age: while what was thought heretofore a worthy Mark for the Greatest of Mortal Men, shall now be despis'd by an Inferiour Scribler? For which reason the increase of such *Titles* does not always argue the increase of Dignity; but when the *Titles* swell higher while the thing it self maintains its first condition, their Value and Price is supposed to be considerably debated. Sometimes also a certain *Title* is affix'd by way of Elogy and Complement to some particular Order, because the quality or thing meant by that *Title*, is or ought to be conspicuous in the generality of the Members belonging to such an Order. And hence those *Members*, who are not really possess'd of the *thing*, do however enjoy the *Title*. Thus in Order of Men of Letters, many Persons are saluted with the Appellation of most *Famous*, and most *Learned*, who are as much any thing else in the World as what those terms signifie. And so too, an idle unactive Nobleman must have *Industry* and *Strength* and *Valour* applied to Him in our Addresses. It happens likewise very commonly, that Private Men or others, either advance or diminish the *Titles* of Persons, as they judge it convenient for the present Condition of their Affairs to flatter and caress, or to despise and vilifie them. And even in the latter sort of *Ti-*

*ties*, as we above divided them, it frequently falls out that the *Title* may continue, tho' the Thing it self, or the Dignity and Right be in a high manner either better'd or impair'd. And farther 'tis very usual, that in different Countries the same Word shall express very different Degrees of Honour. And therefore it would argue a very unskilful Head, to place in the same Class all those who bear the same *Title* all over the World (1). It must not be forgot, that sometimes a bare *Title* is attributed to a Man without the *Thing*, or without the Offices and the Profits which used to attend such a *Title*; only to this intent, that he may hence obtain the External Ensigns and Badges of the Honour, and may acquire a more creditable Place and Seat in the Community of which he is a Member. Lastly, It is worth remarking, that chiefly in the *Titles* of the Principal Houses of *Europe*, the same *Title* sometimes imports both the Family, and the Possession of the mention'd Territory; sometimes the Family only, without the Possession, yet with the Right of succeeding to it according to the due Course, and Order of Inheritance.

XIX. *Moral Operative Qualities* are either Active or Passive. Of the former the most noble Species are *Power, Right, and Obligation*. *Power* is that by which a Man is enabled to do a thing lawfully and with a *Moral Effect*: which *Effect* is, that the Person exercising this Power, shall lay an Obligation on others to perform some certain Business which he requires, or to admit some Action of his as Valid, or not to stop and hinder it; or that he shall confer on others a Licence of doing or possessing something, which Licence they did not before enjoy. Whence appears how wide this Quality runs, and how very diffusive it is of it self. *Power*, with respect to its Efficacy, is divided into *perfect*, and *imperfect*. The former is that, the Exercise of which may be asserted even by *Force*, against those who endeavour unlawfully to lett and oppose it. Now *Force* is chiefly applied, within the Bounds of the same Community by an *Action at Law*, and without those Bounds by a *War*. The latter, or *imperfect Power* is that, the Exercise of which if any Man is unlawfully prohibited, he may be said indeed to be inhumanly dealt with, yet he has no Right to defend it either by Process of a Court, or by the Force of Arms, unless this Inefficacy or Imperfection is supplied with absolute Necessity. With respect to its Subject, *Power* is further divided into *Personal*, and *Communicable*. The former is such as one Man cannot lawfully transfer to another. But then this must be consider'd under several Differences. For some *Powers* are so closely united with the *Person*, that the Acts belonging to them cannot rightly be exercised by Another. Such is the *Power* of the Husband over the Body of his Wife, which no Laws allow him to discharge by a Deputy. In some again, tho' we cannot transfer the Possession, yet we may by Delegacy commit the *Acts* to the Administration of others; but in such a manner, that the whole strength of their Authority must be deriv'd from

(1) Vide Mr. Le Clerc's *Ars Crit.* Tom. I. Part. II. Sect. I. Cap. 13.

him, in whom those Powers are originally seated. Of this kind is the Power of such Kings as are constituted by the Will of the People. For they cannot transfer the Right of Reigning to Another, and yet they may use the Service of Ministers for the Performance of the Acts belonging to that Right. *Communicable Power* is such as may be lawfully devolv'd upon Others; and that either at the Pleasure of the Person so devolving it, or by the Authority or the Consent of a Superiour.

Lastly, In respect of the Objects, the Generality of Powers may be reduced to four Heads. For they regard either Persons or Things; and both these as they are either *our own*, or *other Mens*. A Power over our own Persons and Actions is called *Liberty*; the different Acceptations of which word shall be hereafter discuss'd. This must not be conceiv'd as a distinct Principle from him who enjoys it, or as an Authority of constraining himself to any thing which is oppos'd by his Inclinations (a): But as a Licence to dispose of himself and of his Actions, according to his free Pleasure; which at the same time includes a Negation of any Impediment, proceeding from a Superiour Power. A Power over our own Things or Goods, is called *Property*. A Power over the Persons of other Men is properly *Empire* or *Command*: A Power over other Men's Things, is what the *Civilians* term *Service*.

XX. *Right* (b) is that Moral Quality by which we justly obtain either the Government of Persons, or the Possession of Things, or by the Force of which we may claim somewhat as due to us. There seems to be this Difference between the Terms of Power and Right, that the first does more expressly import the Presence of the said Quality, and does but obscurely denote the manner how any one acquir'd it. Whereas the word Right does properly and clearly shew, that the Quality was fairly got, and is now fairly possess'd. We place Right in the Class of *Active Qualities*, as by Virtue of it any thing may be requir'd of Others. It may likewise be rank'd in the number of *Passive Qualities*, as it impowers us lawfully to receive any thing from Others. For *Moral Passive Qualities* are those by which we are said to do or suffer somewhat, or to admit and receive it. Of these there be three Kinds. One according to which we *rightly* indeed admit something, but in such manner, that neither we our selves have any Power of exacting it, nor others any Obligation to give it: Such is the Ability of receiving a Gift purely under the Notion of a Gratuity. And that this Quality is not meer Fancy and Fiction is evident from this one Consideration, that it may be restrain'd by a Law: A Judge, for Example, may be debarr'd the Liberty of taking a Gift from Parties engag'd in a Suit, under what Colour or Pretence soever. A second Species is such as puts us in a Capacity of receiv-

ing something from Another, not so, that we can force it from him against his will, unless in Cases of Necessity; yet so, that he is oblig'd by some Moral Vertue to pay or perform it. This *Grotius* (1) calls *Aptitude* or *Desert*. The third Species is that by which we are enabled to compel another to some Performance even against his Will, to which Performance he is likewise fully oblig'd by the Force of some Law ordaining a Penalty upon his Default. Here 'tis worth our remembring, that many Things in common reckoning pass under the Notion of *Rights*, which, if we would speak accurately, we should rather call Compositions made up of Power and Right in the strict Sense of those words: at the same time involving, or supposing, some Obligation, some Honour, or the like. Thus the *Right* or Privilege of being a Citizen, contains both the Power of exercising with full Vertue all Acts peculiar to the Members of that City, and also a Right of enjoying the Benefits proper to it, supposing in the Person an Obligation toward the Corporation. So, for Example, the Honours and Degrees of Learned Men include both the Power of performing certain Actions proper to such a Dignity, and the Right of sharing in the Profits of their Order; to which Notion there is further added the height of Esteem and Respect, which accompanies their Place and Title.

XXI. An *Obligation* is that by which a Man is bound under a Moral Necessity to perform, or admit, or undergo any thing. The several kinds of Obligations will be hereafter insisted on at large (2).

There are also a sort of *Moral Patible Qualities*, which are conceiv'd to affect the Understandings of Men in some certain manner: as in Natural Qualities, those have obtain'd the name of *Patible* which affect the Faculty of *Sensation*. Of this Order, are Honour, Ignominy, Authority, Gravity, Fame, Obscurity, and the like.

XXII. It remains that we subjoin something about the *Modes of Estimation*, or the *Moral Quantities*. For 'tis evident in common Life, that Persons and Things are rated, not only according to the Extension of their Natural Substance, or according to the Intenseness of their Motion, and their other Natural Qualities, considered as they flow from the Principles of their Essence; but likewise according to another kind of Quantity different both from Physical and Mathematical: and this *Quantity* arises from the Imposition and Determination of a Rational Power. Now *Moral Quantity* is met with first in *Things*, where it is called *Price*; secondly in *Persons*, where we term it *Esteem*; both which were included in the Notion of *Value*; and thirdly in *Actions*, where it has not yet acquired a peculiar Name. Of each Species we shall treat in its proper place (3). What we have hitherto insisted on about the Variety and

(a) Vide L. 51. D. de Recept. L. 13. D. ad L. Aquil.

(b) The Latin word *Jus* is a very wide and ambiguous Term: besides the Signification here used, it is taken for Law, and for a System or Body of Municipal Laws or Constitutions, and likewise for a Sentence pronounc'd by a Judge.

(1) De Jure B. & P. l. 1. c. 1. sect. 7.

(2) Vide l. 3. c. 4.

(3) Vide, For the first, l. 5. c. 1. For the second, l. 2. c. 4. For the third, l. 1. c. 8.

Distinction of Moral Entities, may seem sufficient to our present Design.

XXIII. We will only add this general Remark, That, as *Moral Entities* owe their Original to *Imposition*, so they draw their Continuance and their Changes from the same Cause, and when that once ceases, they immediately vanish, just as when we put out the Light, the Shadow instantly disappears. Those which are made by *Divine Imposition*, are not dissolv'd but by the Divine Pleasure. Those which are fram'd at the Will of Men, are destroy'd by the same Power, without the least Alteration in the Persons or Things, as to their Natural Substance. For tho' it implies a Contradiction in the Nature of Things, that what has been done already should be made not to have been done; as that a Man, who has been Consul, should not have

been Consul; yet we find every day how easie 'tis to cause a Man not to be for the future, what he has already been: and we see at the same time all the *Moral Entities* that inher'd in such a Man, entirely defac'd, and leaving no real Footsteps behind. For 'tis impossible that a Moral Entity should ever grow up to the Strength and Force of a Natural Quality. Whence 'tis a very weak thing to believe, that, when a Man is constituted such or such a Person, an indelible Character is imprinted on him barely by vertue of that Moral Imposition. For thus, when a Commoner is created a Nobleman, he only acquires new Right, but does not at all change his Substance, or the Qualities founded in it: And if a Nobleman be degraded, he only forfeits the Rights of his Order, but the Benefits he holds from Nature, remain perfect and unimpair'd.

CHAP. II.

*Of the Certainty of MORAL SCIENCE.*

IT has been an establish'd Perswasion among the Generality of Learned Men, that *Moral Knowledge* is destitute of that Certainty, which is so Famous in other Parts of Philosophy, and especially in the *Mathematicks*. The foundation of their Notion is this: they take Morality to be incapable of Demonstration, from whence only true Science, and free from the fear of Error, can proceed, but imagine that all its evidence rises no higher than a Probable Opinion. An unhappines that has been prodigiously injurious to the most noble Disciplines, and the most necessary to Humane Life. For hence it came to pass, that Men of Wisdom and Parts were afraid of spending too much labour in cultivating Notions which depended on so weak a bottom. And the same Principle furnish'd those, who were entirely idle and negligent about these Studies, with a fair excuse; while they might alledge, that there was no firm and demonstrative assurance to be had in such Disquisitions, but that they could only be prosecuted in a rude and unaccurate manner. To which *Aristotle* contributed not a little, who in the common Judgment of the World, has arriv'd at the highest pitch of Mortal Attainments, and left no farther field for the succeeding Industry and Wit of Men. *Aristotle* then, as to the truth of Ethicks, in his Treatise on that Subject, address'd to *Nicomachus* (1), delivers himself in the following Propositions. *It must not be expected, that all kinds of things should be explain'd with the same accuracy. Honesty and Justice, which fell under the consideration of Civil Knowledge, have so many different faces, and are liable to so many mistakes, that they seem to be only instituted by Law, and not originally decreed by Nature. We shall therefore think it sufficient, when we discourse on such Heads, or when we argue from them, to shew the Truth in a ruder man-*

*ner, and under a kind of Shadow and Figure. It becomes a Man well Instituted to require such proof and such explication of any matter, as the nature of the thing will bear. For it seems equally absurd, to demand Demonstrations from an Orator, and to let a Mathematician satisfy us with Probabilities.* We, for our part, as we are not at all influenc'd by the Name of a single Philosopher; so we intend to enquire what Answers are to be return'd to the Principal Arguments urg'd by Him, and Others, so soon as we shall have premis'd a word or two concerning the Nature of *Demonstration* in general.

II. To *demonstrate* then, as we apprehend it, is Syllogistically to deduce the necessary certainty of any Matter propos'd from such Principles as being its Causes, must needs make it known beyond doubt and dispute. Now tho' 'tis manifest that there is such a thing as we here define, and we see Instances of it every day in Mathematical Operations, to which no Man in his Wits ever denied the Art and Power of Demonstrating; yet from the false Exposition of two or three words, it has happen'd that the greatest Number of Philosophers have committed a wretched oversight in the point, and have rashly excluded this noble way of proof from many parts of Knowledge, which had a just title to its possession. The chief occasion of the Error was this; They found it laid down for a Rule, that the *Subject* of a Demonstration ought to be *necessary*, which they interpreted, as if in a demonstrative Syllogism the *Subject* of the *Conclusion*, to which the *Predicate* was applied, ought always to be a thing *necessarily existent*; as for example, in that thread-bare Instance, *Man is Rational and therefore Risible*, the *Subject* of the Demonstration is *Man*, who must be own'd for a *Necessary Being*. But in reality the *Subject* of Demonstration is

(1) *Vid. lib. 1. cap. 1.*

not any one single term, but some entire Proposition, the necessary truth of which is from settled Principles syllogistically infer'd. Where it signifies little, whether or no the *Subject* of this demonstrable Proposition necessarily exist, but 'tis sufficient, if granting its existence such certain affections necessarily agree to it, and if it can be made out, that they do thus agree to it, by undoubted Principles. Thus a Mathematician never troubles himself to enquire whether a *Triangle* be *necessary* or *contingent*, so long as he can demonstrate all the *Angles* of it to be equal to two *Right* ones. And therefore the *Subject* of Demonstration is only call'd *necessary* upon account of the *necessary Connexion* by which the *Predicate* cleaves to it in Conclusions of that Nature.

III. But what kind of Propositions those ought to be which we are to use in Demonstration, will appear from the consideration of its end and effect. That then, which we require by Demonstration, is *Science*, or a *clear and certain Knowledge, every way, and at all times constant to itself, and plac'd beyond the fear of mistake. What we have Science of (says Aristotle) we imagine under an impossibility of being otherwise.*

Therefore 'tis necessary the Propositions should be *true*, really and absolutely, and not upon *Concession* or *Supposition*. For tho' from a Supposition laid down, a long Chain of Conclusions may be drawn, yet 'tis impossible that, being deriv'd from a precarious Principle, the Streams should not relish of the Fountain. And tho' we should make the two most contradictory Suppositions in nature, one of which must of necessity be true; yet we can by this means only prove for certain *τὸ ὄν*, as the Logicians call it, or that the matter is really so: for *τὸ δῖον*, or the reason why it is so, requires, as an indispensable condition, the firmness of the precedent Hypothesis. The Propositions of Demonstration must likewise be the *first* and the highest that can be, so as to want no farther proof, but to deserve credit upon their own evidence; or however, so as to be at last reducible to some *first* Truth. For as some Propositions are plac'd at a less, and some at a greater distance from the first Principles; so we must not imagine that every Demonstration can be finish'd in a single Syllogism, but we must carry on the Argument from the Proposition to be demonstrated, till we arrive at the first Principle, on which it depends. For *they* are not the only Masters of Reasoning, who are so very quick and expert at their *quicquid*, their *atqui*, and their *ergo*, but those also, who beginning at evident Principles, understand how to frame an Argument, by a just train of necessary Consequences. Another Requisite in such Propositions is, that they be *immediate*, that is, that they flow immediately from one another without any gap or interruption. For a demonstrative Argument should be work'd up in the manner of a Chain, the Propositions being knit within one another,

like so many Rings, so that if any one Link breaks, or proves deficient, the whole frame must dissolve and fall in Pieces. Lastly, 'tis necessary that the Propositions in Demonstration be the *Causes of the Conclusion*, as containing the reason why in such a Conclusion the *Predicate* necessarily agrees to the *Subject* (a).

IV. This being premis'd, it is farther observable, that tho' 'tis a thing common to all Moral Disciples, not to take up with a bare Theory, but to pass into Use and Practice, yet there is a vast difference to be discover'd between the two Principal of them; of which one is concern'd about the rectitude of Human Actions in order to Laws; the other, about the dextrous government of our own, and of other Men's Actions, for the Security and the Benefit of our selves, and more especially of the Publick. For this latter part of *Ethicks* ought to be rank'd under the name of *Prudence*, which *Aristotle* (b) defines; *A Habit, active according to reason, about the Good and Evil that can happen to a Man.* Whence he thus settles the Duty of a Prudent Person: *It seems to me to be the Property of a Man of Prudence, to take right Consultations about those things which are Good for him, and of universal Use in well living.* And these Opinions he builds upon Axioms drawn from the accurate observation and comparison of Human Manners and Events. But those Axioms do not appear so very firm and evident, as to be the ground of infallible Demonstration, as well upon account of the wonderful frailness and inconstancy, that occurs in the Wits and Tempers of Men, as because the Events of Affairs are frequently turn'd in a little moment, and driven to a Result quite contrary to our Intentions and Expectations (c). Nor is Human Subtlety in the applications of these Rules and Maxims baffled only by such unlook'd for Accidents and Occurrences, but the Divine Wisdom is pleas'd often to interpose, and to elude the craftiest Stratagems, and the best contriv'd Plots of Mortal Designs. And therefore the ablest Managers of Affairs aspire not to act always with strict demonstration of Success, but when they have apply'd the most sage circumspection, and the most piercing forecast, they commit the Issue to Providence and Fate. (d) For tho' generally we may know what can possibly happen, tho' we may compare these possible Events together, tho' we may determine for certain, not only which of two Possibilities is of greater, and which of lesser value, supposing them now to exist, but also what Effect can proceed from more, what from fewer Causes, either now in being or hereafter to be: and tho' we may conclude *that* Effect, which can be produc'd by most Causes and Ways, to have the highest degree of Probability, and therefore best to deserve our hopes and expectations (e); yet all Possibilities do not occur to the mind at all times and places, or, if they do, are not always

(a) Vide *Erbard. Weigl. in Analyf. Aristolec. ex Euclid restitut.* An Author who hath handled this Point with great Judgment and Accuracy. This *Weigel* (Professor of Math. at *Jena*) first put *Pufendorf* upon this Work, and was very assisting to him in it. (b) *Ethic. l. 6. c. 5.* (c) 'Tis not barely the Event of Things (says *Fabius* in *Livy*, l. 22.) which communicates this Knowledge, for that is only as the Instructor of Fools: but it is the same Immutable Reason which was and will be so long as the World continues in its present Condition. (d) Vide 2 *Sam. X. 12.* (e) Vide *D. Cumberland de. L. Nat. c. 4. f. 4. n. 4.*

rightly weigh'd and consider'd: and by reason of strange and sudden Accidents, which could scarcely have been foreseen, many things which we at first thought to be most possible, or the most likely to fall out, when we come to the point, appear quite otherwise than we before imagin'd them. Hence in Prudential Managements most Men think it sufficient to follow that Rule of *Aristotle* (a): *We ought no less to hearken to the undemonstrated Declarations and Opinions of Skilful, of Ancient, or of Wise Men, than to Demonstration it self: for such Persons found their sight of things on Experience, and so look into the very Principles of Action.* But let others fight out this Prize. As for the former and more noble Species, which we assign'd to Moral Discipline, that which considers what is Right, and what Wrong in Human Actions, the best share of which will be illustrated in our present Attempt; this is built altogether on so sure grounds, that we thence draw genuine Demonstrations, able to produce true and solid Science. Or, in other words, its Decrees may be in such a manner deriv'd from certain Principles, as to leave no Room, no Excuse for Doubt (b). This Assertion will be more clearly made out, if we in the first place consider and examine the Arguments usually alledg'd to the contrary. But, by the way we acknowledge Mr. *Hobbs* (c) to have been extremely mistaken, when he contends that '*Ethicks* and *Politicks* are therefore capable of a Demonstration *à priori* (1), because we our selves are the Authors of the Principles of Justice and Injustice, of Right and Wrong, by making those Laws and Compacts whence the Measures of Justice are to be taken: since before any such Laws or Compacts were instituted, there was no such thing as Justice or Injustice, *Publick* Good or Evil, among Men, any more than among Beasts. The absolute Falseness of which Position we shall hereafter (2) have Occasion to demonstrate; as there is also a Fallacy lurking under the word *Publick*.

V. To proceed therefore to the Objections; Some affirm Moral Things in general to be uncertain and unstable; and no Science can be of a more firm and settled Nature than the Object about which it is employ'd. To which it may be answered; That tho' Moral Entities owe their Original to Imposition, and therefore cannot be call'd *Necessary* in an absolute Sense; yet they do not proceed from such loose and wandring Principles, as that on this account all Knowledge about them should be weak and uncertain. For the very Nature of Man, assign'd him by the Wisdom and Goodness of the Almighty Creator, requir'd the Institution of the chief part of them; and these at least cannot be said to be unsettled and uncertain. This will appear beyond Dispute, when we come to enquire into the Origine of

the *Law* of Nature. Besides, Human Actions are chiefly on this account call'd *Moral*, because they are not *necessary* but free; yet from hence it does not follow, that upon the laying down of certain Principles, such Affections may agree to these Actions, as may be undoubtedly *demonstrated* concerning them. For 'tis evident, that the Acts which fall under the Conduct of the Law of Nature, do in themselves contain an intrinsic Force and Power directing towards a Social Life, tho' the actual Exercise of them depends on the Free-will of Man. While we deliberate, we are properly said to be *free*, and the Effects which are to proceed from our Actions are, with respect to the *Freedom*, rightly term'd *Contingent*: but when we have once determin'd which way to act, the Connection between our Actions and the depending Effects is necessary and natural, and consequently capable of Demonstration. Neither do *they* argue any thing to the Purpose, who deny the Possibility of passing a clear Judgment on Human Deeds, upon account of the great Variety of Circumstances, any one of which seems to put a new Face and a new Quality on the Action; whence it happens that Legislators can seldom frame such a Law, as shall admit of no Exception, and where there shall not be frequent Occasion to neglect the Letter of the Statute, and to have Recourse to Equity for Relief. Because indeed there are establish'd Principles, by which it may be shown how much Weight and Force any Circumstance bears in affecting or varying any Action. And these very Principles are the Occasion, that Law-givers are frequently less Anxious about excepting from their Decrees some particular Cases involv'd in extraordinary Circumstances, but proceed with more Security in the Use of General Words. For they take it for granted, that the Judges whose Duty it is to examine particular Actions by the Rule of the Law, will be very able to understand what Power any Circumstance has over any Fact (d). But hence it cannot be inferr'd, that constant and perpetual Decrees sometimes fail; but we ought rather to conclude, that 'tis not worth while for Legislators in their written Laws to prescribe any thing about Cases that very rarely happen, since such may be easily determin'd by the Judges out of the Principles of the Law of Nature (e).

VI. But to make the Knowledge of the Law of Nature, of which we are now Treating, and which includes all Moral and Civil Doctrines that are genuine and solid, to make this Knowledge, we say, fully come up to the Measure and Perfection of *Science*, we do not think it necessary to assert with some Writers, that there are several things Honest or Vile of themselves, and Antecedent to all Imposition, and so to make these things the Object of our Natural and Per-

(a) *Ethic.* l. 6. c. 12. (b) *Senec. de Benef.* l. 7. c. 7. *Whatever contributes to the improving of our Vertue, or of our Happiness, Nature hath taken care to lay either directly before us, or at a very easy distance, for our Search.* (c) *De Homine* c. 10.

(1) *i. e.* By Reasons drawn from the Nature of the thing. (2) *Cap.* 7. *Sect.* 13. and l. 8. c. 1. *Sect.* 5. (d) And hence chiefly we are to draw the Reason of it, *Sect.* 3, 4, 5, 6. *de Legib.* *Laws ought to be enacted, as Theophrastus us'd to say, with regard to things, as they most commonly fall out, not as they sometimes happen beside Expectation. Little particular Cases and accidental Exceptions, are not worth the notice of a Legislator.* (e) *Add. D. Cumberland de L. N.* c. 4. *Sect.* 4. N. 1.

petual Law, in Opposition to Positive Laws, where matters are right or wrong, just as the Lawgiver was pleas'd to make them either. For since Honesty (or Moral Necessity) and Turpitude are Affections of Human Deeds, arising from their Agreeableness or Disagreeableness to a Rule or a Law, and since a Law is the Command of a Superior, it does not appear how we can conceive any Goodness or Turpitude before all Law, and without the Imposition of a Superior (a). And truly, as for those who would establish an Eternal Rule for Morality of the Actions, without respect to the Divine Injunction and Constitution, the Result of their Endeavours seems to us to be the joining with GOD Almighty some Coeval Extrinsic Principle, which he was oblig'd to follow, in assigning the *Forms* and *Essences* of Things. Besides, 'tis acknowledg'd on all hands that GOD created Man, as well as every thing else, according to his own Free-will. From whence it evidently follows, that it must needs have been his Power and Pleasure to indue this Creature with whatever kind of Nature his Wisdom thought fit. And how then should it come to pass, that the Actions of Mankind should be vested with any Affection or Quality proceeding from intrinsic and absolute Necessity, without regard to the Institution, and to the Good Pleasure of the Creator? So that in reality all the Motions and Actions of Men, upon setting aside all Law, both Divine and Human, are perfectly *indifferent*: And some of them are therefore only said to be Naturally Honest or Dishonest, because that Condition of Nature, which God has freely bestow'd on Man, strictly enjoins the Performance or the Omission of them. Not that any Morality inheres of it self, and without all Law, in the bare Motion, or the meer Application of Natural Power (b): And therefore we see Beasts every day doing such things without Fault or Sin, in committing which Man would have been guilty of the highest Wickedness. Yet are not the Natural Motions of Men, and of Beasts in themselves different, but some Actions of Men are by the Authority of a Law invested with a Moral Quality, which does not at all touch or affect the Proceedings of Brutes.

Nor will it be to the Purpose for any one to object, that since Men are indu'd with Reason, which is wanting in Beasts, therefore there must be a Natural Difference between Human and Brutal Actions. For if we consider Reason, as uninform'd with the Knowledge and Sense of Law, or of some Moral Rule, it might perhaps even in this Condition, furnish Man with the Faculty of acting more Expeditiously and more Accurately than Beasts, and might assist the Natural Powers by an additional Shrewdness or Subtlety. But that it should be able to discover any Morality in Human Actions, without reflecting on some Law, is equally impossible as that a Man

born Blind should make a Judgment on the Distinction of Colours.

Another Argument in Favour of our Opinion is suggested by *Osiander*, in his Notes on *Grotius, de Jure Belli & Pacis* (c). If (says he) there were any such thing as Moral Good or Evil before all Law, how could there be any Obligation to make such a Difference in our Actions, since all Obligation proceeds from the Command of a Superior? For Moral Good or Evil involve a Respect to a Person acting either of those ways; and if that Person be determin'd by no Obligation, he cannot be said properly to Act well or ill.

But here we desire it should be well observ'd, That this Indifference of the Natural Motion in Human Actions is by us maintain'd and establish'd only in respect to Morality. For otherwise Actions enjoin'd by the Law of Nature, have from the Determination of the first Cause a native Force in themselves of producing Effects good and useful to Mankind; as Actions forbidden by the same Law are productive of contrary Effects. But this Goodness and Illness which an Action bears naturally and of it self, can never constitute any new thing in Morals, which are quite beyond its Reach and Concern. For there are many things highly conducing to the Happiness and Advantage of a Man, which are not morally Good, as neither being Voluntary Deeds, nor Performances of any Law (1); and many Actions which contribute to Human Welfare, do in the same manner promote the Benefit of Beasts, in whom certainly they cannot bear any Moral Quality. Thus the abstaining from mutual Hurt, the moderate Use of Meat and Drink, the Care of Progeny or Off-spring, are equally Serviceable in the Preservation of Rational and of Irrational Kinds; and yet Beasts are never said to perform Actions *morally Good* (d). So tho' all Human Actions, falling under the Guidance of the Law of Nature, may be finally resolv'd into that natural Strength and Force which they bear in advancing the Profit or the Harm of Men, consider'd either in a single or in an united State; yet it does not follow on the other hand, that whatever thing is indu'd with a Natural Power of doing Good or Harm to any Species of Animals, is therefore the Object of the same Law.

Another Objection against the Doctrines we are now establishing, is taken from that Passage in *Aristotle's Ethicks* (e): *Every Action and every Affection does not admit a Mediocrity: For there are some Affections which involve a kind of Pravity in their very Name, as Malice, Impudence and Envy, and ἐμψυχησία, or Rejoicing at another Man's Misfortune, and likewise some Actions, as Adultery, Theft and Murder. Now these and the like being Evil directly and in their own Natures, are not called Vices with Relation to any Excess or Defect; for absolutely, and without any Degrees, to be guilty of them, is to commit Sin.*

(a) *Selden de J. N. & G. l. 1. c. 4.* (b) *Plato in Sympos.* This is the Nature of every Action, to be in it self neither Good nor Vicious; as what we are now doing, Drinking, Singing, Arguing. Neither of these, consider'd by it self, honest or dishonest; but the manner of performing it gives every Action its proper Denomination. For what is done right, we call Good, and what is done wrong, Evil or Indecent. The same Rule the Philosopher afterwards applies to Love. (c) P. 60.

(1) Such are a quick Apprehension, Knowledge, Memory, &c.

(d) *Add. D. Cumberland de L. N. c. 5. Sect. 9.* (e) *L. 2. c. 6.*

But 'tis by no means a Good Consequence, that because we have some Names of Actions or Affections, which of themselves, and without any Excess or Defect, imply Vice; therefore there are some Actions and Affections bad in themselves without respect to any Law. Because these Terms or Names do not signify bare Natural Motions and Acts, but such entire Moral Motions and Acts as are Repugnant to some Law, and so take in and express the whole Compass of a Moral Deed. For why, for Example, are Envy and its vile Consequents, which we but now mention'd under the Greek Name of *ζηλοφροσύνη*, reputed evil Affections, but because the Law of Nature ordains, that a Man should never be a Stranger to his own Kind, but should bear a part in the Pleasures and in the Sorrows of his Neighbours: to which Rule it is an open Contradiction, to receive any Joy from the Calamity of others, and to repine at their Happiness and Success (a)? And so what else is Impudence, but a wicked Firmness and Hardiness of Mind in the Commission of such things as the Law bids him be ashamed of? for not to be ashamed, or not to blush, can never be a Fault, when we are not by some Law suppos'd and enjoin'd to do otherwise. After the same manner, Adultery is the Pollution of another Man's Wife, whom the Laws appropriate to her Husband. Theft is the taking away of another Man's Goods against the Consent of the Owner, who by the Law is made the sole Disposer of them. Murder is the Killing of a Person in his Innocence, and against the Laws. Incest is a Conjunction with such a Person, as the Laws oblige us to abstain from, upon account of the Reverence which Men are by Law likewise taught to pay to Nearness of Blood. And the same Judgment is to be made of other Vices. But now, if from all these you take away the Respect to the Law, and the Morality inherent in such Actions, the bare Natural Fact will involve no Absurdity or Contradiction. For in a natural and absolute Sense, these are altogether indifferent Things; to have Conjunction with your nearest Relation, or with the same Woman who is enjoy'd by another, supposing he has no peculiar Right to her as he cannot have without Law; to take away the Life of a Creature of the same Species with your self; to take a thing which another Man had design'd for his Use, tho' he had obtain'd no Right by Law to exclude others from their Share in its Possession. And the Reason why so few Persons can conceive and apprehend such a Natural Indifference as we are maintaining, is only this, because from our Infancy we are taught to detest such Practices; and this Abhorrence being imprinted on our tender Minds, seems to grow into a kind of Natural Judgment; so that it seldom enters into Men's Heads to distinguish between the *Materiality* and the *Formality* of those Actions, or between our Performance of them as Natural, and our Commission of them as Moral, Agents. Hence it appears that *Grotius* had not consider'd this matter throughly, when among those things, to which

the Power of GOD himself does not extend, because they involve a manifest Contradiction, he reckons (b) the Malignity of some Human Actions. Indeed 'tis impossible that twice two should not make four, because twice two and four are really the same thing, and only differ in Name, and in our manner of conceiving them. But the Contradiction which appears in Actions Repugnant to Nature's Law, is of a much lower Degree, and can never rise to an *absolute* Impossibility. And upon the same account he derives this Malignity from such Actions, as compar'd with right Reason. For in the very Terms of right Reason, when apply'd to Man, there inheres a respect to the Law of Sociableness enjoin'd to Human Race by the Creator. Thus at the same rate he alleges (c) for a Proof of the Independency of some of Nature's Laws, the *necessary* Agreement and Disagreement of things to Rational and Social Nature. But Man Obtain'd a Social Nature from the good Pleasure of GOD ALMIGHTY, not from any Immutable Necessity: and consequently the Morality of Actions Agreeable or Disagreeable to him as a Social Creature, must be deriv'd from the same Original and Spring; and must be attributed to Man, not by an absolute, but by an hypothetical Necessity; or upon supposal of that Condition which GOD was pleas'd freely to bestow on Mankind above the Privileges of the Inferior Creation. Nor can this Opinion of *Grotius* find any Shelter or Protection in those places of Scripture, which he quotes to shew, that *GOD Almighty* permits himself to be judg'd according to the Original Laws, and therefore they must be absolutely Immutable. For without Doubt GOD declar'd to Mankind from the very Beginning of Things, that he would be a *Rewarder of the Good*, and an *Avenger on the Wicked*, *Hebr. XI. 6.* And that he would *render unto every Man according to his Works*, *Rom. II. 6.* From which Declaration his Veracity not permitting him to go back, *Abraham* had reason to make that Appeal which we find, *Gen. 18. 25. Shall not the Judge of all the Earth do right* (d)? But how does it follow hence, that Human Actions have any Moral Quality antecedent to the Divine Imposition? Nor does it at all appear how the same Conclusion can be drawn from the Fifth Chapter of *Isaiab*, where God is pleas'd to refer the *Cause between him and his Vineyard* to the Judgment of *Israel* and *Judab*, and concludes, that he may lawfully neglect the farther Care and Culture of it, since the degenerate Fruit made so ill a return to his Pains. And lastly, from that place in the Sixth of *Micah*, where God is said *to have a Controversy with his People, and to reason with Israel*, it seems to be hinted, that Men may by their own Judgment understand the Equity of returning Thanks for Benefits receiv'd; but we cannot thence infer, that, because Men, who have a Sense of Kindness, are oblig'd to be Grateful, therefore this Gratitude is not commanded by any Law, but is of it self before all Law a necessary duty. From all that we have urg'd on this Head, it may appear, that the Sentence,

(a) *Add. Stob. Serm. 111.* (b) *De J. B. & P. l. 1. c. 1. f. 10.* (c) *Ibid. f. 12.* (d) *Add Ezek. 18. 25. Rom. 3. 6.*  
which

which is frequently in the Mouths of most Men, That the Precepts of Natural Law are of Eternal Verity, is so far to be restrain'd and limited, that this Eternity ought to reach no farther than the Imposition and Institution of GOD ALMIGHTY, and the Origine of Human Kind. Tho' to say the Truth, the Eternity which we improperly attribute to the Laws of Nature, is only to be rated in Proportion to the Opposition they bear to *Possitive Laws*, these being subject to frequent Alterations, while those remain fixt and unchangeable.

VII. It may be farther objected, and with some face of Probability among vulgar Judges, That Honesty and Turpitude must needs inhere in some Human Actions of themselves, and by the Force of their own Nature, not by the Power of external Imposition; for this reason, because our very Blood seems to have a natural sense of wicked Deeds, which it expresses by spreading a sudden Redness over the Face, whensoever we are touch'd either with the Memory of them, or with the Reproach. Now they say 'tis very improper to attribute a Natural Effect to a Moral Quality; but on the contrary, that, since such a certain Motion of the Blood raising a Redness in the Face, results in the manner of a natural Effect from an ill Action, that Illness or Pravity must likewise be applied to the Action as a natural and a necessary Affection or Quality. In return to which, in the first place we confess that the most wise Creator has implanted in the Minds of Men the Passion of Shame, to serve as it were for a Guard and Defence to Vertue, and for a Bridle to wicked Designs. And it is likewise probable, that unless GOD had design'd Man for an Agent, who was to frame his Proceedings by a Law, he would never have mingled such a Passion in Human Constitution, since without that Supposition it does not appear to be of any use at all in the World. But indeed, it is no manner of Contradiction, that a Moral Quality owing its Original to Imposition, should produce in Man (tho' not directly and immediately) a natural Effect. For the Soul being united by the closest Ties to the Body, while it self apprehends moral Concerns, and is affected with them, may at the same time easily raise a peculiar Motion in some part of the Body. Besides, we ought to observe, that Shame does not only arise from the Pravity of Actions, but also from any Fact, tho' not morally Evil, which we think will lessen our Character and Esteem. For according to *Des Cartes's* Definition, it is nothing else but a *Species of Sorrow, founded upon Self-love, and proceeding from a Sense or Fear of Disgrace* (1): Or, as *Aristotle* speaks (a), it is a certain Grief and Confusion at things which appear hurtful to our Reputation. For Man is a most ambitious Creature, and highly conceited of his own Excellency, whence he takes an extraordinary Pleasure, if he can find out any Advantage or Perfection in himself, on the Strength of which he may brag, and swell, and carry himself above the Dimensions of his Neighbours. And when-

ever he apprehends these Talents to be the least impair'd, and to weigh lighter in common Account, he immediately conceives the deepest Regret in his own Mind. Now the Heart, that chief Seat of Human Excellency, being affected with this Passion, presently sends up the Blood to be an outward Sign of it in the Face. But because Man does not only value himself upon account of abstaining from Evil Deeds, but for several other things, which are not endued with any moral Quality, if he suffer in any of these latter Points, he is equally liable to *Shame*: Thus we see many Persons who cannot forbear Blushing at their Lameness, or Baldness, at a Wen, a Crump-back, or any other Deformity of Body, at some particular Diseases, at Poverty, bad Cloaths, at faultless Ignorance, or at harmless Mistake, and at many other Things, which are by no means morally Evil (b). And among Sins, those especially put a Man to the Blush, which directly argue a Lowness and Dejection of Mind, and which for that reason make us appear more Contemptible (c); nor has the Fear of this Contempt the same general Power, but only when we are in danger of suffering it from those Persons, whose Esteem and good Opinion we are particularly covetous of Enjoying (c). And those desperate Wretches who have once sinned themselves out of all Care of Credit, are not afterwards touch'd with the least Blush upon the Commission of the vilest Wickedness (d). Whatever we have urg'd against the natural, the absolute, and the necessary Goodness or Pravity of Human Deeds, does not at all seem to rob moral Knowledge of its requisite Certainty, for this would remain fixt and unmov'd, tho' the Morality of our Actions depended entirely on Imposition.

VIII. But if this Doctrine be true, which we have asserted, what will become of that *Moral Latitude*, which is so much talk'd of, and so frequently oppos'd to *Mathematical Strictness*? Do's not that seem to detract somewhat from the Certainty which we maintain? This Doubt will be clearly solv'd, if it be consider'd how far we affirm Demonstration to prevail in these Notions, and in what things this *Latitude* is to be found. Demonstrations therefore are here chiefly employ'd about Moral Qualities, so far as those Qualities appear for certain to agree to such Actions or Persons: When we enquire (for example) whether such an Action be just or unjust, whether such a Right, or such an Obligation, accrue to such a Person, consider'd in general, or as that personal Capacity is common to others with him. Now all these kinds of Truths we maintain to be so clearly and certainly deducible from their genuine Principles and Causes, that no Man, in his right Wits, can entertain a Doubt concerning them. And tho' we should discover some little latitude, or something analogous to latitude, in the Questions, yet that would not be able to prejudice the Certainty of them in it self. As for the Goodness or Pravity of Actions, as they denote their agreeableness or repugnancy

(1) De Passion. Art. 205. (a) Rhetor. l. 2. c. 6. (b) Add. *Sirac.* c. XLII. 9. &c. (c) Vide *Aristot.* Rhet. l. 2. c. 6. (d) Add. *Cartes* de Passion. art. 207.

to the Rule of the Law, in this respect they seem capable of no manner of Latitude, but whatever declines from Good must immediately be pronounc'd Evil. Yet under other Considerations, at least with respect to Men, they admit of something like Latitude; Latitude, properly speaking, being applicable only to Quantity. And first, because in Laws the force and power of obliging Men is not always of the same tenour and degree, but appears more strict in commanding and forbidding some Actions, and more loose about others. Whence it comes to pass that we are forc'd to distinguish between Law and Equity, or between what's rigorously and exactly just, and what's equal and fair to be done. The difference between which things is this, we lye under a more necessary Duty of performing the former, but the latter engage our Obedience with a gentler tie, and with an inferiour obligation. Yet these last have a wider Object than the first; the offices of other Vertues being extended much farther than those of Justice. It happens likewise very commonly, that among Men, and in Human Courts, smaller Deviations from the Law, scarce fall under consideration or animadversion. Many things too are ordain'd and commanded in so weak and indifferent a manner, that they seem to engage Men rather by affecting their Modesty than their Honesty: so that those who perform them deserve commendation, those who omit them are not obnoxious to Reprehension. And among these Matters *Grotius* (a) seems to reckon *Concubinage*, *Divorce*, and *Polygamy*, before they were forbidden by the Law of GOD: *These* (saith he) *are such things as Reason it self tells us it is more honest to abstain from; yet not so, as that (setting aside the Divine Precept) they include any grievous fault.*

But of these we shall treat in their proper place (1). Hither likewise is to be referr'd that passage of *Aristotle* (b); *He that declines but a little from right dealing, whether to the excess or to the defect, is not charg'd with guilt, but he that transgresses in a larger measure; because his faultiness discovers and betrays it self by its bulk.* It may happen too that a thing in it self shall be unobliging and indifferent, and yet the performance or the omission of it shall either always, or however at some certain juncture, be more for our advantage and use. To this Case belong those passages of *St. Paul* in his first Epistle to the *Corinthians*, Chap. VI. vers. 12. Chap. VII. vers. 6, 7, 8, 9. Chap. X. vers. 23. And that observation of *Grotius* (c), *That sometimes by an abuse of words, those things which Reason shows to be Honest, or better than the contrary, tho' they are not enjoyn'd, yet shall be call'd Dictates or Ordinances of the Law of Nature.* From all that has been said, we may understand whether, and in what manner there may be said to be Degrees of Good. If then we consider Good in a strict fence for a Congruity to the Law, 'tis as impossible there should be

any thing better than what is Good, as that there should be any thing straighter than what is properly straight. Yet one Good may be pronounced better than another, according to the different Degrees of Necessity which are found in both, and upon account, of which, if they cannot be both perform'd, one of them manifestly gives place to the other. To this purpose see *Matthew VIII.* 21. and 22. where it was a good thing to bury a dead Father, but a better to follow our Saviour: *Acts VI.* 2. where it was a good thing to Minister to the Poor, but a better to Preach the Gospel: On which point we shall be larger hereafter (2). Lastly, when Actions, in themselves lawful and indifferent, are measur'd and rated according to their usefulness or expedience, one of them is declar'd better than another, as it is more advantageous to the present Circumstance or Occasion.

IX. According to our Doctrine already deliver'd, must that place of *Grotius* (d) be explain'd, about the Causes of Doubt in Moral Actions; where he says, *There is not an equal Certainty to be met with in Morals and Mathematicks: which therefore happens, because Mathematical Sciences treat of Forms, as distinct and abstracted from all sorts of Matter, and because the Forms themselves are generally such as will admit of no Medium, as we can find nothing which is not either crooked or straight. But in Morals the least Circumstance alters the Matter; and the Forms, of which they treat, have commonly some intervenient Latitude, by reason of which they sometimes approach nearer to one Extream, and sometimes to the other. Thus between things absolutely commanded, and absolutely forbidden, there are some things left indifferent; but this Medium of Indifference sometimes inclines nearer to the Injunction, sometimes to the Prohibition. Whence frequently arises an Ambiguity, somewhat like what we meet with in Twilight, or in Water not perfectly hot.* As to this Assertion, we must confess, that, as about other Actions, so especially about making War, a Doubt may probably arise either because the Fact which occasions the War is not yet fully made out, or whether it be of so great Consequence, as to deserve a Prosecution by Arms, where the Cause is so desperate, and where the attending Miseries are so numerous; or whether in the present Juncture and Condition of the Commonwealth, it be a Moot Case, which Course ought to be taken, either to return the Injury in a Hostile manner, or rather conceal the Affront, and defer the Satisfaction, lest an untimely pursuit of Revenge should draw greater Misfortunes on the State. But that the Causes of doubting in such Cases proceed from the uncertainty of Moral Matters, this we absolutely deny. The reason why the Demonstrations in Mathematicks are so very accurate, is not the Abstraction from Matter, but another, that we shall produce by and by. *That in Morals the*

(a) L. 1. c. 2. f. 6. (1) L. 6. c. 1. (b) *Ethic.* c. ult. (c) L. 1. c. 1. f. 10. (2) L. 5. c. 12. f. 23. (d) L. 2. c. 23. f. 1.

*least Circumstance alters the Matter*, is an ambiguous expression. If this be the sense of it, that the least Circumstance alters the Quality of an Action, that is, turns it from Good to Evil, this Variation does not at all injure the Certitude of Moral Knowledge. For a Line that recedes never so little from straightness degenerates into crookedness, and yet no uncertainty arises hence in Geometrical Operations. But if this be the meaning of the phrase, that the least Circumstance either raises or lessens the Quantity of an Action; this, at least in Human regard, is not always true; for trifling Accidents and Punctilio's seldom weigh any thing in the Sentence of a Moral Judge. Yet if we grant this Supposition, it will not in the least diminish the certainty of Morality; since even in Mathematicks, the smallest accession, or the most inconsiderable loss, varies the Quantity. Lawful or Indifferent Things, which compose the Medium between Commands and Prohibitions, we have already observ'd only in this respect to incline sometimes more to one hand, sometimes to the other, as it appears more expedient and useful sometimes to perform them, sometime to omit them. Yet even hence nothing of Uncertainty can arise, nor is any such Medium form'd as we can clearly understand either to be Good or Ill. So that those Examples and Instances of *Twilight* and *Lukewarm-water*, are improperly applied to the present Case; they being of that kind of *Media* we call *Media Participationis*, as *Lukewarm-water* partakes of hot and cold together. But those *Media* which we call *Media Negationis*, as are Indifferent and Lawful Matters, possess not the least share of either of the Extreams, but equally deny them both. For we say in the same manner, Good is not Indifferent, and Evil is not Indifferent; and it does not appear, how a *Medium* of this Nature can prove a Cause and an Occasion of Uncertainty.

X. Yet as to the *Quantities* which are used in Morality, *they*, we confess, are capable of some Latitude, and it's chiefly on this account, that Mathematical Knowledge is esteem'd to have so much higher Degrees of Nicety and Exactness than Moral. The reason of all this depends on the different Constitutions of Natural and of Moral Quantity. For Natural or Physical Quantities may be accurately compared, and measured and divided into the most equal parts; because they are represented as the Affections of Material Things, which are the Objects of our Senses. Whence we may precisely determine, what Rule and Proportion they bear to one another; especially if we employ the assistance of Numbers, by the application of which all Questions of this kind are most exquisitely solv'd. And besides, those Quantities are the effect of Nature, and consequently immoveable and permanent. On the other hand, Moral Quantities proceed from

the Impositions and the Estimation of intelligent and free Agents, whose Judgment and Pleasure not falling under natural Dimensions, the Quantities which they thus conceive and determine, cannot be circumscribed by any such measure, but retain as it were somewhat of the looseness and liberty of their Original. Nor indeed did the ends, for which Moral Quantities were first introduced, require any such punctual Minuteness; but it was sufficient for the use of Human Life, that Persons, Things, and Actions, should be more grossly rated and compar'd together. Thus we discover a Latitude in the value or esteem of Persons; by which tho' we understand that one Person is to be preferr'd to another, yet we cannot exactly determine whether he exceeds him in a double, or treble, or quadruple proportion of Worth. The like Latitude occurs in the valuation of different Things, and of Actions belonging to Commerce; on the account of which we can scarcely fix any settled Price on any other things besides those, which the Civilians call *res fungibiles*, (1) *Consumeable Goods*, that is, such as we borrow for our present use, upon condition of repaying them in the same quantity and quality: As to the rest, we esteem them equal and indifferent, and to be determin'd by the private Bargains and Agreements of particular Men. And so likewise the proportion between many Faults and Punishments is adjusted with some Latitude: For who, for Example, can tell precisely how many Lashes; and how smartly laid on, comes just up to the guilt of some particular piece of Thievery? But in such Cases we assign what proportion we think fit, with great looseness and security. We find too a very remarkable Latitude in many Businesses and Affairs of Life: Human Lawgivers are not us'd to cut every thing to the quick (2). *The Laws, and the Philosophers* (says (a) *Tully*) *clear Subtleties in a different manner: The Laws no otherwise than as Things may be felt and handled, by reason of their grossness, but the Philosophers, as they may be discern'd by Reason and Understanding.* And in the Decision of Causes, 'tis a Maxim vulgarly known, That the Judge does not concern himself with every petty Circumstance. And so when such a number of Honest Men are appointed Arbitrators of any Controversie, there is fair room for Latitude in their Judgment and Sentence (b). Farther, in executing Vindictive Justice, there is an Indulgence made of a convenient Latitude, not only on the part of Clemency, but of Severity too. To which purpose is that saying of *Tacitus* (c); *All great Examples have somewhat of Injustice; but the Injury they do to particular Persons is recompenc'd by the common Advantage they bring to the Publick:* And that of *Jason* in *Plutarch* (d); *'Tis necessary that those should act unjustly in small Matters, who intend to maintain Justice in the grand*

(1) To understand what is meant by these Terms, See B. 5. c. 7. f. 1. (2) To this purpose, Vid. *Senec. De Ira. l. 11. c. 27.* (a) *Off. III. c. 17.* (b) *Add. L. 105. f. de Solution.* (c) *Annal. 4. c. 44.* (d) *De Sanitat. tuend. & Præcept. Reipub. gerend.*

and the chief Concerns. Most Vertues likewise, besides Justice, admit a free Loofness and Latitude in the Exercise of them; as for Example, Pity, Liberality, Gratitude, Equity, and Charity. And so, in common Life, we apply the Names of Habits under a Latitude of Signification. Thus we call him a Just Man, who commits (tho' deliberately) but a few pieces of Injustice. Lastly, we may observe, that if in Moral Consideration some Quantities are brought to an exact Standard, and a punctual Measure, as the Price of some Commodities, the Periods of Time settled by Law, and the like; yet this precise Determination do's not so much proceed from the Things themselves, or from the Times, as from the Institution and Will of Men (a). From all these Remarks we conceive the Difference between Mathematical and Moral Demonstrations to appear very Clear and Evident; and it is no more than this, that the former are chiefly employ'd about Quantity, which is in its own Nature dispos'd for the nicest Division and Determination; whereas the latter endeavour nothing farther than to prove for certain such a Quality of such a Subject, leaving the Decision of Moral Quantities to the larger Scope and Range of Human Will.

XI. But we must take heed of confounding this Moral Certitude which we have been so long establishing, with that which is so often apply'd to Matters of Fact; as when we declare (for Example) such a thing to be *Morally Certain*, because it has been confirm'd by creditable Witnesses. For this latter sort of Moral Certitude is nothing else but a strong Presumption grounded on Probable Reasons, and which very seldom fails and deceives us. Ziegler in his Notes on *Grotius* (b), has not

sufficiently distinguish'd this inferior Certainty from the former and the more noble kind, while, tho' he grants the more general Precepts of Ethicks to bear an equal Evidence with the Propositions of any Science properly so call'd, yet he affirms, *That the particular Conclusions have a much shorter Degree of Certitude, and are often involv'd in dark Obscurities, by reason that the things themselves, concerning which such Conclusions are form'd, are many ways changeable and contingent*: And the Example he brings is this; *We have Moral Certitude and Evidence, that an honest and serious Person, when he takes an Oath, swears truly. And yet this Evidence is not Absolutely such, but Conditionally, because it is not directly Impossible, but that a Man of these good Qualities, may forswear himself, since he may fall from his Vertue and Integrity.* But now that Certitude, by which we know Perjury to be an Evil, is very different from that by which we believe a good Man is not guilty of Perjury; nor is the latter Proposition deduced fairly as a Conclusion from the former. Thus in the same manner the Faith we give to Historians is reckon'd Morally certain, when they testify a thing vastly remote from our Memory and Knowledge, and of which there is no real and demonstrative Proof now extant; and especially if many agree in the Relation: Because it is not Probable that many Persons should join together by Compact in putting a Trick on Posterity, or should entertain any hopes, that the Lie would not in time be discover'd. And yet for all this, if occasion were, we could produce Examples of many popular Fables, that have pass'd through several Ages, under the Colour and Character of Truth.

(a) Add. D. Cumberland. de L. N. c. 8. f. 14.

(b) L. 2. c. 20. f. 1.

### CHAP. III.

#### Of the Understanding of Man, as it concurs to MORAL ACTIONS.

SINCE that part of Knowledge which we have undertaken to explain, is chiefly employ'd in demonstrating what's Right and what's Wrong, what's Good and what's Evil, what's Just and what's Unjust, in Human Actions; in the first place we are oblig'd to consider and examine the Principles and the Affections of these Actions, and to show how by the Help of *Imputation*, they are conceiv'd to be Morally joyn'd and connected to the Authors of them: in this respect then, the Excellency of Man chiefly outshines the Condition of Brute Creatures, that he is endow'd with a most noble and exalted Soul, which exerts it self not only with a singular Light

as to the Knowing and Judging of Things, but also with a prodigious Quickness and Activity, as to the Embracing or Rejecting them. So that on this Score the Actions of Mankind ought to be rank'd in a much higher Class than the Motions of Beasts, which proceed purely from the Spurs of Senses, without the precedent help of Reflexion, whatever *Charon* (c) has alledg'd to the contrary. That Power of the Human Soul which it bears as a Light for its Guidance and Direction, we commonly call the *Understanding*, and in this, as it is concern'd about voluntary Actions, we conceive Two Faculties (1): One is that by which as by a kind of Mirror, the Object is shewn

(c) *De la Sagesse*. L. 1. c. 34. (1) The Author, by his Improper and Unnecessary heaping one Faculty upon another in this Place, causes some Confusion to his Reader. See Mr. Lock of *Human Understand.* l. 1. c. 21. f. 16.

to the *Will*, with a general and confus'd Notice whether it be Agreeable or Disagreeable, Good or Evil. The Other is that by which the Reasons of Good and Evil, which in several Objects offer themselves numerously on both sides, are weigh'd and compar'd, and Judgment is given; what, when, and in what manner we are to act; and Consultation taken about the most proper Means for the Accomplishment of the propos'd End. And here it must be observ'd, that the Beginning of a voluntary Act should regularly proceed from the Understanding, whence arises the vulgar Maxim,

————— *Ignoti nulla Cupido,*

*Objects unknown can never move Desire:*

Although this Knowledge which precedes the Acts of Volition, is not always distinct, because a confus'd Notion is sufficient to make the Will bestir it self. And thus when we have not a tolerable Knowledge of a thing, we cannot be said properly and fully to desire it; yet we may desire to make Trial of it.

II. As to the former Faculty of the Understanding, we must remark, that it is of the Number of those which are commonly call'd *Natural Faculties*; contradistinct to the *Free*: in as much as it is not in the Power of Man to apprehend Things otherwise than as the Images of them present themselves to the Mind; nor can the Will by any Force hinder the Understanding from assenting to a Proposition which appears Clear and Evident to it. But thus far a Man is at Liberty, he can more diligently consider the Object in view, and more exactly weigh in his Mind the opposite Reasons of Good and Evil, and so not stick at the outward Face and Semblance of Things, but pierce into the deepest Secrets of their Texture and Constitution. And after so strict an Enquiry and Examination, he can pronounce a positive Judgment in the Cause before him. The Understanding being in this respect, as in many others, like the Eye, that it makes a very important Difference, in beholding Things with a roving and transitory Cast, and in contemplating them with a fix'd and steady Application (a). And hence 'tis easie to conceive, how far this Power of the Soul, falls under the Culture and Cognizance of Laws. For since 'tis beyond Human Ability that the Understanding should apprehend Things after another manner than they appear: and since Credit or Assent cannot but answer the Idea of the Understanding, no Person can judge otherwise of a Matter, than as he appears to have conceiv'd it; nor can he by any just Law be compell'd to a contrary Judgment: For suppose a Man to be in the wrong, yet a bare Injunction and Command will never make him the Wiser. Yet because

many Things escape a negligent Searcher, which offer themselves to the Notice of more curious Enquirers; and because the Will may hinder the Understanding from contemplating some Truth, by presenting other Objects to tempt and engage its Care; therefore an earnest and assiduous Application of Mind is of vast use in confirming the Judgment; and consequently those who are entrusted with a Care and Authority over others, ought to make all fair Provision for the Assistance and Direction of a serious Meditation: and they may likewise engage Men by the Sanction of Punishments to apply with Diligence those Means which are most likely to dispel the Clouds and Perplexities of Things, and to represent them in their Genuine Colours and Condition.

III. Farther, Since the Understanding performs the Office of a Light in our Course of Action, and since when it doth not guide us aright, 'tis impossible but we should lose our way, we ought to establish this as a certain Principle, That there is both in the apprehending Faculty, and in the Judgment, a natural Rectitude, which upon due Attention given, will not suffer us to be deceiv'd in reference to Moral Things, and that neither of those Powers are so far corrupted and deprav'd, as to put us under a Necessity of being mistaken. For at the same rate it would follow, that because a Glass ill cut presents every Image in a distorted Confusion, and because the Tongue when cover'd with the Tincture of the Jaundice, is not able to discern the Difference of Tastes, therefore the Senses, to which those Offices belong, must be in general pronounc'd Fallacious and Uncertain. Neither could it be charg'd on us as Guilt, that we have done a bad Action, if we were not furnish'd with a clear Discernment of Good and Evil; and it would be the highest Injustice to impute that Error as Sinful, which was beyond our Power to avoid or shake off. Therefore, unless we would utterly subvert and destroy all the Morality of Acting, we must by all Means maintain, that the Understanding of Man is naturally Right and Certain, and upon sufficient Enquiry and Meditation, does always apprehend Things clearly, and as they are in their own Nature and Constitution: And likewise that the practical Judgment cannot prove so far Debas'd and Degenerate, (at least as to the general Precepts of Nature's Law,) as to excuse the Acts proceeding thence from being imputed as if they were Effects of invincible Ignorance (b). And here we desire it should be consider'd, that we are not debating what Power the Understanding has about Matters which depend on peculiar Revelation from G O D, or what it can perform in such Extraordinary Cases, without the singular Assistance of Divine Grace, because this is the Subject and Business of another Profession. Neither are we concern'd to ex-

(a) Add. D. Cumberland. de L. N. c. 2. §. 9.

(b) Vid. D. Cumberland. de L. N. c. 2. §. 10.

amine whether in Speculative Truths, requiring the most subtle Disquisitions of Mind, a Man may not through ill Information, get such firm Possession of a false Tenet, as not to be able to recover himself out of the Mistake. But we are discoursing only about the Power of the Understanding, as it is employ'd in squaring our Actions according to the Dictates of Nature. And, as to this Point, we conceive that there's no Man of proper Years, and Master of his own Reason, so desperately dull and stupid, as not to comprehend, at least, the most general Rules of Natural Law, and those which are of the greatest use in Common Life, and not to discern the Agreement they bear to the Rational and Social Condition of Mankind. And tho' a Person through extream Idleness, may possibly never have thought of one or two Precepts, or through precipitate Rashness may have fram'd wrong Opinions of Acting, or by bad Information, or a Mind corrupted with vicious Courses, may have call'd their Truth and Necessity in question, or have taken up other Rules of Action contrary to Natural Suggestions, yet we do not by any means acknowledge this Ignorance or this Error to be Insuperable, so as to hinder the Imputation of Deeds Consequent on such a Principle. For these universal Edicts are so clearly publish'd and explain'd, and so closely interwoven with our Being, that no one can be overcome with so Brutal a Sottishness, as not to be capable of apprehending and discerning them; since to this Business there is not requir'd any singular Force of Wit, any peculiar Shrewdness of Reason, but an ordinary Portion of Natural Light is sufficient, provided that the Mind be not vitiated and obstructed by some Distemper. To which Purpose *Tully's* Distinction about Folly and Madness is observable; *Folly* (says (a) he) *if assisted with a due State of Health, is able to maintain a competent Sett of Duties, and to keep up, in some manner, the Culture and the Methods of Common Life; but Madness is a perfect Disease, that quite Extinguishes the Right of the Mind, and involves all its Objects in a general Obscurity.*

IV. The Judgment pass'd on Moral Actions by the Understanding, as it is suppos'd Conscious of a Law, and therefore Accountable to the Lawgiver, is commonly call'd *Conscience*, which as it either precedes or follows the Action, we may for Distinction sake, branch into *Antecedent* and *Consequent*: This last is the reflex Judgment of the Understanding, on Things done or forborn, approving what's Well, and condemning what's Ill; the Attendants of which are either Tranquillity or Restlessness of Mind, according to the different Testimony it bears; and as it gives us Occasion to expect either the Favour or the Dis-

pleasure of the Legislator, and either the Good-Will, or the Hatred of other Men (b). The Former, coming before the Action, informs us, what is Good and what Evil, and consequently what to be done, and what to be omitted. But here it is carefully to be observ'd, that the Conscience obtains no other place in the Guidance of Human Operations, than with respect to its being instructed in the Knowledge of some Law, since Laws only are the proper Rules of Acting. And therefore, if any Man will attribute to the practical Judgment, or the Conscience, any peculiar Force or Ability of directing us in our Doings, owing neither to its Original, nor its Dependence on any Law, he will invest with a Legal Power the vain Fancy of Private Men, and will bring the wildest Disorder and Confusion on the Affairs and Transactions of the World. For we must declare, that as far as our Diligence could reach in Searching, the word *Conscience* in this strange Sense, is neither to be met with in the Holy Scriptures, nor in the ancient Latin Authors: but it was first introduc'd by the Schoolmen, and has been maintain'd in these latter Ages by the Crafty Casuists, for the better securing of Men's Minds and Fortunes, to their own Authority and Advantage. But if we have regard to the true and genuine Signification of the Word, to do a thing against Conscience, is nothing else, but to commit a voluntary Evil, knowing it to be such; and is oppos'd to Transgressing out of Ignorance and Mistake. And this we mean by Conscience in our present Enquiry, recovering it to its ancient Import, and exploding the new Abuses that have been obtruded on its Signification.

V. Conscience rightly inform'd is of two sorts; for either it clearly understands that the Perswasion which it holds concerning some Performance or Omission, is built on certain Principles, and agrees with the Laws, which are the Rule of Action and of Conscience; or else, it esteems indeed its Perswasion as True and Certain, and sees no reason to doubt of it, tho' it cannot reduce it to a formal Demonstration; but on the contrary, relies chiefly on Arguments from Probability. In the former Case it is commonly term'd a (1) *Right*, and in the latter a *Probable* Conscience. Concerning a *Right* Conscience this general Maxim is establish'd, That every Voluntary Action against its Suggestion, and the Omission of any Action which it declares to be Necessary, is Sin, and so much the more heinous Sin, as the Person had a more perfect Knowledge of his Duty; because a Transgression under such Advantages, argues a greater Pravity and Corruption of Mind (c).

The Difference of a Probable Conscience from a Right, we conceive, not to be in re-

(a) *Tuscul. Quest.* 1. 3. (b) *Plin. Panegy.* One Man may possibly deceive another, but there's none who can deceive himself; Let him only look into his own Life and Conduct, and take his Merit and Character from his Heart.

(1) This Term is not so Applicable in this place, nor so Expressive of the Author's Intention, as that of *Decisive* or *Resolved*.

(c) See *Luke XII.* 47, 48.

ference to the Truth of the Perswasion, but upon account of its Ignorance and Inability, to reduce this Truth Artificially into the Exactness of a Demonstration; for which reason it has not so evident and unshaken a Knowledge of its Certainty. For (as the Logicians speak) nothing is *Probable* in it self, but only with respect to our Understanding. And by this Rule of Probability the greatest part of Mankind are steer'd and govern'd in their Proceedings. For few Persons are able to apprehend Human Duties as they flow from their first Origine and Foundation. And most Men rely with so much Security on the Tenor of Common Life (1), on the unquestionable Authority of unsuspected Teachers, and on the manifest Decency or Conveniency of such and such Actions, that they think it a superfluous Trouble to make a more curious Enquiry into their Reasons and Foundations of them. In the same manner as the greatest Number of Artificers are satisfy'd with performing their Work by Instruments Mechanically prepar'd, and leave the Mathematicians to demonstrate the Reasons of their Operations. And Men are apt especially to content themselves with these probable Appearances, when the Proposition in Debate is remov'd at a vast Distance from the first Principles, and therefore requires a tedious and troublesome Deduction, which is commonly above the Capacity of those who have not run the Course of the Sciences, nor cultivated their Reason by a Learned Institution. Yet hence can be drawn no Protection for that pernicious *Probability* maintain'd by the later Casuists, and especially by those of the Order of the *Jesuites*, which resolves it self into the sole Authority of a single Doctor, tho' destitute of Reasons, and oppos'd by all other Judgments. For this Principle tends to the utter Subversion of all Morality, and seems design'd only for the keeping under the Senses and the Consciences of Men, and making them depend entirely on the pleasure of the Priests: as has been prov'd at large by others (a). We need only observe farther, that they act not at all fairly when they confound Probability of Fact, with Probability of Judgment, and of Law. For indeed, in Matters of Fact the Authority of one Great and Credible Person, may raise a probable Presumption, and obtain at least half the Force of a full Proof. But in defining Matters of Law, 'twould be the highest Absurdity and Rashness to attribute so much to the Declarations of one Man, not grounded on good Arguments, and at the same time contradicted by Persons of equal Rank and Power, as that it should be safely admitted for the Square and Standard of Acting.

VI. For the Information and Direction of a probable Conscience, there are many Rules commonly laid down, concerning which our Opinion is this, That they take place only

where there seems to be a Clashing between strict Law and Equity; or when both sides of the Question are alike free from the Obligation of the Laws; yet so as that one of them may seem to approach nearer to Honesty, or may appear more likely to produce some Convenience or Inconvenience than the other. For in Matters absolutely determin'd by the Command or Prohibition of some Law, there is no room left for such a free Choice, as that we may reject one side and take the other, because positive Laws will not be satisfy'd with Equivalents, but demand a punctual Obedience to their Decrees. And therefore this Freedom of Election must be confin'd to indifferent Things, to which the Laws do not extend their Sphere and Authority. The chief Rules are these:

1. In a probable Conscience two Opinions being propos'd, neither of them contrary to the Laws, one of which is founded on better Reasons, the other is the more safe; either of the Two may be follow'd without blame.

2. Two Opinions being propos'd, of which one is built on weaker Reasons, the other is the more safe, the latter ought justly to have the Preference.

3. In a probable Conscience a Learned Man may follow that Opinion which seems to him to have the greatest Degree of Probability, tho' perhaps it may appear different to others: unless he is under Apprehension of incurring some Inconvenience or Damage upon account of dissenting from the common Judgment.

4. An Unlearned Man may safely follow the Authority of Wiser Persons.

5. A Subject, or one plac'd under the Command of others (2), may, upon the Order of his Superiors, fairly do a Thing which he does not certainly know to be Unlawful, tho' in his private Judgment he does not think it very Probable that it ought to be done.

6. In Things of little Moment and Concern, if there are probable Arguments alledg'd on both hands, either side may be taken.

7. In Things of great Moment, if there arise probable Arguments on both sides the safer part is to be prefer'd, or that from which there cannot follow so great an Evil, tho' we are never so much Mistaken, as there might have done, had we err'd in the opposite Opinion.

VII. To proceed; Tho' according to our present design, we are engag'd only to treat of what's Good, and what Evil, what Just and what Unjust; leaving the enquiring about Things Profitable and Unprofitable to another part of Knowledge, yet it will not be much out of the way, if we here consider in short, what Rules the Understanding ought to have regard to, in Deliberations concerning Usefulness and Convenience. Especially because the

(1) Vide l. II. c. III. f. 13. (a) Vid. Lud. Montalt. in Lit. Provincial, and upon them Wendrichius and Sam. Rachel.

(2) Vide lib. 8. c. 1. f. 6.

Directions already laid down, depend very much on these; the Profit or Advantage of Things bearing a great force in our Proceedings; according to that of the Apostle, 1 Cor. V. 12. *All things* (that is, all things which he had been there speaking of) *are lawful for me; but all things are not expedient.* And in Civil Business, Affairs are many times committed to the sole Wisdom and Conduct of the Person employ'd, in which Cases a Man is conceiv'd to have acted ill, if by Imprudence or by Negligence he has taken the less profitable Course. In Debates therefore arising about such Things to which we are bound by any Necessity, or any determinate Obligation, (for Necessity excludes all deliberation and debates, and determinate Obligations leave nothing to the Agent but the duty of Execution;) this is laid down for a Foundation, that nothing ought to be undertaken from which in Moral Esteem, (or as far as Human foresight can pierce into the Obscurity and Uncertainty of Future Events,) there do's seem likely to follow as much Evil as Good, or more Evil than Good. The reason of which Maxim is evident. For as much of Evil as any thing has joyn'd with it, so much it loses of its Goodness, and consequently when the Good and Evil are in Equal Degrees, the former is swallow'd up by the latter, and the Thing is depriv'd of the Nature and Denomination of Good. Hence that Field is reckon'd very unprofitable, which do's not in the value of its Fruits exceed the Charges of Tillage (a). For those Matters which make the Subjects of such Deliberations as we are now speaking of, are undertaken purely on account of the use and advantage which may accrue to us from them (b). As Corollaries from this General Truth, we may subjoin the three Rules establish'd by Grotius (c): 1. *If the Thing under debate has an equal efficacy or ability for the production of Good and Evil, that is, if we may as easily gain as lose by it, we may then venture on it, when the Good Consequence is a greater Good, than the Ill Consequence is an Evil:* that is, if we are like to gain more by being successful in the Attempt, than we can lose if we prove unsuccessful. Thus it would be no rashness or imprudence to hazard ten Pounds, suppose in a dangerous Adventure, when we may get an hundred, if the Chance prove fortunate (d). 2. *If the Good and Evil which may proceed from the thing in debate appear equal, we may then chuse it, with this provision, that it has a greater efficacy or ability for producing the Good, than the Evil:* that is, if

'tis more easie that Gain should arise from it than Damage. In which point we cannot omit the noble Argument of Arnobius (e): *Since this* (says he) *is the condition of future things, that they cannot be felt or held by any anticipating touch, is it not much the clearer Reason of two Uncertainties, the expectation of which is equally doubtful, rather to believe that which brings some hopes along with it, than that which affords none? For in the former Case there can be no danger, tho' the Matter expected never come to pass: But in the latter we incur the highest Damage, if what we disbelieved should not prove a falsity in the final event of things* (f). 3. *If the Good and Evil seem to be unequal, and the ability of the thing to produce them not less unequal, then we must determine our choice by one of the two Conditions, either that the ability for producing Good compar'd with that for producing Evil, be greater in proportion, than the Evil it self compar'd with the Good: (that is, if the Excess of Evil be less than the ability for producing Good;) or, if the Good be greater compar'd with the Evil, than the Ability for producing the Evil, compar'd with that for producing the Good: that is, if the power and efficacy which seem to incline towards the production of the Evil, be less considerable than the degree by which the Good exceeds the Evil. To which we will add this fourth Rule, That where Both the Good and the Ill effect of a Thing, and likewise its ability for producing of both, remain uncertain and undetermin'd, 'tis the part of a wise and cautious Man, to abstain from such a Matter, unless he is driven on it by urgent Necessity.*

VIII. When the Judgment of the Understanding is at a loss, and cannot discern whether a Thing be Good or Evil, and consequently whether it ought to be perform'd, or omitted, we call this a *Doubtful Conscience*. Concerning which this Rule ought to be observ'd, That as long as the Judgment cannot by the force of any Arguments be inclin'd to one side more than to the other, the Action is to be suspended, and that therefore, he who proceeds to do a thing about which his Conscience still hangs in an *equilibrium* commits a sin; because as much as in him lyes, he has transgress'd a Law. For he declares his Mind to this effect, *I am not indeed certain, whether or no this Action is repugnant to the Laws; but whether it be or no, I am resolv'd to undertake it.* 'Tis good Advice (says (g) Tully) *to forbear doing a thing, where we doubt whether it be fair and just, or foul and injurious: For when we are*

(a) Cato de RR. *A Field that is Fertile, if it be at the same time chargeable, turns to little account.* (b) Xenophon. *Rer. Grec.* l. 6. *They are very far from deserving Commendation, who having carried off Glory and Victory from many Encounters, do still continue to engage, 'till being at length shamefully overcome, they lose their former Honour and their former Labour. The Case is the same with those Gamesters, who once meeting with a run of Good Fortune, are entic'd to venture on, 'till they lose double to their former Gains, and, in conclusion, are commonly Beggars. These Examples ought to warn us in our Martial Affairs, that we never suffer our selves to be drawn into such a Combat, where we must of necessity either win all, or lose all.*

Lucan. l. 1.

Par labor atque metus pretio majore petuntur.

An Equal Labor for a Greater Prize.

Isocrat. Archidam. *Two things propos'd, one plain and evident, the other doubtful and perplex'd; would it not be ridiculous for you to reject that which is beyond dispute, and to chuse that which is controverted and uncertain?* (c) L. 2. c. 24. l. 5.

(d) Comp. *Epiſtet.* Enchirid. c. 35, 36. (e) L. 2. (f) *Add. Pensees de M. Paschal.* c. 7. (g) *Off.* l.

certain the thing is just, we have clear light and guide to proceed by; but to act with an unsettled judgment, do's not free us from the Thoughts and Intentions of offering an Injury. Grotius (a) says that this Rule, of abtaining from a doubtful Action, do's not hold when we are oblig'd to do either this or that, and yet are unsatisf'd in either, whether it be just or not; for then we are allow'd to chuse that side which appears less Evil or Unjust. For whensoever we are under the Necessity of making a choice, the lesser Evil assumes the Character of Good. This Observation, we think, ought rather to have a place in Evils of Damage, than in those of Morality; because in the former it is reckon'd a Gain and an Advantage, to avoid a greater Evil by admitting a less. But it cannot be applied to Moral Evils, without a very dextrous Construction. Properly speaking, therefore, of two Moral Evils, neither is to be chosen. Yet it frequently happens, that two Laws, either both Affirmative, or one Affirmative and the other Negative, shall seem to clash with one another, so that we cannot satisfy both at the same time (1). In this Case ignorant Persons are apt to fancy, that a Comparison is made between two Evils, or Sins of Omission, and that we are to do that, which it would have been the greatest Sin to have left undone. But in reality, we do not here of two Sins choose the lesser; but that Action which without this clashing and interfering had been a Sin, now ceases to be sinful, when we are oblig'd to a contrary Duty, by the force of a stronger Law. Thus, for example, when there seems to be a clashing between the Affirmative Command, Give Alms, and the Negative, Do not Steal, without doubt we must not be guilty of Thievery to gather Matter for our Alms; according to that of the Apostle, We must not do Evil, that Good may come of it. Yet in this Case, not to give Alms, is not properly a Sin, because Affirmative Precepts exert not their force of Obligation, when there remains no supply of Matter to furnish out the Action. So again, when a clashing is made between the two Affirmative Precepts, Obey God, and Obey the Magistrate, no question but we ought to Obey GOD rather than Men (b): not because of two Evils the least is to be chosen, but because it is not an Evil to deny Obedience to the Magistrate, when it cannot be given without violating the Duty we owe to God. For a weaker Obligation always yields to a stronger, when both cannot be fulfill'd together.

IX. To a *Doubtful Conscience* a *Scrupulous* one is nearly related; and this is, when the Judgment of the Understanding is possess'd, with an anxious fear, lest the thing which

we fancy to be Good, should prove Evil, or vice versa. Now when such Scruples are founded on probable Arguments, the Action is to be suspended, 'till they can be taken away and clear'd up, either by the force of Arguments, or by the Authority of Wise Men: but when they proceed only from a Melancholy and a Superstitious Softness and Indiscretion, they are by all means to be discouraged, and forcibly driven out of our Thoughts. Therefore 'tis a good Remedy which *Cartes* (c) prescribes against Fluctuation of Mind, and the Bitings of Conscience which precede an Action, to accustom our selves to the forming of certain and determinate Judgments of all Things that offer themselves to us. But we must observe farther, that these Judgments ought to be drawn from Genuine and Solid Science, or from Doctrine of the Laws of Nature, and from the Christian Religion, purg'd from the vain Additions of Superstitious Men. For tho' without this Security, the Mind may indeed be so far harden'd, as not to perceive any fluctuation, or to feel any remorse of Conscience, yet such a firmness and obduracy is neither of long continuance, nor free from the Imputation of Sin. Whence we cannot approve of the latter part of *Des Cartes's* Prescription, where he tells us, *We should always think our duty is discharg'd, when we have done what we judg'd best, altho' we have made the worst Judgment that can be.* For this is not to cure the Disease, but by an ill temper'd Opiate, to bring a drowsiness and stupidity on the Mind.

X. When the Knowledge of the Understanding is wanting as to the Performance or the Omission of any Thing, we call this *Ignorance* (2). Which, as far as concerns our present Design, may be divided, either with respect to its Influence on the Action, or with respect to its Origine. With reference to the former, it is of two sorts, one being the Cause of the Thing ignorantly done, and the other not. The first may be call'd *Efficacious*, and the other *Concomitant*. The first is the Negation of such a Knowledge in the Understanding, which had it been present, would have hinder'd the Action. Such was *Abimelech's* Ignorance, *Gen. XX. 4, 5.* who, had he known *Sarah* to have been *Abraham's* Wife, had never entertain'd any thoughts of taking her for himself. The latter is a Negation of such a Knowledge in the Understanding, as would not have hinder'd the Fact, so that the Man, tho' he had known what he was indeed ignorant of, yet would have done the thing nevertheless. As suppose a Man should Kill his Enemy by a chance Blow, whom he would otherwise have Kill'd, had he known

(a) L. 2. c. 23. f. 2. n. 2. (1) See B. 5. c. 12. f. 23. (b) This was the brave Declaration of *Socrates*, I honour and esteem you, O ye Athenians, but in point of Obedience, my Duty to God is to be satisfied before my Obligations to you. Plato Apolog. (c) De Passion. Art. 170. & 177.

(2) *Titius* in his 23d Observation thinks the Author's Divisions of Ignorance not clear, nor compleat enough; and therefore rectifies them by considering Ignorance, 1. With respect to the Influence of the Object upon the thing we act; whence arises *Efficacious*, and *Concomitant Ignorance*. 2. With respect to the Nature of the Object consider'd in it self; which produces an *Ignorance of Law*, and an *Ignorance of Fact*. 3. With respect to the Consent of the Agent; whence results *Voluntary* and *Involuntary Ignorance*.

him to be in that particular place, where he now threw his Weapon casually, and without any intention of Hurt. Thus the Boy who flung a Stone at a Dog, and by mistake hit his Mother-in-law, and kill'd her, said, τ' αὐτοῦ μάλιστ' ἔτυχεν καὶ τὴν βουλὴν αὐτοῦ, *Fortune had a better aim than I.* Some distinguish these two Species's of Ignorance, in this manner, that what is upon the former shall be said to be done *out of Ignorance*, what by the latter, to be done *by one that is Ignorant*. Yet even in the latter case, no Murder, according to the strict and proper sense, is committed. For tho' that ill Affection of Mind was in it self vicious, yet it contributed nothing to the Fact. With reference to its Origine, Ignorance is divided into *Voluntary* and *Involuntary*. The former is by some term'd *Consequent* and *Vincible*, the latter *Antecedent* and *Invincible*. The former, whether it be directly *affected*, or proceeds only from idleness and unattention, is when a Man knows not that which he could, and ought to have known: the latter, when a Man knows not such things, as he had neither Ability nor Obligation to know. This *Invincible Ignorance*, is either such *in it self*, and *not in its cause*, or else both *in it self*, and *in its cause too*. The former is, when in doing a thing a Man is not able to overcome the Ignorance from which it proceeds, and yet is in fault for falling into that Ignorance. Thus frequently when a drunken Man commits a Sin, he do's not know what he is doing, yet he is culpable for not knowing it. The latter is, when a Man not only is ignorant of such things as could not be known before the Action, but is also free from any blame upon the account of his falling into that Ignorance, or his continuing in it. On this Point is observable what *Aristotle* has said in his *Ethicks*, Book III. Chap. 1. 11. and what *Eustrathius* has commented on the place. Where he distinguishes between what is done *by one being Ignorant*, and what is done *out of Ignorance*. For Instances of the former, he brings the Actions of a Drunken, or of an Angry Person: for such Men, tho' they often know not what they do, yet the Ignorance is not the Cause of their Acting, but the Drunkenness or the Anger, of which 'twas in their power to decline the former, and to restrain the latter. He adds farther, that those Persons cannot be said to do a thing unwittingly, who sin upon account of knowing what was to be done, or what to be avoided, which Ignorance he calls *Ignorance in Election* (1), or *Ignorance of Universals* (2): for these every Man was oblig'd to know. But that *Ignorance of Particulars*, is the thing which renders an Action capable of being construed involuntary. These Particulars are, *who, what, about what, and in what, with what Instrument, for what Cause, and by what manner*. All these no Man in his

Senses can be ignorant of together, because he is at least apprehensive of his own acting, and therefore can resolve the first Question (*Who?*) But in all the other Circumstances Ignorance may intervene. Thus Persons who say what they did not intend, alledge for excuse that they know not *what* they said. And the same is the Case, of a Man who intending to show his Friend some shooting Engine, should let it go off, and kill him. An Instance of Ignorance *about what*, and *in what*, (which are the same thing) may be, when a Man kills his own Son, mistaking him for his Enemy. *Ignorance of the Instrument*, is, suppose a Man should throw a pointed Spear at another, and kill him, taking it to have had no Point. *For what cause*, comes to be consider'd in Ignorance, in such a Case as this, suppose a Man should apply a Remedy to Another with design of preserving his Health, and the Remedy should (against his Knowledge) prove Mortal. The last Circumstance is *in what manner*; as if a Man in teaching another should intend only to give him a slight Blow, but should by accident desperately wound him. The Roman Lawyers have treated under a peculiar Head concerning *Ignorance of the Law*, and *Ignorance of the Fact*. But they did not consider Ignorance so much for the force and use it had in Moral Actions, as for the influence it had on Matters of Right, and as it made for the keeping, or acquiring, or losing of any Legal Possession or Qualification. But their numerous Reasonings about both kinds, may be reduc'd to this short Issue, That Ignorance of the Law, is, for the most part joyn'd with some degree of Culpable Negligence, but Ignorance of the Fact is not; and that therefore Equity directs us to interpret the former to the Man's prejudice, and the latter not.

XI. When not only a Knowledge of the Truth is wanting in the Understanding, but a false Perswasion has intruded into its room, which pass'es it self for Truth, then we say a Man has an *Erroneous Conscience*, or that his Mind is possess'd by an *Error*. This Error, is (like Ignorance) either *Vincible* or *Invincible*. The former is that which a Man could and ought to have overcome, by applying such Diligence as is morally possible, or as the common Condition of Humanity admits and allows. The latter is such as a Man could not vanquish by all Diligence morally possible. Where it must be observ'd, that should we approve of that saying of the Emperour *Antoninus*, Book IX. Chap. 43. *Whosoever sins, do's in that decline from his propos'd end, and is certainly deceiv'd* (a), yet if the Error were not insuperable, the ill actions proceeding from it cannot be exempted from the number of Sins properly so call'd, nor ought to be pardon'd in gross by a promiscuous Indulgence.

XII. But it ought especially to be remark'd,

(1) *i. e.* When we are Ignorant which of two Things propos'd to us is more Advantageous. (2) Such is the Ignorance of the Law of Nature, at least of its common Principles: and the Ignorance of the Civil Laws of the Government to which we belong. (a) Add. *Arrian Epictet.* l. 1. cap. 28.

that Error has different Effects in Actions, which a Man may undertake or omit as he pleases, or the exercise of which is left to his Free-will; and in such Actions, as are enjoyn'd or forbidden him by the Law or the Command of a Superior. In the former kind of Actions, the Error is suppos'd to intercept our Consent: And therefore those Consequences do not flow from it, which are otherwise apt to follow on such an Action as we have thus consented to; especially if the Error did not steal on us thro' Supine Carelessness and Neglect. And therefore in Bargains an Error about a thing, or about its quality, upon prospect of which a Man was induc'd to come to such an Agreement, renders the Bargain void. For in this Case the Man is not conceiv'd to have agreed absolutely, but upon supposal of the presence of such a thing or quality, on which, as on a necessary Condition, his Consent was founded: and therefore the thing or quality not appearing, the Consent is understood to be null and ineffectual. Which Point shall be discuss'd more fully in its proper place.

XIII. But the Case seems to be very different in Necessary Actions, or in such as are commanded or forbidden by a Superior. Where we must first enquire, whether the Error arises in the Theory, or in the Practice; that is, whether a Man entertains a false Opinion concerning the Necessity of some Actions, thinking those ought to be omitted, which should have been perform'd, or *vice versa*; or whether some Error occurs in the very exercise of an Action by means of which the Action is not applied so rightly as it ought to have been. The former kind of Errors do not, in our Judgment, at all hinder the *Imputation* of an Action to the Agent, according as it shall appear to agree or disagree with the Rules prescrib'd him; because they must upon all accounts be esteem'd superable. For he that would restrain the Actions of another by a Rule, ought at the same time to make a sufficient declaration of his Will, that it may be clearly known by the Person whom he is to oblige. For otherwise 'tis the most unjust thing in the World to require obedience to a Law, when either the Law is unknown, or the discovery of its sense exceeds the Capacities of those whom it affects. Therefore, if a Man *errs in Theory*, that is, if he fancy a thing to be commanded which is really forbidden, or *vice versa*, he is suppos'd not to have apply'd sufficient diligence, and therefore he cannot refuse to bear the Imputation of Faults committed upon such an Error. This Doctrine is by some Casuists thus explain'd in other words. If the Conscience entertain a vincible Error about an Evil Thing, the Man sins, as well if he acts for it, as if he acts against it. That is, if he has perswaded himself that an Action was commanded, which was indeed forbidden, or that an Action was for-

bidden, which was indeed commanded, he sins by performing the former, and by the forbearing the latter: because such a performance and such a forbearance are repugnant to the Law, but the Agent might and ought to have known the Law, according to its true import and signification. And yet the same Man has sinn'd no less, if he has forborn an Action, which was indeed forbidden, but by him believ'd to be commanded; or if he has perform'd an Action really commanded, yet such as he imagin'd to be forbidden. For tho' in these Cases there be no external Acts repugnant to the Law, yet because the Man thinks his false Notion and Construction of the Law to be right, therefore the contrary Intention shall be imputed to him as Sin. For the Evil Intention of the Agent makes the Action appear Evil, at least with respect to the Agent himself. From all which it appears, that from an Erroneous Judgment no Action can proceed which may be imputed for as good and right to the Actor, and that when a Man is *fallly* perswaded that such a thing is unjust, the thing is unlawful for him to do, so long as his Perswasion shall continue uncorrected (a).

XIV. But if a Speculative Error be entertain'd concerning a thing Indifferent, that is, if a Man should be perswaded that he ought to do, or to omit somewhat, which was indeed left free on both sides, he will only sin if he acts contrary to what this false Opinion suggests, upon the account of the Pravity of his Intention, but will not sin if he acts according to the Directions of his Error. For Indifferent Things are plac'd without the Bounds of the Law; which cannot be transgress'd by their Performance or Omission: And that Error appears very harmless which does not give occasion to Sin. Yet it is plain, that Actions undertaken upon the Motions of such an Error, cannot obtain those good Effects which otherwise follow the like Instances of Obedience to the Laws: Thus if a Legislator had constituted such a Reward to those who comply'd with his Injunctions, this Reward could not be challeng'd by one, who through Error and Mistake, should have observ'd some indifferent things, fancying them to be positively determin'd, and legally enacted.

XV. But 'tis much more usual that an Error should intervene in the Practice and Exercise of Actions commanded by the Laws: As suppose the true object of the Action should be remov'd, and another substituted in its place; or if we should mistake the time or place of the Execution enjoyn'd. Such Actions, as they are not follow'd by those Effects which are otherwise due to Actions rightly apply'd; so neither are they attended with the Effects proper to bad Actions, because the Error was not contracted by any Culpable Negligence. Which some Authors thus express in other words, An Intervening Error hinders the Action from being imputed on either side, making it

(a) Add. l. 46. f. 8. D. de furtis.

neither Good nor Evil (a). Thus, tho' otherwise you would be freed from your Obligation by paying a Man what you owe him, yet should you pay him Undesignedly, and by pure Mistake, you will not indeed have committed a Sin, but you will by no means have cancell'd the Obligation. Thus, when a Man has, with an honest Intention, tho' with an inconsiderate Liberality conferr'd a Kindness on a wicked Person, who will abuse it toward the maintaining of his Disorders; he cannot at all boast of having done a good Action, yet he shall be excus'd from any Share in the consequent Wickednesses, and not be reckon'd to have contributed any thing toward their Commission. But when a Man has been particularly commanded, to discover and observe precisely the Object, the Place or Time of acting, it will be a hard matter for him to escape the Imputation of those Effects which shall proceed from the ill applied Action, unless he can demonstrate his Error to have been Morally insuperable and unavoidable. Thus if you give your Servant a strict Charge to wake you at such a certain Hour of the Night, it will not serve him for an Excuse of his Default to say, that he mistook in telling the Clock; yet if by any Casualty the Clock went wrong, or was out of order, the Servant shall be free from all Offence and Blame.

XVI. It frequently happens too, that an Error intervenes in the Exercise of a bad Action, while the Actor misses the Object at which he aim'd. In which case, the Malice of the Actor shall continue the same, as if he had not mistaken, but the Action it self shall be esteem'd more or less Heinous, according as the Object is on which it Casually lighted. Thus a Person who intending to kill his Enemy, accidentally kills another Man, shall be nevertheless guilty of Murther (b). Yet the Murther shall receive more or less Aggravation, according to the Dignity or Meanness of the Man, who has been so unfortunately slain. Hitherto must be referr'd the Case of a Man's killing another out-right, whom he intended only to wound, or to hurt in a less degree: for here the Fact it self must be the Rule to go by in Judgment: But when in the Exercise of a faulty Action, a Man by Mistake lights on a lawful Object, such an Action will be no farther Evil, than as it flows from an ill Intention in the Actor; so that this Error shall hinder the Fact from coming under the Name of the Vice design'd to be committed. And therefore that Saying of Seneca (c) will not hold, at least in Human Courts and Consideration, *That if a Man lies with his own Wife, fancying her to be anothers, the Man shall be an Adulterer, tho' the Woman be no Adulterers.*

(a) Senec. Her. Fur. *Quis nomen unquam sceleris errori dedit?* Who'd brand Mistake with the foul name of Sin?

(b) Vide l. 18. f. 3. D. de Injuriis, l. 14. D. ad L. Cornel. de Sicariis, & Grot. in Sparf. Flor. ad loc.

(c) De Constant. Sapient. c. 7. Add. De Beneficiis l. 2. c. 19. l. 5. c. 13. Comp. Liban. Declam. 35. p. 780. B. C. D. Edit. Morel.

CHAP. IV.

*Of the Will of Man, as it Concerns MORAL ACTIONS.*

THE most Wise Creator being pleas'd to make Man an Animal governable by Laws, for this Purpose implanted a Will in his Soul, as an Internal Directress of his Actions; that the Objects being propos'd and known, this Power might by an Intrinick Principle, and without any Physical Necessity move it self towards them, and might chuse that which seem'd most Agreeable and Convenient, and reject that which appear'd Unfuitable and Incommodious. The Will is concern'd to govern human Actions by the Administration of two Faculties, by one of which it is said to act *spontaneously*, and by the other *freely*. To *Spontaneity*, if we may so speak, are attributed certain Acts and Motions, of which some are Interior, commonly call'd *Eliciti*, others Exterior, generally term'd *Imperati*. The former are such Acts as are immediately produc'd by the Will, and terminated in the same Power. Some of these are

employ'd about the End, as Volition, Intention, Fruition; others about the Means, as Consent, Election, and Use. *Volition* is that Act of the Will, by which it is *simply* carried toward some End, without Regard had whether the End be present or absent; or that Act by which the End is barely approv'd of. Others call this the Will of Simple Approbation, by which a Thing is understood to agree with the Nature and Inclinations of some Person, tho' he has not yet Actually and Effectually mov'd himself towards the producing or obtaining of it. *Intention* (or *Proæresis*) is a *Desire Efficacious toward the obtaining of an End*; or it is an Act of Will, by which it effectually tends toward an absent End, and endeavours Actually to produce or to acquire it. This Act being joyn'd with the Hopes and the Attempts of procuring an End, we may easily conceive what sort of Things it is employ'd about: and they to be sure, must be Things Possible in themselves, and

and Things in our Power; as *Aristotle* (a) has more largely observ'd. For it enters into the very Definition of *Intention* or *Προαίρεσις*, that it be made with Reason and with Thought. Though there be many Degrees of *Intention*, with reference to its different Height and Force; yet as far as concerns the Occasions and Purposes of Civil Life, 'tis sufficient to divide it into Plenary and Semi-plenary. The Former is that by which the Will determines on any thing after a full Examination of the Matter, and without being driven to it by the Violence of the Passions. The Latter, when due Deliberation has not been taken, or when the Hurry of the Affections has created a Confusion and Disorder in the Reason. *Fruition* is the Rest, or the Delight of the Will in the End now obtain'd and present to it. To which is oppos'd Repentance, or an Aversion (commonly joyn'd with Shame or Grief,) to somewhat which we have before designed or affected. *Consent* is our simple Approbation of Means, as we judge them proper for our Work: and these Means when they are plac'd within our Reach and Power, employ the two remaining Acts mentioned in our first Division; for, *Election* determines, and *Use* applies them to the compassing of the End propos'd.

Those Acts are call'd *Imperati* or enjoyn'd, which are perform'd by other Human Faculties upon the Motion and Appointment of the Will.

II. *Liberty* is a Faculty of the Will, by which, all Requisites of Acting being given, it may out of many propos'd Objects chuse one or more, and reject the rest; or if one only Object be propos'd, may admit that or not admit it, may do or not do it. What we call the Requisites of Acting, some express by the single Term *Occasion*; now from these the last Determination of the Agent is conceiv'd as a distinct thing, which being added to the other Requisites, we immediately proceed to Action: and therefore those Requisites mention'd in the Definition of *Liberty*, do not include that Share which the Man himself bears in the Action, but are contra-distinguish'd to it. But more particularly, we call the Faculty of chusing one or more out of many Objects, *Liberty of Specification*, or of *Contrariety*, and the Faculty concern'd in the Admission or Rejection of one only Object, *Liberty of Contradiction*, or *Liberty of Exercise* (1).

Now *Liberty* is suppos'd to superadd to Spontaneousness, first an Indifference of Acts as to their Exercise; so that the Will is not oblig'd necessarily to exert one of its Acts, as to desire or refuse: for tho' in general it is impossible but it should affect Good, and refuse

Evil as such, yet in reference to any particular Object propos'd, it may determine on which side it pleases, tho' perhaps, it may seem to have a greater Propension toward the one than toward the other. Another Thing that *Liberty* superadds to the Notion of *Spontaneousness*, is the *Freedom of Determination*, so that the Will may upon an internal Impulse and Motion, exert either of its Acts of wishing or loathing, just in such a place, and at such a time. We must add farther, That tho' the Reason, which makes a thing desired or avoided, does not depend upon the Will, but upon the Condition of the Object, according as it bears the Face of Good or Evil; yet that Appetite and that Aversion, which thus follow the Appearance of the Object, are not of so much Force and Sway, but that there still remains in the Will a Liberty, whether or no it shall determine it self to any external Act about such an Object: especially since such an Evil thing may bear the Countenance of Good, and consequently be Desirable, as long as it shall be set in Opposition to a greater Evil. And therefore to refute that Notion of *Hobbs's de Homine*, Cap. XI. §. 2. that Appetite and Aversion necessarily follow our Pro-conception of some Pleasure, or of some Uneasiness likely to proceed from the Object, no room being thus left for Free-will; we must carefully distinguish the Volition of simple Approbation, from effectual Intention or *Προαίρεσις*, of which the latter does not so necessarily depend on particular Objects. In the words following this Assertion, he applies a very Idle piece of Nicety, while he observes, That when we say a Man has free Will of doing this or that, we ought always to understand it with this Condition, If he pleases; for 'tis absurd to say that a Man has free Will of doing this, or that, whether he will or no. For no Body is so Stupid as not to apprehend this Contradiction: and 'tis extream Foolish to add the very same thing which the Proposition asserted as a Condition to it. To say that a Man may freely will the doing of a thing, if he will, is the same thing as to say Peter runs if he runs: and who would ever give this Clause the name of a Condition? From what has been said it likewise appears, how we are to judge of those Notions laid down by Monsieur *Le Grand* in his Institutions of Philosophy, Part 7. Artic. 5. as if it were impossible for a Man not to desire what he clearly and distinctly perceives to be Good; and as if a Man sinn'd only upon this account, in not having a clear and distinct Perception of Evil.

III. But the chief Affection of the Will,

(a) *Ethic.* 1. 3. c. 4. *Election* is concern'd only about those things which are in our Power. Every Man purposeth to do that alone which he imagines himself able to compass. Again *Ethic.* 1. 6. c. 2. What is already done, cannot be the Object of our Choice and Pursuit: for no Man consults of what is past, but of what is to come, and is Changeable and Contingent. Whereas what is already gone cannot be alter'd or recall'd. And as *Agatho* well says, it is beyond the Power of God himself, to undo what hath really been done.

(1) Notwithstanding this Distinction is commonly used, yet it does not appear to some to be sufficiently, either Clear or Necessary. See Mr. *Le Clerc. Pneumat.*

and what seems immediately to flow from its Nature, is an *Intrinsic Indifference*, upon the account of which it is not restrain'd to any certain, fix'd, and unalterable way of Acting; and which cannot be entirely extirpated by the Force of any external Means. And this Indifference we are the more firmly to assert and maintain, because upon the Removal of it, all the Morality of Human Actions is inevitably overthrown (a). Of which wicked Design those Men are in a great measure guilty, who fancy some strange kind of Physical Predetermination in Human Deeds, by which the Motion in it self, and as it is a Natural Being, is so determin'd by the first Cause, that it cannot be done in any other manner; tho' it afterwards receive its Morality from the second Cause. Nor are they in a less Fault, who from the Divine Presence would derive an absolute Necessity on all our Proceedings. For tho' this Attribute of GOD cannot be deceiv'd, yet that it does not take away the Indifference of the Will, may be easily understood, if we either clear the word *Prescience*, from the Imperfection which it seems to imply, as do all other Terms taken from Human Things, and applied to the Divine Nature; (since in GOD there can be no Succession of time;) or if we say, that the Divine Concurrence does in such a manner accompany second Causes, as still to leave them the Power of acting in the way Originally assign'd them by their Creator, not debasing them with reference to Moral Actions from Principal into merely Instrumental Causes (b). How Prejudicial such Notions are to a State or Kingdom, *Grotius* is well aware when he observes, That those who utterly discard the Doctrine of Free-will, can hardly avoid making GOD the Author of all Wickedness; an Attempt which *Plato* himself declar'd ought not to be born with in a Commonwealth (c).

IV. For the right understanding of this Indifference of the Will, somewhat ought to be premis'd concerning the Nature of Good in general, now tho' Good by many (1) of the Philosophers is consider'd absolutely, so that every Being really existent may be pronounc'd

Good: yet we, without regarding this Signification, which we judge to be very usefess, will only consider *Good*, as it denotes Respect to others, and as it is said to be Good to one, or for one. According to which Sense the Nature of Good (2) seems to consist, in that Aptitude by which one thing is dispos'd to benefit, preserve, or compleat another; and therefore this *Good*, to which we may give the Name of Natural, is firm and uniform, and has no Dependance on the erroneous and various Opinions of Men. But because *Good* does not excite the voluntary Appetite of Man unless it be known, at least under a confus'd Notion; and because Knowledge arising from Sense, gives but a gross Representation of the Genuine Natures and Consequence of Things, so that the Understanding is often clouded with Error, and disorder'd by the violent Noises of Sense and Passion; hence it comes to pass, that many Men invest things falsely with the Name and Notion of Good, and this is what we call *Imaginary Good*. And farther, every particular Person as he understands a Thing to make for his Profit, his Preservation, or his Perfection, loves and desires it; and on the contrary, what he conceives to be Evil for him, he hates and avoids. But as it is not requisite to the Nature of Good, and to its Power of moving the Appetite, that it should be consider'd precisely as Good only for the Person desiring, and abstracting from the Advantage of others; especially since upon account of the Society and Conjunction of Men, the Good of Others may redound to our Benefit and Use; so amongst Mankind there is so fair an Agreement about the general Nature of Good, and its chief Parts and Species's, that barely on the score of their being divided about some Particulars, there's no manner of Reason either why we should deny the Universal and Unshaken and Uniform Notions of Good, or why, in a State of Natural Liberty, we should make it depend on the bare Opinion of every private Man, in a state of Government on the sole Judgment of the Supreme Magistrate, as the only proper Measures and Rules for its Determination (d). As for the

(a) *Arrian. Epictet. l. 1. c. 17. What can overcome an Appetite? another Appetite. What can conquer a Desire or an Aversion? another Desire, or another Aversion. You will say, He that threatens me with Death compels me. I deny it; 'tis not the terrible Proposal which lays the Force upon you, but 'tis your own Choice which inclines you rather to the Commission of such a Deed, than to the Desire of Death. In this Case therefore, as well as in all others, nothing compell'd you but your own Opinion; that is, nothing overcame your Will, but your Will.*

*Nem. l. 1. c. 29. The Will is not Conquerable by any thing but by it self. Add. Simplic. ad Epictet. c. 1. p. 22.*

(b) *Add. Lucian, Plinæ, & Jupit. Confutat. Anton. le Grand. Philosoph. p. 1. c. 17, 18.*

(c) *Plato's words are (de Repub. l. 11.) Τὼν κακῶν ἀλλ' ἀπὸ θεῶν καὶ ζῆσειν τὰ πάντα, ἀλλ' ἔτι δὲ θεῶν. We ought to affix any other Cause of Evil, but never to refer it to GOD.*

*Sueton* was in the right, when he makes *Tiberius* (1. 69.) a Contemner of all Religion; *Quid omnia fato agi crederet, for believing the World to be guided by Fate.* For thus *Proclus* (ad *Timæum*) divides *Atheists* into three Ranks or Orders. Two of which he makes those who deny GOD the Care of Human Actions and Affairs; and those who attribute such a Care to GOD, as imposeth an absolute Necessity on all Events, utterly depriving Men of their Freedom and Choice.

*Salustius Philos. de Diis & Mundo. To attribute Injustice, or Lust and Wantonness to the over-ruling Influence of Fate, is to make our selves Good, and the Divine Natures Wicked.*

In *Plautus* (*Aulular*) when one says, *I believe this was the Will of the Gods, for otherwise I am certain it could never have come to pass. Another answers him merrily, And, I for my part believe, 'tis the Will of the Gods, that I should take you and hang you up for a Rascal.*

(1) All the *Metaphysicians.* (2) See *Mr. Lock's Definition of Good and Evil, Human Underst. l. 2. c. 10.*

(d) *Add. D. Cumberland. de L. N. c. 3. where he refutes Hobbs's Notions of Good, & c. 1. l. 20.*

*Moral Good* which appears in Human Actions, it shall be discuss'd by and by in its proper place.

From the foregoing Observations this manifestly appears to be the Nature of the *Will*, that it is always desirous of Good in general, and always averse to Evil in general. For it implies an open Contradiction, not to incline towards that which seems agreeable, and to incline to that which seems disagreeable to us. And therefore in this general Inclination of the Will, there can be no Indifference admitted, as if it could (with the Appetite of simple Approbation) sometimes desire Good and sometimes Evil. But they are the particular Goods and Evils, which give room for the Indifference of the Wills of particular Men, who at different times, and upon different Occasions, are very various in their Scents and Pursuits. And there is this evident reason why it should be so, because there are scarce any Goods or Evils which appear to a Man in their native Colours, and without suffering any Mixtures, but commonly they are blended and shuffled together; Good is adulterated with Evil, and Evil is sweetned with Good; to which if we add the strange Inclination which we find to some Things in particular Persons, and how all Men have not the Happiness, to distinguish solid and durable Enjoyments, from those which are only painted and transitory; we shall see how there must needs arise hence an infinite Variety in the Wills and Inclinations of Men; and how all pursue what they think their own Good, but in different Paths and by different Means. Besides, many Men do not know what Things are good for them, and therefore do not desire them; many more prefer the fair Face and Semblance of Evil to Real and Substantial Good, and so reject what they ought to desire, and desire what they ought to reject. To which purpose *Aristotle* well observes (a), That to be desirable by the Will, simply and properly speaking, which is truly Good, but that to be desirable by every particular Man which he imagines so (b).

Thus then in almost every Thing and every Action many Species of Good and Evil, both Real and Apparent, crowd themselves into our Thoughts, and when these have for some time variously agitated the Mind, and driven it one while to favour one, and one while another,

at last the Will by an intrinsic Force determines it self to the embracing of one Object, and discarding the rest. And an Action perform'd in this manner, is call'd Spontaneous or Voluntary, which *Aristotle* thus defines (c); That is to be esteemed Spontaneous, the Principle of which is in the Person acting, who likewise understands the Particulars in which the Action consists. *Eustrathius* comments on this place to this purpose; Both these Conditions are necessary to the constituting a Spontaneous Action, that the Principle be in the Actor, and that the Actor know the Particulars. For he that acts out of Ignorance, has the Principle of acting in himself, and he that knows the Particulars, may yet act by the Compulsion of others; and therefore neither of these Conditions by it self can make a Thing properly Voluntary.

V. But it does not always fall out that the Mind shall maintain a kind of *Aequilibrium*, and apply it self to acting or not acting, without any considerable Advantage on one side more than on the other. But for different Reasons, and by different Causes, it frequently bends with great Violence one way; and sometimes External Violence bears so hard upon it, as to take away its Strength and to disable its Powers. As the Mariner does not always cut the Sea with an even and prosperous Gale, but sometimes oppos'd by furious Winds, he hardly holds the Helm, and sometimes being violently shaken out of his Seat and his Command, he is oblig'd to commit his Vessel to the Rage of the Tempest.

Among the Things then which are forcible in drawing the Will to one side, are the peculiar Genius's and Dispositions of Men, by which many Persons are render'd extremely Inclinable to some kind of Actions. These Dispositions arise in a great measure, from the Nature of the Climate and of the Soil (d), from the Temperature of Humours in Men's Bodies, (occasion'd by the Food, the Age, the Diet, the Health, the Studies and Pursuits of particular Persons) from the Conformation of those Organs, which the Soul employs in performing its Duties, and from the like Causes (e). Concerning all which it must be in general asserted, That none of them, as they belong to the Production of a Moral Action, are of so great Force and Vehemence, as to render it impossible for the Will to take the contrary side (f). And tho' as to some par-

(a) *Ethic.* 1. 3. c. 6. (b) *Gunter Liguria.* 1. 3.

Tantum falsa loquendo  
Fallere nemo potest: veri sub imagine falsum  
Influit, & furtim deceptus occupat aures.

(c) *Ethic.* 1. 3. c. 3. (d) *Lucan.* 1. 8.

When Falshood bare and undisguis'd appears,  
It never can deceive: but Falshood wears  
The Garb of Truth, and cheats the heedless Ears.

Emollit gentes clementia celi.  
The Heavens sweet Clemency  
Softens the Tempers of the Men.

*Herodot. Calliop.* It is the settled Appointment of Nature, that soft Soils should breed soft Men; and that the same Land should never be famous for the Excellency of the Fruits, and for the Vigor of the Inhabitants.

Add. *Charon de la Sageffe.* 1. 1. c. 42. (e) Add. *Hobbes de Homine.* c. 13. & *Bacon de Augment. Scient.* 1. 4. c. 1.

(f) *Horat. L. 1. Epist.* 1.

Nemo adeo feras est, ut non mitescere possit,  
Si modo cultura patientem commodet aurem.

The fiercest Soul to Temper may be brought,  
If calm to Rules and patient to be taught.

It is my Opinion (says *Socrates* in *Xenoph. Apomnen.* 1.) that, whatever is Good and Honest, Men by Exercise and Application may attain.

ticular Impulses arising from the difference of Constitutions, the Will sometimes seems unable to hinder their Existence, or their breaking out into Action, yet it may provide so far, as to see they shall break out without Sin. Thus if a Man be so far vanquish'd by the warm Motions of Love, as to raise his Passion above Restraint, a Power is still left him of satisfying his Desires, in an innocent and a lawful manner (a). And thus *Plato* (b) disputes, 'That however the most Unnatural of Lusts had prevail'd in a Grecian State, that they might yet be suppress'd, by the Laws, if rightly fram'd and apply'd. By the same Rule we must judge of what *Horace* and others have deliver'd concerning the different Manners and Inclinations of the several Ages of Life. Thus, for Example, if old Men are violently inclin'd to Covetousness, yet 'tis in their Power to pursue Wealth without injuring others, and without usurping the proper Goods and Possessions of their Neighbours (c).

VI. Another thing that inclines the Will vehemently to some particular Actions, is the frequent Repetition and Custom of those Actions, whence it comes to pass that they are undertaken very Freely and with great Dispatch, and that when the desired Object presents it self, the Mind seems by a kind of Magnetism to be drawn towards it. And these Inclinations being joyn'd with an exceeding Desire and Dexterity of acting, pass commonly under the Name of *Habits*, which as they are concern'd about Moral Actions, either Good or Evil, are call'd either Vertues or Vices. There's no reason why we should tire our selves in reckoning up these according to their full tale and number, since most Authors, who have hitherto profess'dly treated of Moral Philosophy, have fancied the main part of their Business and of their Science discharg'd, by explaining only the Eleven Words that stand for so many Vertues. It will suffice to observe in general, that those Dispositions of the Mind are Vertues, by which a Man is inclin'd to Actions making for the Preservation of himself, and of Human Society; and that those on the contrary are Vices, which addict us to Actions Destructive of our selves, and of the Community to which we belong. And here Mr. *Hobbs* must fall under Censure for that Assertion in his Book *De Homine*, c. 13. §. 9. where he declares, *That, except in Civil Life, there can be no common Measure found out applicable to Vertues and Vices, and that consequently in a State of Nature there can be no such Measure Establish'd, by which, as by a Standard, those things which we call Vertues and Vices may be settled and determin'd.* For the Definition which we but now set down, will reach even to a Natural State: and whatever things are enjoyn'd as Vertues in Civil Communities, ought to agree to that Definition;

and if any things should be ordain'd contrary to it, they ought to be reckon'd Absurd and Unreasonable Commands.

The Diversity which appears in the Laws of several different Communities, does not hinder, but that there may be some Universal and Uniform Definition of the Vertues. For this Diversity either is concern'd about such things as are plac'd without the Sphere of Natural Laws, or it arises from hence, that what is really a Precept of the Law of Nature, is in one place invest'd with the farther Force of a Civil Law, and in other places not; or lastly, it is an Evidence that some Legislators, in framing their Edicts, were not befriended by good Reason. Of which we shall have more to say by and by (1).

Farther, tho' Vices and ill Manners confirm'd by long Use and Habit, seem to pass into a kind of second Nature, so as not to be without great Difficulty resist'd (d), yet Actions proceeding from them ought nevertheless to be reputed Voluntary. And altho' Actions which precede any Habit, and by which it is introduc'd, are undertaken with a fuller Intention, and with a more urgent Endeavour, than those which are perform'd after the Habit has been contracted, when as it were without staying for the Command of the Will, the other Faculties rush swiftly upon the Object; yet neither the Goodness nor Pravity of the Actions seem upon this account to be at all diminish'd. For 'twould be a thing of very ill consequence, if a Good Action were therefore to be reckon'd less Good, because it has been often repeated, or if a Man were to be esteem'd less a Sinner, because he had frequently sinn'd. Especially, since if every Man is the cause of his own obtaining a Habit, or of his acting so suddenly and expeditiously. *Aristotle* has an Observation very close to this purpose in his *Ethicks to Nicom. Lib. III. cap. 5. Actions and Habits* (says he) *are not spontaneous in the same manner; for as to our Actions we are Masters of them from the beginning to the end, because we understand all the Circumstances that belong to them: but of Habits the beginning only is properly in our power, continual additions being beyond our knowledge or prevention, just as it happens in the increase of Distempers. But because we had originally the power of doing so or otherwise, therefore the Habits likewise are to be construed as spontaneous, upon account of the Principle whence they spring.* On which place *Eustrathius* thus descants; *We have a command only over the Beginnings of Habits, not over their Encrease or their End. For the Progress and Improvement of them is unperceiv'd and unregarded, while they rise and advance by silent degrees; whence it happens, that some Men run deeper now and then into Wickedness and Vice than they intended: This may be seen particularly in Drunkenness and Uncleaness, in*

(a) See 1 Corinth. VII. 2. (b) De LL. 1. 12. (c) Add. *Huart. Scrutin. Ingen. c. 5.* (1) See Book VIII. c. 1. (d) *Calpurn. Flacc. Declam. 2. When Modesty hath once lost its influence, no Ruine, no Horror appears deform'd to Minds bent upon Wickedness.* Add *Bacon's Essays, 37.*

which Men sometimes going on freely and heedlessly, as if it were left to our pleasure whether we should get a Habit or no, by a continuance of bad Practice, contract a Habit before they are aware. Nor is it in Vices only that the Additions and Augmentations are undiscover'd, but in Vertues likewise the Advances are made by such secret steps, that a Man may sooner observe his own Proficiency, than he can know how he came by it.

VII. Those Motions of the Mind which they call Passions or Affections, chiefly excited by the Appearances of Good and Evil, have likewise a great force in driving the Will violently to some certain Actions, besides their ill Influence on the Judgment, which they frequently cloud and obscure (a). How many these are, by what means they are either rais'd or allay'd, and what use and service they have in Life, is most excellently shown by *Des Cartes* and his follower *Le Grand*; to whom may be joyn'd Mr. *Hobbs* (b). It is enough to our design, if we only remark, that however violent the Affections may prove they can never quite extinguish the force of our Will. But that Men of the weakest Souls may obtain an absolute Command over their Passions, if they use a sufficient diligence, in managing and in directing them, as *Des Cartes* has prov'd (c). *Ovid's Medea* put a Cheat upon herself, when she said,

*Sed trahit invitam nova mens,*

especially since she acknowledges that the Judgment of Reason oppos'd her Passion.

— aliudque cupido  
Mens aliud suadet, video meliora proboque  
Deteriora sequor.—

The Observation of *Grotius* on *Matthew V. v. 22.* is very applicable to our present purpose. He considers three distinct things in Anger, the πᾶθος or Affection, the ὄρμη or Impetus, and the συγκατάθεσις or Consent. The πᾶθος or Faculty, enabling us to be angry, being implanted in us by Nature, cannot be extirpated; but it should be rank'd among those indifferent things which we may make either a good or a bad use of. But because that part of the Mind where the πάθος or Passions are seated, is in it self irrational, hence it comes to pass, that without expecting the Judgment of Reason, the ὄρμη or sudden Sallies, exert their force; and unless these are diligently kept under, the συγκατάθεσις or Consent certainly follows, when the Power of the Soul, which was constituted for the governing and restraining of the Affections, idly lets go the Reins, and permits it self to be dragg'd by those it ought to guide.

This συγκατάθεσις then, or Consent, he declares to be Voluntary, and to be perform'd at the free Pleasure of Man: But he tells us farther, that from diligent attention and exercise, but more especially from the *Holy Spirit of God*, sufficient Assistance may be obtain'd even against these first Motions, (which the Philosophers compare to the twinkling of the Eyes,) so as to hinder them from any long continuance, or any forcible sway (d).

Besides, that Man is arm'd by Nature with some peculiar Instruments for moderating the Passions, and that he is engag'd by a stricter Necessity to restrain them, in as much as he incurs a far greater harm to his Health and Life from their Violence and Rebellion, than any other Animals do, has been fully made out by Dr. *Cumberland* (e). To conclude this Point, since some of the Passions are excited by the Appearance of Good, others by the Appearance of Evil, and accordingly spur us on toward procuring the one, and avoiding the other: this difference is observable between them, that the former kind afford very little or no excuse, if any thing be done otherwise than it ought to be, by their Instigation; but the latter deserve the greater degree of favour and pardon, according as the threatening Evil which excited them, was more ungrateful to Human Nature. For 'tis much easier to want a Good, not necessary to the preservation of Nature, than to admit an Evil tending to the destruction of our Nature: whatever *Aristotle* (f) has affirm'd to the contrary in that Maxim of his, καλεπώτερον ἢδὲν ἢ μάχεσθαι ἢ θυμῷ, (1) *It's harder to resist Pleasure than Anger.* When a Man has done an ill action out of obedience to an itching Lust, he is suppos'd for the sake of the present Pleasure, voluntarily to run the hazard of bearing whatsoever Evil may thence ensue: and therefore when he has already had the Enjoyment, which he thought equivalent to the Evil that might arise from it, he cannot upon any pretence plead for mitigation of that Evil. But he that has done amiss upon the fear of an impending Evil, has all the Infirmary of Human Nature apologizing and interceding in his behalf, since the only cause of his Miscarriage was his being willing to admit what he imagin'd to be the least of the Evils likely to befall him. But of those Cases, we shall hereafter have a larger field to consider and determine (2).

VIII. Lastly, The Vice of *Drunkenness* is a great inciter of the Will to some particular kinds of Actions; and this is procur'd either by Drink, or by some other sorts of Fumes, or by Opium, a thing of so universal use in the Eastern World, the effect of which is, that it disturbs and drives along the Spirits of the

(a) *Pindar. Olymp. 7. A troubled Mind betrays into Mistake the wisest Heads.* (b) *Cartes de Passion. Le Grand. Inst. Phil. Cartes p. 7. c. 9. Leviath. c. 6. & de Homine, c. 12.* (c) *Di&. loc. Art. 5. Cicero Tusc. Quest. 1. 3. All Disorders and Disturbances of Mind arise from the scorn and the neglect of Reason.* (d) *Add. Senec. de Ira. II. 4.* (e) *De L. N. c. 2. f. 26, 27.* (f) *Eth. II. 2.*

(1) *Aristotle* contradicts this Saying, *Eth. 1.3. c. 12. Καλεπώτερον γὰρ τὰ λυπηρὰ ὑπομένειν, ἢ εἶναι ἠδὲων ἀπὸ χεῖρας.*

(2) See Book VIII, chap. 3, f. 19.

Blood with a most violent Motion, and by these means renders Men extremely prone to Lust in the first place (a), and not much less to Anger and Rashness: upon which account *Lycurgus* us'd to call Wine, an Evil Potion, (or a Magick Draught) because it chang'd and turn'd Men's Minds (b). And for the same reason the *Cretans*, receiv'd this among other Laws, of their famous *Minos*, *Μὴ συμπνεον ἀλλήλοις εἰς μέθην* (c), *Not to drink with one another so far as to disorder and excess*. Among the *Indians* Drunkenness lyes under the heaviest Censure, being rank'd in the number of their five most heinous Sins, which are said to be these; *To lye with ones Mother*, which takes in both a Mother-in-Law, and the Wife of a Master or Teacher. 2. *To kill a Brachman*. 3. *To steal Gold*. 4. *To be Drunk*. 5. *To converse and keep company with Persons guilty of any of these Crimes* (d). *Mabomet* too, under the Notion of Religion, found means to prohibit his People the use of Wine, tho' they were naturally more addicted to it than most other Nations.

Whosoever is voluntarily guilty of this Vice, since he knew, or at least might presume what effects would follow it, can with no more reason desire to be freed from the Imputation of Faults committed under its guidance, than he can with a good grace complain of a Shower of Rain falling into his House, when he himself, out of a petulant humour, has been pulling off the Roof. *Plautus* (e) has a merry Jest to this purpose; *Wine* (says he) *would be too cheap at the price it now brings, if a drunken Man might do whatever he pleas'd, without being call'd to an account*.

Yet in Indifferent Actions which are left to every Man's Pleasure to perform or omit, Drunkenness is allow'd this favour, that the Effect which would have follow'd any such Action, had it been deliberately perform'd, shall now be utterly invalid, since the over-

taken Person acted with much disadvantage.

And, those Causes which we have hitherto reckon'd up, are the most considerable among such as impose a kind of Physical Biass and Tendency on the Will. That which Morally inclines it most, or at least *ought to incline it*, is *Obligation*: And yet this, how great soever, neither takes away the Wills intrinsic Liberty, nor renders the Action involuntary, tho' the Lusts and Passions may strive vehemently to oppose it. Hither may be referr'd that Sentence of *Aristotle* (f), *ἀπορον τὰ ἀκήσια φάναι ὄν δὲ ὀρέγεσθαι*, *'Tis absurd to call these things Involuntary, which we ought to desire and to pursue*.

We say, Obligations ought to incline the Will; For such is the perverse disposition of Human Minds, that frequently the very forbidding of a thing, raises a desire of doing or of enjoying it (g): Which unhappiness, if we consider its closer and nearer Causes, may be referr'd, partly to the vicious Curiosity of Mortals, who admire every thing that they are strangers to, (which opinion is strongly confirm'd by the harshness of the Edict, and by the care and trouble of Obedience;) and partly to the Hatred and Obstinacy which we bear towards the Forbidder, whence we disdain that our Liberty should be abridg'd by a Person who looks so ill in our esteem; whereas on the contrary, it's the Nature of Love to make us willing to comply with the Commands and Desires of the Party we affect.

IX. It is farther observable, That sometimes upon the approach of extraordinary Dangers, and such as are suppos'd to exceed the common strength and firmness of Human Minds, the Will is so vehemently urg'd and press'd, that it gives consent to somewhat, which had it been free from that necessity, it would have utterly abhorrd. Actions of this

(a) Propert. l. 4.

———— *Potæ non satis unus erit.*  
 ————— Her Sparks she doubles in her Drink.

(b) Hygin. Jub. 132. *Isocrat. ad Demonic. The Mind, when debauch'd with Liquor, is in the same condition as a Chariot that has lost its Driver; the latter is not more fatally hurried into danger, than the former into sin.* (c) *Plato, Minoe. Add. Plin. L. 14. c. 22. Aristoph. Vesp. Drunkenness is all Mischief and all Terrour: It tears down Gates and Doors, and defies Opposition. And then you pay for it doubly the next Morning, in your Pocket and in your Head.*

(d) *Manil. Astron. l. 5.*

*Ardescit vitio vitium, viresque ministrat  
 Bacchus, & in flamma sævas exsuscitat iras.*

One Vice adds fewel to another's fire,  
 And Bacchus makes their Fury blaze the higher.

Mr. Creech.

(e) *Aulular.* (f) *Ethic. III.*

(g) *Ovid. Amor. III. 4.*  
*Nitimur in vetitum semper, cupimusque negatum.*

*Quicquid servatur, cupimus magis; ipsaque furem  
 Cura vocat.*

———— *Juvat inconcessa voluptas.  
 Cui peccare licet peccat minus: Ipsa potestas  
 Semina nequitie languidiora facit.*

We court the more what Men the less will grant;  
 Warm when Deni'd, and fiercer by Restraint.  
 What's closely kept improves in our Belief:  
 To hoard the Gold is to invite the Thief.  
 Forbidden Pleasures have a quicker Taste.  
 They that have freedom use it least; and so  
 The power of ill doth the design o'rethrow.

Sir Charles Sidley.

kind have the name of *Mixt*, being partly voluntary and partly involuntary. Thus far they are to be esteem'd Voluntary, in as much as their Principle is in the Agent, who is acquainted with the Nature and Circumstances of the Thing he is going about: and in as much as the Will for the present Time and Necessity, inclines toward them as toward a lesser Evil, or toward one part of an Evil, when otherwise a greater or an entire Evil must be undergone: And this lesser or partial Evil turns into a kind of Good, when both it and the Evil compar'd with it, cannot be both avoided together. 'Tis a known Maxim, that of *Aristotle* (a), *A less Evil compar'd with a greater, obtains the place and character of Good.*

But the same Actions are likewise in some degree Involuntary, because the *Will* seems to be driven on them contrary to its Inclinations, and would never undertake them, if the impending Evil were by any other means possibly to be escap'd. For which reason they have this Quality in common with Involuntary Actions, that the Moral Effects and Consequences attending Actions meerly Voluntary do in these, in a great measure, if not totally, fail. For tho' sometimes a Man may have so straight an Obligation laid upon him, that even upon the Threats and Apprehensions of Death, the most terrible of Natural Evils, he ought not to recede from it; yet where this do's not expressly appear, it is not easily presum'd and suppos'd, as being too sharp and rigorous for the Condition of Humanity: and where there is no such severe Obligation impos'd, it would be downright Folly, not to come off as cheaply as we can, and not to suffer as small a share of Evil as we may compound for. And therefore many things, which would have deserv'd reprehension, had they been undertaken without such a necessity, when they are done under the urgency of so hard a case, are commended by all fair and equitable Judges; other things are for the same reason, either entirely, or for the most part excus'd, and in others the Odium and Fault of the Action is devolv'd upon another Person, the Man who perform'd the Deed being declar'd Innocent. *Aristotle* (b) discourses well on this point, *For these kind of Actions, (says he) Men are sometimes commended, when for the sake of great and honest things, they have sustain'd some Indecency or Harshness. To some things, tho' we allow no praise, yet we grant a pardon, when a Man has done what he ought not, upon the fear of Evils exceeding Human Nature, and not tolerable by Mortal strength. And there*

*are some things perhaps, which no Man can be forc'd or compell'd to commit, but ought rather to endure the utmost Extremities, and Death it self (c).*

X. Lastly, Since to make an Action voluntary, there is requir'd not only that the Principle of Motion be in the Agent, or that the Agent address himself to work by the Impulse of his own Will, but likewise that he knows what he is doing, upon the want of both or of either of these Conditions, the Action is rendred Involuntary (d). Now a Man is properly said to be *compell'd*, when by the force of a stronger Extrinsic Power, he is brought to apply his Limbs otherwise than he would, so as to express his Aversion and Dissent by manifest Signs, and especially by Corporal Resistance and Reluctancy. *As if (to use Aristotle's Examples) the Wind, or Men superiour to us in power, should violently carry us any where against our Consent.* *Tully* in his Second Book of *Invention*, gives an Instance after this manner; The *Rhodians* had a Law, that whatever *beak'd* Vessel should at any time be found in their Harbor, it should be condemn'd as Prize, and expos'd publickly to Sale; Now the Question is, Whether a Vessel of this kind, being driven into their Port by a Tempest, ought nevertheless to suffer the common Penalty? 'Twas upon this Topick, that the Friends of the ravish'd *Lucretia* (e) comforted her under her deep Affliction, by turning all the Guilt on the vile Author of the Crime, telling her, *That the Mind only properly sinn'd and not the Body; and that there could be no fault where there was no deliberation or design.*

This Reluctancy in Civil Courts is presum'd to have been us'd, in such Actions or Passions, as are not vulgarly thought to be willingly perform'd or undergone, and where all Signs of an Actual Consent are wanting; whence arose the term of *Interpretative Reluctancy*.

Thus whereas by the *Jewish* Law a Virgin is suppos'd to have suffer'd Ravishment, if she lost her Honour in the Field, without Witnesses; yet *Philo* the Jew (f) denies the favour of this Law to reach a Maid, who admitted a Debauch willingly, tho' in a Solitude: as neither can the same Law hurt a Maid in the City, who in the like Danger either could not cry out, or cried to no purpose, and without relief.

A *forc'd* thing may be so either *in it self*, and *not in its causes*, or else both in it self, and in its cause. The first is, when a Person remains in such a state at present, as to be un-

(a) *Ethic. L. V. c. 7. Quintil. Instit. VII. c. 4. In comparing Evils, that which appears lightest, must pass for Good. Aristot. Ethic. III. 1. Simply and absolutely speaking, no Man in his Wits, willingly throws away his own Goods, but for the Security or Preservation of himself and others. Such Actions then are to be accounted Mixt, tho' they approach nearer to involuntary than to involuntary. (b) Ethic. III. 1. (c) Add. *Eufrath. ad. loc.* But I question whether it were proper, (especially for a Christian Bishop,) to give this Example of a mixt Action, *Familiarity with another Man's Wife, though in it self foul and sinful, yet ceaseth to be so, if undertaken on the account of killing a Tyrant.* (d) *Aristot. Ethic. III. 1. Those things seem to be Involuntary, which are done either upon Force, or upon Ignorance. An Action cannot be said to have been perform'd involuntarily out of Ignorance, unless it be followed with Sorrow and Repentance.* (e) *Li. Lib. I. c. 58.* (f) *De Legib. Special.**

able to repel the offer'd violence, and yet was in a fault for getting into such a state. Of this kind was the Rape of *Dinah*, *Jacob's* Daughter (a); for the Virgin ought not to have wander'd among Strangers. The latter is, when the Person has, not by his own fault, been brought into those straits, which now occasion the compulsion of him to any Fact. By the not

(a) *Genes.* XXXIV.

being his own fault, we mean, if he has done nothing but according to the Laws of Prudence and of his Duty. For if a Man performs the Office enjoyn'd him, or us'd his Right any other way, and acts not rashly or inconsiderately, whatever violence over-powers him, he will have no Guilt imputed to him, and no Sin to answer for.

## CHAP. V.

### Of MORAL ACTIONS in General, and of their Application to the Agent, or their Aptness to be Imputed.

HAVING in Pursuance of our Design examin'd and explain'd the Will and the Understanding, as the Principles whence Human Actions obtain the Privilege of being rank'd in a different Class from the Operations of Brutes, the next thing which we are concern'd for, is the general Disquisition of Moral Actions, since in discovering their Rectitude, or Pravity, the Science we are now engag'd in is chiefly employ'd. Moral Actions then, are the *Voluntary Deeds of Men consider'd in Common Life, as they include the Imputation of their Consequences and Effects*. We call those Voluntary Deeds, which in such a manner depend on Human Will as on a free Cause, that without its Determination, (proceeding from its Internal Acts drawn forth by the previous Knowledge of the Understanding) they would never have been perform'd; and which therefore, as to their being done or not done, must be refer'd to the Power of Man. And these Actions are here consider'd, not as they are bare Motions produc'd by some Power according to the Natural Constitution of Things, but as they proceed from the Determination of the Will; a Faculty dispos'd to embrace either part of two Contradictory Choices. For a Voluntary Action contains something *Material* and something *Formal*; the first is nothing else but the Motion of a Power existing by Nature, or its Exercise consider'd barely by it self; the other is the Dependence of that Motion or Exercise on the Determination of the Will, as on a Cause that is truly Free and Acts by its own Resolution. The Exercise consider'd separately and by it self, is for Distinction's sake rather call'd an *Action of the Will*, or of the *Willing Power* in a Man, than a *Voluntary Action*.

We may farther consider the *Action of the Will*, either in it self and *absolutely*, as it is a Physical Motion, undertaken upon the previous Injunction of the Will, or else *reflexively*, as the Effects of it may be *imputed* to the Actor. Now *Voluntary Actions*, as they comprehend this Reflexion, are, by a special Ap-

probation of the word, call'd *Human Actions*. And because from these Actions, as they are perform'd *well* or *ill*, as they are agreeable or repugnant to their Rule, the Law, one is said to be a *good* or an *ill Moral Man*, (the Inclinations of the Mind resulting from frequency of acting, being likewise term'd *Morals*;) hence it comes to pass that *Moral Actions* seem only another Name for *Human*.

II. The Essence of Moral Actions, according to the last way of considering them, may be divided into two Parts or Notions, a *Material* and a *Formal*. The Material Part, or the Matter of a Moral Action is of a very wide Extent: Such may be first any Physical Motion, whether it be of the Locomotive Faculty, or of the Sensitive Appetite, or of the External, or of the Internal Senses, or of the Understanding, so far as concerns the Exercise of Apprehension. For the Act of Judgment depends so much on the Quality which appears in the Object, that it is not Capable of the Direction of the Will, tho' in forming of that Judgment, our Free-will and our Industry are allow'd some Influence and Power: The Act of the Will it self may likewise be the Matter of a Moral Deed, if we consider it in its Natural Condition, or as it is precisely taken, for an Effect produc'd by a *Physical Power, as such*. So likewise may be the Privation of any *Physical Motion*, which a Man might have produc'd either in it self, or in its Cause: For a Man may render himself Obnoxious to Punishment, as well by Omissions as by Commissions. As also the Inclinations of the Natural Powers toward certain Objects (acquir'd by the Voluntary Actions that have already pass'd,) at least so far as they are Spurs and Incentives to Acting. Nor are my own Motions and Habits, or the Privations of either, alone the Material Parts of my Moral Actions, but the same Motions and Habits or Privations proceeding immediately from others, provided they could or ought to have been directed by my Will. Thus the *Spartan Inamorato's* were to suffer for the Faults committed by their

Minions (a). Nay, the Operations of Brutes, of Vegetables, and of Inanimate Things, may furnish out the *Matter* of my Moral Actions, when my Will should have guided their Proceedings. Thus even in the Law of God, a Mischief done by a Goring Ox is imputed to the Owner, in case he know before-hand that his Beast was faulty this way (b). Thus a Vine-dresser is Responsible, if through his Negligence the Vine has spent all its Fruitful Strength and Vigour, in sending out numerous and unnecessary Suckers. Thus the Damages by Fire are Repairable by the Persons who occasion'd it; and Wafts caus'd by the breaking in of the Sea, or of Rivers, are to be made good by him who has either broke down, or neglected to keep up the Banks. *Quintilian* (c) has propos'd two Declamation Lemma's much to our present purpose. *A Piper had plaid a Phrygian Air to a Man who was offering Sacrifice, the Man running Mad, and throwing himself down a Precipice, the Piper is accus'd as the Person who had caus'd his Death.* *A Club of Young Persons, who had frequent Meetings and Entertainments, one Day made an Agreement to Sup together by the Sea-side. One of the Society being absent, the others wrote his Name upon the Stone Table which they had reared: The Young Man's Father at his Return from a long Voyage, landing in this place, and reading the Inscription on the Stone, took it for his Son's Monument, and hang'd himself for Grief. The Company is hereupon impeach'd as Accessory to his Death.* Lastly, the Admissions or Receptions of another Man's Deeds, as far as my Default contributed to their Production, may be the *Matter* of my own Moral Actions. Thus a Rape is partly imputed to the Woman, if it appear that she rashly ventur'd into such a place, where she might have expected to meet with such violent Treatment.

III. The Formality of a Moral Action consists in the *Imputativeness* of it, if we may so speak, by which the Effect of a Voluntary Action may be imputed to the Agent, or esteem'd as something properly belonging to him, whether he himself Physically produc'd that Effect, or whether he caus'd it to be produc'd by others. And from this Formality of the Action, the Agent likewise has a Share in the Denomination of Morality, being call'd a Moral Cause. Whence we may easily understand, that the *ratio formalis* of a Moral Cause, in Strictness and Propriety of Speech, consists in Imputation consider'd with Reference to the Person in whom it terminates, and that therefore such a Cause can be nothing else but a Vo-

luntary Agent to whom the Effect is, or must be imputed, upon account of his being either wholly or partly the Author of it; and that therefore whether it be Good or Evil, both are to be reckon'd as owing to him, and he is liable to give an Account for both. Thus one Man is the Moral Cause of Hurt in another Man, whether he has made his Head swell by Blows of the Fist, or whether he has broke it with a Club, or whether he has set Dogs or Murderers upon him. Thus *Anah* was the Moral Cause of Mules, he being recorded in *Genesis* (d), to have first found them out, or to have joyn'd the Mares and the Asses together for their Production. So *Jacob* was the Moral Cause of the different Colours in *Laban's* Sheep. Yet it does not always happen that a Man who has barely given Occasion to the Fact of another Man, should be reputed the Moral Cause of that Fact: and therefore the Sentence pronounc'd by *Piso* which *Seneca* speaks of, was extream Foolish as well as Cruel, when ordering a Soldier to be led to Execution upon Suspicion of whose Murder another Soldier had before suffer'd Death, he gave his Reason in these words, *I order you to be executed for being the Cause of the Condemnation of your Fellow Soldier.* There seems no great Necessity that we should here, with the Author of the Treatise *De Principiis Justitiae & Decori* (1), distinguish between a Moral Cause by it self, and a Moral Cause by Accident. For a Cause by Accident is a Term of vast Obscurity, and very likely to create and encourage vain Disputes: and besides, if we cannot rightly impute the Effect of an Action to a Man, we cannot upon any Account, call him a Moral Cause by Accident, tho' he contributed never so much to the Material Part of the Action. Yet thus far we must plainly acknowledge, that in weighing and rating the Greatness of the Imputation, it is a very Important Query, whether the Action proceeded from such a Person as the Principal, or as the Accessory: as likewise whether the Agent directly intended such an Effect, or whether it proceeded from his Inadvertency, or any other Concomitant Reason. For if the last of these Cases appear true, the Consequence will be, that the Action shall not be imputed to the Person, as if committed against the Laws of Justice, but against those of Prudence or Foresight, and that therefore he shall not be reckon'd to have acted wickedly, but only rashly or unadvisedly. It will not be amiss to examine more closely what the above-mentioned Author lays down in the same place.

(a) *Ælian*. V. H. l. 3. c. 10. (b) *Add.* l. 1. f. 1, 2, 3. *D. si quadrup.* l. 11. f. 5. *D. ad L. Aquil.* *Lex. Wisigoth.* l. 8. tit. 4. c. 16. *V. Exod.* XXI. 29. (c) *Inst. Orat.* l. 1. c. 10. & l. 7. c. 3.

(d) *Ch. XXX.* v. 37. And thus *Lysius* (*Orat. contra Aporat*) pleading against an Informer, upon whose Accusations many Persons had been Executed, calls him *the manifest Cause of their Death.*

*Ovid. Heroid. Epist.* 12.

*Phyllida Demophoon leto dedit, hospes amantem;*

*Ille necis causam præbuit, ipsa manum.*

Poor *Phyllis* dy'd by him she lov'd oppress'd;  
The truest Mistress by the falsest Guest.

(1) *Velthuyzen*, P. 161.

He was the cruel Cause of all her Woe;  
But her own Hand perform'd the fatal Blow.

*Mr. Poley.*  
First

First therefore he establishes this as a Maxim, *Whatever is Evil in its own Nature, so that it can never be chang'd into Good, yet may by Accident follow upon the Exercise, or upon the Defence of my Right, without my incurring the Guilt of Sin, and therefore I am not oblig'd to decline the use of my just Right in such Cases.* Grotius likewise proposes a Rule much to the same purpose in his Third Book (a), but Judiciously tempers it with a good Restriction. But our Author proceeds: *A Sin is said to follow by Accident upon another free Act, when upon the use of a thing, to which I have a Right, some Effect follows, which I have otherwise no Right to produce.* For an Instance of this Case may be alledg'd what Divines call Scandal or Offence taken; concerning which they tell us, That a Man ought not to omit an honest, a pious, or a due Act, though a wicked Person should take never so much Offence at it; and this Rule they confirm by the Authority of our Saviour. But now this very Example might have taught our Author to lay aside his Term of *Causa per Accidens*; since even in that restrain'd sense it would be little less than Impiety to call *Him* the Cause of Evil who is the Spring and Fountain of all Good. We ought rather to say, That a Man who exerts a Good and Necessary Action, is by no means the Cause of Sin in another Man, who shall thence take occasion of offending. Thus we commonly say, He who uses his own Right, does no Body any wrong. But he further adds, *Since every Man has a Right of Preserving his Health, it is Lawful for the Recovery of Health to make use of a Medicinal Potion, tho' upon the taking of this Potion should follow Distraction (for some little time) or Drunkenness, or (Voluntary) Pollution, or Abortion, (in Case both the Mother and the Fetus must otherwise infallibly perish) and that therefore the Person who takes the Medicine is only the Cause of such Effects by Accident.* On which Doctrine we only observe that it had been much plainer to have said, that those Effects are not to be accounted Sins in the Cases here mention'd. Neither do all the Examples brought by the same Author to illustrate the *Moral Causa per se*, or that which is truly and properly such, rightly hold. For a Criminal (as he speaks) *who is to suffer, tho' he go on to the Place of Execution, and ascend the Ladder, cannot merely upon this account be call'd the Moral Cause of his own Death, because if he had refus'd to go willingly, he had been dragg'd along by the publick Officers.* And yet there is no reason, why one Man who drinks Immoderately, or another who wasts his Strength in honest and necessary Labours, may not be reputed the Moral Cause of their own untimely Deaths; tho' the former Person sins and the latter not; and tho' neither, properly speaking, can be call'd a Murtherer. But

such a one we should rightly call the *Moral Cause* of his own Death, who is therefore condemn'd, because he would not declare such Matters as might demonstrate his Innocency.

IV. It must be farther observ'd, that this *Imputativeness* which we have made the *Formale* of a Moral Action, bears the Nature of a *positive Form*, from which as from a Spring and Root, all the Affections, Properties and Consequences of such an Action result. And therefore a Moral Action may be call'd a *Positive Being*, (at least in the Order of *Morals*, if not always in the Order of *Naturals*) whether the Matter of it be a Physical Motion, or the Privation of a Physical Motion. For to constitute a Positive Being in Morality, 'tis sufficient that we conceive something in it, from which there arise true Affections of the same kind; since, as a *Nou Ens* can have no Affections, so whatever has certain and positive Affections cannot upon any account be stil'd a meer *Nou Ens*.

V. Now that a Moral Action should belong or should be *imputed* to any Man, (in which we have asserted the *ratio formalis* of it to consist,) there can be no other Reason or Cause; but that the Man had Power and Ability to do it, or not to do it; to perform or omit it. And this is so manifest a Truth, That the most ignorant and unskilful Mortals, when they are accus'd of any Omission, or of any Fact, think they cannot bring a fairer Excuse, than to say in the first Case *that they could not do it*, and in the other, *that they could not help it*. So that it is to be establish'd as a prime Maxim in Morals, That a Man is Accountable for those Actions, the Performance or the Forbearance of which were both in his Power: Or (what comes to the same thing,) that every Action dirigible by a Moral Rule which a Man is able to do, or not to do, may be imputed to him: And on the contrary, that whatever neither in it self, nor in its Cause, was in a Man's Power and Disposal, cannot be imputed to him, or affect him in the manner of a Debt (1). Nor is it any Breach of this Rule, that sometimes a Man is oblig'd to perform a Business depending on Chance, and consequently not in his Power. For this Case can never happen, unless the Man Voluntarily takes on himself such an Obligation (2). Thus much therefore is in the Man's Power, to bind himself to repair a Damage, proceeding from Causes not Capable of Human Direction. To conclude then, that an Action or Fact should be imputed it is sufficient that it was not Involuntary, according to our Discourse in the preceding Chapter (b), and that it was subject to the Guidance of our Will. But to make an Omission truly *Imputable*, 'tis Requisite that there have been both Power and Opportunity for performance,

(a) C. 1. f. 4. & c. 11. f. 9. (1) *Culpam autem nullam esse, cum id, quod ab homine præstari non potuerit, evenit.* Cicer. Tusc. Quæst. l. 3. c. 16. (2) See what is said, l. 5. c. 9. (b) Sect. 10.

which Conditions of Power and Opportunity seem to include these four Things, First, That the Object be ready at hand. Secondly, That we have a commodious place, where we may neither be hindred by others, nor suffer any Evil from them upon our Acting. Thirdly, That we have a convenient time, in which we are not call'd to the Discharge of more necessary Duties, and which is equally Seasonable for those who are to concur with us in the Action. And Lastly, that our Natural Powers administer sufficient Strength for the Business. When any one of these Conditions is wanting without the Fault of the Man, it would be most absurd and unjust to lay the Omission of any thing to his Charge (a).

VI. Thus much being premis'd in general, it will be worth our while to consider more distinctly and in particular, what Things may be imputed to a Man, which proceed from a Physical Necessity, or from any Cause placed beyond the Direction of Men. And therefore 'tis a simple Practice they tell of the Kings of *Mexico*, that at the Commencement of their Reign, they us'd to promise their Subjects, that they'd take care the Sun should rise and set at due times; that Rain should fall as often as there was Occasion; and that the Land should bring forth Fruit. Neither can it be imputed to Man, that Natural Causes produce this and no other Effect, or that they produce it in this and no other way; as for Instance, that the Fire warms and not cools us. Yet thus indeed the Effects of Natural Causes furnish large Matter for Imputation, as their active Force is drawn out, or confirm'd by Man, applying Actives to Passives, or exciting their internal Strength by proper Means. On which account a Plenty of Fruit is imputed to the Husbandman, in as much as his diligent Culture obtain'd it from the Earth: Thus the Damage of Fire is imputed to him that kindled it; and thus the varied Colour of *Laban's* Lambs, may be imputed to the Subtlety of his Shepherd *Jacob* (b). A Natural Effect may be farther imputed to a Man as he has mov'd the supream Cause and Director of all Things to determine such an Effect. Thus the *Three Years Drought* might be imputed to the Prayers of *Elias* (c). As in fabulous Story a long Drought is said to have ceas'd on the Prayers of *Aacus* (d). Thus too, the Death of the Men who fell in the Pestilence (e), might in some measure be imputed to *David*, though not to the Degree of Murther.

VII. Neither may we impute to a Man the Actions and the Effects of Vegetative Faculties which appear in his Body, as they arise from his Birth, or from other Causes beyond his Disposal. Yet thus much is in a Man's Power, to supply those Faculties with convenient or with unsuitable objects, which may either maintain and cherish, or weaken and extinguish their Force; as also to distort and abuse their proper Organs. Thus he whom Nature has given a large, a sound and an able Body, is liable to no *Imputation* of Merit on that score. But to correct a weak Constitution by Industry and Exercise, and to encrease the Natural Powers, gives just occasion for Commendation; and on the contrary, to break or destroy the same Powers by Idleness and Petulancy, turns to a just Shame and Reproach.

Hence no Man can be fairly reprehended for a weak, or a tender, or a diminutive Body; for distorted, or for maim'd Limbs, or for want of Strength, provided that none of those Infirmities were contracted by his Default. *Aristotle* talks very pertinently to this purpose (f); 'Not only Faults of the Mind (says he) are Voluntary, but those of the Body too in some Persons, whom we therefore discommend. For we do not blame those who are naturally deform'd, but those who are grown so by Neglect of Exercise, and by a Careless way of Life. And the Case is the same as to any Meanness or Unsightliness arising from Distempers, or from the maiming of any part of the Body. For Men will not reproach, but rather pity *his* Blindness, who had it from Nature, or from a Distemper, or from an honourable Wound: But he will justly fall under universal Scorn or Censure, who has lost his Eyes by Drunkenness, or by any other kind of Intemperance (g). Yet it was not without reason that among the Ancient *Gauls*, as *Strabo* relates (h), *The Young Men were Fin'd for exceeding the Measure of their Girdle*. Because they took it for granted, that such a large Paunch, at such early Years, could proceed from nothing else but Laziness and Gormandizing (i).

The same may be said of the other Faculties which Nature and not our own free Pleasure has implanted in us, as that a Man has sharp or heavy Parts, quick or dull Senses, a firm or a deceitful Memory; unless these Natural Abilities have been improv'd or impair'd by the Man himself. Hither must be referr'd that Observation of *Aristotle* in his

(a) Cicero de Invent. l. 1. Occasion or Opportunity is a part of Time implying a Convenience of doing a Thing, or not doing it. Add Cartes de Passion. Art. 144, 145, 146. (b) Gen. XXX. 37. (c) 1 Kings XVII. 1. James V. 17. (d) Apollodon. l. 3. (e) 2 Sam. XXIV. 13, 17. (f) Ethic. III. 7.

(g) Plutarch de Audiend. Poet. Ulysses doth not upbraid Theristes with his Lameness, his Baldness, or his Crook-back, but with his Scurrility and Impudence. Thus the wise Poet gently derides those who are ashamed of Lameness, Blindness, or the like Defects; it being his Judgment, that nothing can be Blame-worthy which is not Vicious, and nothing Vicious the Cause of which is in Fortune, not in our selves. As those who brush or strike our Cloaths, touch not our Body, so those who censure others for their Imperfections of Birth or of Fortune, vainly and foolishly strike the outward Parts, but never reach the Soul, nor those Blemishes which really deserve Reprehension and Correction. Ibid. Add Sympos. l. 2. qu. 1.

(h) Lib. 4. (i) Nicol. Damascen. de Mor. Gent. The Iberians use a Girdle of a certain Measure, and whoever suffers himself to grow beyond those Bounds, is look'd upon as highly Infamous.

Ethicks (a), *Many Things according to our Nature we do and suffer, which we are truly conscious of, and yet which cannot be call'd Voluntary or Involuntary: as to grow old and to die.* These things therefore are not proper Matter of Imputation. Neither can the getting of wicked Children be imputed to Parents, provided they have not encourag'd them in their Vices by ill Education. Whence the witty Turn of *Vindex* will not hold in strict Truth, when he said, *That Nero's Mother was justly put to Death by her Son, for bringing such a Monster into the World* (b).

VIII. It's Evident likewise, That those Things cannot be imputed, which exceed our Strength, either as to the Hindrance or the Performance of them: provided that this Inability has not been of our own sinful Procurement. On which Foundation are built those common Maxims, That Impossibilities are incapable of Obligation (1); That no Man can be conceiv'd to have enjoyn'd Impossible Duties in a Law; And that therefore if any such thing occur in a Statute, or a Covenant, or a *Will*, it is either to be esteem'd as Null, or else a more Commodious Interpretation of it is to be found out (c). To this purpose we meet with a pleasant Passage in *Herodotus* (d); He tells us that when *Themistocles* desir'd a Supply of Money from the Inhabitants of *Andros*, supported by the two strong Goddesses *Perswasion* and *Necessity*, the *Andrians* oppos'd him with two stronger Goddesses *Poverty* and *Impossibility*. But here it must be carefully observ'd, that it is one thing to be *Physically*, and another thing to be *Morally*, Impossible. The former, Impossibility lays an Obstacle, which binds up the Will in such a manner, that either it cannot break out into Action, or else that it shall lose all its Labours and Endeavours. But a Moral Impossibility lays no Impediment surpassing the Active Power which inheres in the Will, but on the contrary arises wholly from the Will it self. And in this manner, we say, 'tis impossible that all Men should conspire together in delivering down a Lie to Posterity, without any prospect of Advantage: Or that any Man should lead a Life of such exact Holiness and Circumspection, as not to offend (at least through the Precipitancy of his Passions) in some smaller Instance of Duty. Hence the Author of the Treatise *De Principiis Justi & Decori* (e) infers, *That a Legislator cannot indeed enjoyn what is Physically Impossible, but he may exact Obedience to things which include a Moral Impossibility. Because in this he commands nothing contrary to the Liberty of the Will, since all the Difficulty of obeying arises*

from the Will it self. Thus 'tis not Impossible for any Man to frame a Lie gratis; and if not for any Man, then not for the whole Multitude; and yet 'tis certain that the whole Multitude will not do so. In the same manner every Man has the Power of speaking Truth, and consequently a whole Society or Community; and yet 'tis most certain, that a Common-wealth will never be so happy, as to have all its Members abstain from false Speeches: yet this Impossibility does not take away the Liberty of particular Men, or excuse them from Sinning. Thus too we say, that the Fulfilling of the Law is Impossible, and yet that that Impossibility does not injure the Liberty of the Will. For 'tis equally Impossible for a particular Man to obey God's Command in all things, and for a Multitude to abstain from all manner of Lying: And he is as able to preserve himself from each particular Act of Sin, as the particular Citizens are to keep themselves Pure from Lies; and yet this is never likely to happen in the World. Which Doctrine, as it is applied to Theological Points, we leave to be discuss'd by the proper Professors. But if it keep within the Bounds of Human Courts, it does not appear why this should not rather be admitted, then that Assertion of *Grotius* (f), where speaking of those Sins which some call *Sins of daily Incurfion*, he says, *It may well be doubted whether such as these may rightly and properly be call'd Sins, because tho' we are at Liberty as to the doing each Particular, yet we seem to lose that Liberty, when we consider them in general.* For how can these Failures, taken Collectively, escape the Nature of Sin, when at the same time each Particular of them is acknowledg'd to be Sinful? Tho' indeed such small Slips are in Human Cognifance scarce look'd upon as Punishable.

IX. Neither can those things be imputed which a Man do's or suffers upon Compulsion: For they will belong, in Moral estimation, to him who offers the force, and he that receiv'd or executed them is look'd upon only as an Object or an Instrument. 'Tis a Rule with *Dionysius Halicarnassens* (g), *That every thing which is Involuntary deserves excuse.* And *Cicero* (h) argues with good reason, when he says, *If we are oblig'd to pardon those who hurt us out of Ignorance, we are not bound to thank those who benefit us out of Necessity.* Now Compulsion is suppos'd to be apply'd, not only when the Principle of Motion is in another Man, who by force bends the Members of a Person, to some Action or Suffering, of which the Person by struggling and resisting expresses his abhorrence; but likewise, when a Man by the Peril of Death, or of any other extream Evil, is put upon the Execution of

(a) Lib. 5. c. 10.

(b) *Philast. Apollon.* 1. 5.(1) *Impossibilium nulla obligatio est.* Digest. 1. 50. tit. 17.(c) *Ovid. de Pont.* 1. 1. El. 8.*Nulla potentia vires**Prestandi ne quid peccet amicus habet.*

So far can no Degrees of Power extend

To purge all Frailty from a Mortal Friend.

*Quintilian. Inst.* 1. 6. c. 3. *We usually reckon it Inhuman to upbraid a Man with his ill Fortune; either because it comes without his Fault, or because it may be the Censurers Turn to suffer next.*(d) *Uran.*(e) *Velthuisen, P.* 174.(f) *L.* 2. c. 20. f. 19.(g) *L.* 1.(h) *De Invent.* 1. 1.

some Enormity to which he is otherwise exceedingly averſe; yet ſo that he ſhall not be the Author of the Deed, but the other Perſon who compell'd him to it. Examples of the former kind are, when a Man by Superiority of ſtrength violently thruſts another upon a third Perſon, or ſtrikes him with a forcible bend of the other Man's Hand: or when any one commits a violent Rape upon a Woman that did not provoke his lewdneſs by her own fault. Her Body indeed, in this Caſe ſuffers diſhonour, but the Blemiſh doth not reach her Soul (a). But a Nymph will not have the benefit of this Interpretation, when with a faint reſiſtance ſhe lets her Ring be ſtoln off from her *digitus male pertinax*, as *Horace* (1) calls it. An Inſtance of the latter Compulſion may be, when a Sergeant or a Guards-man is commanded to kill a Man whom he knows innocent, under pain of being immediately kill'd himſelf upon reſuſal: For he can by no means lye under an *Imputation* in this Caſe, ſince nothing is enjoy'd him but the bare Execution, which in it ſelf is agreeable enough to his Perſon and Character, and ought not to be reſuſ'd upon the hazard of loſing his Life: Eſpecially ſince tho' he threw away himſelf, he could not by that means ſave the other innocent Party. Yet it muſt be confeſt, that the bare Execution of ſome Acts is ſo very foul and deteſtable, that it is a generous Bravery for a Man rather to die than to apply his Body to ſuch Operations, tho', if committed, the fault of them would not light on himſelf, but on others. To which Caſe the paſſage of *Ariſtotle* relates above-cited: An Inſtance of it may be, Suppoſe a Man ſhould be commanded to commit a Rape on his own Mother, which Faſt, in *Oedipus*, tho' committed out of invincible Ignorance, yet tormented him ſo, as to make him tear out his own Eyes. But when *Ariſtotle* alledges for an Inſtance of a *forced* Action, the doing a *baſe thing*, upon the Command of a Tyrant who has our Parents or Children in his hands, and will ſave or kill them according to our Obedience or Diſobedience; what he then calls *αισχροπραγία*, or a *baſe thing*, muſt be underſtood in a limited ſence, ſo as not to reach thoſe more odious Villanies which we are now ſpeaking of.

X. Ignorance likewise takes off all Imputa-

(a) *The Body is ſtain'd, but the Mind is pure*, ſays *Lucretia* in *Livy*, l. 1. c. 58. See *Hen. Stephens's* elegant Diſcourſe on that Story in his *Apolog.* for *Herodot.* c. 15. (1) *Lib.* 1. *Od.* 9. See alſo to the ſame purpoſe, *Lib.* 2. *Od.* 12.

Aut facili ſervitia negat,

Quæ poſcente magis gaudeat eripi.

(b) *Xenophon.* *Cyropæd.* l. 3. *I take all thoſe things which Men commit through Miſtake, to be done againſt their Inclination and Deſign.* *Euripid.* *Hippol.* *Coronat.* *Your Ignorance and Error cleanſe the Deed from ſinful ſtain.*

(c) *Seneca Phœniſ.*

Aliquis intra viscera

Materna letum præcociſ fati tulit;

Sed nunquid & peccavit?

— An Infant with untimely Fate,  
Dies in the Womb before the Gift of Light;  
And has it therefore ſinn'd?

But this muſt be extended no farther than *Human Conſideration*. (d) *Add.* *Anth.* *Matthæ.* de *Crimin.* *Proleg.* c. 2. f. 5, 6, 7, 8. (e) *Ariſtot.* *Magn.* *Moral.* l. 1. c. 9. *We then blame diſeaſ'd or deform'd Perſons, when we judge them to have been the Authors of their own Diſtemper or Diſfigurement; becauſe it was in their power to have kept ſound and perfect.*

And more fully *Ethic.* l. 3. c. 7. *Legiſtators correct and puniſh thoſe who commit Evil, provided they did it neither upon violence and compulſion, nor out of ſuch Ignorance as they did not themſelves occaſion. For otherwiſe, Ignorance it ſelf is puniſhable, when contracted by the Perſon's own fault. Hence there is a double Punishment ordain'd againſt Drunkards, becauſe the Spring of that Vice is in a Man's ſelf, he having the power of avoiding it; and therefore what he doth through Ignorance in that Condition, is nevertheleſs to be charg'd upon him. In like manner they puniſh thoſe who plead Ignorance of the Laws, when the Points were eaſie, and ſuch as ought to have been known. The Caſe is the ſame with all that are Ignorant by their own neglect, they being Maſters of their own Powers, and capable of Diligence and Application.*

Igno-

tion, ſo far as it renders the Action Involuntary (b). This point may be illuſtrated from ſeveral Paſſages of *Ariſtotle's* *Morals*; 'Whenſoever (ſays he) Ignorance has been the occaſion of doing a thing, that thing is not done willingly, and conſequently cannot be injurious. But when a Man is himſelf the Cauſe of his own Ignorance, and out of that Ignorance commits a Deed, he plainly offers an Injury, and may in Juſtice be accountable for the Crime. This is the Caſe of drunken Men, who if they commit any diſorder under that Condition, without diſpute do a real Injury, ſince they themſelves have been the Cauſes of their Ignorance. For 'twas in their power, whether or no they would tittle themſelves ſo far out of their Senſes, as to make them (for example) beat their own Father. The ſame Rule will hold in all other Inſtances of Ignorance, the cauſe of which is in the Agent, ſo that he who injures another upon the ſtrength of thoſe Pleas, is nevertheleſs properly unjuſt. But thoſe Perſons cannot by any means be call'd *unjuſt*, who offend out of Ignorance not of their own procuring. For ſuch Ignorance is to be eſteem'd Natural; as when little Children ſtrike their Parents, their Natural Ignorance, which is the cauſe of the Faſt, hinders it from being ſtil'd *Unjuſt*; the Ignorance not at all depending on their own power (c).

But in reference to Infants it is farther obſervable, that we chide and beat them for ſome Actions, not becauſe in Human Judgment they be ſtrictly Crimes, but meerly for the ſake of Amendment, that they may not prove troubleſome to others by ſuch Tricks, or may not get an ill habit when they are little, and ſo keep it when they are grown up. And the ſame muſt be ſaid of Delirious Perſons, provided their Diſeaſe was not occaſion'd by their own fault. For the Blows given to one in this Condition, have no more the proper Nature of a Punishment answering to a Fault, than thoſe we give to a kicking Horſe, to break him of that Cuſtom (d).

But he who is the Cauſe of his own Ignorance, and who has wittingly and willingly hindred himſelf from the knowledge of thoſe things, which he might and ſhould have known, is in the ſame Caſe as if he had offend'd upon Knowledge and Deliberation (e).

Ignorance of Universals, and that which we were oblig'd to know, do's not take off Imputation, but only Ignorance of Particulars, and of what concerns the present Fact (a). An Example of this Ignorance is thus given by Tully (b); *There was a Law in some certain place, forbidding to Sacrifice a Calf to Diana; now a Company of Mariners being in distress at Sea, made a Vow that if they gain'd the Port which was now in sight, they'd offer a Calf to the Deity who presid'd there. It happen'd that in that very Port there stood a Temple of Diana, to whom no Calf was to be offer'd by the Laws; but the Mariners not being acquainted with these Laws, offer'd the Calf which they promis'd: and upon this Fact they are accus'd.*

If an Action be done without any malicious design, and not with Ignorance voluntarily contracted, but such only as crept in by Inconsideration and Inadvertency (c), the Imputation is not altogether taken away, yet it is considerably diminished (d). Hither we may refer the Case propos'd by Aristotle (e) of a Woman that gave a Love-Potion to her Gallant of which he died. Now the Athenian Judges absolv'd the Woman from this Indictment, because she did the Fact undesignedly, and only mis'd the Effect of her Potion, and procur'd his Death instead of his Love, which was her only Aim. But to make this Sentence equitable, it must have been suppos'd as a Principle, that the Woman never so much as thought, the Potion she administred was any way hurtful (f).

XI. Farther, Since the Images form'd by the Fancy in sleep are not in our power, nothing can be imputed to us which we seem to do in a Dream, only as far as by thinking on such things in the day time with delight, we have fix'd the Idea's deeply in our Minds (g). Hence the Man whom Tacitus (h) speaks of, and reports to have seen the Emperour Claudius in his sleep, cover'd with a Crown made of Ears of Corn, was not guilty of any Crime. And the Fisherman in Theocritus (i) entertain'd a very vain Scruple, when he appear'd

concern'd for an Oath he had made in his sleep never to venture out again to Sea (k). Neither was Julius Cæsar guilty of Incest, upon account of his strange Dream, recorded by Sueton (l). Yet Byblis was not altogether innocent, when, as Ovid tells the Story,

*Sæpe videt, &c.*

In sleep she oft does the lov'd shadow seem  
To grasp, and joys, yet blushes in her Dream.  
Mr. Oldham.

Nor is Plutarch (1) much out of the way, when he maintains, that a fair Argument may be drawn from a Man's Dreams, as to the temper and composure of his Mind: and therefore 'twas a good saying of Epicurus, *That a wise Man will be like himself, even in his sleep* (m).

XII. Lastly, It is against Reason, that the Imputation of any future Crime should be as it were Antedated, or that it should affect us backwards: unless perhaps the future Crime should depend on some future or present Act of ours, as a Necessary Effect do's on its Cause: For it is a common thing to impute the Effect to him to whom the Cause properly belong'd. Indeed it is not at all absurd, that by Imputation of Favour a future Deed shall procure some good thing to the Agent, or to some Body else, long before it is perform'd. For since any Man may (if he pleases) do a kindness gratis, it is certainly in the power of a Benefactor, who knows what will afterward happen, to confer a present Favour under some Term and Condition hereupon to be fulfilled. But since ill Actions cannot be imputed, but by way of Debt or Guilt, it would be the highest Absurdity, to reckon so far backwards, as to lay Imputation on Persons who neither had any Knowledge of Futurity, nor any Obligation or Power to hinder the Thing from being done; nor, lastly, any Communication of Action with the Author of the Fact (n).

(a) Aristot. Ethic. l. 3. c. 2. He that is ignorant of his Duty or Interest, ought not to be said to act against his Will; for Ignorance upon choice doth not produce an involuntary, but a wicked Action. An Ignorance of Universals renders Men liable to reprehension; but an ignorance of Particulars, or of the Circumstances of the Action, deserves pity and pardon, in as much as the Person thus offending doth truly proceed involuntarily. (b) De Invent. l. 2. (c) These are properly the ἀμαρτημαία of Aristotle. (d) And thus far only may we allow the saying of Quintilian, Inst. (l. 1. c. 6.) Even an Error is commendable in those who follow Great and Noble Guides. Vide Aristot. Ethic. l. 5. c. 10. (e) Magn. Moral. l. 1. c. 17. (f) For otherwise it were more rational to proceed according to L. 38. f. 5. D. de Pœnis. Add. Anth. Marth. de Crimin. ad l. 48. D. tit. 5. c. 5. f. 6. (g) Nonn. Dionys. l. 4.

Ἀνίπτου γδ  
Ἔργον ὅπερ τελέει τις ἐν ἡμέρῃ νυκτὶ δοκῶει.  
Fancy's idle Play  
Mimicks by Night the Labours of the Day.

(h) Ann. 11. Add. Ammian. Marcellin. l. 15. c. 2. (i) Idyll. 22. (k) See Evagrius's Oath made in a Dream, in Sozomen. Hist. Eccl. l. 6. c. 30. (l) Cæf. c. 7. Nam visus erat per quietem matri stuprum intulisse. (1) De Profect. Virtut. Sent. (m) Diog. Laert. l. 10. Some apply to this purpose Psalm XVII. 3. Add. Claudian Præfat. ad l. 3. de Raptu Proserp. Theocrit. Idyll. 22.

Καὶ γδ ἐν ὕπνῳ  
Πᾶσα κίων ἀρτων μαντεύεται.  
The hungry Dog prefaces in his Dream  
A mighty Spoil of Crufts.

(n) Cicero de Invent. l. 1. A Remote Argument is such as depends on a Cause and Principle too far distant. For Instance, If P. Scipio had not married his Daughter to Tiberius Gracchus, by whom she brought forth the young Gracchi, the Seditions had been prevented which those Brothers rais'd in the State: And therefore all those Disturbances are chargeable on P. Scipio.

XIII. Beyond these Exceptions no Human Action ought to be reckon'd involuntary or incapable of Imputation, tho' to undertake it be never so contrary to right Reason, or tho' any disorder of Mind violently hurry us into the Commission. Indeed *Plato* (a) lays it down for a Rule, That 'in those Injuries which 'tis impossible to repair, no Man is voluntarily Injurious, because no Man is willing to admit the greatest of Evils into any of his Concerns, and much less into those Things which are most dear to him, and most excellent in themselves; such as is his Soul (b). To the same purpose *Aristippus* says in *Diogenes Laertius*, 'That all Mistakes (by which he means all smaller Offences) deserve Pardon, because no Person is mistaken willingly, but as he is compell'd by some perturbation of Mind. And the Emperour *Antoninus* frequently advanceth the like Doctrine (c). But *Aristotle* hath in many places refuted this Opinion. As when (d) he recites the following Argument of *Socrates* design'd to prove, that it was not in our power whether we would be good or bad: 'Because supposing we should ask any one, whether he had rather be just or unjust, no Man would chuse Injustice; whence it should appear, that if some Men are wicked, they are not wicked of their own accord, and consequently none are of their own accord Good. In Confutation of which *Aristotle* hath us'd these Reasons; 'that it would be absurd for a Lawgiver to enjoyn Good Actions, and to forbid and to punish Evil, unless both were ἐν ἡμῖν, in our power: and that otherwise there would be no manner of cause why Vertue should meet with Praise, or Vice with Disgrace and Reproach. In another Work (e) he handles the Point more at large, and with good reason rejects that common Argument of the *Stoicks*, All desire and follow what appears good to them; but now no Man is Master of his own Fancy, but the Ends he pursues appear to him just, according as he is inclin'd and dispos'd. For in spite of this Objection, the understanding of what is Just, and what Unjust, must be acknowledg'd both to be in the power of Man, and to be attainable without much difficulty or labour (f). In the same place *Aristotle* well observes, that as Ignorance contracted by our own fault, doth not render an Action involuntary, so neither can an ill Habit, or a Mind corrupted by frequency of sinning. 'If (says he) a Man, not out of Ignorance, do's things which may denominate him unjust, he is voluntarily unjust; but he cannot, at his Will and Pleasure, turn from unjust to just again (g); no more than a sick Man can be Sound again when he pleaseth, tho' his Sickness perhaps was voluntary, occasion'd either by his intem-

perate way of Life, or by his disobedience to the Orders of his Physician: Such a Person at first had it indeed in his power not to be sick; but when he hath once neglected his Health, it is not in his power to restore it: In the same manner as one, who hath thrown a Stone out of his hand, cannot recover it again, tho' at first he had the power of throwing or not throwing it. Thus the Unjust and the Intemperate, at first might have been otherwise, and therefore were voluntarily such, but being once under those Conditions, they are not at liberty to be without them; that is, before they have reform'd and corrected themselves.

It may not be amiss to cast an Eye upon what the Author of the Treatise *De Principiis Justitiae & Decori* (h) hath advanced on the Subject of Moral Habits. 'Those Moral Habits which we commonly call Evil, are not (says he) really Sins, nor worthy of punishment if consider'd in themselves; because they do not touch the Effect with any Moral Causality, so long as they continue Habits, but only as they break out into Acts. And if they prove a hindrance to Vertue, this is done by an elicite Act of Men's Will, which Will is then the Cause of the Moral Vice. But to establish a Moral Cause superior to the Will, is to take away the Nature of that Faculty, it is to turn one Elicite into an enjoyn'd Act, and to attribute to Habits an actual efficacy of operating without any Operation. For we operate only by the Will, and nothing truly Moral can work before the Elicite Act of that Power from which alone proceeds the Morality of any performance. For an Ill Habit, before the Act of the Will, is only a Physical Thing, or a Mode of the Soul; but when the Soul works sinfully by the Will, then the Habit ceaseth, and is superseded. The Efficacy by which ill Habits dispose the Mind to ill Actions is different from that, (for Instance) by which lewd Discourse instils Wantonness into the Minds of the Hearers: because that Discourse may be properly said to work antecedently to the Will of him to whom it is applied, tho' the Effect doth not always follow. Which abstruse Doctrine may fitly enough be explained by this Similitude: Splayness of Foot in it self, and as long as the Foot rests, is not a fault against the Rules of Dancing, but when the Spark makes an ill Step; the Moral Cause of that Miscarriage is not the turning out of the Toes too far, consider'd in it self, but the Will of him that hath so awkerdly mov'd them.

The same Author adds, That 'the reason why we hate ill Habits, is partly because the Persons got them by ill Actions, and partly because they are more prone to ill Actions on the ac-

(a) De Leg. 1. 5. (b) Add. *Timæum* p. 1085. & *Marsel. Fecin. Præfat. ad Plato*, l. 9 de LL. & *Apolei. de Philosophia*. (c) Lib. 4. f. 3. Lib. 7. f. 22, 63. Lib. 8. f. 14. Lib. 11. f. 18. (d) *Magn. Moral.* l. 1. c. 9. (e) *Ethic.* l. 3 c. 7. (f) Add. *Eustath.* ad loc. (g) But this we are to understand, either in a compound sense, i. e. that he cannot be just and unjust at the same time; or else in this meaning, that the bare Will cannot presently abolish a confirm'd Distemper of the Mind; tho' by long and earnest Endeavour it may be overcome. (h) P. 165, &c.

'count of them: and that *tho' they are Diseases of the Mind, yet they do not deserve Punishment in themselves, but because they were voluntarily contracted.* As if we should say, when we beat an unluckly Boy that puts out his Ankle by a wanton and negligent Leap, the reason why we beat him, is not the putting out his Ankle (*in it self,*) but the idle Leap that caus'd it.

XIV. A Man is not only liable to have his own Actions imputed to him, but likewise the Actions of other Men. Yet this cannot rightly be, unless he has some way or other efficaciously concurr'd in their production. For otherwise Reason will never suffer that the Effect of a Moral Action should be transferr'd from One to Another, unless this other Person had some influence on the Action, by some performance or some omission of his own (*a*). Thus when a sound arrives at our Ears against our Consent, the bare *hearing* can be no Crime, if we proceed no farther (*b*). Though sometimes indeed a quiet and silent hearing is construed as a Token of Consent. And 'twas on this account that the brave *Germanicus*, when on the News of *Augustus's* Death, his Seditious Soldiers offer'd him the Empire, started immediately in Confusion from his Seat of Command, *as if he had been already tainted with Rebellion* (*c*).

Sometimes, then, it happens, that an Action is not *imputed* to the immediate Performer of it, but to him who commanded it to be done. As when a Superior, under the Penalty of the severest Evils, and such as he is really able to inflict, enjoyns a Subject the bare execution of some Deed. Thus, as *Procopius* (*d*) well observes, 'an Ambassador, at the command of 'him whom he represents, speaks such and 'such words; in which if there appear any 'fault or offence, it ought not to be charg'd on 'him, but on his Master, whose Orders and 'Instructions he is under a necessity of obeying. When the *Roman* Senate declar'd the League with the *Sannites* to be Base and Inglorious, and voted the delivering up the General, the Author of it, to the Enemy, it was a very

senseless Proposal mov'd by one of the Grave Fathers, that the same Punishment should be inflicted on the Person who held the *Swine* during the Ceremony of making the Agreement (*1*) (*e*). When *Mithridates* put to death *Attilius* and other Conspirators against his Life, he pardon'd *Attilius's* Freed-men who were of the Company, *ὡς δεσποτῶν διακονοῦντες* (*f*), *as Persons that only obey'd their lawful Master.*

But it's more usual that the Action shall be imputed both to the Performer and to the Commander of it. And this is chiefly done in these three ways: Either, that the Commander shall be the Principal Cause of the Action, and the Performer the Inferior and Accessory Cause, or that both shall be deem'd equally guilty, or that the Commander shall be the Inferior Cause, and the Performer the Principal. And in all Cases the Concurrence to another Man's Action is made either positively or privatively by some Commission or Omission.

First then, He is esteem'd the Principal Cause of an Action committed immediately by another Man, who commands something to be done by One under his Power and Sway, or who by his bare *Authority*, not easily to be resisted, moves a Man to the performance of some Deed, which he could not have enjoyn'd, by Command or Power properly so call'd. And this last was the Case of *Piso* in *Tacitus*; whom *Tiberius* himself *excused from having any Guilt in the Civil War, since as he was a Son he could not decline his Fathers Orders* (*g*). But now his Father, by his Paternal Right and Power, could not have oblig'd him to engage in such a Crime, and therefore he was mov'd only by his *Authority*.

Secondly, He who gives a Consent necessarily requisite to the performance, and without which the Agent had not proceeded (*b*).

Thirdly, He who ought to have forbidden an ill Action, and did not; provided he had a full Obligation thus to prohibit it, and that upon the account of that Obligation other Men had a right of exacting such a Prohibition from him (*i*). On this score *Diogenes* beat a

(a) *Arrian. Epictet. l. 1. c. 28. No Man suffers for the Fact of another. Marc. Antonia. l. 8. f. 53. Unto my Free-will my Neighbour's Free-will (as his Life, or his Body) is altogether indifferent. For although we are all made-one for another, yet have our Minds and Understandings each of them their own proper and limited Jurisdiction. Else another Man's Wickedness might be my Evil; which God would not have, that it might not be in another Man's power to make me unhappy.*

(b) *Lucian de Imagin. Unless you fancy any Crime in the bare Act of Hearing. (c) Tacit. Ann. 1. Themist. Orat. 5. Heretofore, in Crimes of this sort, no distinction was made between Misfortune and Guilt: it being judg'd as heinous to bear a villainous Proposal, tho' against one's will, as to contrive the Plot, or to attempt the Execution. But this was indeed to censure and reproach Nature for framing our Ears flat and open, and for not putting it in our power to close and contract them, as we do our Eyes or our Mouth: since these alone of all our Instruments of Sense, are plac'd beyond our Will and Command, lying ready to receive of necessity every thing that flows in, like a House without Gates or Doors. But You at length have restor'd our Faculty of hearing to its just Character of Innocence. (d) Hist. Goth. l. 1. (1) This Custom of using Swine at times of Pacification is accounted for, *Livy, lib. 1. c. 24. Si Populus Rom. prior defecerit publico Consilio, dolo malo; Tu illo die, Jupiter, P. Rom. Sic ferito ut ego hunc Porcum hodie feriam: tantoque magis ferito quanto magis potes pollesque. Id ubi dixit Porcum Silice percussit.* To this purpose, *Virg. Æn. 8. 641. — Casa jungebant fœdera Porca.* See Mr. Kennet's *Rom. Antiquities*, part II. chap. 17. (e) *Cicero de Invent. l. 2. Mamerlin. Paneg. 1. Whatever is transacted by his Commission, is properly the Deed of the Emperour. Seneca Troad. Ad authores redit sceleris coacti culpa.* The Guilt of Mischief acted upon force turns on the Authors.*

(f) *Appian. Mithridates. (g) Annal. III. Add. 1. 37. Princ. D. ad L. Aquil. l. 11. f. 3. &c. D. de Injuriis; Aut Matth. de Crim. Proleg. c. 1. f. 13. (h) Comp. Valer. Max. l. 2. f. 8. f. 2. Liban. Progymn. He is to suffer for the Fault, without whose leave it had not been committed. Id. Ibid. They are not so properly to be accounted the Authors of Crimes, whose Hands commit them, as they who gave the power and authority of committing them. (i) Vide l. 45. D. ad L. Aquil. l. 2. de Noct. act. l. 1. f. 1. D. famil. furt. sec. Seneca Troad. Qui non vetat peccare cum possit, jubet. Not to forbid a sin, when in our power, is to command it. Sophocl. Philoctet. — Men are influenc'd into Vice by bad Instructors.*

Schoolmaster, whose Boys were too much given to their Bellies, *Not imputing the Fault* (as *Plutarch* (a) says) *to them for not learning better things, but to him for not teaching them.* Thus *Messalinus* in *Tacitus* (b) advised, that a Decree of Senate should pass to punish the Magistrates for the Crimes committed by their Wives, in Relation to the Government of the Provinces, whether they themselves were concern'd or unconcern'd in the Fact. And thus too by the *English* Laws, the Husband is oblig'd to Answer and to make Satisfaction for the Wrong his Wife doth to another, either by Word or Deed; because he neglected to use his Power of restraining her. Nay, if the Husband and Wife commit *Felony* together, the Wife is accounted neither a Principal nor an Accessary in the Crime, because she is suppos'd to have acted upon Necessity, by Vertue of the Obedience she owed her Husband (c).

Fourthly, He who commands, or hires a Person to perform a Villany (d).

Fifthly, He who assists; as he who brings and holds the Ladder, while a Thief gets into a Window: He who strikes the Money out of a Man's purse, that another Rogue may pick it up: He that drives away a Man's Cattle, that his Comrade may seize them, and carry them off (e).

Sixthly, He that conceals or receives stolen Goods (f).

Seventhly, He who did not assist the suffering Party, tho' he was oblig'd to do so (g). Thus Soldiers, who are hired for a Guard in a Journey, if, on the Approach of a number of Villains, whom they are able to grapple with, they refuse to fight, they are to be reckon'd themselves among the Villains. Thus a Fire shall be rightly imputed to the Watchman, who saw it kindling, yet neglected to stop it, or call for help (h). Thus among the *Egyptians*, if a Man on the Road saw another kill'd, or suffering any Violence, and did not rescue him tho' he was able, he was obnoxious

to Capital Punishments. And if the Man was too weak to give Assistance and Deliverance, he was oblig'd to discover and prosecute the Actors: Upon Default thereof, he receiv'd a set number of Blows, or was enjoy'd a three days Abstinence from Viſuals (i). And thus *Abas* King of *Persia*, to clear his Country of Thieves, publish'd an Order, that whenever any Person was kill'd or plunder'd, the Inhabitants of the next Town should be Accountable for the Fact (k). So with the *Spartans*, he that did not reprove a Person who offended in his presence, was punish'd as a Partner in the Crime (l). So *Cato* exhorting the Magistrates to put the Laws in Execution against Offenders, told them, 'That those who were 'able to restrain wicked Doers, and yet neglected this Power, did plainly assent and contribute to their Enormities (m). As for the Silence and the Diffimulation of Magistrates, *Plato* (n) has given those Crimes their due Censure: *The second Enemy to a State* (says he) *is the Man, who, tho' he be not strictly a Partner in this Villany* (he means Treason,) *yet while he enjoys the highest Offices in the Commonwealth, does not observe the Conspiracy; and if he does observe it, out of a timorous Baseness neglects to Succour and to Deliver his Country* (o).

For the same reason, if a Keeper, who has undertaken the Care of a Madman, prove negligent, and the Madman happen to do any Hurt, the Keeper shall be answerable for the Fact, tho' the Madman be not capable of *Imputation* (p).

Those Persons are reckon'd the inferiour or less principal Causes of other Men's Actions, who have advis'd, commended, or cajol'd them before the Facts, in such a manner, as that their Counsel, or Praise, or Flattery, has had any weight in promoting their Undertakings. For otherwise, a Man who barely commends a Crime, and yet by his Commendation contributes nothing to it, ought not to be punish'd for the Crime it self, but should suffer for his

(a) *Libro, virtutem doceri posse. Vide Ælian. l. 3. c. 10. Juvenal. Sat. 14.*

*Nemo satis credit tantum delinquere quantum Permittas; adeo indulgent sibi latius ipse.*

All think too straight th' Indulgence they receive;  
And to themselves a kinder Licence give.

Add. l. 4. f. 2. D. de Offic. Proconsul. (b) Ann. IV. (c) Chamberlain's Present State of England, p. 1. c. 16.  
(d) Vide *Anth. Matth. d. l. f. 12. & ad l. 48. D. tit. 5. c. 3. f. 16.* (e) Add. l. 54. f. 4. l. 66. f. 2. D. de furtis.  
(f) Phocylid. Ἀμφοτέρωτε κλέωντες, καὶ ὁ κλεψύμενος καὶ ὁ κλέψας. They that receive are arrant Thieves no less than they that steal. *Plato de LL. l. 12. He that knowingly takes into his keeping stolen Goods, shall be esteem'd equal in Guilt to the Thief himself. L. 1. Princ. D. de fugitivis. Add. t. 1. D. de receptoribus, & Edict. Reg. Theodoric. c. 116.* Concerning the Assistants or Abettors in Adultery, See l. 8. l. 9. D. ad L. Julian. de adulter. *Periander* the Tyrant of *Corinth* threw all the Bawds into the Sea, *Heraclid. de Polit. Add. Anth. Matth. de Crimin. Proleg. c. 1. f. 11 & ad l. 47. D. tit. 10. c. 1. & 2.* (g) *Cicero Off. 1. He that doth not, when he is able, guard and protect an injur'd Person, is as much in fault as if he should desert his Parents, his Country, or his Friends. Add. Anth. Matth. de Crimin. Proleg. c. 1. f. 15.* (h) Add. *Ezech. 33. v. 6.* (i) *Diodor. Sic. l. 1. c. 77. Add. l. 7. D. Nautæ caup. Stab. l. 1. 6. D. ad L. Pompeiam de Paricid. l. 7. d. t. l. 9. f. 1. D. ad D. Cornel. de fals. l. 6. f. 8 D. de re militari.* (k) Vide *Pet. de Valle Itinerar. P. 2. Epist. 1.* (l) *Plutarch Lacon. Institue.* (m) Vide l. 2. D. de noxal. Act. l. 7. D. qui sine manumissione, t. 1. D. de Magistratibus conveniendis. (n) De LL. l. 9. (o) See the Story of *Scedasus's* Daughters, in *Plutarch. Amator. Narration. Grotius ad Proverb. XXIX. 24. He that knows the Thief, and doth not, when requir'd upon Oath before a Magistrate, discover him, is in Guilt equal to him, Vide Levit. V. 1.*  
(p) Vide l. 14. D. de Offic. præsid.

ill Thoughts and Designs (a). It will not be very unjust to reckon those in the same Class, who by their Recommendation have prefer'd a Man to the Care and Management of any Business, since 'tis decent they should blush for his Faults and Miscarriages (b).

But as to the Matter of *Counsel*, it's worth while to run over the Disputes of the *Civilians*, where they are arguing whether the words *Ope* and *Consilio*, by *Help* and by *Counsel*, are to be understood in a Conjunctive or in a divided sense. For if *Counsel* imports the same as Intention or Design, he only will be guilty of another Man's Theft, who assisted him in it, not out of Imprudency, but with premeditated Wickedness (c).

If Counsel has been given without help, it will be requisite to enquire, whether it were General or Special. The former kind is, for Example, when a Man, hearing another complain of Poverty, advises him to support himself by Stealing; and such a Counsellor will not in Human Cognifance, pass himself for a Thief. But if a Man has given special Counsel to another, as, if he has shown him what way to break into a House, told him the fittest time, and where the things be that may be most conveniently carried off, or how he may hide himself after the Fact, such an one will have a very strong Twang of the Thief (d). It is farther observable, in reference to Counsel and other like Influences on other Men's Actions, that by them the Guilt is only communicated; but not wholly devolv'd from the Actor to the Exhorter, unless the former were under an Obligation to put his Advice in Practice. Hence *Diodotus* in *Thucydides* (e) complains with good reason, 'That the Orators in a State should be accountable for their Advice, and the People not at all accountable for hearkening to them. He adds, *If he that believ'd, as well as he that perswaded a Business, were liable to be punish'd, you would proceed much more wisely in your Judgments. But now, when you fall into Passions on any Disappointment of your Hopes, you only punish him who gave the Advice, and not your selves, who have always born so great a Share in the Mistake or Miscarriage.* Hence Mr. *Hobbs* (f) thus declares in general; *This is also Incident to the*

*Nature of Counsel, that whatsoever it be, he that asks it cannot in Equity accuse or punish it: For to ask Counsel of another, is to permit him to give such Counsel, as he shall think best; and consequently he that gives Counsel to his Sovereign (whether a Monarch, or an Assembly) when he asks it, let it please or displease, cannot be punish'd, because he gave it to such as were willing to hear it, whatsoever it should be. But here he should have added, If the Counsellor gives his Opinion bona fide, and has a perfect Knowledge of the Matter in debate. For it is a piece of Wickedness to pretend to give a Judgment about a thing which we are unacquainted with. He presently subjoyns; But if one Subject gives Counsel to another to do any thing contrary to the Laws, whether that Counsel proceed from Evil Intentions, or from Ignorance only, it is Punishable by the Commonwealth, because Ignorance of the Laws is no good Excuse, where every one is bound to take notice of the Laws, to which he is subject.*

Hence that Maxim in *England* commended so highly by Dr. *Bates* (g) cannot be receiv'd without some Limitation; *That the King can never mistake, nor do any Man an Injury, because all the Fault and Punishment, is deriv'd, as it ought to be, on his Ministers and Counsellors, whose Duty is to Admonish the Prince, to deny him their Assistance, when he enters on ill Designs, and rather to quit their Places, than to Obey him when he Commands the Doing of any thing contrary to the Laws* (h).

It is Doubtful whether we should rank under this, or under the former Class those, who by their Example excite others to such Sins, as they would have otherwise declined (i).

From all these Observations it is easy to perceive the Reason and the Limitation of those common Axioms; *What a Man does by another, of that he himself is reckon'd the Author: We make those things our own, to which we grant our Consent* (k). *That which, in matters relating to us, is done by others upon our Command, obliges us our selves: That is esteem'd our Action the Execution of which we have impos'd on another; and the like. As for that Communication of Actions, which*

(a) *Ovid. Trist. l. 5. El. ult.*

*Qui monet ut facias quod jam facis ille monendo  
Laudat, & hortatu comprobata sua.*

So in the Constitutions of the *Lombards*, l. 1. tit. 7. f. 25. He that stands by and encourageth the Commission of any Villainy, is himself adjudg'd an Actor in it. Add. *Rem. l. 5. ult. Quintil. Declam. 255. To commit Villany, and to approve of it, are Actions naturally resembling each other, Anth. Matth. de Crimin. Proleg. c. 1. f. 9, 10, & 14.*

(b) Vide *Socrat. in Xenophon. Apomn. l. 2. p. 472.* (c) *L. 52. f. 13. D. de furtis.* (d) Vide *Ant. Matr. de Crimin. Proleg. c. 1. f. 7.* (e) *L. 3. c. 43.* (f) *Leviath. c. 25.* (g) *Elench. Mot. P. 1.*

(h) Add. *Gell. l. 1. c. 3.* where he tells us of *Chilon*, that he was troubled with Remorse of Conscience, upon his having perswaded the Judges to absolve a Friend of his manifestly Guilty, and whom he himself had in private condemn'd. 'Tis a remarkable Story which we find in the same Author, l. 11. c. 18. of a Person's being convicted as a Man-stealer, for hiding with a Cast of his Gown a Runagate Slave who was passing within sight of his Master.

(i) *Matth. 18. v. 6. Juvenal. Sat. 1.*

*Grex totus in agris  
Unius scabie cadit, & porrigine porci;  
Uvaeque conspecta livorem ducit ab una.*

Add. *Grot. l. 2. c. 17. f. 6. &c. & c. 21. f. 1. &c. Ant. Matth. de Crimin. Proleg. c. 1. f. 6. &c.*

(k) *L. 1. f. 1. D. de eo per quem factum erit.*

Who prompts you to go on, approves the ways  
You took before; and his Advice is Praise.

From one infected Beast the Murrain reigns  
O'er all the Drove, and spreads them on the Plains:  
And one corrupted Grape its purple Neighbour stains.

results from the Union of a Moral Body, it will be hereafter explain'd in its proper place.

When one is said to partake of another's Action, upon account of his own Permission, or because he did not hinder the Action, in this case it is requisite not only that he should have been able by his natural Strength to have hindered it, but likewise that he should have had an Obligation incumbent on him to hinder it. When either of these Two Conditions fails, nothing can be imputed to him, who gives another leave to act at pleasure. And therefore God Almighty is Capable of no Imputation, upon the account of his Permission of Sins. For he is not oblig'd to restrain them in such a manner, as to make them impossible to be committed: that is, by withdrawing our natural Strength, or extinguishing the Liberty

of our Will: since upon the Removal of these, no sort of Moral Actions could be perform'd by Man (a).

That Permission then of another Man's Action is void of all Moral Effect, which we give when to hinder the Action is beyond our Duty, or above our Strength; unless this Weakness and Inability is procur'd by our Fault, and unless the Ignorance arose through supine Negligence, and within that Degree of Diligence, which we are oblig'd to observe.

Lastly, Nothing can be imputed upon the account of permitting a good Action, which we might indeed, but ought not to have hinder'd. Thus he can impute nothing to me (or I owe him nothing) who has given me Permission, or has not forbidden me to use my Right; that is, has done me no Injury.

(a) 'Tis a notable saying of *Lucian, de Merced. Conduct.* God is not in the fault, but the Man that makes it. And thus we intend no more than a Jest, when we say on some Occasions, *Now I'll give it leave to rain, or the like.*

## C H A P. VI.

### *Of the Rule of MORAL ACTIONS, or of Law in General.*

WE come now to consider of that Moral Rule, or *Law* (1), by which Moral Actions are to be squar'd, and according to their Agreement or Disagreement with which, they acquire peculiar Qualities. And here we must take Care in the first place, accurately to distinguish *Law* from some other things which seem to bear some Relation to it, and which for that Reason are frequently confounded with it: And these are *Counsel*, *Covenant*, and *Right*. Now *Law* differs from *Counsel* in this, that by the latter a Man endeavours, with Reasons taken from the Nature of the Thing, to induce another Person to some Performance or Omission, over which Person, at least as to the present Business, he has no proper Power, so as that he can lay no direct Obligation on him, but must leave it to his Pleasure and Choice, whether he will follow the Counsel, or not. Yet Counsel indeed may administer occasion to an Obligation, in as much as it furnishes a Man with some Knowledge, by which an Obligation may be produc'd or increas'd. Thus, a Physician cannot by Virtue of any Power or Command, order his Patient to take such things, and to abstain from others; but while he shews one thing to be conducive, and another pernicious to Health, the Patient is bound to embrace the former, and to avoid the latter; not upon account of any Right which the Physician holds over him, but by the Law of Nature, which commands every Man to take Care of his own Life and Health. But Law, though it ought not to want its

Reasons, yet these Reasons are not the Cause why Obedience is paid to it, but the Power of the Exactor, who when he has signify'd his Pleasure, lays an Obligation on the Subjects to act in Conformity to his Decree, tho' perhaps they do not so well apprehend the Reasons of the Injunction. To which purpose Mr. *Hobbs* (a) thus expresseth himself; *Counsel* (says he) *is a Precept, in which the Reason why we obey, is taken from the Thing prescribed: But Law, or proper Command, is a Precept, in which the Reason of our Obedience is taken from the Will of the Prescriber.* For no Man can say, *Sic Volo, Sic Jubeo*, so I will, and so I command; unless

— *Stet pro ratione voluntas.*

his Will is his Reason.

We obey Laws therefore, not Principally upon account of the matter of them, but upon account of the Legislator's Will. And thus, *Law is the Injunction of him, who has a Power over those to whom he prescribes; but Counsel, of him, who has no such Power. To do the things enjoyn'd by Law, is Matter of Duty; to do those appointed by Counsel, is matter of free Pleasure. The End of Counsel is directed toward him who receives it: And this End he is at Liberty to weigh and to approve. But tho' Law too has commonly some End directed toward those who receive it, yet it does not leave them the Right of examining and rejecting this End, but Actually determines it, by enjoying it. Counsel is only given to those who*

(1) See Book 2. c. 1.

(a) De Cive, c. 14. s. 1.

are willing to have it, But Law reaches the unwilling. Lastly, The right of a Counsellor ceases at the Pleasure of him who receives the Counsel; but the Right of a Lawgiver cannot be taken away at the Pleasure of those on whom he imposes the Law (a).

II. Neither were those Ancients accurate enough in their Expressions, who frequently apply to Laws the Name of *Common Agreements* (b). For besides that, neither the Divine Positive Laws, nor the Laws of Nature, had their Rise from the *Agreement* of Men, and therefore that Title can only be attributed to *Civil Laws*; even these are not properly Covenants and Agreements, tho' there was indeed some Intervention of Compact at the Original of Civil Power. It's plain that the *Grecians*, as in their other Politick Speeches, so in this too, had an Eye to their own Democratical Governments; in which, because the Laws were made upon the Proposal of the Magistrate, with the Knowledge and by the Command of the People, and so (as it were) in the way of Bargain or Stipulation, they gave them the Name of *Covenants* and *Agreements*, before-mention'd. Though indeed, neither upon account of the major part of the Peoples consenting or agreeing to them can Democratical Laws be properly stiled *Covenants*. For this Agreement is only the manner by which the Supream Power lodg'd in a General Assembly exerts its Force; that being taken for the Will and the Decree of All, to which the Greater Number give Consent.

So that the Efficacy of a Vote given in Council by any Member about framing a Decree, is very different from the Consent which a Man declares at his Entrance on a Covenant: For in this last Case, a Person that dissents is not bound, and the Party cannot proceed without him: whereas in the former Case, even the dissenting Party is tied and obliged by the Plurality of Votes.

The remaining Points of Distinction between a Compact or Covenant, and a Law, are obvious. For a *Compact* is a *Promise*, but a *Law* is a *Command*. In *Compacts* the Form of Speaking is *I will do so and so*; but in *Laws* the Form runs, *Do thou so*, after an imperative manner. In *Compacts*, since they depend, as to their Original, on our Will, we first determine what is to be done before we are oblig'd to do it; but in *Laws*, which suppose the Power of others over us, we are in the first place oblig'd to act, and afterwards the manner of Acting is determin'd. And therefore he is not bound by a *Compact*, who did not freely tie himself by giving his Consent; but we are for this reason oblig'd by a *Law*, because we ow'd an antecedent Obedience to its Author (c).

III. As for the Term of Right, as it imports a power of acting granted, or left free by the Laws, we must take care not to let it pass for the same thing as the Law it self. That is, when we are said to have a *Right* by the Divine Law, of doing such or such a thing, we must not imagine that the same thing is enjoin'd and commanded by the Divine Law, and that therefore we may fairly do it, tho' it should be forbidden by the Laws of Men. For, since a Man hath a power of doing all such things as can proceed from his Natural Abilities, except those which are forbidden by some Law, hence by common Custom of Speech, those Things which are not prohibited by such or such a Law, we are said to have a *Right* of doing, by that Law. *Right* therefore, in this sense denotes a Liberty; but *Law* includes some Bond and Engagement, by which our Natural Liberty is restrain'd.

IV. In general, a *Law* may conveniently enough be defin'd a *Decree* by which a Sovereign obligeth a Subject to conform his Actions to what he prescribes. We call it a *Decree*, not as it remains in the Mind and Will of the Party decreeing, but as it is communicated to the Subject in such a manner, as to let him understand the Necessity of his conforming to it: and therefore the Term *Decree* is here Equivalent to *Command*. And we think it an indifferent matter, whether one should call a Law a *Decree* or a *Speech*, provided it be not esteem'd Necessary to it, that it be promulgated either *vivâ voce*, or in writing; since it is sufficient that the Will of the Legislator be any way made known to the Subject, tho' it should only be by the internal Suggestion of Natural Light. Therefore we take it to be an useless piece of Subtlety and Niceness in Mr. *Hobbs* (d), when he maintains that the Laws of Nature have no farther the Force of Laws, than as they are promulgated in Holy Scriptures by the word of God; and not as they are certain Conclusions apprehended by Reason, concerning the doing or the omitting of Things. For from the bare Dictates of Reason, we do not only understand that the Observance of Nature's Laws is good and profitable to Mankind, but likewise that it is the Will and the Command of GOD, that Men should govern their Actions by those Rules; which is sufficient to the Essence of a Law. Tho' still indeed this Reply may be made, that Natural Laws, even as they are the Dictates of Reason, cannot be conceiv'd any otherwise than in the manner of Speeches, Propositions, or Sentences.

As to *Grotius's* (1) Definition, where he says the Law obligeth to *that which is Right*, we must observe, that he supposeth somewhat

(a) Add. Dig. B. 17. Tit. 1. De Mandato. (b) So *Isocrates*, advers. Callimach. calls the Law of Indemnity  $\sigma\omega\delta\eta\kappa\eta$  τῆς πόλεως. So *Aristotle Rhetor. ad Alex.* c. 1, 2, 3. and the Phrase is frequent with the *Grecian* Authors. In *Dion. Halic.* l. x. 'tis said,  $\sigma\omega\delta\eta\kappa\eta\varsigma$  ἢ κοινὰς πόλεων τὰς νόμους. That Laws are the common Agreements of States.

(c) Vide *Hobbs* loc. cit. f. 2. Add. *Grot.* Annot. in *Matth.* Inscript. vocab. ἡ  $\pi\alpha\iota\tau\eta$   $\delta\iota\alpha\delta\eta\kappa\eta$ .

(d) De Civ. l. 3. f. ult. (1) B. I. c. 1. f. 9.

to be Just and Right before any Rule or Law; whence it must follow that the Law of Nature doth not make what we call *Right*, but only denotes or points it out as a thing already Existing. Concerning which Hypothesis we have formerly declar'd our Mind (1).

To conclude this Head, it is evident that under the Name of *Laws*, not only those are comprehended which belong to *Justice* strictly so called, directing us, upon a full and perfect Obligation (2), to exhibit such and such things to *Others*; but those too which are concern'd about the other Vertues, and which extend no farther than the Agent's own Person. For which Reason Laws may, and frequently are, made against Drunkenness (a), and other kinds of Intemperance, which Vices are so very Prejudicial to the Parties Committing them. The same must be held as to *Sumptuary Laws*, which prescribe the Measure of Expences in Victuals, Cloaths, Building, and other Furniture or Provisions. In which Particulars if any Man offends, he doth no one an Injury, provided he defray the Charges out of his own Stock: And yet there's no Question to be made, but that a Subject may by Laws be obliged to Frugality, which conduceth so highly to every Man's Interest and Advantage.

V. But since in the Definition of Laws it hath been asserted that they proceed from a Superior, and that they have in themselves the power of *Obliging*, it seems necessary that we here shew what *Obligation* is, and whence it ariseth; as also who is capable of receiving an Obligation, and how one Man can *Oblige* another, or which is the same thing, how it comes to pass that one Man may, by Virtue of his Authority and Command, enjoyn another such and such Duties.

*Obligation*, then, we have already defin'd (3) a Moral Operative Quality, by which a Man is bound to perform somewhat, or to suffer somewhat (b). The *Roman* Lawyers call it *Bond of the Law*, by which we are necessarily tied to this or that. For by means of it a kind of *Moral Bridle* is put upon our Freedom of Action, so that we cannot rightly take any other way than what we are thus guided to. Not that it can so far restrain Men's Wills as to render them unable to steer a different Course, tho' at their own Peril: for in this sense *Arrian's* (c) Assertion will ever hold true, Περαιρέσις ἀλλοτρίαις ὑδαίς κρείττε, *No Man is Master of another's Will*.

Now although there are many other things which have an Influence on the Will, in bend-

ing towards one side, rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only press the Will with a kind of Natural Weight or Load, on the Removal of which, it returns of its own accord to its former Indifference, *Obligation* affects the Will in a *Moral* way, and inspires it inwardly with such a particular sense, as compels it to pass Censure it self on its own Actions, and to judge it self worthy of suffering Evil, if it proceed not according to the Rule prescrib'd. And hence alone we may understand how sufficient the strength of the Obligation is to the bending and inclining the Will; since there's nothing but the Thoughts of that Good or Evil (4) which our Actions may bring on our selves or others, that can lay any Necessity of such a Performance, or of such an Omission, upon the Mind of Man whilst in debate about future Concerns; supposing that the Will is allow'd its proper Liberty, and that such Actions are to be exerted, as may be properly *imputed* to the Agent. And in this respect chiefly, *Obligation* differs from down-right Compulsion, that although both do ultimately represent some Object of Fear, yet *Compulsion* only shakes the Will with an external Force, and drives it on to the Choice of an ungrateful Thing by the bare sense of approaching an imminent Danger: whereas *Obligation* doth farther engage the Person to acknowledge that the Evil denounc'd against the Transgression of such or such a Rule, doth not undeservedly fall upon him, since by observing the Rule, he might have declin'd and escap'd it.

VI. As to Man's being capable of receiving *Obligation*, one reason how he comes to be so is, because he is indu'd with Will, which can turn to either side, and so guide it self by a Moral Rule; unlike those other Beings which by some intrinsical Constraint are determin'd to one and the same way of acting. Whence it follows, that so far as no Necessity is interpos'd by any external Principle, Man must be conceiv'd to be perfectly free, and to have a power of doing all those Things which fall within the Sphere of his Natural Strength and Ability. Nay, when he hath once determin'd and resolv'd with himself, or when he hath once made any Choice, yet in the Determination, Resolution, or Choice, consider'd purely as they proceed from the Will, there is no such Force, but that he may, at his pleasure, rightly change or relinquish them: unless there intervene some outward Restraint, forbidding any Alteration of the Will,

(1) C. 2. f. 6. (2) To understand this Distinction of *Perfect* and *Imperfect* Obligation, See Chap. 7. of this Book, f. 7. and B. 3. c. 4. f. 3, &c. (a) *Ælian*, V. H. l. 2. c. 37. relates a remarkable Law of *Zaleucus* to this purpose, That *whosoever* of his Subjects happening to be indispos'd, should drink pure Wine, unless upon the Advice of a Physician, if he recover'd, should suffer Death, for exceeding the Bounds of Temperance without express Oracles. Which Penalty was no doubt unreasonably severe. (3) C. 1. f. 21. (b) In thus defining *Obligation* we consider it as it inheres in the Person obliged. Bp. *Cumberland*, c. 5. f. 27. in his Definition proceeds another way, considering *Obligation* as it is an 'Act of the Legillator, by which he shews or declares that Actions conformable to his Laws, are necessary to be done by the Persons for whom the Laws are ordain'd. (c) In *Epicet.* 1. 4. c. 12.

(4) This is Dr. *Cumberland's* Sentiment, whose words our Author here uses.

when once settled and declar'd; for a Man upon once signifying his Will and Purpose, may put himself under such a Condition, as that it shall be unlawful for him afterwards to recede.

Now a Man is suppos'd to have chang'd his Will, not only when he expressly declares his present Dislike of his former Choice, but likewise when he hath done any thing inconsistent with his preceding Resolution. And from this Principle may be deduc'd the greatest part of what the *Civilians* deliver concerning *Repentance*, or the altering of a Purpose. For if we enquire after the general and ultimate Cause, why to repent of a Design should in some Acts be lawful, in others not, we shall find it to be no other but this, that some Acts are attended with an external Bond, which forbids any Change of a Purpose once declar'd; whereas in the rest, the Will is left to the Exercise of its intrinsic Liberty. The former Case usually happens, when upon Supposition of a Change in one Man's Resolution, some other Man would be highly injur'd and prejudic'd, and so Occasion would be admittred to the breaking off of all Society and Commerce amongst Men. And therefore from a Signification of the Will, this other Man is said to *obtain a Right*, by means of which he is now empower'd to make the promising Party stand to his word, and upon Default may prosecute him by Force, either such as he himself can exert, or such as proceeds from the Supreme Ruler, according as the Persons live, either in a State of Nature or of Civil Society. Therefore, when upon Declaration made of my Will, another Man doth not obtain a Right over me, I am then at Liberty to repent of what I have done. And such a Right over us is then not obtain'd, when the Sovereign under whose Power we live, hath not given another Man Authority to require and exact that from us which we have signify'd as our Intention. And hence it appears why Positive Laws may be repeal'd by him that enacted them; because they do not convey to the Subjects any such Right upon the Legislator, by Virtue of which they may demand and require their Continuance. Tho' some Common-wealths have endeavour'd to preserve the Perpetuity of their Laws, by obliging the Members to declare upon Oath, that they will not consent to their Alteration. Nay, though at the end of the Statute or Ordinance a Clause should be affix'd, pronouncing all Decrees that may hereafter be made contrary to this, to be null and void, yet such a Clause cannot hinder the altering or reversing of a Law by which no Man has obtain'd a Right. For 'tis absurd that a former Decree should disannul a latter;

since Absolute Power cannot bind and restrain it self; and since that which is in its own Nature subject to change, cannot be made fix'd and irrevocable (a). The *Athenians* in *Tibucydides* (b), laid up a thousand Talents in the Citadel, denouncing a Capital Penalty against him who should either decree or perswade the employing that Money to any use, except in case the City were attack'd by a Hostile Fleet. And yet upon the Revolt of the Inhabitants of *Cbios*, their Fears engag'd them to repeal that Decree (c). When Princes add expressly in some of their Constitutions, that altho' they should hereafter order any thing to the contrary in a particular Edict, yet the Magistrates and Judges shall not obey or regard any such Command, this Addition doth by no means amount so high, as to prove they may not abrogate such Constitutions, but rather shews that the latter Orders are not serious, or that they dropt from them unawares. And sometimes by this subtle Artifice they cut off and prevent the Importunities of fawcy Petitioners, whom perhaps it would not be safe for them absolutely to deny (d).

But there's need of distinguishing very nicely between the positive Law it self, and that Right which it occasions to be obtain'd. The Law it self may be disannull'd by the Author, whilst in Force, must still remain: For, together with a Law, to take away all its precedent Effects, would be a high piece of Injustice (1). For example, Suppose it were a Law in any State, that *as a Man dispos'd of his Possessions by Will, so the Right to them should stand*: it would be very fair, in this case, for the Sovereign to retrench this Liberty of Testaments, and to order that for the future all these Inheritances shall pass to the Heirs at Law. Yet it would be unreasonable to take away from Persons what fell to them by Will, whilst the former Law was in Use and Vigour. And by the same Rule we may judge of that Action of Pope *Boniface VIII.* when out of Hatred to *Philip the Fair*, King of *France*, he recall'd all the Indulgences which his Predecessors had granted to the *French Nation*; which *Harry Stephens* hath so justly ridicul'd in his pleasant Apology for *Herodotus* (e).

We must take care likewise to distinguish the other Acts of Sovereigns from their Law, lest any should imagine that All their Just Donations, Alienations, or Compacts may be retract'd by themselves, or by their Successors. For upon these Acts a Right is obtain'd by other Men, which ought not to be taken from them against their Consent. Hence it appears, that when a Man renounceth his Right, it is not necessary to add expressly, that neither he

(a) Vide *Cicero ad Attic.* 1. 3. Ep. 23. (b) *L. 2. Ed. Oxon.* p. 98. (c) *Ibid.* 1. 8. p. 476. (d) *Vid. Cod.* 1. 5. tit. 8. *si ex rescripto nuptiæ petantur.* (1) As in *Civil Law*, new Laws and new Constitutions regulate only what is to come, without touching what is pass'd. *Vid. Cod.* 1. 50. tit. 14. *De Legibus & Constitut. Principum*, &c. (e) *Cap. 40.*

nor his Heirs will do hereafter any thing contrary to that Rénunciation, and that if they do attempt any such Matter it shall be esteem'd void. For, since in Deeds of this Nature, a Man plainly declares his receding from his Right to any thing, and professeth to translate it on another Person, it would be evident, without that additional Clause, that he cannot (with any Force or Effect,) afterwards dispose of that thing, having no longer any Right or Title to it. And for the same reason, because whilst the Testator lives, no Man hath obtain'd a Right by virtue of his Testament, he may fairly alter it, even tho' he had strengthen'd it with a Clause, declaring all Wills that should hereafter be made to be invalid. For this indeed carries Grounds enough to make us presume the latter Will did not proceed from his serious Intentions; yet if that very Clause be revok'd in that latter Will, the former will be of no Virtue or Efficacy. And so in Deeds and Instruments of Conveyances and other Contracts, if a Dispute arise about any Point, that which bears the latter Date shall take place, in Prejudice of that which was made sooner.

VII. From what has been said, we may likewise gather the reason why a Man cannot be *oblig'd* to himself, or why he cannot enter into any Agreement or Promise purely directed to his own Person, no other Party being concern'd with him. For he who obtains a Right by any Obligation, may fairly wave that Right, when by so doing he injures not a third Man. But now in this Case the obliged and the obliging Party, or he that owes the Right, and he that obtains it, are one and the same. Therefore should a Man never so much resolve to oblige himself, yet the Obligation would be in vain, since he could excuse himself from Performance at his pleasure: And he that can dispence with himself in this manner is actually Free. Besides, such an Obligation could be of no manner of use; because when a Man gives or denies any thing to himself, he neither gets by the Performance, nor loseth by the Omission (a).

But whereas it is sometimes said, that a Man is obliged to preserve himself (1), the meaning of this is no more but that the Exercise of that Obligation inherent in every Man is terminated in a Man's own Person, but it hath likewise a reference to GOD the Author of Natural Law, as to him who hath a Right of requiring the Performance of that Obligation, and of punishing its Neglect: And therefore a Man is so far bound to consult his own Preservation as he is a Servant of God, and a part of Human Society, to which by the Divine Command he ought to shew himself a useful Member. In the same manner as a Master may rightly punish his Servant, and a Sovereign his Subject, who hath render'd him-

self unfit to discharge his proper Labours and Employments. Neither is this Maxim, That *a Person cannot oblige himself*, confin'd to single Men, but extends to whole Bodies and Societies (2). As for that which some Authors urge about a Man's swearing to himself, That he will, for instance, refrain from this or that Enormity to which his Evil Appetites incline him, this Obligation bears the Nature of a *Vow*, the Exacting of which appertains to Almighty God (b).

VIII. Another Reason why, since the Will of Man is capable of conforming to a Rule, such a Rule may be prescrib'd to it, and an Obligation laid on it thus to conform, is, because he stands under the Command of a Superior Power. These two Conditions put together, render Men liable to Obligations, proceeding from Eternal Principles. For when the Powers of any Agent are so tied up by Nature to an uniform way of acting, as that it cannot by its inward Motion steer a different Course, the Action thus produc'd is rather *Physical* than *Moral*, and ariseth rather from Necessity, than from Obligation. And, on the other hand, where a Person acknowledgeth no Superior, there can be no Essential Principle apt to restrain his Inward Liberty. And, although such an one should never so exactly observe a certain Method of proceeding, and constantly refrain from some kinds of Actions, yet this would not be taken for the Effect of any Obligation, but of his own free Pleasure. It follows then, that he alone is capable of Obligation, who can have Knowledge of a Rule prescrib'd him, and hath a Will intrinsically free, able to steer contrary ways; which Will must however, when a Rule is injoin'd it by a Superior, be sensible that it ought not to recede from it. And that such is the Nature of Man, every one's Observation may inform him.

IX. *Obligations* are laid on Human Minds properly by a *Superior*, that is, by such an One as not only hath sufficient Strength to denounce some Evil against us upon Non-compliance, but hath likewise just reason, to require the retrenching of our Free-wills by his own Pleasure. For when any one is indued with these Qualifications, so soon as he shall command any thing, and shall farther signify the Good and Evil Consequent on Obedience and Disobedience, there must needs arise in the Rational Faculty a Fear mix'd with Reverence, the former proceeding from his Power, the latter from the Consideration of such other Reasons, as without that Motive of Fear, and barely by way of Counsel, ought to prevail on us to embrace the Command. Hence we conceive, that the Right of imposing Obligations on another, or, which comes to the same thing; the Right of commanding another, and of prescribing Laws, doth not arise barely

(a) Add. *Senec. de Benef.* l. 5. c. 7. &c. (1) See Book II. c. 4. f. 16.

(b) *Com. Felder ad Grot.* l. 2. c. 13. f. 1.

(2) See what has been said upon

from Strength, or from the superior Excellency of Nature. Strength indeed, may of it self, so far bend me contrary to my Inclinations, as to make me chuse rather, for a while, to obey another's Will, than to venture the Experience of his Force: But this inducement ceaseth, when once the Fear is over, and I shall then have no reason why I should not act, rather according to my own Pleasure, than according to *his*. And where a Man can bring no other Argument for my Compliance to his Orders, but Force and Violence, nothing hinders, but that if I judge it expedient for my Affairs, I may try all means to repel the Violence, and to assert and vindicate my Liberty (a).

X. It may not be improper here, to examine that Assertion of Mr. *Hobbs*, which he hath laid down in his Book, *de Cive* (b), and which runs thus, in the *English* Improvement of his *Leviathan* (c). *The Right of Nature, whereby God reigneth over Men, and punisheth those who break his Laws, is to be deriv'd not from his Creating them, as if he requir'd Obedience as of Gratitude for his Benefits; but from his irresistible Power.* The Argument with which he defends this Notion, is carried on to this purpose. 'All Right over others being either by Nature, or by Compact, that Right may be said to be granted by Nature, which Nature doth not take away. Now seeing all Men, by Nature, had a Right to all things, they had a Right every one of them, to reign over all the rest. But because this Right could not be obtain'd by Force, it concern'd the Safety of every one, laying aside that Right, to set up Men with Sovereign Authority, by common Consent to rule and defend them: Whereas if there had been any Man of Power Irresistible, there had been no Reason why he should not by that Power, have rul'd and defended both himself and them, according to his own Discretion. To those therefore whose Power is Irresistible, the Dominion of all Men adhereth naturally by their Excellence of Power; and consequently, it is from that Power, that the Kingdom over Men, and the Right of afflicting them at his Pleasure, belongs naturally to Almighty God, not as Creator and Gracious, but as Omnipotent. Now, in this Discourse, there are several things that deserve to be censur'd. For in the First place, it may be question'd, whether or no those two Expressions, *A Right of Sovereignty* (upon account of Strength) *is granted by Nature*, and *A Right of, &c. is not taken away by Nature*, hang very well together. Because in most Cases, my not taking away a thing is by no means an Argument, that I therefore grant it. And since, *not to be taken away*, and *to be granted*, are different things; such a

Right may seem to be granted by some other Principle than Nature, tho' Nature doth not take it away. Besides that Maxim, *All Men by Nature had a Right to all things* (1), ought to be interpreted with great Caution. By *Right* (2), he means the Liberty which every Man hath of using his Natural Faculties according to Reason. Therefore his Principle, in a sound Sense, will amount to no more than this; By Nature, that is, upon the removal of all Law, every Man may fairly use his Natural Strength against those whom his Reason instructs him thus to deal with, for the sake of his own Preservation. But it doth not hence follow, that barely by Natural Strength an *Obligation*, properly so call'd, may be laid on another: For to *compel*, and to *oblige*, are very different Matters; and though Natural Strength be sufficient for the former, yet the latter cannot be perform'd by that Superiority alone. For, even according to Mr. *Hobbs's* own Notion, as one Man hath a Right of *compelling others*, so those others have a Right of *resisting him*. But now, *Obligation* cannot stand with a Right of *resisting*: Because, it presupposeth such Reasons as, inwardly affecting Men's Consciences, make them conclude, by the Judgment of their own Mind, that they cannot *Honestly*; and therefore *Rightly*, resist. And though it be Irrational, to contend violently against a superior Strength, and by that means to draw upon our selves greater Mischiefs (d); yet there remains in us, a Right of trying all ways, either to drive off the Force, by the dextrous Application of other Force, or to elude it by Subterfuge and Escape: But neither can this Right consist with that *Obligation* which is precisely so term'd, and which *Grotius* commonly opposeth to *Extrinsiccal* (3). So that, on the whole Matter, by bare Force, not the Right of Resistance, but only the Exercise of it, is extinguish'd. We may explain the Point by the Case of Brutes, with which we Men live in a Lawless State: Now those of them which we can master by our Strength, we lay hold on, and employ in our Service; but if any of them escape our Power, we are not apt to complain of any Injury receiv'd from them. Nor can it here be reply'd, that Brutes are not capable of *Obligation*; and that therefore they cannot be tied and engag'd any other way than by Strength: For Mr. *Hobbs* himself acknowledgeth (e), That a Captive of War, although capable of *Obligation*, yet is under none, whilst he is restrain'd only by *Natural Bonds*, and before the Interposition of any Faith or Compact; and that therefore, such an one may give his Conqueror the slip, or may assault him violently so soon as he finds

(a) Terent. Adelph. *Malo coactus qui suum officium facit, &c.* He that doth his Duty out of Fear of Punishment, will be sure to take care whilst he is under Apprehension of being discover'd: but upon the hopes of Privacy and Security, he never fails to give a loose to his old Inclinations. (b) C. 15. f. 5. (c) P. 187. (1) See B. II. c. 2. f. 3.

(2) Vide de Cive, c. 1. f. 7. (d) Pindar. Pyth. Od. 2. Πόν κέντερον δε, &c. To kick against the Goad, is a very dangerous Attempt. (3) He understands by an *Obligation Extrinsiccal* that which is founded only upon Civil Laws: whereas an *Internal Obligation* has for its Principle the Light of Conscience, which makes us look upon many things unjust, which Civil Laws permit, tolerate, or at least don't formally forbid. (e) De Cive, c. 8. f. 2.

Opportunity (a). Were we dispos'd to be tedious, we might farther shew, that this Maxim of Mr. *Hobbes* is meer Absurdity and Nonsense, if applied to GOD Almighty. For how can Nature be said to have granted any thing to God: Since Nature is either GOD himself, or at least the Work of GOD? For these Reasons therefore, and because it seems unworthy of the Divine Goodness, we conclude, that the Right of Commanding, or the Sovereignty of GOD, as it denotes the Virtue of imprinting Obligations on Men's Minds, is not to be deriv'd from the bare Consideration of his Omnipotence.

Neither do those Arguments, brought by Mr. *Hobbes* from Scripture, prove the Truth of his Position. When GOD seems to have recourse to his Absolute Power, about the Calamities sent on *Job*, we cannot hence infer, that he hath no Right over his Creatures, but what ariseth from that Power only. *Job* himself, at the beginning of his Sufferings, made a true Declaration, by what Right GOD had depriv'd him of his Goods, and of his Children: *The Lord gave (says he) and the Lord hath taken away: That is, why may not he recall at his Pleasure, those things which he gave upon the same free account (b)?* But when his Grief had so far prevail'd on his Reason, as to make him enter into Expostulation with Heaven, then GOD, to repress the Insolence of the Complaint, alledg'd his Power, since the Sufferer had now neglected to consider the other Reasons of the Divine Sovereignty and Command. And thus we commonly deal with Obstinate and Refractory Subjects; when they refuse to hear our Reasons, we shew them our Strength; to make them understand not only their Sin, but their Folly too in opposing our Dominion. In the same manner, if a Person complains of the Misfortunes of good Men, and the Prosperity of the Wicked, when he persists Deaf to the genuine Causes of that Proceeding,

in the last place, we confound him with the Divine Omnipotence: As if we should say, *You that fancy your self injur'd, go and try your Strength against GOD for Satisfaction.*

Nor is it a better Inference of Mr. *Hobbes*, when he says, that the Obligation of paying Obedience to GOD is incumbent on Men, upon account of their Weakness. For this could only make it a piece of Folly in us, not to redeem our selves by obeying, from some greater Evil: But it doth not at all take away our Right of desiring, and of endeavouring by all means, to escape the Superior Strength, which thus oppresseth us. But such a Right is utterly excluded by every true Obligation. Nor is this Consequence good, *Of two Omnipotents, neither can oblige the other, therefore Men are oblig'd to GOD, only because they are not Omnipotent;* were the Antecedent never so unquestion'd. Not to say, that the Fancy of two Omnipotent Beings is an impossible Supposition. Neither did our Saviour intend to assert his Right against *Saul* by that Argument, *It is hard for thee to kick against the Pricks;* but rather to reprove the Boldness and Vanity of *Saul's* Design. Nor was that Mighty Convert afterwards invited by *Ananias* into the Christian Faith, barely by being inform'd how much above his Strength it was, to destroy that Profession. We have applied so much the more Diligence to the confuting of this Opinion, the more Danger we apprehended of its being abus'd by Violent and Head-strong Men (c).

XI. Others there are, who derive the Origin of Sovereignty, or of the Power of imposing Obligations on another, from Eminency or superior Excellency of Nature, which they pretend is of it self sufficient for that great Purpose. They draw a main Argument from the very Nature of Man, in whose Mind, as in the most excellent Part, is seated the  $\tau\delta$   $\eta\mu\alpha\nu\omega\nu\delta\eta$  the Directive Power. To illustrate which, they alledge the Authority of *Cicero*\*,

(a) *Senec. de Ira*, l. 2. c. 11. *Nature hath so order'd things, that he whose Greatness depends on the Fear of others, is not without Fear himself.* (b) *Add. Senec. ad Polyb.* c. 29. (c) In *Thucydides* (l. V.) the Athenian Ambassador speaks to this purpose, *We follow the common Nature and Genius of Mankind, which appoints those to be Masters who are Superior in Strength. This Law is not of our making, nor are we the first who have used it; but we receiv'd it as it came down to us, and we shall leave it to guide the Practice of all Posterity.* *Dionys. Halicarn.* l. 1. *It is a Law of Nature common to all Men, and which no time shall disannul or destroy, that those who have more Strength and Excellence, shall bear rule over those who have less.* *Brennus* (in *Plutarch's Camillus*) calls it a most ancient Law, that which gives to the Valiant the Possessions of Cowards; derived from GOD himself, and reaching even to Brute Creatures; for even amongst these, Nature gives larger Privileges and Portions to the strong than to the weak. *Livy* hath express'd the Notion more concisely, *omnia fortium esse, that the World was made for the Bold and the Strong.* *Callicles* (in *Plato's Gorgias*) pursues the same Argument: In the first place, he lays down this Supposition, that Nature and Law, are many times contrary to each other: He instanceth in the Case of Injury, to receive which is by Nature the most base and vile, as the Treatment of a Slave, not of a free Subject; yet to do an Injury is much worse in the Construction of the Law. He observes it to have been the Policy of Law-givers, to encourage this latter Notion, so to order the useful Engines of Praise and Dispraise, as to hinder others from growing too powerful for them; well knowing, that they were otherwise an unequal Match for the Multitude. Now Nature her self (says he) as I imagine, shews it to be just and right, that the Good and the Strong should have, in every thing, a larger share than the Bad and the Weak. And therefore, whereas *Xerxes* and *Darius* had both made use of this Pretence, the former against the *Grecians*, the latter against the *Scythians*; he says they did all this according to the Law of Nature. He complains, that the rigid Doctrine of Justice damps and oppresseth the Generous Spirits of young Men; or that on the contrary, when any one breaks through those formal Restraints, he seems to shake off his rust, and to shine in all the Splendor of Natural Right. On this Principle, he says, *Hercules* drove off *Geryon's Oxen*, who neither sold nor gave them him; the Hero having a Natural Right to the Oxen, and all the other Goods and Possessions of Inferior Puny Mortals. And this is indeed the Maxim which the great Bullies of Mankind would have prevail in the World: *Hoc Ithacus velit & magno mercetur Atrida.* *Plutarch's* Opinion is much more moderate, and might be admitted with less Exception; *It is the first and principal Law of Nature (says he) that he whose Circumstances require Protection and Deliverance, should admit him for his Ruler, who is able to rescue and to defend him.* \* *Tusc. Quest. lib. 3. cap. 5.*

when he commends the *Latin Phrase exire de potestate*, as applied to those, who are carried away from Rational acting, by the Fury of their Passions and Lusts; such Men being truly gone out of the Power or Command of their Minds. *Aristotle* likewise, is brought in to strengthen their Party, because he hath somewhere declar'd, that if a Man can be found excelling in all Vertues, such an one hath a fair Title to be King. Thus the most Superlative Pre-eminence of GOD, would, they say, deserve Veneration, though he had never created the World. Farther, to this Pre-eminence of Nature, they add *Non-accountableness*; and affirm, That for this Reason only, if Man useth Brute Creatures (whom he so far excels) any otherwise than with Decency and Moderation, he may do it fairly and securely, and they have no Right to complain of their hard Treatments: Because when one contends with another about Matters of Right, he doth, as it were, compare himself with him, and is willing that both should be judg'd by the same Law; but this cannot be admitted in two Natures, so vastly different, that one may be said to have been made for the sake of the other. And therefore they pretend, that GOD declar'd Mens Right over Brutes, purely on account of their superior Nature. Whence, they tell us, if a Man for abusing his Cattle happen to be punish'd by the Magistrate, this is not done in favour of the Beasts, but for the sake of the other Subjects, whose Interest it frequently is, that every one should use well what he possesseth. On the same score, they say, the Body ought not to complain, though it should, by the Command of the Soul, be wasted and worn out in Labours; since it is in so high a degree surpass'd by that Nobler Part.

But, to deliver our own Judgment, we cannot yet be perswaded, that from a bare Transcendency of Nature, can spring a Right of imposing *Obligation* on others, who have in themselves a Power of being their own Governours and Directors. For neither doth a superior Nature always imply a Fitness to Rule an Inferior; nor do the different Degrees of Perfection, in Natural Substances, immediately

denote a Subordination, and a Dependance of one upon the other. But rather, since the Person who is to receive the Obligation, hath in himself a Principle of guiding his own Actions, which he may judge sufficient for his turn; there appears no reason, why he should be suppos'd to stand presently convicted in his own Conscience, if he acts rather by his own Pleasure, than at the Will of another, who in Nature excels him. And therefore tho' that Notion of the *Epicureans*, was most senseless and impious, in which they describ'd the Gods, as enjoying their own Happiness with the highest Peace and Tranquility, far remov'd from the troublesome Care of Human Business; and neither smiling at the good, nor frowning at the wicked Deeds of Men; Yet they rightly enough infer'd, that upon this Supposition, all Religion, and all Fear of Divine Powers, was vain and useless. For who will worship another, that is neither willing to assist, nor able to injure him? The Contemplation of so Noble a Being as this, may indeed excite Wonder in us, but it can never produce Obligation. Besides, we *Christians* confess, that there are created Spirits indued with a Nature far surpassing our own; and yet we acknowledge no Sovereignty that they bear over us, immediately on their own account (a). The Instance about Brutes is nothing to the purpose; for they are not held by Obligation, but only by force, or by the Enticement of Food: Neither would they act contrary to their Natures, should they endeavour to throw off the Yoke and the Authority of Men. As to the Argument about the Soul, when that is said to bear a Sovereignty over the Body, the Speech is Figurative: For Sovereignty or Command is not properly understood, but between two Persons, or two compleat Natures; and the Body is subject to the Soul, by virtue of the *Physical* Combination, not of any Moral Tie. Lastly, for the Citation from *Aristotle*, if a King were to be constituted by Free Election, the Crown ought to be given to the most deserving Person (b); yet would not he bear the Sovereignty by a Right deriv'd purely from his superior Gifts and Excellencies, but by virtue

(a) *Apocalyp. XXII. 9. Marc. Antonin. l. VI. c. 44.* If the Gods do not at all regard or order Human Affairs (which yet it is the highest Impiety to imagine) to what purpose are our Sacrifices, our Supplications, and our Oaths, and our other Acts of Worship, by which we suppose the Divine Powers to be ever present and conversant amongst us? *Cicero de Natur. Deor. l. I. c. 2.* There have been Men in the World, who thought the Gods not in the least concern'd about Human Affairs. Were this Opinion admitted for true, there could be no such thing as Piety, Holiness, or Religion amongst Men: For to pay these Regards to the Divine Natures, is most agreeable to Goodness and to Purity, provided they take notice of our Actions, and are the Authors of any Benefits and Advantages in our Lives. But if the Gods are neither able nor willing to help us, nor at all bestow their Care and Observation on our Proceedings, and so derive no Blessings, no Favours upon Mankind, to what end is our Worship, our Honours, and our Prayers, the Tribute which we now pay to the Immortal Beings? As no Virtue can subsist in Hypocrisy and Shew, so especially Piety would be soon lost in that Disguise; and then farewell to all Holiness, and all Religion; which being once banish'd the World, what could follow but the Misery of utter Disorder, of Universal Confusion; And again, What Piety can you owe to him from whom you have receiv'd no Benefit? Or how can he claim any thing as his Due, who hath no Merit to plead in his Behalf? *Idem de Nat. Deor. l. 2.* The common Title which our Ancestors gave Jupiter was *Optimus Maximus*, most eminent in Goodness and in Greatness: in which we find Goodness, or Beneficence prefer'd to Greatness; it being a more Noble, and more Excellent, as well as the most Acceptable Prerogative to be Good, than to possess the highest Degrees of Majesty and Strength. *Ovid. de Pont. l. 2. El. 9.*

*Nunquid erit quare solito dignamur honore  
Numina, si demas velle juvare Deos?*

What Vows would to Regardless Powers be paid?  
They lose their Altars, if we lose their Aid.

(b) So far the Saying of *Cyrus* will be true, That no one ought to be a Governour, who is not better than his Subjects. *Plutarch in Apothegm.* And in the same Sense, we must take what *Socrates* urgeth in *Xenophon.* *De Rebus Memorab. l. 3. p. 453, 454.* *Ed. H. Steph.*

of the Donation made him by the Consent of the Electors.

XII. It must be acknowledg'd therefore as a certain Truth, That neither Strength, nor any other Natural Pre-eminence, is alone sufficient to derive an Obligation on me from another's Will; but that it is farther requisite, I should either have receiv'd some extraordinary Good from him, or should voluntarily have agreed to submit my self to his Direction (a). For, as we naturally yield and give up our selves to some singular Benefactor; so if it appears that this Benefactor both intends my Good, and can consult it better than I my self am able, and, farther, doth actually claim the guidance of me, I have no reason in the World to decline his Government and Sway. Especially if it so happen, that I am beholden to him for my very Being (b). For he who first confer'd on Man the Benefit of Free Acting, why may not he, by his own Right, retrench that Freedom in some Particulars? And then, as for the other Case, he that consents to admit another for his Sovereign, declares by this his own proper Act, that he will conform to his Sovereign's Pleasure. Though indeed to make a Lawful Sovereignty arise from Consent, it is farther necessary, that by this new Subjection, no prejudice be offer'd to the well-grounded Right of a third Person, and that the one Party may justly have such Subjects, and the other Party as justly such a Governour. From these two Springs we conceive all those Obligations to flow, which do, as it were, cast an inward Tie and Restraint upon the Liberty of our Wills. But because 'tis beyond the Power of any Moral Bonds, utterly to suppress our Natural Freedom of acting; and because such is either the Lightness or the Wickedness of most Mens Minds, that they despise these Grounds of Dominion, as feeble Reasons for Obedience; hence there ariseth a necessity of adding some further Motive, which may work on our disorderly Lusts with a stronger effect than the bare Sense of Decency and Honour.

And this Addition is the more requisite in as much as, generally speaking, the Wickedness of one Man tends to the Damage of another: Whereas we should be more willing to leave a Man to his own Guidance, provided his Sins would incommode no Body but himself. Now there is nothing which could have such an Effect as this, but the Fear of some Evil, to be inflicted upon our violating an Obligation, by some stronger Power, whose Interest it was, that we should not have thus offended. So that Obligations receive their final Strength and Authority from Force, and from a Supposition, that he whose Business it is to see them observ'd, is furnish'd with so much Power, either originally inherent in himself, or confer'd upon him by others, as to be able to bring some considerable Evil on the Disobedient. For amongst wicked Subjects He must needs be a very Precarious Ruler, whom they can despise without Danger. On the contrary, His Dominion is settled on a firm Bottom, who in the first place, bears a just Title to it, and, besides this hath so much Force always at his Command, as is sufficient to reduce the Seditious, and to restrain the Transgressors (c).

From our Disquisitions on this Head, some Temper may be found and applied to that Maxim, which some have more crudely utter'd, that *Right and Law is nothing else but what pleaseth the stronger Party*: For indeed, Laws can hardly obtain their outward end and effect, unless they are supported and arm'd with Strength, so as to be able, upon occasion, violently to force a Compliance (d). Even all that Pleasure, and Joy of Conscience, upon Performance of our Duty, and those Horrors and Tortures of Mind, which are the constant Attendants of Sin, both which we are in Piety, oblig'd to admit and acknowledge, proceed from the Strength and Power of Almighty GOD, who can easily make such Wretches their own Punishers, as contemn the Authority and the Restraints of other Men (e). And indeed it highly concerns the

(a) *Plin. Paneg. Nature doth not ordain amongst Men as she doth amongst Beasts, that the Power and the Sovereignty shall pass to the strongest.* (b) *Acts XVII. 24. &c.* (c) *Sophocl. Ajac. Flagellif. p. 61. Ed. H. Steph.*

Nor Laws, nor Governments could stand secure  
Without the Guard of Fear; nor Mighty Chiefs  
Secure the Faith of Armies, but sustain'd  
By Awful Dread, and Shame of doing ill.

*Arrian Epictet. l. 1. c. 29. p. 164. Ed. Cantab. 'Tis not Man who is the Lord of another Man, but Life and Death, Pleasure and Pain, are the proper Sovereigns whom we obey: Take away these, and bring me before Cæsar, and see how little Majesty without Terrour can prevail upon a Man's resolution.* (d) *Solon, as he us'd to say of himself, archiev'd the greatest things, οὐκ ἔστιν τι κ' εἰκὼν οὐρανόθεν, by coupling together Justice and Strength. Plutarch Solon, p. 86. Ed. Wschel.*

And there is no Argument of greater Efficacy in Human Affairs, than that which *Scylla* in *Ovid* (*Metam. l. 8. v. 59.*) useth concerning *Minos*,

*In causaq; valet, causamq; juvantibus armis.*

With a good Cause, he brings as good a Sword to second it. —

(e) *Juvenal. Sat. 13. 193. & seqq.*

*Cur tamen hos tu  
Evassisse putes, quos diri conscia facti.  
Mens habet attonitos, & surdo verbera cadit,  
Occultum quantiente animo tortore flagellum?  
Pœna autem vehemens, & multo sævior illis  
Quas aut Cæditius gravis invenit, aut Rhadamanthus,  
Næste dieq; suum gestare in pectore testem,*

But why must those be thought to 'scape that feel  
Those Rods of Scorpions, and those Whips of Steel,  
Which Conscience shakes, when she with Rage controuls,  
And spreads amazing Terrors thro' their Souls?  
Not sharp Revenge, nor Hell it self can find  
A fiercer Torment than a guilty Mind.  
Which Day and Night doth dreadfully accuse,  
Condemns the Wretch, and still the Charge renews.

*Mr. Creech.*

common Good of Mankind, that all Men believe and confefs the Certainty of a Divine Tribunal, incapable of the leaft Corruption, where Judgment is to be pafs'd on thofe, who by means of Cunning, Collufion, or Strength, have declin'd the juft Performance of their Duty (a).

They, therefore, who would prefcribe Laws to others with any Effect and Validity, muft build their Power on the Foundations which we have here eftablifh'd.

XIII. But that a Law may be able to exercife its directive Force, there is requir'd in the Perfon for whom 'tis made, a Knowledge both of the Law-giver and of the Law. For how can any Man pay Obedience, who neither apprehends to whom it fhould be paid, nor to what Duties his Obligation binds him? And here, it will be fufficient, that a Man hath once been Mafter of fuch a Knowledge: For he that forgets what he once knew, is not at all loos'd from his Obligation, fince he might well have secur'd his Remembrance, had he taken up, as he ought to have done, a real Defire and Refolution of obeying. Now to the Knowledge of the Legiflator, 'tis hardly poffible any Man fhould be a Stranger. For, as to Natural Laws, that they have the fame Author with the Univerfal Frame of things, none can be ignorant, that will but make ufe of their ordinary Reafon. Much lefs can the Author of Civil Laws be hid from the Apprehenfion and Notice of his Subjects: Since he is conftituted, either by the exprefs and open Consent of thofe Subjects, or elfe by their tacite Agreement, whilft they any way fubmit to his Command. How we arrive at a Senfe of Natural Laws, by the Contemplation of Human Condition, we fhall hereafter have occafion to explain. Civil Laws are convey'd to the Subject's Knowledge, by a Promulgation, publickly and perfpicuoufly made. In which there are two Conditions which ought to be clear and certain, firft, that the Laws proceed from him who hath the chief Command in the State; and fecondly, that the meaning of the Laws is fuch, and no other. The former Condition is then known, when the Sovereign promulgates a Law either by his own Voice, or by Perfons of his Deputation. That thefe Perfons publifh Laws by the Command and Authority of the Sovereign, there is no Queftion to be made, if it appear, that they have been employ'd by the Sovereign in declaring his Will; if the Laws are brought into ufe at judicial Proceedings, and if they contain in them nothing derogatory to the Sovereign's Power. For it is not to be fuppos'd that a Minifter fhould vent that for a durable Decree of his Prince, which is not fo, or that he fhould impudently ufurp fo extravagant a Power;

fince in an Enterprize of this Nature, there could be no hopes of Concealment, or of efcapeing due Punifhment for fo Insolent an Offence. As to the other neceffary Point, that the Senfe of a Law may be clearly apprehended, it is incumbent on the Promulgators, to ufe the greateft Plainnefs that the thing is capable of: Contrary to that Management of *Caligula*, who wrote his Laws in fmall Letters, and fix'd them in a High Place, in this manner only, fhewing them to the People (b).

If any thing in the Laws feems obfcure, the Explication of it is to be fought, either from the Legiflator, or from thofe Perfons, who are by him appointed to judge according to the Laws. For it is their Bufinefs, obferving a right Interpretation, to apply the Laws to particular Cafes, or upon the Propofal of fuch or fuch a Fact, to declare the Sovereign's Pleafure concerning it (c).

We cannot here but obferve, that the Notion maintain'd by fome Authors, *That the Consent of the People is requifite to make Laws oblige the Subject in Confcience*, is neither true in the Laws of Nature, nor in the Civil Laws of Monarchical or of Aristocratical Rulers; nor indeed at all, unlefs it be underftood of Implicite Consent, as a Man by agreeing to the Sovereignty of another, is at the fame time fuppos'd to have agreed to all the future Acts of that Sovereignty. Though it would really be very ufeful, and contribute much to engaging the Subjects in a voluntary Obedience, if the Laws could be made with their Consent and Approbation; efpecially fuch as are to pafs into their Lives and Manners (d).

XIV. As in the Sovereign, or in him who is to govern another by Laws, two things are requifite, that he underftand what is fit to be prefcrib'd, and that he have fufficient Strength to denounce and to execute fome Evil on thofe who fhall not conform to his Rules: (for we fuppose the Perfons for whom the Laws were made, to have both Power and Inclination to difobey them) So every Law confifts of two Parts; in one is defin'd and declar'd what is to be perform'd, or omitted; in the other is fignify'd what Evil fhall be incur'd by thofe who tranfgrefs in either refpect; and this latter part is ufually term'd the *Sanction* of a Law: About which *Bifhop Cumberland* (e) hath open'd a wide Field of Enquiry, whilft contrary to the General Opinion of the Lawyers, 'He maintains that the Sanction of Laws is made, not only by Punifhments, but by Rewards too, and more principally by the latter than by the former. That, as to the Sanctions of the Laws of Nature, it is impoffible by any Natural Signs more openly and more forcibly to perfwade Men, or to

(a) Hither may be referr'd that of *Plutarch* (adverf. *Colot.*) 'Tis eafier to build a City without Ground to hold and fupport it, than to make a Commonwealth either unite or fubfift, without the Acknowledgment of a GOD and a Providence.

(b) *Dio. Caff.* in Excerpt. *Pieresc.* l. 59 (c) *Comp. Hobbes de Cive*, c. 14. f. 11. &c. and *Leviath.* c. 26. (d) Agreeable to this is *Pericles's* Saying in *Xenophon*, *Apomn.* l. 1. p. 418. Ed. *Steph.* *Whoever, either by written or unwritten Commands enjoins another to do a thing, without perfuading him that he ought to do it, feems to me, not to ufe Law but Violence.* *Comp. Sanderfon de Oblig. Confcient. Prælect.* 7. f. 22. &c. (e) *De Leg. Nat. Prolegom.* f. 14. & c. 5. f. 40.

‘judge with good Authority, that such a Duty  
 ‘is commanded by the Governour of the  
 ‘World, than if such Acts are grac’d by him  
 ‘with Natural Rewards. That, altho’ in the  
 ‘Sanction of Laws by Men, use is made of  
 ‘Negative Conceptions and of Words properly  
 ‘expressing them; yet in the Nature of things,  
 ‘that which drives us on to Action, is some  
 ‘positive Good, which we hope to preserve,  
 ‘or to acquire upon keeping off those things  
 ‘that would have a contrary effect. That,  
 ‘Privations and Negations do not move the  
 ‘Will of Man, and that the avoiding of Evil  
 ‘is by no means its Object any farther than as  
 ‘it denotes the Preservation of some Good.  
 ‘That, whatever Strength is usually ascribed  
 ‘to Natural Punishments and Evils, in engage-  
 ‘ing Men to shun and decline them, is all to  
 ‘be resolv’d into the attractive and impulsive  
 ‘Force of those Goods which the Punishments  
 ‘or Evils would deprive them of. That, thus  
 ‘all those things which are commonly said to  
 ‘be done for the sake of escaping Death or  
 ‘Want, might be more properly affirm’d to  
 ‘proceed from the Love of Life, or of Riches.  
 ‘That, unless Life went before it, Death would  
 ‘signifie nothing, and that the former would  
 ‘never be fear’d, if the latter were not first  
 ‘desir’d. That, the Nature of things moves  
 ‘our Affections more strongly with the Love  
 ‘of a Present Good, or the Hope of a Future,  
 ‘than with the Hatred of a Present, or the  
 ‘Fear of a Future Evil; and that good things  
 ‘are desir’d upon account, not of the opposite  
 ‘Privation, but of their inward Agreeableness  
 ‘to our Natures. That, Civil Laws receive a  
 ‘firmer Establishment from their End, the  
 ‘Publick Good, a part of which is commu-  
 ‘nicated to every honest Subject, than from  
 ‘the Penalties they threaten, the Fear of  
 ‘which can prevail only on a few Men, and  
 ‘those the most wicked in the Commonwealth.  
 To this purpose Bp. *Cumberland* discourseth.  
 On whose Opinion we may first observe, that  
 if we would comprehend under the Term of  
*Sanction* even the good Things and the Re-  
 wards following the Observation of Laws:  
 it is requisite, that those good Things should  
 really proceed from our Obedience, and be,  
 as it were, bought or purchas’d by it. But  
 now ’tis apparent, that all the good things we  
 possess we do not obtain by conforming to  
 Laws; and therefore those which we any  
 other way acquire, do not come under the  
 Notion of Rewards. Thus, our selves, our  
 Lives, and all the Natural Benefits we enjoy  
 are not paid to us as the Rewards of our  
 fulfilling any Law; but the Divine Goodness  
 freely confer’d them on us, before we could  
 so much as think of any Law to be fulfill’d.  
 Neither is the Continuance of these good  
 Things, (since it proceeds from the inward  
 Force of Natural Substance,) deriv’d from  
 any Performances of ours, but is the Gift of our

Great Creator, who (1) *makes his Sun to shine  
 on the Evil and on the Good, and sendeth Rain  
 on the Just and on the Unjust.* Thus likewise,  
 what a Man gets by his proper Labour, and In-  
 dustry, he doth not directly and principally  
 ascribe to his own Obedience, but to his Cre-  
 ator who gave him the Strength, and to him-  
 self who rightly employ’d it. Yet this Effect  
 indeed, we may obtain by Laws, both the Pre-  
 servation of those good Things which either  
 the free Bounty of Heaven, or our own Dili-  
 gence hath procur’d us from the Incursions  
 and Assaults of other Creatures that might  
 otherwise hurt or destroy them; and likewise  
 the Increase of the same Enjoyments by va-  
 rious Methods and Means: And therefore  
 these Advantages only, in as much as ’tis in the  
 Power of the Legislator to make them good,  
 are properly to be esteem’d Rewards. And  
 that these may have a perfect Force in dis-  
 posing Men to Obedience, the Legislator is to  
 signifie, that such Effects will most certainly  
 follow such a Cause.

We may observe farther, That altho’ the  
 Will may be incited to an Action, by the Pro-  
 posal of some Good likely to proceed from  
 that Action; yet this Consideration doth not  
 impose any Necessity (2) of Performance, un-  
 less it be strengthen’d with the Commination  
 of some Punishment, to be incur’d upon Non-  
 Compliance. And therefore, that any good  
 Effect proceeds by natural Consequence from  
 any Action, is indeed a Token of the Super-  
 lative Bounty of our Creator, who is so willing  
 to confer that Good on us, and so kindly in-  
 vites and perswades us to imbrace it. Yet  
 this must not presently be thought a necessary  
 Argument, that He at the same time com-  
 mands us, by performing the Action, to ac-  
 quire such a Good. He might perhaps judge  
 it sufficient to have offer’d us so fair an Oc-  
 casion of receiving his Munificence. But if  
 some Evil be farther pronounc’d against us  
 upon Omission, then there can remain no doubt,  
 but that the Action is really and directly en-  
 join’d. To which we may add, that the  
 Minds of Men are mov’d more forcibly by the  
 Infliction of Evil, than by the Possession of  
 Good. It must be confess’d, that the Acqui-  
 sition of Good hath very powerful Charms:  
 especially when it is fresh, and join’d with  
 the Deliverance from some present Evil. But  
 the Sense of this Pleasantness wears off in a  
 long Course of Possession; and when once  
 that Motion of Mind ceaseth, which either  
 the Absence of the Good, or the fresh Enjoy-  
 ment of it rais’d, there remains scarce any  
 thing, but a dull Acquiescence and Content-  
 ment. Whence it comes to pass that many Per-  
 sons, then only begin to value their good things,  
 when they either have lost or are in danger of  
 losing them. But *Grief*, into which all Evils  
 and all Privations of Good are at last resolv’d,  
 is not it self a bare Privation, but a thing of a

(1) *Matth. V. 45.*(2) See *Lock of Human Understanding*, l. 2. c. 21. f. 35, &c.

most positive Nature, and of such prodigious Strength, as to be able so far to extinguish all Sense and Value of Happiness, as sometimes to make us desire so severe a Remedy as Death, for its Cure.

Hence, we think, Civil Legislators have sufficient Grounds and Reasons for chusing to make the *Sanction* of their Laws consist rather in Punishments than in Rewards. The Observance of Human Laws is indeed advantageous enough in general, as it secures the Possession and Enjoyment of those Blessings which attend a Civil Life: But were the Exercise of common Virtues enforc'd by the Proposal of particular Rewards, 'twere impossible to furnish stock enough for supplying so profuse a Bounty. On the other hand, the denouncing of Punishments was the surest way to make Men shake off that heavy Drowsiness with which most of them are besotted and benumm'd: And because generally the Transgression of the Laws is join'd with the Hurt of others, and with some imaginary Good of the Offender, therefore it seem'd most expedient to repress the enticing Allurements of Sin, by representing the frightful Image of that Pain and Grief which was unavoidably to follow it. Thus we find that Civil Laws do always come enforc'd with a Penalty denounc'd against Transgressors, either expressly defining the kind of Mulct or Punishment; or else intimating that it is left undetermin'd to be settled by the Discretion of the Judges, and of those who are to take Care of putting the Laws in Execution. Indeed the *Roman* Lawyers tell us of some Laws which were *imperfect* (1), or which wanted this Penal *Sanction*. Such a one they reckon the *Lex Cincia*, which had no other Clause added at the end to enforce it, but this, *He that doth otherwise shall be accounted to have done wickedly*. But I should conjecture, that in that Law either the Infamy alone was thought a sufficient Punishment, or it was left to the Power of the Censors to fix some further mark of Disgrace on the Delinquents in this point. That such Persons were not altogether unpunish'd, we may fairly conclude from *Tacitus* (a). *Livy* (b) gives us an Instance of another Law seemingly *Imperfect*. *The Valerian Law*, says he, *when it had forbidden the Scourging, or the Beheading of a Man, who should make an Appeal, only added, that whoever acted thus, acted wickedly*. *This I suppose, (so great was the Modesty of Men in those Days) might be thought a sufficient Tie for a Law: But in our times such a Simplicity of Expression would be us'd in no Threats, but those which were design'd for Jest*. In the same Rank we may place the Law of *Zaleuchus* mention'd by *Diodorus Siculus* (c). *Let no Citizen prosecute his Enemy with implacable*

*Hatred, but let him so maintain Enmity with him, as if he were shortly to return into Favour and Friendship*. *He that doth otherwise, let him be reputed a Man of a Fierce and Barbarous Disposition*. Unless you'll say, that in this Case, as well as in the former, the Infamy may well be interpreted as a Punishment. And so likewise in those other Laws, recited immediately after by the same Author (d). *Let not a Free Woman, unless she be drunk, go attended with above one Maid*. *Let her not stir out of the City in the Night time, unless when she goes to prostitute her self to her Gallant*. *Let her not wear Golden Ornaments, nor Garments interwoven with Gold, unless she designs to act the Courtesan*. *Let not a Man wear a Ring allied to Gold, or a Garment approaching near to the Milesian Richness, unless he be guilty of Fornication, or of Adultery*. Thus, (as the Historian proceeds to observe) *by such Scandalous Exceptions and Conditions, he easily diverted his Subjects from the Pursuit of Luxury and of Intemperance*. For no one could bear the exposing himself to his Fellows by so foul a Disgrace (e).

Thus then, there are two Parts of a Law, one *Definitive*, and the other *Vindicative*, which is the Penal Sanction. These, we say, are two parts of the same Law, and not two Species of Laws. For as it is lost Labour to say, *Do this*, if nothing follow besides, so it is absurd to say, *You shall undergo such a Penalty*, unless it have been before signified by what means we shall render our selves obnoxious to this Suffering. We must therefore take notice, that the whole strength and force of a Law, properly consists in declaring what our Superior is pleas'd we should perform or omit, and what Penalty we shall incur upon Default. Whence also it may be understood in what sense the Power of obliging is attributed to the Law. For, properly speaking, the Power of obliging, or of laying an inward Necessity on Persons to act in such a manner, is in him who bears the Sovereign Command. But the Law is only the Instrument of Sovereignty, by which the Ruler makes his Pleasure known to his Subject, which being once discover'd, an Obligation to Obedience is produc'd in them by Virtue of his Supreme Authority. Hence too it appears, that the vulgar Distinction of the Power of a Law, into *Directive* and *Compulsive*, was ill made; unless by the Compulsive Power we understand the Penal Clause. For the proper Efficacy of a Law consists in *directing*, as it declares the Will of the Sovereign, and denounceth Threats against the Subject, if he prove Disobedient. But the *Compulsive* Power, or the Power of exacting from the Subject a Conformity to the Rule prescrib'd, by decreeing

(1) *Inter Leges quæque illa imperfecta esse dicitur, in qua nulla deviantibus pœna sancitur*. Macrob. in Somn. Scip. l. 11. c. 17. (a) Ann. XIII. 42. Cicero de Legibus, l. 2. c. 9. *The Punishment of Perjury, is from Men Disgrace, and from Heaven Destruction*. (b) L. 10. c. 9. (c) L. 12. c. 20. (d) L. 12. c. 21.

(e) Add. l. 11. t. 7. D. de Relig. Sumptibus Funer. & l. 3. f. 4. Leg. de Sepulchro violato.

and actually inflicting Penalties, is properly in the Person of him who made the Laws, or of him who hath the Care of their Execution (a). Though 'tis a common thing with Writers, to attribute to the Laws themselves such Effects, as in a strict sense belong to the Supreme Power. Of which kind of Speech, that one Passage of *Apuleius* (1) may be a sufficient Instance, *Quod Lex est in Urbe, &c. What the Law is in a City, what the General is in an Army, such is GOD in the World.* When *Livy* (2) says, *The Commands of the Laws are more Powerful than those of Men;* this is so far true in Democracies only, that the Magistrates cannot recede from the Laws, nor over-rule their Force.

Legislators, as such, are said to *compel*, only *Morally*; not that by any Natural Violence they so constrain a Man, as to render it impossible for him to act otherwise than as they direct; but because, by declaring and exhibiting a Penalty against Offenders, they bring it to pass that no Man can easily chuse to transgress the Law; since, by reason of the impending Penalty, Compliance is in a high degree, preferable to Disobedience.

XV. Now by attributing thus to Laws the Power of *Obliging*, we immediately exclude *Permissions* from the Number of true and proper Laws: Though *Modestinus* (b) tells us, the Virtues of Law, are to *command*, to *forbid*, to *permit*, to *punish*. For *Permission* is not properly an Action of the Law, but the Negation of an Action. Whatsoever things the Law *permits*, those it neither commands nor forbids, and therefore it really doth nothing at all concerning them. Some maintain, that there is nevertheless, a kind of Obligation in *Permissions*; not indeed affecting him to whom we say a thing is *permitted*, but binding up a third Person from giving him any hindrance, in case he undertake what the Law thus permits. Though this is by many restrain'd to such things as are fully and perfectly permitted, so as not to take in those lesser and imperfect *Permissions* which may be more properly stil'd Indulgences or Connivances. Thus, for example, the Laws of some Countries permit the killing of a Wife taken in Adultery; yet they do not forbid others, from using their utmost to hinder her Death. But if we would be accurate and exact in our way of Talking, even this Effect doth not properly result from the *Permission* of the Law, but from every Man's just Liberty. For about those things in which the Law gives me no stop or hindrance, I have a perfect Freedom of acting, the chief Effect of which is, that no Man ought to disturb me in the harmless Exercise of it. So that for a

Law expressly to permit those Things, to which we claim a sufficient Licence by their not being prohibited, which cannot well fall under Doubt or Dispute, seems little better than useles and superfluous. As likewise, it is not always necessary, that when any prohibiting Law is repeal'd, an Act hitherto *forbidden*, should by an express Ordinance be declar'd *permitted*: Since upon removal of the former Impediment, our natural Liberty doth, as it were, revive and recover it self. There are indeed two special Cases, in which Civil Lawgivers are wont to use express *Permission*; First, when Licence and Impunity is indulg'd to such an Act, within such a Measure; and secondly, when the Licence or Impunity is to be purchas'd by some Fine or Burthen. Of the former Case, some give an Instance in the Laws of most Countries permitting Usury, within such a fix'd Degree: Of the latter, in the Constitutions of some Places, where Women are allow'd to prostitute themselves, upon Condition of paying a certain Tax: which whether it be well or ill done, we are not now to dispute (c).

Legal *Permission* is divided into *Plenary*, which gives a Right of acting, and makes the Deed altogether lawful; and *less Plenary* which either affords Impunity, or Freedom from Impediment, or both. Now that several things find an Impunity amongst Men, is occasion'd by some of these Reasons. Either, that the Matters exceed the Reach of Human Courts and Cognifance, as do the Faults of Kings; or, that Human Law hath either determin'd nothing plainly about such an Action, or hath declar'd it shall be Lawful; or, lastly, because Civil Ordinances frequently leave many things to the Modesty and common Honesty of every particular Man (3).

Some have more accurately observ'd concerning these *Permissions* of Civil Laws and Civil Courts, that they are made either by the Action of the Law, or only *tacitely*. To the former they refer the Omission, or passing by of a Matter, not simply, and, as it were, by accident, but when the Design and the Form of the Law run in such a manner, that the Legislator shews his Intent of making a full Enumeration of Particulars. For in such a Case, he is suppos'd to have *permitted* whatever he hath not expressly reckon'd up amongst things prohibited; provided the matter be not repugnant to Natural Honesty. Those things are understood to be *tacitely* forbidden, which the Civil Power lets pass by conniving at, tolerating, or dissembling; either for the present only, or for a longer time, so as to let them obtain the Force of Customs. Yet a *Permission* granted by a Civil Law, cannot

(a) *Liban. Orat. V. Laws were of no Force without Judges to put them in Execution. Bare Statutes have neither Ears to hear our Cause, nor Feet nor Hands to hasten to us and defend us: But all the Assistance which Justice gives us, is convey'd by its Ministers.* (1) *De Mundo*, p. 749. Ed. in *Usum Delph.* (2) *L. 2. c. 1.* (b) *L. 1. D. de L. L. T. 3.*

(c) *Vid. Evagr. Hist. Eccles. 1. 3. c. 39. Of the Tribute paid by common Strumpets, which Anastasius the Emperor took off. See B. VIII. of our Author, c. 1. f. 3.* (3) *Vid. Digest. 1. 50. tit. 17.*

cause that an Action shall not be contrary to the Divine Law, or set it beyond the Fear of the Divine Punishment.

We may farther remark, that when a thing is said to be *permitted*, which is not determin'd by the exprefs Command of any Civil Law, we are not to cavil at the Words of the Law, but to consider the Scope and Intention of it. For many things are contain'd in the sense of the Laws, and are suppos'd to be really implied by them, either as they are necessary Consequences, or upon Account of their near Affinity and Resemblance to the determin'd Cases. Regard is likewise always to be had to Natural Law, or to common Honesty, which is the perpetual Supplement of Civil Decrees. Lastly, those things which are tolerated only for a time, or upon the Score of Necessity, cannot fall under the proper Notion of *Rights*. All which Observations are chiefly to be understood of the most perfect or *Plenary Permission* (a).

XVI. The *Matter* of Laws, in General, is whatever *can be done* by those Persons for whom the Laws are made, at least at the time of their Promulgation. For if any Man afterwards by his own Fault, loseth his Ability to fulfil the Law, the Force of the Law doth not thereupon cease and expire; but the Legislator hath Power to punish him, for rendering himself thus incapable of conforming to the Rule prescrib'd him. But, otherwise, to make such a Law as a Subject cannot fulfil, and yet hath not lost his Power of fulfilling by his own Fault, is not only a most vain, but a most unjust Design (1). As to the subject Matters which employ the particular Species of Laws, we shall more conveniently consider them in their proper place.

XVII. To know who is capable of being *oblig'd* by a Law, we need seek no further than to the Right of the Legislator; which certainly takes in all those who are subject to his Command. What Persons the Legislator intended to oblige is plain enough from the Law it self. For in all Laws it is signified whom they concern; either by exprefs Determination, made sometimes by a general Sign, sometimes by a Restriction to certain Individuals; or else, by some Condition or Reason which a Subject finding in himself, at the same time apprehends that he therefore stands *oblig'd* by such a Law. Regularly then, a Law obligeth all Persons subject to the Legislator, whom the Reason of the Law reacheth, and to whom the matter of it may be applied. For otherwise, Tumults and Confusions would continually arise amongst Subjects, the Prevention of which Disorders was a principal Reason why Laws were first introduc'd. And therefore no Body shall be esteem'd exempted from a Law, unless

he can shew his peculiar Privilege. Yet this indeed frequently happens, that a Man may be exempted from the Obligation of a Law, *after* the time of its being enacted, and this we call being *dispens'd with*. For if the Legislator may rightly abrogate or repeal a Law, he may as fairly suspend the *Effect* of it in some certain Person. *Dispensation* differs from *Equity* (2), with which it is generally confounded, in this respect, that the former cannot be granted but by one indued with Legislative Power; whereas an Inferior Minister of Justice not only *may*, but *ought* to apply the latter; so that if he follow the strict Letter of the Law, in a Case where there is room for an Equitable Construction, he shall be judg'd to act contrary to the Mind and Intention of the Legislator. *Dispensations* therefore depend on the free Grace of the *Law-giver*, but *Equity* on the Office and Duty of the *Judge*. In granting *Dispensations*, great Prudence is to be us'd, lest by a promiscuous Indulgence, the Force and Authority of Law be enfeebled; or lest, if the same happen to be denied to Persons of the like Condition, occasion should be given to Anger and Repentment, whilst Men of Equal Circumstances are not admitted to Equal Favours. *Plutarch* hath recorded several Instances of very nice and subtile *Dispensations*. As when *Agessilaus* suspended the Laws for one Day, with this Form, *Let the Laws sleep to day* (b); to hinder those Persons who had fled in an Engagement, from suffering the usual Disgrace. So when *Demetrius* desir'd to be admitted at once into all the *Athenian Mysteries*, whereas it had ever been a Custom to celebrate the Greater *Mysteries* in *November*, and the Lesser in *August*, *Stratocles* publish'd a Decree, that the Month *March*, in which *Demetrius* visited *Athens*, should be call'd, first *November*, and then *August* (c). What the same Author reports of *Demosthenes*, is more plausible. *Demosthenes*, upon his being recall'd from Banishment, lay under a Pecuniary Mult, and the Law forbidding, that he should be entirely discharg'd from it without Payment, they invented this way of eluding the Law; they had a Custom of giving Money to the Man who prepar'd and adorn'd the Altar, at the time of sacrificing to *Jupiter the Deliverer*: This Office and this Money they decreed *Demosthenes*; and under that pretence allotted him fifty Talents, the Sum in which he had been amerced. The *Lacedemonians* made use of much such another Evasion in Reference to *Lyfander*. It was a Law amongst them, that no Man should bear the same Office above once; but now resolving to let *Lyfander* have again the Chief Power in a Naval Expedition, they gave *Aratus* (3) the Formal Command of the Fleet, but join'd *Lyfander* with

(a) Vide *Bæcler* in *Grot.* l. 2. c. 1. f. 9. Author says in B. 5. c. 12. f. 21. Add. & in *Alexandr.* p. 672. & 679. the *Acheans*.

(1) See B. 7. c. 9. f. 5. of our Author.

(b) *Plutarch* Apothegm. Lacon. & *Agessil.* *Appian* Lybic.

(2) See what our

(c) *Idem* *Demetr.*

(3) Our Author must have meant *Aratus*, for *Aratus* was a General of

him in a private Station, with exprefs Orders, *That the General should never act contrary to his Advice* (a). I know not whether the *Spanish* Custom mention'd by *Naudæus* (b), may not be reckon'd likewise amongst these nice *Permissions*. 'In *Spain*, he says, when they deem 'a Man to be guilty of *Treason*, they appoint 'Judges to sit on him in secret, who form a *Process* and condemn him to suffer *Death*; after 'which they seek by any means to put the *Sentence* in Execution. And this they practice as a 'Salvo to their Consciences; that they may not 'be accus'd of *Injustice* in punishing Men capitally, without a *Legal Knowledge* of their Crime.

XVIII. LAW may be best divided, with Reference to its Original, into *Divine* and *Human*; the former having *GOD*, and the latter *Man* for its Author. But if we consider Law as it bears a necessary Agreeableness to the subject Matter, in this respect we divide it into *Natural* and *Positive*. The former is that which is so exactly fitted to suit with the Rational and Social Nature of Man, that Human Kind cannot maintain an honest and a peaceful Fellowship without it: or, in other Words, that which carries in it a *Natural Goodness*, or a *Usefulness* arising from its internal Efficacy, towards Men in General. Though there be also a farther Reason of this Denomination; in as much as this Law may be found out, and known by the ordinary Sagacity of Men, and from the Consideration of Human Nature in Common.

*Positive Law* is that which doth not by any means flow from the general Condition of Human Nature, but from the sole Pleasure of the Law-giver; tho' these Laws ought likewise to have their Reason and their Uses: in reference to that particular Society for which they are enacted.

Some are us'd to call *Positive Law* by the Name of *Voluntary*: Not as if the Law of *Nature* did not proceed from the Will of God, but because no *Positive Law* had such an Agreeableness with human Nature, as to be necessary in general for the Preservation of Mankind, or, as to be known and discover'd without the Help of exprefs and peculiar Promulgation. And therefore the Reasons of this Law are, not to be drawn from the General Condition of Human Race, but from the Particular, and sometimes the temporary Advantage of separate Communitie (c). So that upon the Union of Men in Societies, they are fix'd and determin'd by the Pleasure of Superiors. We may improve our Notion of *Positive Law* by that Passage of *Aristotle* (1), where he says, *That Laws proceeding from Institution and Usefulness, bear some Resemblance to Measures: For the Measures of Wine and Corn, for instance, are not every where the same; but Greater where the Merchants buy, and Lesser where they sell.*

*Divine Law* is again divided into *Natural* and *Positive* (2): But *Human Law* strictly taken, is only *Positive*. Of the particular Species, we shall discourse in their Place.

(a) *Diodor. Sic. l. 13. c. 100. Plutarch Lysand. Add. Valer. Max. l. 6. c. 5. f. 3.* (b) *Coups d' Estat. cap. 3. p. 193.* (c) *Morem accommodare prout conducatur*, is a Phrase with *Tacitus*, l. 12. c. 6. to change the common Manners and Ways of Acting, for the Publick Benefit and Convenience. (1) *Vid. Eth. ad. Nicom. l. 5. c. 10. Et Vid. l. 15. D. de condit. Instit.* (2) *Divine Natural Law* is distinguish'd from *Positive*, because This is alterable by the Authority that made it, That is not, but is *Eternal and Immutable*. See what our Author says in B. 2. c. 3. f. 4.

## CHAP. VII.

### Of the Qualities of MORAL ACTIONS.

OUR next Business is to consider the Qualities of Moral Actions: Now according to these, Actions are said to be *Necessary*, or *not Necessary*, *Lawful* or *Allow'd*, and *Unlawful* or *Disallow'd*, *Good* or *Evil*, *Just* or *Unjust*. So that the Qualities of Moral Action must be *Necessity*, *Licence* or *Allowance*, and the Opposites of these, which want proper Names; together with *Goodness* and *Illness*, *Justice* and *Injustice*.

II. A *necessary* Action is that which by *Virtue* of the Law or the Command of a Superior, the Person to whom the Law or the Command is given, is bound absolutely to perform. For in this consists the *Necessity* of Moral Actions, that they ought not to be omitted, nor yet to be done in another manner than what is en-

join'd; though by our *Natural Power* and *Strength* we are able either to omit them or to do them in another manner. Yet it is usual for the *Lawyers* to say absolutely, that a thing which wants only this *Moral Necessity*, cannot be done (1). To a *Necessary* Action is oppos'd not only a *Forbidden* Action, expressly prohibited by the Laws or other Orders of the Superior; but likewise a *Lawful* or an *Allow'd* Action, which the Laws neither command nor forbid, but leave it to every Man's Pleasure, whether he will undertake or decline it (a). Now by common Usage of Speech, not only those things are said to be *Lawful*, which neither *Divine* nor *Human Law* forbids, and which therefore may be undertaken without *Sin* or *Blame*, but likewise those things which

(1) *Nam quæ facta ledunt pietatem, Existimationem, verecundiam nostram, & (ut generaliter dixerim) contra bonos mores sunt: nec facere nos posse credendum est.* Dig. l. 28. t. 7. (a) *Cicero pro Balb.* There are some things which we ought not to do, though we might lawfully do them: But on the other hand, whatever we cannot lawfully do, it's every certain we ought not to do. *Liban. Declam. 16.* The Law by not commanding me to do a thing, cannot be said to forbid me the doing it.

although

although prohibited by the Laws of Nature, yet the Laws of particular States so far permit, as not to impose a Penalty on them in Human Cognisance; leaving them to every Man's Private Conscience and Honour. *Tully's* Observation is admirable to this purpose, *It is not lawful (says he) for any Man to sin; but we commit an Error in Speech, whilst we say that such a thing is lawful, which is indeed tolerated or allow'd (a).* The former kind of Actions, we may call *perfectly lawful*, the latter *imperfectly*.

But farther than this, we sometimes in a very loose Sense, term even those things *lawful*, which all Men agree and confess to be the most base and vile; whensoever the Person who performs them is Master of so much Strength, as to be too Big for Human Punishment, or Reprehension (b).

III. We call that Action *Good* Morally (c), or in Moral Estimation, which is agreeable to the Law, and that Action *Evil* which is disagreeable. In as much as the *ratio formalis*, the proper and distinguishing Nature of the Goodness or Illness of Actions, consists in a *Relation* determining them towards a Directive Rule; and this Rule is what we term a Law: (under which Name we here mean a *necessitating*, and not a *permitting* Law, and if it be Human we suppose it not contrary to those which are Divine,) For as a design'd Action proceeds from the Rule prescrib'd, and is by it so form'd as exactly to agree with it, it is said to be *Good*: As it is undertaken against the Prescrib'd Rule, or varies from it, it is call'd *Evil*, and, in one word, *Sin*. Now it is plain, that any Directing Rule, for instance the Mariner's Compass, is said to be *the Cause* of his right Sailing, and of his coming to the Port; not so much in regard that the Ship takes a Course falling in with its Direction, as because the Pilot guides himself by it in managing the Steerage: In like manner, a Law is said to be *the Cause* of Rectitude in an Action, not when the Action, however intended, is agreeable to it; but when the Action proceeds from the Dictate of the Law, and from some Dependence on it; that is, from an Intention of paying Obedience to its Injunctions. Whence, if a Man by chance, or without thinking of any Obedience to a Law, performs a thing prescrib'd by that Law, he may indeed be said to have done *rightly*, or *not ill*, in a Negative rather than in a Positive Sense, but he cannot be said to have done Morally *well*: No more than one that by discharging a Gun at venture and random hath brought down a Bird, can be said to have shot skillfully, and like a Marks-man.

IV. Farther, since the Law determines either the Disposition of the Agent, or else the Object, or the End or the Circumstances of the Action; an Action is Morally Good or Evil, for one of these Reasons, either because the Agent is so dispos'd as the Law requires him to be, or otherwise; or, because the Action is directed towards the proper Object, with that End and those Circumstances which the Law prescribes, or with the contrary. But here it must be observ'd, that to make an Action Good 'tis necessary, that it not only conform to the Law in all its *Material* Requisites and Conditions: but likewise, that, in respect of its *Formality*, it be exercis'd, not out of Ignorance, or any other Cause besides the Intention of paying Obedience to the Law. And therefore an Action, though otherwise on the account of the Matter of it *Good*, may by reason of the Bad Intention of the Agent, be imputed to him, as *Evil*. For a Man who designing an ill Thing doth a good one, hath by no means a Title to any Reward for his Service: As he in *Valerius Maximus (d)*, who intending to kill *Jason*, luckily broke his Imposthume. Upon the same account, he who mispends his lawful Power in ill Service, is guilty of Sin: as a Judge, suppose, who abuseth his Authority of punishing Offenders, to the satisfying his own Private Resentments. For which reason the *Carthaginians* sentenc'd their Generals to Death, if they had undertaken an Enterprize, though with Good Success, yet with ill Counsel and Design (e). But, on the other side, an Action as to the *Matter* of it Evil, cannot by Virtue of the Honest Intention of the Agent, be turn'd into Good. Whence the Reason is clear, why a Man cannot use his own Sins as means for the Attainment of any Virtuous End, or why we must not *do Evil that Good may come of it (1)*. For to render an Action Evil, it's sufficient that it be incongruous to the Law, in any one Point or Condition, whether *Material* or *Formal*: That is, if either the Disposition of the Agent, or the Object, or the End, or any one of the Circumstances contradict what the Law directs. 'Tis a most vain Distinction of some Men, when they affirm that an Action, as to the Substance of the Work, may be good, although the End required by the Law be not intended by the Agent. For the End makes a main part of the very Essence of a Moral Action; in as much as it enters into the Intention, which is a Principle of the greatest Force in determining the Action's Quality. Hence it is sinful to direct an Action, not only to an Ill End, but likewise to any other End, than what is prescrib'd

(a) *Lampridius* reports of the Emperour *Severus*, that he had some thoughts of prohibiting the Publick Professors of Lewdness: But he fear'd this might rather increase Debauchery in Private: Men naturally affecting what is Unlawful, and pursuing with Eagerness and Fury any Practice which hath been forbidden them. (b) *Senec. de Clement. l. 1. c. 18.* Though we commonly say, All things are lawful towards a Slave, yet there are indeed some things which common Nature forbids us to act towards a Man: one of our own Species and Condition. (c) For the other kind of Goodness, term'd Natural or Material, by which a Thing or an Action tends to the Benefit or Perfection of any one, is explain'd in another place. Though we must observe, that in the Precepts of Natural Law, and in most Civil Constitutions, it goes along with this Moral Goodness, and amongst Rational Creatures, seems to give the first Spring or Occasion to it. See B. I. c. 4. f. 4. and B. II. c. 3. f. 21. (d) *L. 1. c. 8. f. 6. Extern.* (e) *L. 38. c. 48. Val. Max. l. 2. c. 7. f. 1. Extern.* (1) *Rom. chap. 3. ver. 8.*

by the Law (a). Nor is an accomplish'd Fact only, or such as hath obtain'd its End, accounted Wickedness, but even a Commenc'd Enormity: And this latter is by Civil Laws sometimes punish'd with equal, or however with little less, Severity than the former; according as they find it necessary to repress a Villany in its first Rise and Appearance.

V. This Goodness and this Evil of Actions as they consist *formally* in such an Agreeableness or Disagreeableness to the Law, as we have been speaking of, so they depend entirely on him as their efficient Cause, who performs an Action which the Law either commands or forbids. For his Determination so constitutes the Action in the Rank of *Moral Beings*, that it must be imputed to him, and to him only. And therefore those Men have tormented themselves with a needless Fear, who, lest they should seem to make GOD Almighty the Author of Sin, have plac'd the *ratio formalis* of an Evil Action; in the *Privation of Conformity to the Law*. For though the Position of any *Form* necessarily infers the *Privation* or Absence of the contrary Form; yet how mistaken must he be in his Opinion, who would seek for the Essence of a thing in this Privation? Nor will he find himself any great Proficient in Wisdom, who hath arriv'd to know that Streightness is the Privation of Crookedness, and Crookedness the Privation of Streightness. But these Inventions and these Fears of Men, both proceeded from their Ignorance of Moral Things. GOD, the Author of all Natural Beings, need not and ought not to be esteem'd the Author and Cause of all Moral, all Notional and all Artificial Beings. Some loose Thinkers must needs be touch'd with a strange Itch of Wit, when they imagine they have given us an extraordinary Specimen of their Philosophical Subtlety, in numbring GOD amongst the Causes

of our sinning. For a Man who hath the least Insight into the Constitution of Morality, will judge nothing more absurd, than to enquire whether or no *He* be the *Cause* of an Action, who forbids it by a Law, and punisheth it for being done after his Prohibition. As for GOD's concurring to the Physical part of an Action, he can with no more reason be on this account stil'd the Cause of Sin, than one who hath furnish'd an Artificer with Materials to work upon, can be reckon'd the Cause of a Deformity in his unskilful Work. Wherefore, to the Term or Name of *Cause* into a Signification so very improper, and so remote from common Sense, is to join our Pride and Ambition, in offering an Irreverence to the Divine Nature (b).

VI. We are, in the next place, to discourse of *Justice*, concerning which it ought to be our first Observation, that the Signification of this Term as applied to *Persons*, is very different from that, by which it denotes an Attribute of *Actions*. For when we use it with regard to *Persons*, to be *Just* imports as much as to delight in acting justly, to study after Justice, or to endeavour in every thing to do what is just: And to be *Unjust*, is to neglect Justice, or to think it should be measur'd, not according as it is really due, but as it suits with present Advantage. So that a *Just Man* may perform several *Unjust Actions*, and an *Unjust Man* several *Just Actions*. For he is to be esteem'd a Just Person, who doth Just Things in Obedience to the Law, and Unjust Things only through Infirmary, and he an Unjust Person, who doth Just Things in fear of the Punishment annex'd to the Law; and Unjust Things either out of Perverseness and Pravity of Mind, or for the procuring of Glory, or any other seeming Benefit (c). Hence it appears, that the Definition of (1) Justice so much in vogue with the *Roman* Lawyers, in which they call

(a) Matth. VI. v. 5. Juvenal, Sat. 8. v. 215. *Causa facit rem dissimilem*. Senec. de Constant. Sapient. c. 7. *All Villanies before the Accomplishment of the Work are compleat in respect of the Guilt.* (b) Philo Judeus de profug. *What greater instance of Blasphemy can there be, than to make GOD and not our selves, the Author of Evil?* Maxim. Tyr. Dissertat. 3. *These dreadful Names, of Furies, Fates, and Destinies, what are they but the specious Pleas and Excuses of Human Wickedness, by the means of which we are wont to charge our own faults upon the Providence of Heaven? When alas! these, and all the other Ministers of Terrour, and over-ruling Necessity which we so often complain of, are Monsters of our own making, and such as we carry about us in our Breast.* Idem Dissertat. 25. *Let the Wretch who sins upon Choice, take all the Guilt upon himself, and let GOD be clearly justified.* (c) Hobbes de Cive, c. 3. f. 5. Plin. Panegy. c. 56. *A Wicked Man may do many things, in himself commendable: But to deserve Commendation in his own Person is the Prerogative of a Man truly Good and Virtuous.*

Philemon in Stobaeo. Serm. IX.

He is not Just who barely acts no Wrong,  
But he who spares when fraught with Power to harm;  
Nor will the Conquest of a Puny Lust  
Ensure his Triumph; but a Strength of Soul  
Fit to sustain th' united Force of Sin,  
And foil Temptation in its last Attack.  
Solid in Worth, and Generous Honesty,  
Nor bent with crooked Guile, nor bribed with Praise,  
He courts the Virtue and contemns the Fear.

Architas de Viro bono & beato. *As he who hath some time or other been guilty of Immodesty, Injustice, or Timorousness, is not to be reckon'd in the number of Bad Men? so neither is he who hath perform'd some Acts of the opposite Virtues, immediately to be rank'd amongst the Good. But the true Judgment of Persons is to be made, not from any short Period of acting, but from the whole Course and Tenour of Life.* Agathias (l. 5.) hath left a very judicious Censure of those People in Constantinople, who upon a terrible Earthquake in the City, had contended with each other in the Performance of Good and Pious Works. *All this they did (says he) for a certain Time; so long as the Impression of the Fright was fresh and strong upon their Apprehension. But when the Calamity began to abate, most of them return'd to their former looseness of Practice. Now such a sudden motion of the Mind, such a Fit, as it were of Goodness, cannot be call'd true Justice, or solid and fruitful Piety, such as is wont to be form'd in Men by Right Opinions and Constant Application; but an Unnatural Disguise, an ill-contriv'd Stratagem, a meer Huckstering in Holiness, taken up as a Preservative against the Common Evil. Virtue upon Necessity is just as long liv'd as the Fear that occasions it.* (1) Instit. l. 1. tit. 1. Dig. l. 1. tit. 1. f. 10.

it, a *Constant and Perpetual Inclination to give every one his Due*, belongs to the Justice of *Persons*, not to that of *Actions*. And this we take to be very Inconvenient: In as much as the Science of *Law* is chiefly employ'd about the Justice of *Actions*, and toucheth on the Justice of *Persons* only by the by, and in some few Particulars.

VII. The *Justice of Actions* differs from their *Goodness* chiefly in this, that *Goodness* barely denotes a Conformity to the Law, but *Justice* farther includes a respect to those Persons towards whom the Action is perform'd. So that we apprehend that Action to be *Just*, which with full Design and Intention is applied to the Person to whom it was due. And therefore *Justice*, in this Sence, will be nothing else, but the right Application of the Action to the Person. We shall chuse to divide Justice chiefly with regard to the Matter which is owing, or which bears a relation to Another by way of Debt or Due.

But we must observe beforehand, that some Actions may be call'd *pure* and others *mixt*. The former are perform'd and finish'd by the Motion of some of our Powers applied in such a certain manner to the Object; of this kind are Honouring, Paying Duty and Respect, Loving, Hating, Comforting, Praising, Dispraising, &c. the Product of all which is nothing else but the causing the Object to be really affected, or to be thought affected by the Action in a certain way, either with Complacency or Dissatisfaction. But the latter, or the *Mix'd Actions*, are join'd with the transferring of some Advantage or Disadvantage on the Person towards whom they are exercis'd; and therefore their effect consists principally in some Operation, either profiting or hurting another Man in his Person or in his Goods (1). Again, there are some Actions which make a part of Commerce amongst Men, and are valu'd at a certain Rate; others have no Price or Rate impos'd upon them: Concerning which difference, we shall enquire farther hereafter (2). Lastly, We must take notice, that some things are *Due* to us *Perfectly*, others *Imperfectly*. Those things which are due to us in the former manner, if voluntary Payment be not made, we may constrain the Debtor to discharge; if we live in a *Natural State*; by Arms and main Strength; if we are Members of the same *Civil Society*; by preferring an *Action* against him in Courts of Justice. But what is due to us in the latter way, we ought neither to claim by Methods of Hostility, nor to extort by Legal Procefs. It is usual with Authors to express *Perfect Right*, by the help of the word *Suus*, as when they say a Man claims such a thing *suo jure*, *By his own Right* (3). Now that some things should be thus *due* to us *Perfectly*, and others *Imperfectly*, the reason amongst those who live in a State of Natural Liberty is, the great Diversity of Precepts in Nature's

Laws, of which some conduce to the very Being, others only to the well-being of Society: And therefore since there's lets Necessity of Performing these latter than the former, Reason shews that the former may be requir'd and executed by more severe Courses and Means; whereas in regard to the latter, it is meer Folly to apply a Remedy more grievous than the Disease. Besides, there usually passeth between Men some Covenant about the former, but not about the latter; and consequently, since they are left to every Man's Conscience and Modesty, it would be very improper to extort them violently from another, unless in Cases of extraordinary Necessity. In Civil Communities, this difference ariseth from the particular Laws and Constitutions allowing or disallowing an *Action* in such or such Cases. Though most Commonwealths do in these Points follow the Tract of the Law of Nature; except where they have some particular Reasons advising the contrary.

VIII. When then, we exhibit to another either Actions or Things due to him only by *Imperfect Right*, or when we exercise towards another Actions not coming under the Head of strict Commerce, we are said to have observ'd *General or Universal Justice*. As when a Man supplies another with his Counsel, Goods, or Help, as he hath need; or when he performs the Offices of Piety, Reverence, Gratitude, Humanity or Beneficence, towards those to whom he is in Duty bound to pay them. This kind of Justice only enjoins that the Debt be paid, not considering whether the thing given in Payment be equal to the Reason why it is due or not. Thus a Man sufficiently dischargeth the Duty of Gratitude, if he make all the return that his Abilities will allow; though perhaps the Kindness he hath receiv'd were in value much greater.

But when we perform towards Another Actions falling under Commerce, or such as transfer any thing on Another to which he had *Perfect Right*, this is call'd *Particular Justice*.

IX. Now this *Perfect Right* accrues either to single Persons by a Covenant (tacite or express,) made with some Society, in order to their being admitted Members of it; or to a Society by a Covenant made with single Persons, in order to the receiving them into the same Community: Or, lastly, from (4) Pacts made between any Parties concerning Things or Actions falling under Commerce. When we pay those things which are due upon the Pact of a Society with a Member, or of a Member with a Society, upon the accounts just now specified, we are said to exercise *Distributive Justice*. For whenever a Man is receiv'd into a Society, a Pact is either expressly, or at least tacitely, made between the *Society* and the *Member* now to be introduc'd, by which the

(1) For Example, a Gift, a Loan, Murder, &c.

(2) See B. V. c. 1. f. 5.

(3) Vid. Groz. l. 1. c. 1. f. 5.

(4) See B. III. c. 5. f. 1st and 7th.

*Society* engageth to give him a just Share and Proportion of the *Goods* which it enjoys as a Common Body; and the *Member* promiseth, that he will bear his proper and equal part of those *Burthens* which conduce to the Preservation of the *Society*, consider'd as such. The exact Determination of the proper share of Goods to be assign'd to the Member, is made according to the Rule and Value of the Pains or Charges employ'd by him, towards preserving the Common Society, in Proportion to the Pains or Charges contributed by the other Members. On the other hand, the Determination of the proper Share of Burthens to be laid on the Member, is made according to the Value of the Benefits receiv'd by him from the Society, consider'd in proportion to the Advantages which the rest of the Members enjoy. Hence, since it generally happens, that one Member contributes more towards the Preservation of the Society than another, and that one likewise exceeds another in deriving Advantage from it, the reason is very apparent why, upon the supposal of Many Persons, and of this Inequality amongst them, we ought in the Exercise of *Distributive Justice*, to observe a *Comparative Equality*: Which consists in this, that what Proportion the Merits of one Person bear to the Merits of another, such Proportion shall his Reward bear to the others Reward (a). Thus, for Instance, if Six Things of the same Value are to be Distributed amongst *Caius*, *Seius*, and *Titius*, upon Supposition, that *Titius* exceeds *Caius* in a triple Proportion, and *Seius* in a double, *Titius* shall have three, *Seius* two, and *Caius* one. Nor is it Requisite to this Equality, that the Reward fully answer and come up to the Merits of the Person; but 'tis sufficient, that what Proportion the Service of the one bears to the Service of the other, the same Proportion there should be between their Shares of the Common Benefits. And the same Rule must be follow'd in distributing *Burthens*.

As for what Mr. *Hobbs* (b) alledgeth, to overthrow this *Respective Equality*, that *I may of my own Goods distribute least to him that deserves most, and most to him that deserves least, provided I Pay but for what I Bargain'd for*; and useth the Authority of our *Saviour* in the XX. of *St. Matthew*, v. 13, &c. to confirm his Opinion: All this if rightly consider'd, makes nothing to the purpose. For in the place of Scripture above-cited, it is shewn indeed, that he doth not offend against *Commutative Justice* (which governs the Contracts about Hire, &c.) who out of his Liberality gives to some a larger Reward than their Service deserves; or who,

to the Wages due upon this *Commutative Justice* adds something out of free Bounty, which is comprehended under *Universal Justice*. But how doth this Affect our *Distributing Justice*, the Business of which is nothing else, but to assign to many Persons their proper Shares of a thing, to which all of them have a *Perfect*, though (in regard to the Quantity) an *Unequal Right*? And then as for the Word *Distributing*, which occurs in the Instance alledg'd from Scripture, this doth not in the least make the Act fall under Justice, strictly call'd *Distributive*; but only hints, that the Labourers were *Many*, to every one of whom their Wages were to be paid according to *Commutative Justice* (1).

To clear the Doubts rais'd on this Head by *Grotius*, in his first Book and first Chapter, we need only observe, that his (2) *Expletive Justice* doth not exactly come up to *Commutative*, nor his *Attributive to Distributive*; and that his Division is not founded on the same Bottom as ours. For *ours* is chiefly taken from the *Matter* which is owing, and from the *Cause* of owing it; but *his* from the *Manner* and the *Degree* in which a thing is ow'd. Whence the Reason is evident why the parting of Gain in Contracts of Societies, is by him referr'd to *Expletive*, and by us to *Distributive Justice*. The observing of (3) *Geometrical Proportion* in these Cases, is indeed only *Accidental*; since 'tis not necessary, that the Members should have contributed unequal Shares, but they might as well have contributed equally, and then in parting the Gains a *simple* or strict Equality must have been follow'd. As for that Case stated by *Grotius*, *If one Man only be found fit for a Publick Office, his Reward shall be assign'd him according to Simple, or Arithmetical Proportion*; it must be farther enquir'd, whether the Man had a *Perfect* or *Imperfect* Right to this Office. If the latter, the Case will then belong to *Universal Justice*: if the former, we agree to *Grotius's* Remark, that Species of Proportion call'd *Geometrical*, is though generally, yet not always follow'd in *Distributive Justice*. Nor have we taken the difference of our two kinds of Justice from their making use of a different Proportion. And so, for the other Instances of *Grotius*, *the assigning of Legacies* belongs not to *Distributive Justice*, but to *Universal*: And *when a City or State repays out of the Common Stock, what some particular Members have expended on the Publick Account*, *Commutative Justice* is exercis'd, and not *Distributive*. Because the Reason of the Debt ariseth, not from that Pa&t by which the Society first admitted the said Members,

(a) For as *Philo Judæus*, l. 2. p. 640. Ed. Genev. (de *Monarch*;) observes, 'tis high Inequality to give equal Honours to those who are not equal in Merit. *Arrian. Epictet.* l. 3. c. 17. This is a settled Law of Nature, that he who is more excellent, should on that very account, have a larger share of Good Things, than he who is less. (b) De *Cive*, 3. l. 6.

(1) *Hobbs* gives another Example, See the next Section. (2) Our Author will Explain and Examine more largely this Definition of *Grotius* in Section the XI. of this Book. (3) To understand what *Geometrical Proportion* is, the best way is to give an Example of it. When I say then, Six is to Two, as Twelve is to Four, there is a *Geometrical Proportion*; because, Two is as often found in the number Six, as Four is found in the number Twelve.

but from a particular and a very different Contract.

X. When we exhibit to another Things or Actions due upon Reciprocal Pact, and coming into Commerce, this is call'd *Commutative Justice*. And since Pacts of that kind tend to this Issue, that for a Thing or Action of my own falling under Commerce, I receive from another an Equivalent Thing or Action, at least such as I esteem Equivalent; the Reason is hence obvious, why in this Species of Justice a *simple Equality* is requir'd which we commonly call (1) *Arithmetical Proportion*, but that the strict Mathematicians will allow it that Title we dare not engage (a). The Thing or Action then, coming in Commerce to another, ought to be answer'd by somewhat exactly of the same Value in Moral Estimation. For, the Objection of Mr. *Hobbs* (b) that if we sell our own Goods at the highest Price that can be, we do no Injury to the Buyer, who inclin'd and consented to the Bargain, shall be examin'd at large hereafter (2). As for *Vindicative Justice*, which according to our Notion constitutes a particular Species, it will be Consider'd in a more convenient Place (3).

XI. It may be worth our while to take farther Notice of (4) *Grotius's* Opinion concerning Justice, which he, neglecting the usual Distinction of *General* and *Particular*, divides into *Expletive* and *Attributive*. This difference is founded on the Diversity of that Right which one Man hath to receive any thing from another, which, as we have already observ'd, is either *Perfect* or *Imperfect*; the latter being also term'd *Amplitude* in Opposition to *strict Right*. Therefore an Act belongs to *Expletive Justice*, when we render that to another which is due to him by a *Perfect* Right; but to *Attributive Justice*, when we render that which is due to him only by an *Imperfect* Right. Now the Reason of these two Appellations of Justice seems to be this; whatsoever is due to me by *Perfect* Right, is conceiv'd to be already in some measure *my own*, and consequently so long as it is withheld, somewhat of *my own* is suppos'd to be wanting. (Thus even Names and Titles are reckon'd part of our Patrimony, and may pass in Payment to others.) So that if a Man pays me what is my Due by a *Perfect* Right, he gives me no new thing, but only fills up the place of a thing which before was absent, and which in the mean time was supplied by an *Action*. For Example, a Man who hath borrow'd a Book out of my Study, when he restores it, doth not properly increase my Study, but only fills up a place made empty

on his account. But such things as I have only an *Imperfect* Right to receive, I cannot reckon my own, nor put them into my Patrimony; since they depend entirely on the Modesty and common Honesty of another Man, who may not, by any violent means, be compell'd to pay them. And therefore 'twould be ridiculous, if a Beggar, for Instance, should make over to a Shoe-maker for the price of a Pair of Shoes, an Alms which he *expects* to receive from some Rich Person. Thus then, he who renders to another any thing due by *Imperfect* Right, doth properly *attribute*, give or add to him somewhat which he could not before call *his own*. For this Reason *Grotius* calls *Attributive Justice* the Companion of those Virtues which tend to the Benefit and Advantage of others, as *Liberality*, *Mercy*, *Humanity*, and the like. For these Dues Men receive only by *Imperfect* Right. When he adds to these, *Providentia rectorix*, or *State-Providence*, he is, in our Judgment chiefly to be understood of the Distribution of those Rewards, to which the Subjects have only an *Imperfect* Right; in which though a greater Liberty may be taken than in giving those which are due upon Contract, yet it would be perhaps most adviseable to proportion every Man's Share to his Merits, as the surest way to prevent Strifes and Complaints (c).

Why *Grotius* forbore the use of the Common *Aristotelian* Terms, he himself gives this Reason: because the Word *συμβαλληκη* doth not come up to the full import of *Expletive*; for, that he who is possess'd of my Goods should restore them again, doth not proceed from any *συμβαλληκη* or *Commutative Contract*, and yet it belongs to *Expletive Justice*: that is, though I have a *Perfect* Right of retrieving what is my own' from any Possessor, yet my Action is not founded upon any Contract made between us about the Restitution; but 'tis sufficient to my purpose, if I can prove my self to be the true Master and Proprietor of the thing thus withheld. It is clear then, that there may be an Act of *Expletive Justice*, without any *συμβαλληκη* or Contract. Neither doth the other Term *δωρεα* fully answer that of *Attributive*; because it supposeth a necessity of many Persons amongst whom the Distribution is to be made. But now *attributive Justice* may be exercis'd towards a single Person, when he alone is fit to receive such an Honour or such a Reward.

XII. *Aristotle's* Opinion concerning the Species of Justice, as far as we can apprehend, seems to be this. *General Justice*, which He (d) calls *the Universal Exercise of Virtue towards others*, is a Duty which belongs to all

(1) See l. 12. (a) Yet *Plutarch* (de Amore Fraternali) useth the Phrase in this Vulgar Sense. (b) De Civitate, c. 3. f. 6. (2) See B. V. c. 3. (3) See B. VIII. c. 3. (4) L. I. c. 1. § 8. (c) Thus *Isocrates* (*Areopagit.*) p. 247, 248. Ed. Paris. observes of the old Athenian Ministers, One thing which prov'd of great advantage to them in the Management of the Commonwealth was this; that whereas there are two sorts of Equality, one which gives exactly the same Portion to each Man, and another which proportions Mens Shares to their particular Merits, they were not ignorant which of these two was most Beneficial to a State: But rejecting that as unjust, which deals out the same Allotment to Good and Bad Men without Distinction, they chose the other which assigns Honours and Rewards according as every Man deserves, for the surest Guide of their Proceedings. (d) *Ethic.* l. 5. c. 5.

Men. Particular Justice he divides into three kinds. First *Distributive*, which takes in the Partition of Honours or Money, or other things capable of being divided amongst the Members of the same State. Secondly *Corrective*, which consists in rectifying *Commutations*: And of these some are *voluntary*, others *Involuntary*. The former are made without Consent, as Buying and Selling, Hiring and Letting to Hire, in Loans, Usury, and Suretyship. The latter consist in (1) Crimes, when Men are forc'd to a *Commutation* against their Wills: For instance, when my Goods pass to a Thief; for then there ariseth an Inequality, he having *more*, and I *less* than we ought. The Correction then of this Inequality is made by taking from him what he had above his Due, and restoring it to me. Thus, suppose a Man, by the Fraud of the Seller, gives nine Shillings for a thing that's worth but Six; three Shillings are to be taken from the Seller and given to the Buyer, to make an Equality. Now between these Numbers 3, 6, 9, there is properly an *Arithmetical* Proportion, the third Number exceeding the second just as much as the second exceeds the first (*a*). These two kinds of Justice belong properly and principally to those who bear some High Command in a State. For 'tis the Duty and Office of such, and not of private Persons, to distribute the Publick Goods amongst the particular Members; and to correct the Inequalities which arise either in Contracts or Crimes, by reducing them to a Parity (*b*).

The third Species of Justice assign'd by *Aristotle* is *Retaliation*, which serves to regulate the *Commutations* made between Man and Man, by comparing things that are different and unequal, and reducing them to a Geometrical Proportion. To give an Instance, were a pair of Shoes to be exchange'd for a Horse, the Question would be how many times the Price of the Horse contains the Price of the Shoes, which supposing to be twelve times, the Rule of *Retaliating* or compensating is, that twelve Pair of Shoes be given for one Horse (*c*). And this Species of Justice belongs as well to Men of Private as of Publick Capacities. As for our former Remark, that the other Species assign'd by *Aristotle* concern'd principally the Magistrates and Judges; this will be easily granted by any who take a closer view of his Moral Works: For they will find that in ranging and marshalling the Virtues, he had always in his Head the *Idea* of some *Grecian* State; in which time all the Subjects had not the same Duties to perform, 'tis no wonder that he hath given us some Virtues applicable only to Men of particular Quality and Degree.

XIII. Mr. *Hobbs* (*d*) hath advanc'd one single Notion of Justice to comprehend every kind;

making it nothing else but a keeping of Faith, and fulfilling of Covenants; which Opinion he borrow'd from *Epicurus* (*e*). *Commutative* Justice, he says, takes place in Contracts, as in Buying and Selling, Hiring and Letting to Hire, Lending and Borrowing, Exchanging, Bartering and the like. *Distributive* Justice, (tho' improperly so call'd) is, he says, *the Justice of an Arbitrator, when being trusted by them who make him Arbitrator, if he perform his trust, he is said, to distribute to every Man his own*. Nor will he allow any other Equality to be observ'd but this, that since we are all equal by Nature, one Man ought not to arrogate to himself more Right than he allows another, unless he hath obtain'd a greater Right than ordinary, by the Intervention of Covenants. Farther, since according to his Sentiments, an Injury or an Unjust Action, or Omission, is nothing else but the Violation of a Covenant; he hence infers, that we cannot offer an Injury to a Man, unless we have before Covenanted with him. This Assertion is founded on his old Maxim, of *the Right of every Man to all things*, which he hath stretch'd far beyond its just Limits; so that he imagines, before any Covenant is made, by which one Man might transfer his Right to another; every Man hath a Right of doing to others what he pleaseth; and thus, only using his Right, he cannot be said to commit an Injury (*f*). But we shall by and by (2) shew, that this *Right of every Man to all things* can be extended to no farther Sense than this, that Nature allows a Man to use all such means as Reason shall judge conducive to his firm and lasting Preservation: As indeed Mr. *Hobbs* himself, in his Definition of *Right* (3), inserts the *Use of Reason*. But now sound Reason will never advise us, out of our own Pleasure and Humour to put such Affronts on another, as cannot but provoke him to *War*, or to a Reciprocal Desire of hurting us. Besides it implies a manifest Contradiction to say, that upon the Supposal of many Men equal in Rights, each of them hath a Right to all things; since the Right of one Man to all things, if it hath any effect, must extinguish the Rights of the rest; and if the Right hath no effect upon the others, it is useless, absurd, and ridiculous; For in Moral Account, *not to be*, and *not to be effectual* are much the same. And indeed, how can we call that a Right, which another may oppose with an equal Right? Who would say, I had the Right of commanding a Man, if he by the same Right might despise my Orders? Or, that I had the Right of beating another, when he too had a Right of turning my Blows, and if he pleas'd, with Advantage and Increase? 'Tis certain therefore, that he that doth these things to another, hath no Right

(1) By Crimes we understand all sorts of Injury done to Another. (a) Vid. *Felden ad Grot. l. 1. c. 1. f. 8.*  
 (b) *Aristot. Ethic. l. 5. c. 7. It is the Business of the Judge to reduce those things to an Equality, which upon account of an Inequality are unjust.* (c) Vid. *Aristot. Ethic. l. 5. 8. & Michael Ephes. in loc. Eund.* (d) *De Cive, c. 3. f. 6. & Leviath. c. 15.* (e) In *Diog. Laert. l. X. circ. fin.* (f) Vid. *Gassend. Syntagm. Epicur. par. 3. c. 26, 27.* (2) See B. III. c. 5. f. 3. (3) *De Cive, c. 1. f. 7.*

of doing them, and consequently is injurious. On the contrary, the other Party hath a Right that such things should not be put upon him, and is therefore injur'd. Thus we see, that such *Right* as being violated produceth an Injury, is not only acquir'd by Covenant, but was given at first by Nature, without the Intervention of any Human Act: And so the Assertion, that an Injury can be done to no Man unless we have transfer'd something on him by Covenant or Gift, is false and unreasonable.

The other Position of Mr. *Hobbs* (1), that Justice as well as Property owes its Original to Civil Constitutions, we shall hereafter consider and refute.

Indeed so far is it from being rational to resolve all Justice into Performance of Covenants, that on the contrary, before we can know whether any Covenant is to be perform'd, we ought to be certain that it was entered upon, either by the Command, or with the Permission of the Laws of Nature; that is, that it was justly made (a).

From what hath been here offer'd it is farther evident, that although otherwise *Damage* and *Injury* are very different things, and though it be possible that the Injury of an Action may redound to one Man, and the Damage to another; yet the Inference which Mr. *Hobbs* draws from this Consideration will not hold, that a bare Damage and not an Injury is done to him, who is either hurt or hath somewhat taken from him, by a Man with whom he had pass'd no Covenant. Nor do the Instances which he brings to countenance this Conjecture, make very much to the purpose (2). *When the Master, says he, commands his Servant to give Money, or to do a kindness to a third Person; if it be omitted, the Injury is done to the Master, but the Damage to the third Person.* But indeed, if the Servant does not pay the Money which is due as he is order'd, the Creditor shall suffer no Damage, since his *Action* remains good against the Master. Nor, if a Servant being commanded to do a kindness to another Man, fails in performing it, shall the other Man incur any Damage (b). For, besides that from the not receiving of a Kindness which is not strictly due, Damage properly so call'd cannot arise (c), the other Person may complain to the Master, who will be sure to compel the Servant to his Duty. And though we suppose the Servant to have been never so far from doing an Injury to the third Person, yet for all this, 'tis certain he did not what by *Right* he ought to have done; because he affords the other Man sufficient grounds of a Complaint against him. His other Instance Mr. *Hobbs* thus proposeth in his *Leviathan* (3), *Private Men may remit to one another their Debts, but not Robberies, or other Violences whereby they are endamag'd:*

*Because the detaining of a Debt is an Injury only to themselves, but Robbery and Violence are Injuries to the Person of the Commonwealth.* Which we are willing enough to admit, provided he will not hence infer, that in Crimes, an Injury is not likewise done to the particular Person who is hurt. But as he proposeth the same in his Book *de Cive* (4), it is by no means to be endur'd. He says, that *in a State, if any one hurts another, with whom he hath not covenanted, he damageth the Party on whom he brings the Evil, but he doth an Injury only to him who holds the Sovereign Power in the State.* For, if one of my Fellow Subjects hurts me by Violence, doth he offer an Injury to the King only and not to me? Or suppose we should grant, as Mr. *Hobbs* desires, that when Men live in a Natural Liberty, each of them hath a Right to all things, yet will this hold good amongst the Members of the same Republick, who own one Common Master? As to what he subjoins, that *if the Person who receiv'd the Damage, should accuse the other of injuring him, he would be answer'd in this manner, what are you to me? why should I act according to your Pleasure, rather than my own since I don't hinder you from acting by your own Will rather than by mine?* 'Tis so far from being true, that if no particular Covenants have interven'd, this way of speaking will not be free from Reprehension, that we should rather imagine a Man to be out of his Senses, who should hope by such a way of arguing to satisfy the Complaints of one whom he had hurt. Yet one thing Mr. *Hobbs* hath well remark'd, that *the Term of Injustice signifies with reference to the Law, but the Term of Injury with reference both to the Law, and to the particular Person.* For, when an *Unjust* thing is done, all may call that *unjust*, or it is *unjust* to all. But an *Injury* may have been done, not to me, or to him, but to a third Person, and sometimes to no private Subject, but to the State only; as when a Man is kill'd in a Duel, for Instance, upon a fair Challenge. For in this Case, the Party who receiv'd the Hurt cannot complain of having an *Injury* done him, since he himself agreed to the Chance of the Unlawful Combat: But the Legislator may, however, prosecute the Survivor for transgressing his Prohibition.

XIV. Having arriv'd to know what Justice is, we may easily settle our Notions of *Injustice*, and of its several Species. An Action then, is *Unjust*, either when we apply it designedly, to a Person to whom we ow'd a different Action, or when we deny another somewhat which was really his due. That is, we are equally guilty of a Breach of Justice, by doing any Evil to another which we had no Right to do, and by taking from another, or denying him any Good which he had a fair Title to require. For good things are of that

(1) *Lev. c. 15.* (a) Add. Dr. *Cumberland. de LL. c. 8. f. 6.* (2) *De Cive, c. 3. f. 4.* (b) Though he is indeed guilty of Theft, or the like Crime, if he intercept and keep for his own Use, what he ought on his Master's account to have deliver'd to others. (c) *Vid. Grot. l. 2. c. 17. f. 2.* (3) *C. 15. p. 75.* (4) *C. 3. f. 4.*

Nature, that they may be given to any Man without a Reason, provided a Third Person is not defrauded thereby: And the *Evils* likewise which a Man hath merited, we may without Injury withhold from him, if at the same time we do not endamage others by our Forbearance. An unjust Action therefore, either brings upon another Man what it ought not to bring upon him, or denies and withholds what it ought to give him. For the Denial or Omission of an Action, is in Moral Account, it self an Action.

XV. But an Unjust Action proceeding from Intention, and trespassing on the perfect Right of another, is in one Word call'd Injury. Which if we would exactly state, we must again observe, that a Man may be hurt Three ways: either, if he be denied what he ought to have (a), or if that which he now hath for his own be taken from him, or if some Evil be put on him by another, who had no just Right of doing it. As to the first of these ways, things may be said to be due to a Man, either by the bare Law of Nature, yet so as that he hath no perfect Right to them; of which kind, are the Offices of Humanity, Beneficence and Gratitude: Or else by Covenant, and that either such as is express and particular, or such as is contain'd under our Obligation to Civil Laws, by which we engage our selves to perform those things towards others, which the Laws command us to exhibit. If things of the latter kind are denied a Man, an *Injury* is properly done; but there is no proper Injury in the Denial of things which belong to the former kind; though there be a Sin indeed committed against the Law of Nature. Yet neither doth the Law of Nature it self allow of compelling another by Violence to pay these Duties, (especially if the compelling Party have no Power and Authority over the other;) unless upon urgent Necessity: Since the Nature and Property of those Offices requires that they be perform'd voluntarily, and without the Motive of Fear. Thus far therefore, and no farther, will the Maxim of Mr. *Hobbs* hold true, That an *Injury* cannot be done, but to a Man with whom a Covenant hath been made. But when we studiously and industriously bring an Evil on another Man, unconsenting and unprovoking, either by taking from him any Good which he possesseth, or by positively inflicting on him an Evil; in these Cases an Injury is always done, whether a Covenant hath interven'd or not. For Nature hath given this Right to every Man, that no Evil

be offer'd him from another Man without his own preceding Demerit: Nor is it allowable for any Person, unless when provok'd to hurt another, any further than the due Exercise of Government shall require (b).

XVI. In an *Injury*, properly so call'd, it is farther requir'd, that it proceed from Intention and deliberate design of hurting or vexing another. And therefore the harm which is done casually in Ignorance and unwillingly, is not us'd to come under the Name of Injury. As suppose a Soldier that is exercising himself, in the usual Place, at casting his Javelin, should strike it through a Man that pass'd by accidentally: Or, if a Lopper of Trees should let fall a Bough upon a Person who had no Right to be in that Place (c).

*Aristotle* (d) tells us, That the doing of a thing justly or unjustly depends on its being done voluntarily or involuntarily. And again, that when we do a Hurt beside Reason, it is only a Misfortune; but when we do a Hurt which is not beside Reason, and yet not out of Malice, then we commit an *ἄδικημα*, or *Trespass*; on which place *Michael of Ephesus* thus comments. Of Hurts, some are done out of Ignorance and against our Wills, others with our Knowledge and Consent. Those which are done out of Ignorance, are again divided into such as are done without any Likelihood and beside all Expectation, and such as are done, though involuntarily, yet not beside all Expectation and Probability. Therefore after the *Philosopher* hath said, that all Hurts proceeding from Ignorance fall under the general Name of Errors or *Trespases*, he then makes a kind of Subdivision, and tells us, that those which are done beside Reason are Misfortunes, and those which are done not beside Reason, are properly *Trespases*. Now those things are beside Reason, which happen very rarely and unexpectedly; as if a Man by suddenly thrusting open a Door, should strike his Father, who stood accidentally behind it; or if, whilst he is exercising himself at his Javelin in a place through which none are wont to pass, he wounds some body who happen'd to come by when the Weapon was flying. For these, and such like Accidents, fall out beyond all Thought and Expectation. But Actions done indeed ignorantly, but not beside Likelihood or Probability, are call'd *Trespases*. For, Man who exercising his Bow and Arrows in a Place commonly frequented, strikes any Person, doth properly trespass; as a Man is then always said to do, when he himself was the Principle and Cause of the Unluckiness of the Action: But now the Man whom we speak of, was no doubt the Principle and Cause of what

(a) *Marc. Anton.* l. 9. f. 5. It often happens that there may be Injustice in the not doing of a thing, as well as in the doing.

(b) We add unless provok'd, because to make an Action properly Injurious, there is requir'd the *τὸ ἀπορέειν*, that it be done first: For *Aristotle*, *Eth. Nicom.* l. 5. c. 15. tells us, that he who returns another what he first suffer'd from him, cannot be said to do an Injury.

(c) So *Antiphon*, *Orat.* 7. p. 56. Edit. Hanov. defends the Soldier who had unfortunately kill'd a Youth with a Cast of his Javelin: He was engag'd, says he, in no forbidden Exercise, but in his proper and necessary Business; nor by himself, but with his Companions in Arms: Nor did he strike the Youth by an unskillful Throw, at a distance from the Mark: but he guided the Weapon with exact Art and Care, and was so far from doing any thing amiss, that he rather suffer'd, in having his Throw spoil'd, and in being hindred from hitting what he so well aim'd at.

(d) *Ethic.* l. 5. c. 10.

he did, since he voluntarily chose such a place to shoot in, where it was probable some body or other would pass by.

An ἄμειπμα or *Trespass* of this Nature, is what the *Civilians* properly term *Culpa*, or a *Fault*; which they say is committed through Negligence or Unskilfulness, when a Man is either careless or ignorant of such things as he ought, and was able, to have known, and to have observ'd. Of *Faults* they make three Degrees, answerable to the Degrees of Diligence, by the Omission of which the Fault is contracted. First then, there is a General Diligence of all Men, not work'd out by Labour and Wit, but deriv'd, as it were, from common Sense. Next to this, there is a Diligence more improv'd, proper to every Man in his own Affairs; and which is requir'd by Nature in the Management of Human Life, according to each Person's Capacity and Parts. Lastly, there is a Diligence of the greatest Exactness and Accuracy, us'd only by the most knowing and experienc'd Men in their own Business and Concerns. To this last kind of Diligence they oppose their *Culpa levissima*, to the second, their *Culpa levis*, and to the first, their *Culpa lata*. As to this *Culpa lata*, they observe, that it is equivalent to Malice and Deceit, in Contracts and other Civil Business, and in Cases of Reparation for Damages: But that in Criminal Matters it bears not so hard an Interpretation; where however it doth not take away, but only extenuate the Guilt. The Effects of the *Culpa levis* and *Culpa levissima* they shew at large, when they treat about Performances of Contracts.

The *Trespases* we have hitherto spoken of, are suppos'd to be done without Intention. But now if a Man through the Violence of his Passions, and only with an Imperfect or Semiplenary Intention is driven to hurt another, this Hurt shall not be exempted from the Name of Injury, altho' the Man be not immediately for such a Fact, branded with the Character

and Style of *Unjust*. Aristotle's Distinction is excellent in this Case, *An ill thing, says he, done with Knowledge, but without Deliberation, is unjustly done; such are the Effects of Anger and of other Natural and Necessary Passions. For Persons who offend on such accounts, commit Injustice indeed; yet they are not for this Reason accounted Unjust and Wicked Men, because the Hurt did not proceed from any meditated Malice. But when a Man hurts another out of Choice and Design, then only he incurs the Name of Unjust and Wicked. Hence Facts proceeding from Anger, are always interpreted as done unadvisedly; for the Principle and Cause of such Mischances, is not the angry Person, but he who provok'd him to Anger.*

XVII. Lastly, It is requisite to the making an Action properly *Injurious*, that it be done to a Person against his Will. For 'tis a Maxim in every Man's Mouth, that *volenti non fit injuria*, *Nothing can be an Injury when the Party is willing to receive it* (a). The reason of which is, that both the Good which I take from a Man, and the Debt which I withhold from him, with his Consent, are, as it were, *Gifts* from him to me: But now who will say I do an Injury, by taking what is given me? Nor can that be esteem'd Evil, which a Man desires to receive; since all Evil necessarily includes an Abhorrency of the Will from embracing it. But then it must be suppos'd, that the Man enjoys the full use of his Reason, and is not transported with the Violence of any extravagant Affection (b). Hence Aristotle (c) gathers, that a Man who in a Passion lays violent hands on himself, doth an Injury not to himself, but to the State; which he robs either of a General, or a Soldier, or an Artificer, or the like, according as his Station was. Upon which account it hath been a Custom in most Commonwealths, to punish such Offenders even after their Death, by affixing some Mark of Disgrace on their Bodies, and on their Memory (d).

(a) *Arist. Ethic. l. 5. c. 11. A Man with his own free Consent may be Hurt, or may suffer things which are in themselves Unjust; but he cannot properly be injur'd, except it be against his Will. See Dig. l. 50. tit. 17. De divers. reg. Juris. Nemo videtur fraudare eos, qui sciunt & consentiunt.* (b) *Add. Ant. Matth. de Crimin. Proleg. c. 3. f. 2, 3. Mr. Hobbs's Definition which he gives in his Book de Cive, c. 3. f. 7. is founded upon a wrong Supposition, that Injury consists in nothing but the Violation of a Covenant.* (c) *Ethic. l. 5. c. 15.* (d) *Add. Mich. Ephes. ad loc. dictum. Though Aristotle's Reasoning in that place, (the Law commands not a Man to kill himself; but what it doth not command it forbids;) is false and absurd; unless we say, that by κλέβει commands, he rather means permits.*

## CHAP. VIII.

## Of the Quantity of MORAL ACTIONS.

HAVING done with the *Quality*, it comes next in our way, to say something of the *Quantity* of Moral Actions; or to consider on what account they fall under different Rates and Measures. Now we find the Voluntary Deeds of Men to be Capable of undergoing a double Measure or Valuation, either absolutely in themselves or relatively towards

one another. As to the absolute Estimate, the Case is very different in Good and in Evil Actions. For in a good Action, if we consider it formally and precisely, we discover nothing which bears any Analogy to Quantity: Since the Goodness of it consists only in an Agreeableness or Conformity to the Law, which doth not appear capable of Measure. Hence

Hence good Actions consider'd, as we said, precisely as to their *Form*, are not better one than the other; though they surpass each other in Excellence as to their *Matter*, with regard to the Condition of the Object, and to the Intensity or Strictness of the Obligation. But now, an Evil Action, as declining from the Legal Rule, is conceiv'd to bear a greater or a less distance from it; and on that account, may, even consider'd *formally* and *in it self*, be esteem'd *greater* or *less*: In the same manner as one crooked Line may recede farther from a Right Line, than another doth. For Zeno's Argument, in *Diogenes Laertius* (a), is not worth confuting: *All Sins, says he, are Equal; for as nothing is truer than Truth, nor falser than Falsity, so neither can Deceit be greater than Deceit, nor Sin than Sin. As he that is an hundred Furlongs from CANOPUS, and he who is only one Furlong distant from the same City, may be said both alike not to be at CANOPUS; so he that sins less and he that sins more, are both at an equal distance from doing well.*

II. Farther, since to the Goodness of an Action it is requisite, not only that what the Law commands be fully done, but likewise, that it be done with such Intention as is agreeable to the same Law; it appears hence, that to make an Action be esteem'd perfectly Good, there is a Necessity, not only that the Prescription of the Law be answer'd in all its Parts; but besides, that the only thing which prevail'd on the Mind of the Agent, and put him on such a Proceeding, was a Desire of paying ready Obedience to the Legislator. And for this reason, since we are, in the Divine Law, commanded *to love God, with all our Hearts, and with all our Souls, and with all our Strength; and our Neighbour as our selves* (1); 'tis manifest, that no Action can be approv'd by God Almighty as entirely Good, but such an one as was undertaken with the fullest Intention, and in which the Agent propos'd nothing else to himself, but a Compliance with the Pleasure of his Creator. Especially, since the Divine *Searcher of Hearts* cannot but discover the least wavering in our Resolutions, and the smallest Obliquity in our Designs. Whoever considers this Point as he ought, will find in himself but very little Inclination to boast of his Uprightness towards God.

III. But in human Account, so exact a Diligence is not requir'd. For since our Earthly Lawgivers propose as the chief end of their Constitutions the Benefit of their Subject, which commonly proceed from the outward Performance and Exercise of the Actions, whatever the Intention of the Actor may be; hence they are usually satisfied, if the exterior Action be conformable to their Injunctions. And so much the rather, because they are unable to dive into the Recesses of Mens

Minds, nor can at all understand the Intention of any Agent, but by Conjectures and by Signs obvious to their Senses, which are by no means infallible Guides, in discovering our inward Sentiments and Purposes. Therefore they value Good Actions only as they appear to Sense, or so far as the Reach and Condition of Human Sagacity and the Use of Civil Life do admit or require; and are not very solicitous how full or sincere the Intention of the Agent was, provided his exterior Work deserve their Approbation. Yet in Evil Actions, even amongst Human Judges, more regard is had to the Intention. And where this shall appear to have been absolutely wanting, as happens in things done upon invincible Ignorance or Error, the Action shall be accounted involuntary: and such an Action as it is not usually *imputed* to the Agent, so is it conceiv'd to be destitute of all Moral Quantity. But otherwise, an Evil Action undertaken upon Knowledge and Deliberation, as it proceeds from a former and fuller Design. And since an Ill Intention is to Mortal Judges scarce more evident than a Good one, by reason of their Incapacity to search into the Heart; they are us'd to settle this point by the help of various Indications and Conjectures, which we shall elsewhere explain at large (2).

IV. With regard to the *Matter* of Moral Actions, that Good Action is esteem'd Perfect in its kind, which hath attain'd its utmost Complement, or to which no part is wanting that it ought to have. Those which decline this Perfection are reckon'd Inferiour in a greater or less degree, according to their Distance from it; whether the Cause of this Defect be, that the Action was destitute of some part which should have made it compleat, or that it was only attempted and not actually perform'd. On the other hand, of Evil Actions, that is reckon'd the worst in its kind, which hath fully arriv'd at the end propos'd; and every one is less Evil, according as it falls shorter of this final Completion.

And here we must observe a twofold difference in the *Objects* (3) of Actions, as set down in Laws. For some admit of a Division, others do not: or, to speak more plainly, some are so constituted, that when we exercise an Action about them, we must either entirely perform, or entirely omit them, or do what's directly contrary to them: But in others, it is possible to perform some one part only, and to omit the rest; or something may be done which is opposite to them not directly, but in an inferior Degree. We may likewise consider Objects under a second Distinction. For some of them contain things into which they may be divided as into so many Species. Thus the Affirmative Law of the sixth Commandment enjoining us to succour our Neighbour in all Necessities and Distresses of his Body, con-

(a) L. 8. See *Cicero*. Paradox. c. 3. (1) *Mark* XII. 30, 31. (2) See B. 8. c. 3. f. 19, 20. (3) Our Author must mean the *Matter of Actions*, for the *Object of Actions* is not a thing order'd or prohibited, but it is the Person, with respect to whom we do, or do not any thing. And so our Author understands this Term in the next Paragraph.

tains under it in the manner of different Species, the Preservation of his Life, of his Members, of his Health, the turning away of any thing that doth or may grieve, or molest him, the supplying him with Food in time of Famine, &c. And the Opposite or Negative Law, in the same Commandment, forbidding us to hurt the Body of our Neighbour, comprehends, in like manner, Murther, Maiming, Wounds, Stripes, Threats (a), &c.

Thus too the Affirmative Law, in the Seventh Commandment, enjoining Chastity, contains under it, Purity of Thoughts, Modesty of Words and Gestures, Abstinence from unlawful Love, &c. And the opposite Law forbidding Unchastity, comprehends Adultery, Fornication, obscene Speeches and Gestures, and impure Imaginations. For, to give an Instance in this case, obscene Words do not respect Adultery in the way of a Part or Degree: But because the Divine Lawgiver was pleas'd, for Brevity sake, to comprehend many *Special* Acts under one General Law, hence it comes to pass, that he who commits simple Fornication, doth as fully and entirely sin against the Seventh Commandment, as he that is guilty of Adultery. Therefore, as to these Objects, when what the Law commands is not perform'd, we must of Necessity either quite omit or do directly the contrary. But

other Objects of Actions, as determin'd in Laws, are in such a manner divisible, that they seem to consist of *Integral* Parts. So that here it is not necessary we should do all, or omit all, or perform the contrary, but 'tis possible to perform one part, and to let the rest alone. For Example, the Law commands me to pay the Labourer his full Hire; now I may perhaps pay him some part of it, and keep back the rest. But when I not only deny a Man his Due, but farther take something from him, or bring any Evil upon him, this Act will be quite of another Species, and bear no Reference or Affinity to the former.

V. Besides all this, since one may be concern'd about a more Noble, another about a more Ignoble Object; and since one may produce more Good or Evil than another; it is plain, that upon this account likewise, amongst Good Actions some are far better than others, and amongst Ill Actions, some far worse than others. *Horace's* (b) Instance may serve to illustrate this Truth;

*Nec vincet ratio hoc, tantandem ut peccet, idemq;  
Qui teneros caules alieni fregerit horti,  
Et qui nocturnus divum sacra legerit.—*

Reason will never call't an Equal Sin,  
To rob an Orchard and a Sacred Shrine (c).

(a) *Vid. l. 47. t. 10. D. de Injuriis.* (b) *B. l. Sat. 3. v. 115, 116, 117.* (c) *Add. Cicero pro Muræna: Where he smartly refutes the Stoicks Notion, that All Sins are Equal. Yet in many Cases, Horace's Reasoning will hold good, L. 1. Epist. 15.*

— *De mille fabæ modis quum surripis unum,  
Dammum est non facinus pacto mihi lenius isto.*

When from a Thousand Pecks you steal but one,  
Less Loss is felt, but no less Guilt is shown.

And this is the *Relative* Estimation of Actions, which is treated of at large, Book VIII. Chap. 3.

## CHAP. IX.

### *Of the Imputation of MORAL ACTIONS.*

**W**HAT Conditions are required to make an Action capable of being *imputed*, or of being consider'd as really belonging to a Person, we have formerly shown at large: It remains, that we see how and by what means it may be actually *imputed*, so as to produce some Moral Effect either in the Agent, or in some other Man. And here we must first of all distinguish between those Actions which are directed by Law, and those which are left to every Man's free Pleasure. Actions of the former kind are then said to be *imputed* to the Agent, when the Legislator or Sovereign declares him to be the Author of them, and at the same time decrees, that the ordinary effects of such Actions shall redound on him, or shall be conceiv'd as inherent in him. But the latter kind of Actions are then said to be *imputed*, when he, who without being bound by any necessity, hath exercis'd them for the Use and Benefit of another Man, doth signifie, that he

undertook such an Action for the other Man's sake, and out of an Intention to oblige him. The latter Sense of the Word *Imputatio* is most frequent in Claffick Authors, and the former more in use with the Divines and Moralists. But there is between them this manifest difference, the former tends from the Legislator or Sovereign toward the Agent, but the latter proceeds from the Agent, and rests in the Person for whose sake or use the Action was perform'd.

II. The former kind of *Imputation* is subdivided into *Imputation of Favour*, and *Imputation of Debt*. *Imputation of Favour* is when a Man, out of pure Benevolence, derives upon another the Effects of an Action perform'd by a third Person; which Effects the second Party had no Right to, without the Grant of the first. Or, when one, out of free Kindness, makes a larger Effect redound to the Performer of a certain Action, than the Action would other-

otherwise of it self have produc'd. But this last Instance will hold good in Matters of Reward only (1), not in Matters of Punishment. For, as such is the Nature of Good Things, that they may be given to another *gratis*, without any Colour or Condition; so, if a Man is not willing to confer a good thing on another by the Name of a Pure Gratuity, he may lawfully do it under the Notion of rewarding him for some *Imputed* Action, which either did not otherwise belong to him, or could not have given him a Right of demanding such a Benefit. But on the other hand, Common Reason will not allow me on the same pretence, to derive on another the Effects of an *Evil Action*, which he is not really guilty of, and without the *Imputation* of which, these Effects would not follow his Natural State and Condition. And therefore 'tis very incongruous and absurd, that either for a Fault purely anothers, I should have those things taken from me which Nature gives every Man on the very account of his being a Man; or that, under the same Colour, such things should be impos'd on me, as Nature, by an Indulgence Universal to all Mankind, hath forbidden us to suffer without Reason. A Prince, for Example, may *impute* the Father's Merits to a Son not Illustrious by his own Atchievements; and may, on the account of those Merits load him with Honours not otherwise his Due. But to punish the Innocent for the Father's Crime, is (strictly speaking) unreasonable (2). This indeed may happen, that the Father's Fault shall be the occasion of not conferring on the Son, or of taking from him, those things which he was neither to receive, nor to retain but under certain Conditions. But a Person thus dealt with, cannot be said to suffer an Evil, which his Natural State would otherwise have made him a Stranger to. For Nature, in this Case, gave no Security to the Children, that they should certainly possess the Parents Goods, or that they should be admitted to the like Posses of Honour: But their Right to those Goods, or those Honours, proceeded on these Conditions and Proviso's, that the Parents should deliver them down safe and untainted, and should not fall under such and such Penalties by their Crimes. Nor can he by any means be said to be in a worse Condition than Human Nature admits or allows, who having no Paternal Inheritance, is forced to work out his Fortunes by his own Industry.

It is Just likewise so far to proceed against Innocent Children upon account of their Parents Demerits, as to oblige them to quit the Kingdom or State. For no Man hath a Right from Nature of living in this or that Territory; but every one attains to such a Right by some Act of his own, or of other Men: And it may be a Condition of keeping this Right, that he shall lose it in case his Parents

are found Guilty of some particular and High Offences. It is not being repugnant to Reason, that the Possession of a Right should depend on Contingent Terms. Though, that the Laws of some Countries are too rigorous and severe in this point, no Man can pretend to deny.

III. *Imputation of Debt* consists in this, that those Persons whose Interest it concerns, that an Action be done or not done, do declare that the said Action belongs to the Agent, and that the Effect assign'd to that Action shall redound or fall upon him. Hence, if in any Law, a certain Reward be decreed to such or such a Good Action, so soon as the Sovereign or the Guardian of the Laws shall understand that particular Action to have been perform'd by any Man, 'tis manifest, that the Man hath immediately a Right of demanding the promis'd Reward. But when a Man is enjoind to do a thing, solely by the Authority of the Commander, and without any such Proposal of a Reward, he ought to rest satisfied with the bare Approbation of his Superior, and to esteem it a very sufficient Recompence, that he hath avoided his Displeasure, which would necessarily have follow'd upon default. On the other side, when an Ill Action hath been committed, so soon as the Author of it is discover'd, he hath reason to fear the Execution of the Legal Penalty.

As to inferior Persons, to whom neither the Guardianship, nor the Execution of the Laws do belong, if they either approve a Good Action, or reprehend a Bad one, their Judgment can affect only the Credit and Character of the Agent. According to that Elegant Saying of *Diodorus Siculus* (a), *Praise is a kind of a Reward of Virtue putting us to no Charges, and Dispraise is a Punishment of Vice inflicting no real Wound.*

It is farther to be observ'd, that when the Interest of many Persons is concern'd in the doing or the not doing of an Action, if one of those Persons shall forgive and not *impute* it to the Agent, he cannot by this means abate any thing of the Right of the other's, which he hath no Power to controul. Thus, if a Man hath done me an Injury by an Illegal Fact, I may forgive him for my own Part and Concern, but at the same time I do not in the least derogate from the just Pretensions of the Publick, and of the Sovereign Authority. And thus too the Pardon which GOD Almighty is pleas'd to vouchsafe to repenting Sinners, doth not at all impair or hinder the Proceedings of Human Judicature. But when all the Persons, whom the doing or the not doing of a thing concerns, agree that they will not *impute* it, in such a Case the Deed is conceiv'd to be Null and Void as to all Moral Effects. Now the Persons concern'd in a thing's being done or not done, are either the Objects or the Directors of the Action; that is, those towards whom

(1) The Author will explain this distinction l. 5. c. 12. f. 11. (2) See Lib. VIII. c. 3. f. 31. &c. (a) In Excerpt. *Peiresc.*

the Action is perform'd, and to whom it brings either Good or Evil, and those who have a just Power of guiding and supervising such an Action. For which reason, if in case of an Injury, the Deed be forgiven by the Person to whom it was offer'd, by the Civil Magistrate, and by GOD Almighty, in Moral Estimation it shall be suppos'd undone, and consequently shall be attended with no ill effect.

IV. Very different from the Imputation of which we have been speaking, is that by which the Agent is said to *impute* an Action, which he might have omitted, to the Party for whose sake and use he perform'd it. A Man who hath exactly fulfill'd the Command of his Superior, may indeed expect the Approbation of his Performance as from all others, so especially from him who enjoin'd it. But he cannot lay claim to any farther Reward, unless such as is expressly promis'd in the Law (a). For the same reason, no Man can demand that it should be *imputed* to him, in order to the giving him any *Right*, that he hath abstain'd from a Bad Action, forbidden by the Laws, or by any Command of his Superior; but he must be satisfied, that his Obedience hath pleas'd him who requir'd it. For since upon acting contrary to the Law, he would have justly incurr'd a considerable Evil, to escape such a Punishment must pass with him for a Reward. Hence in *Seneca's Controversies* (b), when a Man, who being taken in Adultery by a Tyrant, had forc'd the Sword out of his hand and kill'd him, desir'd a Gratification from the State, he is put off with this Rebuke, *imputat nobis quod deprebensus in adulterio mori noluit. He reckons we are indebted to him, because being taken in Adultery he had the Sense to save his own Life*: And *Tully* in his second *Philippic*, denies himself to have any Obligations to *Antony* upon account of his not being murder'd by him: *Where lies the Kindness to me* (says he) *in your keeping your self from so horrid a Villany*. Others maintain the Reasonableness of our present Assertion from this Topick, that the Omissions of Ill Actions are purely *non Entia*, and consequently can have no Positive Affections or Properties. Though to such an Argument it might perhaps be answer'd, that even these Omissions may, in Moral Account pass for Entities, as they are the real and actual Restrictions and Confinements of our Natural Powers.

But now, if for the sake of another Man, I do what I might rightly and properly have omitted, or omit what I might fairly and conveniently have done, it is highly reasonable, that I should *impute* my Service to

him; or, that I should by Virtue of my Right, demand of him to acknowledge my Kindness; and his own Obligation according to the Quality and Condition of it. This *Imputation* cannot rightly be laid, unless there was in the Actor a real Intention of procuring some Good to the other Man; and in the Receiver an express, or at least a presumptive Consent to admit it. For no Man can *impute* or *reckon* to us a Service forc'd upon us against our Will: And it would be a much higher degree of Impudence, to charge such a Fact to us for a Kindness, as was perform'd either without any regard to our Benefit, or perhaps with a design to hurt us. Thus he must be extremely Foolish, who would desire a Reward from a Man whom he had restor'd to Health by breaking an Impoſtem, otherwise incurable, whilst he intended to give him a Mortal Stab. Yet *Marius Celsus*, in *Tacitus* (c), when he was brought before *Otho* as one of *Galba's* Servants and Confidants, immediately confessing his Loyalty to his old Master, propos'd it as an Example, how faithful he would be to the New Emperour; and thus reckon'd he had already oblig'd *Otho*, by sticking resolutely to *Galba*. And thus *Eudoxia*, when she was married to the Emperour *Theodosius*, sent for her Brothers by whom she had been formerly expell'd her Father's House; and was so far from resenting their Injury, that she rather paid them Thanks, as the Authors of her Promotion: Since unless she had been driven from Home, she had never seen *Constantinople* (d).

When the Parties concern'd and interest'd do agree in defining the Rate at which a thing shall be reckon'd or *imputed*, in this Case a Covenant intervenes, expressing how far, or to what value the *Imputation* shall extend, and beyond which it shall not reach in any Business or Transaction (e). For *Merit* (as Mr. *Hobbs* (f) observes) *presupposeth a Right*, and implies, *that the thing deserv'd is due by Promise*.

V. Hence 'tis easy to gather what is the Force of *Merit*, or what Actions are properly Meritorious, which some Men would vainly set to the account of GOD himself. Now the main Spring of all Merit, is the Performance of a Work which we did not owe; or, which the Person towards whom it is exercis'd had no Right of requiring from us. For he that performs a thing which he lay under a full and perfect Obligation of doing, only dischargeth his necessary Duty, and lays no Foundation for any consequent Merit (g). Neither is it fair to *impute* a thing which we do not owe to a Person against his Consent;

(a) See Luke XVII. 9, 10. (b) L. 4. Controv. 7. (c) Hist. l. 4. (d) Zonar. Tom. 3. Add. Genes. 45. 5. 50. 20.

(e) Comp. Matth. XX. 13, 14. (f) *Leviath.* c. 10.

(g) M. *Senec.* Controv. l. 1. c. 8. Give me leave to perform some Service to my Country, which may properly be a Piece of Merit. What I have hitherto done in the common Course of Arms, is not owing to me, but to the Laws. *Julius Capitolinus*, in his Life of *Antoninus Pius*, reciting the Reason of the Emperour's obtaining that Title, from lending his Hand to support his Ancient Father-in-Law, in the Presence of the Senate, adds, *This Action was really no great Argument of Piety: Since the Debt we owe our Parents is such, as rather denominates a Man Impious if he neglects, than Pious if he pays.*

and much less, if our doing of such a thing did not turn to his Benefit. Whence it is clearly apparent, that no Man can pretend to any Merit with reference to Almighty G O D, even though it were possible for him to pay a full Obedience to all the Divine Laws. And that therefore, G O D cannot any other way become a Debtor to Mortal Men, but upon account of his free Promise, the Breach of which would be repugnant to his Goodness; (1) not that any *Right*, properly so call'd, is thence deriv'd to us. Indeed no Actions enjoin'd by Virtue of a supreme Authority do produce Merit towards the Enjoiner. For though both the Sovereign of Heaven, and the Inferior Rulers of the Earth, are wont frequently to confer certain Good things on those who comply with their Commands, in order to the encouraging and exciting their Obedience; yet to the Payment of these good things, they are not bound by the Merits of the Agent, or as in the manner of Covenants; but by their own free Offer and Promise: And therefore they cannot be so properly call'd *Rewards* as *Gratuities* in the strictest Sense of that Word (a).

But notwithstanding all this, if the Legislator do expressly declare, that upon the Performance of such or such an Action, the Agent shall have a Right of demanding such a Reward; there's no doubt to be made, but he may fairly and justly require it. But the bare Omission of forbidden Actions is utterly unable to produce any Merit, or any Matter for Boasting or for Praise (b).

It remains then, that the only Actions whereby we can obtain Merit towards other Men are such as we do not owe to them; at least, not by a full and perfect Obligation: Whether Natural Reason either commands or adviseth them in general, leaving the Application of them to particular Persons in our Power; or whether they are only not enjoin'd by the Civil Laws. For whatsoever I owe another as a full and proper Debt, to that he hath already a Right, and therefore when I pay such a Due, I do not, properly speaking, part with any thing which I have then a Right of retaining or of otherwise applying, because upon denying and keeping it back, I should bring a real Injury and Damage on the Person to whom I stand engag'd. And therefore since things which I owe in this manner, do already belong in some respect to another Person, and I have no longer a Power to dispose of them as I please, they cannot be proper Matter for the founding of Merit. But when I perform any thing towards another Man, which I was not bound to pay by any *perfect Obligation*, such a thing really passing from me, and accruing to

him, leaveth in me either a perfect or an Imperfect Right of receiving an Equivalent Return. And this is properly *Merit* (c); the Retribution or Payment of which, when it is determin'd by Express Covenant we call *Wages*: But when as to the manner, the time, and the Quantity, it is left to the Equity of the other Party, it bears the Name of *Reward*. Now upon such accounts and Considerations we may receive four kinds of things, Corporeal, Incorporeal, Moral, and Notional. Of the first sort are, Money, Land, &c. of the second, the Grant of Privileges and Immunities; of the third, Honours and Dignities; of the last, Statues, Inscriptions, Crowns, and the like Tokens and Testimonies of Worth (d).

And thus, as hath been shewn, *Merit* ariseth from those Actions which we do not owe to others; and chiefly as they are useful and beneficial to them. On the contrary, from Evil Actions, especially such as damage or injure others, ariseth *Demerit*; by Virtue of which, a Man is oblig'd to make Satisfaction for the Harm he hath done; But in general, all Evil Actions produce a Guilt, by which the Agent is suppos'd liable to undergo some Penalty: Which Point we shall hereafter find more room to explain (2).

VI. As the actual applying of *Imputation* causeth the Effects of Moral Actions to exist; so the ceasing and as it were the recalling of it, doth dissolve and extinguish those Effects. And as to this Matter, the Case is very near the same in Good Actions and in Evil. For both Good and Evil Actions whilst they are *such*, or so long as they are enjoin'd or prohibited by the Laws, must necessarily be attended with *Imputation*; at least in the first and plain import of that Term. But when a Law is repeal'd, the Action about which it was concern'd can no longer be *imputed*. The Imputation of an Action not properly due, he alone can remit, whose Interest it is that the Effect or Consequence of the Action should be made good. Therefore if he who hath perform'd a Work remits the Imputation, the Wages otherwise due cannot on any account be demanded. But to make this Release or Remission, is not in the Power of the Person for whom the Work was done; it being the Creditor's part to forgive, and not the Debtor's. So likewise to take off the Imputation of an Ill Action, as to any Force and Efficacy, belongs to those whose Interest it is that such an Action be attended with its due Effects; that is, to the Party Injur'd, and to the Maker and Guardian of the Law, not to the Author of the Fact.

The *Civilians* reduce the chief Ways by which Crimes are cancell'd or extinguish'd in

(1) Or rather his Veracity: For it is properly out of his Goodness that God at first promises a reward to our imperfect performance; but his Veracity that he performs such Promise. (a) *Euripides. Rhes.* Rewarded Virtue gives a Double Joy. (b) *Philostrat. de Vit. Apollon.* l. 6. c. 11. It is not an Act of Justice to abstain from Injustice, nor an Act of Prudence to have declin'd a Foolish Resolution, nor of Valour not to desert ones Colours, nor of Temperance not to fall into the base Effeminacy of the Medes; nor will a bare Negative Goodness entitle you to any Commendation: When we escape Punishment, but yet do nothing worthy of Honour and Reward, such an Indifference cannot reasonably be call'd Virtue. *Add. Luk. XVIII.* 11. *Amnian. Marcell.* l. 30. c. 11. To forbear Plunder and Rapine, is a false Foundation for Praise. (c) *Add. Senec. de Beneficiis* l. 3. c. 21, 22. (d) *Add. Montaigne Ess.* l. 2. c. 7. (2) See lib. VIII. c. 3.

Human Courts, to these Five. First, when the Punishment defin'd by the Law shall be compleatly undergone: For no Man is punish'd twice, and with equal Severity for the same Individual Fault. Though many Punishments indeed leave a kind of lasting Stain behind them (a): And frequently after the Completion of a Corporal Punishment, Moral Punishment, or Infamy with its scandalous Marks continues. Secondly, he whom the Judges have acquitted, passeth in Human Esteem for an Innocent Person. The third way is, when the Delinquent dies. Though sometimes in extraordinary Crimes, for a Terrour to others, Severities are shown on the Body, the Goods and the Memory of Wretches after they are dead. Fourthly, by length of time Crimes are so far taken away, as that the Author cannot be afterwards try'd on the same Account (b). The Fifth and last way is the procuring of Pardon for the Offence from the Sovereign Power (c).

As the Effects of an Evil Action do so long lie dormant, as the Action is either conceal'd, or thoroughly dissembled or pardon'd (as it were) before-hand: So when once these Effects have broken out in Publick, their *Moral* part may indeed be effac'd, but not their *Physical*. For

what is once done, cannot in a Physical or Natural Sense be rendred undone; but it may be so order'd, as that it shall no longer have any Moral Effect in Civil Life. Thus a Man who hath been whipp'd for a Misdemeanour, must still keep the Scars and Signs in his Back, though all the Disgrace and Scandal of the Punishment may be remov'd by a Decree of the Government. And when the Imputation is taken off, the Action is to all Intents and Purposes, no more than if it had never been done (d).

We need only add by way of Remark, that those Authors are strangely overseen, who in order to the taking away the Guilt of an Evil Action, besides the Non-Imputation, or the Forgiveness of it, require the Infusion of some contrary Quality, or of the Habit of Justice and Honesty. In the same manner, as by plaistering over a Wall we rid it of the Spots that were in it before; and as we drive away an ill Smell by burning Frankincense in a Room. Which Mistake was occasion'd by their Ignorance of Moral Things, and because they imagin'd that Moral Qualities were produc'd and destroy'd in the same way as Physical: The Absurdity of which Notion is plain enough from what we have before deliver'd.

(a) Vid. Sueton. Claud. c. 16.

(b) Senec. Oedip. *Latere semper patere quod latuit diu.* What long hath lain conceal'd should ever lie.

Though *Lysias* (Orat. 12.) denies that a Crime can be blotted out by any Space of Years.

(c) All which are treated of at large by *Anton. Matthæus* de Crimin. ad l. 48. D. tit. 19.

(d) And thus we are to understand those Sentences of *Ovid de Pont.* l. 1. El. 1.

*Estque pati panam quam meruisse minus.*

'Tis less to feel than to deserve our Doom.

*Pœna potest demi, culpa perennis erit.*

The Penalty may cease, but ne'er the Crime.

*Mors faciet certe ne sim cum venerit exul,*

Ne non peccarim mors quoque non faciet.

Death's kind Release may end my Banish'd State,

My Sin will live, and mock the Power of Fate.

OF THE  
LAW of NATURE  
AND  
NATIONS.

BOOK II.

CHAP. I.

*It is not Agreeable to the Nature of Man, that he should live without LAW.*

I. **H**AVING in the preceding Book explain'd the Condition of Moral things in general, together with the most frequent Uses of the Common Terms, (which Notices if inserted otherwise, and only as Occasion serv'd, would have interrupted us in our Business, and broken the Series of our Undertaking;) we come now to fall more directly on our main Design; and the first Enquiry we are here to make is, whether it would be convenient or not for Men to pass their Lives without the Restraint of any Law. Whence it will evidently appear, why the All-wise Creator hath not invested them with such a wild Liberty, as should empower them to act merely as they list, and as their wandring Inclinations lead them; without being under the Restraint of any Rule, Necessity or Law. For since God Almighty has been pleas'd to endue Man with a Will, (that is, with a Power working by a kind of internal Impulse, and enabling him to incline towards such things as appear agreeable to him, and to Turn from such things as seem Inconvenient or Unpleasant;) and with such a Will as cannot be compell'd; a Doubt may be rais'd, whether it did not become the Divine Goodness, to allow him the full range of this flexible Faculty, without any Limit or Impediment. For to what purpose, some will say, did God first make us entirely free to all things, and afterwards confine us to certain Bounds and Rules? And as the Motion of our Joints is render'd useless by the Restraint of Chains and Fetters, so may the Liberty of the Will seem vain and

of no manner of use, if we can incline to many things which must of Necessity be forborn, and if we can be averse to many things, which we must as necessarily pursue and undertake.

II. In tracing this point to its proper Spring, we think it convenient first of all to show, that an absolute Liberty would be so far from being useful, that indeed it would be destructive to Human Nature; and that therefore the binding and restraining it with Laws is highly conducive to the Good, and to the Safety of Mankind. And this Consideration rightly pursued, will at the same time discover what Scope may be fairly indulg'd, and how far the Reins may be given to our Freedom. Here then we must know, that Liberty in general implies *an Internal Faculty of doing and of omitting things according to the Direction of our Judgment*. When we call it a *Faculty* or *Power*, we intimate that the Person to whom this Liberty is applied, is Master of sufficient Strength for many Performances, and has a Force and Ability not only to move himself, but to imprint Motion on other Things, and to affect them in a certain manner. We term this Faculty *Internal*, to signify that its Force and its Motion arise from an inward Principle, contrary to that outward and violent Impulse which is the Cause of Movement, rather in a Log than in a Man. Lastly, we add *according to the Direction of our Judgment*, to hint that the Motion is not rais'd at a venture, or by some blind kind of Force; but that the Agent is suppos'd, in some degree at least, to have had a Knowledge of the Object, and to have determin'd himself to Action after some fort

fort of Deliberation, so that the immediate Reason of his acting shall be, because he was pleas'd to act. At the same time it will be understood, that all Rubs and Hindrances which may either prevent the Motion, or turn it another way, ought to be suppos'd absent, when we state the Notion of Liberty in Perfection and without alloy.

III. Matters being thus settled, if we cast our Eyes over the universal Frame of Things, we shall find that many have no Liberty at all, such as are all Inanimate and Vegetative Creatures. Others enjoy several kinds of Liberty, and in several degrees. An universal Liberty void of all Hindrance and of all Defect, is applicable only to God Almighty; this is conceiv'd as the most Noble Attribute of his most perfect Essence, admitting no Bounds or Circumscription, and intimately join'd with Omnipotence. And therefore, the reason why God doth not do some things, or why he doth not always do all things, is not to be fetcht from the Deficiency of his Liberty, but from his own absolute Pleasure (a). So likewise when we say He cannot do all things, this does not proceed from any outward Impediment whether Natural or Moral, but from his own Intention and Design, which we Mortals endeavour to conceive in Proportion to his Greatness and his Excellency. In which sense we are to interpret that common Saying, *That God is a Law to himself.* Thus too the Justice which we ascribe to God, is not to be suppos'd to bear a regard to any Obligation, or to any Right in another Person, as the Nature of Human Justice necessarily implies. But in as much as he has shown both by his Works and by his Revelations, that such a manner of acting is suitable to his most compleat Nature, hence we come to express it by the same Term which denotes our own equitable Dealings towards other Men. Thus the reason why God's Promises do not fail, is not because his Liberty was restrain'd by any Obligation arising from his Promise; but because it is agreeable to the Divine Excellency to let us not expect in vain, what he commands us to expect; or because to violate a Promise, implies some kind of Imperfection, from which the Supreme Nature is most immensely remov'd. Upon which account, we Men do not challenge the Divine Promises as of Right belonging to us, but receive them with Humility and Reverence, as Gratuities proceeding from God's Free Pleasure. For 'tis not here as in Human Promises, where there lies an Obligation to Payment, where the Promise turns into a Debt, and what was before free, is brought under a Necessity: But those things which God performs upon Promise, do as fully retain the Nature of Gifts and Benefits, as those things which he dispenses, without any such seeming Engagement. Thus may we weak Mortals faintly represent the Divine

Liberty; but that alone which we can determine with Certainty about it, is, that it surpasses in an infinite manner, both our Notion and our Condition (b).

IV. Brute Creatures which are plac'd below our Degree of Being, do however enjoy a Liberty proper to their Nature and State. But this Liberty cannot be otherwise than very Ignoble, since the Power of these Animals is confin'd to such Narrow Bounds, and since such is the Dulness of their Senses and such the Lowness of their Appetite, that they are concern'd about very few Objects, and regard even those but very negligently and superficially; nor are excited by any thing but what is extremely gross and perpetually obvious, and tends to the Service of their Belly. As to other Matters, they have no Custom, no Law, no Right to bind them in transacting either with one another, or with Mankind. Amongst a few of them there is some Semblance of Marriage, but of such as is observ'd in the bare Act of Conjunction and in some shew of Love or Liking, not in any strictness of serious and constant Fidelity. Most of them, as soon as they have satisfied their Lustful Desires, retain no farther Mark of Love, no Sense of Shame, no Regard to Off-spring. Some indeed are most passionately fond of their Young, but then their Kindness continues no longer than till they are able to provide for themselves. After this Period, all Love is lost and forgot on both sides; the Dams take no Care or Notice of their Progeny, and the Progeny do not show any Gratitude, any sense of Debt or Duty to their Dams. Those Beasts which feed on Flesh, tear and devour without Distinction, whatever is agreeable to their Palate; and many when they fall out, pull one another in pieces without Regret. Being Ignorant of the Laws of Propriety, whenever a sharper Hunger than ordinary pinches them, we may see them fighting furiously for the common Pasture or Prey; and what some have laid up or seiz'd for their private use, the others make no scruple to invade and to devour. Nor is there among them any such thing, as Esteem, as Honour, as Command, as Prerogative, unless such as is deriv'd purely from Superiority of Strength. It must be confess'd, that Likeness of kind does produce in some Creatures a shew of Friendship and of Society. Hence many delight to live in Herds, and those which are more fierce than others, have some Aversion to preying on their own Kind. Thus *Juvenal* observes, *Sat. 15.*

*Parcit cognatis maculis fera: quando leoni  
Fortior eripuit vitam leo? quo nemore unquam  
Expiravit aper majoris dentibus apri?  
Indica tigris agit rabida cum Tigride pacem  
Perpetuam: sævis inter se convenit ursis.*

(a) See *Psalms* 115. 3. *Ephes.* 1. 11.

(b) Add *Cumberland, de Legg. Nat. c. 7. f. 6.*

From spotted Skins the Leopard does refrain,  
 No weaker Lion's by the Stronger slain:  
 Nor from his larger Tusks the Forest Boar  
 Commission takes his Brother Swine to gore.  
 Tyger with Tyger, Bear with Bear you'll find,  
 In Leagues Offensive and Defensive join'd.

Mr. Tate.

But not to say that there's something of a Poetical Figure in these Expressions, we may only take notice, that this seeming Relation is but a very weak Bond for a lasting Friendship: since 'tis immediately broken whenever the Concerns of the Belly intervene. Thus you shall see a Litter of Puppies play very lovingly together, but throw a piece of Meat amongst them, and you breed a dangerous and a general Quarrel. The reason why some Creatures exercise a little shadow of Duty, Love, Faith and Gratitude towards Men, is purely to be referr'd to Custom, and to their desire of being supplied with Food. If these Obstacles are once remov'd, and if they find themselves of sufficient Strength, Man himself cannot escape their Violence, if he unhappily provokes them. The Liberty of Brutes then is not restrain'd by any Intrinsic and Moral Tie: Tho' their External Motions are often violently put under Confinement by Men. Now if any one is so curious as to enquire on what account Brute Creatures are allow'd so unbounded a Freedom, the plain reason seems to be, because GOD ALMIGHTY has not given them a Mind capable of the Knowledge of Right and of Law. There was indeed no occasion to be so very careful and exact in enforcing the Safety and Preservation of such Beings, as are not only produc'd by Nature with such vast Fertility and with so little Pains, but are likewise denied the Privilege of an Immortal Soul; and whose Life consists in nothing else, but in the curious and accurate Disposition of the little parts of Matter, with the additional Benefit of Motion. Hence GOD is pleas'd, in producing and in destroying these Inferior Animals, to give us frequent Instances and evident Tokens of his Power. Another reason why Brutes had no need of the restraint of Laws, is, because their Appetite is rais'd by nothing else but by Hunger, or Thirst, or by falacious Desire, for their Satisfaction in all which Enjoyments, Nature has made such large Provision. Neither is it likely, that their unlimited way of proceeding should render them very hurtful and destructive to Mankind, since we are enabled by our Superior Strength and Cunning to prevent any such unhappy Effects (a).

V. Now why the Great Creator should not indulge us Men in so lawless a Liberty, many Reasons may be given, arising both from the Primitive and from the Accessory State and

Condition of Human Nature. The Dignity of Man and his Excellency above all the other parts of the Animal World, made it requisite that his Actions should be squar'd by some Rule; without which no Order, no Decorum, no Beauty can be conceiv'd. Hence it is his greatest Honour that he has obtain'd an Immortal Soul, indu'd with the Light of Understanding, with the Faculties of judging and of choosing things, and with an admirable Capacity for Arts and Knowledge. On which account he is justly term'd

*Sanctius — animal, mentisq; capacius altera  
 — Et quod dominari in cetera posset.*

*an Animal blest with Loftiness of Mind and with Sanctity of Reason, and fram'd for the Dominion and Sovereignty of all the rest (b).*

Farther, That the Soul was design'd by the All-wise Creator for a much nobler end than to serve only as Salt to keep the Body fresh, may be gather'd from this Consideration, that the greatest and the most shining part of its Faculties are such as contribute either little or nothing to the Preservation of the Body, which might be secur'd without any such mighty Parade, without so Great and Pompous a Provision. It's plain, that the Power and the Activity of the Rational Soul, is chiefly exercis'd about such things as belong to the Worship of GOD, and to a Life of Society and of Civility. And 'tis principally for the Service and Furtherance of these Great Ends, that it can from known things infer and explain those which are less known, that it can discern and judge what is agreeable and what disagreeable to it; that it can form Universal Notions by Abstraction from Singulars; that it can by proper Signs communicate its Notions to others, can form Inventions, can apprehend the Nature of Numbers, Weights and Measures, and compare them with one another; that it can perceive the Beauty and the Force of Order and Method; that it can either raise, or repress, or moderate Affections; that it can hold in Memory an endless Compass of things, and call out as it were at its beck, any part of the Stock which it has occasion to use; that it can turn its Sight inward upon it self, recollect its own Dictates, and by them judge of its Actions, whence arises the Force and the Authority of Conscience. Of all these Powers and Abilities there would be very little use, or rather none at all in a Lawless, a Brutal and an Unsocial Life (c). Now the more Gifts GOD has bestow'd on Man, and the greater Inlargements he has granted to his Wit and Mind, the more base and unseemly would it be, that all these noble Endowments should rust for want of Culture and Regulation, should be vainly spent and squander'd away without Use, with-

(a) Add *Charron of Wisdom*, B. I. c. 34. (b) *Solinus* (Cap. 3.) calls Man a Being whom Nature has prefer'd to all others, in Excellency of Sense and in Capacity of Reason. (c) Add *Cumberland de Legg. Nat. c. 2. f. 4*; who likewise in the 33d Section of the same Chapter, has drawn most admirable Proofs from the Frame and Structure of Human Bodies.

out Order, and without Grace. Nor was it altogether in vain, that GOD indued Man with a Mind apprehensive of Accuracy and of Decency; but it was without doubt intended, that he should so employ the Powers he had receiv'd as to manifest the Glory of his Creator, and to promote his own true Interest and Happiness. The Heathen Poet was able to make such an Inference as this :

— *Quis dubitet hominem conjungere cælo ?  
Eximiam natura dedit linguamq; capaxq; (unum  
Ingenium, volucremque; animum; quem deniq; in  
Descendit Deus atq; habitat, seq; ipse requirit.*

Then who can doubt that *Man* the Glorious Pride Of all, is nearer to the Skies alli'd? Nature in *Men* capacious Souls has wrought, And given them Voice expressive of their thought. In *Man* the God descends, and joys to find The narrow Image of his Greater Mind.

Mr. Creech.

VI. Another reason why it was inconvenient to allow Man the same extended Liberty as Brutes, was his prodigious Corruption and Degeneracy so many degrees beyond theirs. That we charge him thus, no one will wonder who has had the Curiosity to reflect a little on the various Pursuits and Inclinations of Mankind. Beasts are sollicitated only by their Belly and by their Lust: And then their Lust has some shew of Temperance, provoking them only at certain Times and Seasons, and being exercis'd not for empty and superfluous Pleasure, but for Increase and Propagation of their kind (a). But the Carnal Desires of Men do neither observe any set times for their Eruption, nor are by any means so moderate in their heat, as to make no farther Efforts than are necessary for the Preservation of Human Species. Again, the Hunger of Beasts is easily satisfied with such Food as Nature has spread

in all places for their Sustainance; nor do their Meals stand in need of the Formality of Furniture, or of the Incentives of Sauce. And when they find this Appetite reliev'd and quieted, they put an end to their Business and their Care. (Nor are they very forwardly dispos'd to Rage or Mischief, provided they are unprovok'd, and that their two chief Desires are at rest.) But now the Food of Man must not only satisfy his Belly but tickle his Palate. Nature has taken Care, that Beasts should have no need of other Clothing besides what she has given them. But Man turns the Infirmary of his Nakedness into an occasion of Vanity and of Pride. Besides, do not Men float in a whole Tide of Affections and Desires utterly unknown to Beasts? Covetousness, Ambition, Vain-Glory, Envy, Emulation, Contentions of Wit, Superstition, the Care of future things, and the Spur of Curiosity do all claim Entertainment in Human Breasts, and yet are Strangers to the Dumb Creation (b). Whoever considers and examines the unhappy Variety of Contentions and Quarrels that continually arise amongst Men, will find that the greatest part of them proceed from such Inclinations and Propensions, as never disturb the Peace of Brutes (c). Now in so violent a Fierceness, and in so wide a Diversity of Affections and of Desires, what a Life would Men lead, were they destitute of the Benefit of Law to unite and to compose them? We should see nothing but a furious Multitude of Wolves, of Lions, of Dogs tearing and destroying one another. Every Man would indeed be a Lion, a Wolf, a Dog, to his Neighbour, or rather a Monster more pernicious and more spiteful than the fiercest of these Creatures; since Man of all Living Things is the most able to hurt Man, and if left to his own furious Passions, the most willing. And since Men are continually bringing so many Evils and Mischiefs on one another, while they now

(a) *Oppian Cynez. l. 3. Vers. 151, 152.*

Ὅου γὰρ τοῖς θύρεσσιν νόμου γαστήρ ὅτε πλῆθει  
Ἐἰς λέχος ἑρχομένοις τελέειν φιλοπόρου βερον.

(b) *Manilius Astron. l. 4.*

— *Nulla votorum sine beati  
Virtutis agimus semper, nec vivimus unquam,  
Pauperiorq; bonis quisque est quo plura requirit:  
Nec quod habet numerat, tantum quod non habet optat.  
Quumq; sui parvos usus natura reposcat,  
Materiam struimus magnæ per vota ruinæ,  
Luxuriamq; lucris emimus, luxuq; rapinas,  
Et summum census pretium est effundere censum.*

Beasts in their Joys a decent Temp'rance keep;  
Nor offer Love, when 'tis the Time for Sleep.

Why should deluding Hopes disturb our Ease,  
Vain to pursue, yet eager to possess?  
With no Success and no Advantage crown'd,  
Why should we still tread on th' unfinished Round?  
Grown Grey in Cares pursue the senseless Strife,  
And seeking how to live, consume a Life?  
The more we have, the meaner is our Store,  
The unenjoying craving Wretch is poor.  
But Heaven is kind, with bounteous Hand it grants  
A fit Supply for Nature's sober Wants:  
She asks not much, yet Men press blindly on,  
And heap up more, the more to be undone:  
By Luxury they Rapine's force maintain,  
What that scrapes up, flows out in Luxury again.  
And to be squander'd, or to raise Debate,  
Is the great only Use of an Estate.

Mr. Creech.

*Liban. Declam. IX. Is not Man a Mild and Peaceable Animal, so far as Words go; but in reality Savage and Ungovernable? For when do we hear of Lions undertaking an Expedition against Lions? When do Wild Beasts war against their own Kind? What Injury do we find amongst them? What Breach of Covenants? What Perfidiousness and Avarice, what Insatiable Love of Riches? What Intemperance, what Adultery can we lay to their Charge? (c) Add. Charron Of Wisdom, B. I. c. 34. n. 12. and c. 39. n. 11.*

live under the Force of Law, and under the Fear of Punishment; what would become of the World, if they were left to the wild sway of their Corruptions, if they had no inward Bridle to curb their Inclinations and to check their Pursuits (a)?

VII. It is still farther observable to our purpose, that a much greater Variety of Dispositions may be discover'd in Men than in Beasts. All the several Kinds of Irrational Creatures are for the most part indu'd with the same Inclinations, and rais'd and incited by the same common Appetites and Affections. We may understand a whole Species by the Knowledge of one single Member of it. But amongst Men there are *not more Heads than Wits*; and every one is equally zealous in giving the Preference to his own Opinion, and to his own Possessions (b). Nor are all mov'd with a simple and an uniform Desire, but with Propensions as vast in their Number, as they are various in their Mixture and Compositions. Nay, the same Man is very frequently unlike and unequal to himself, and what he most eagerly desir'd, he shall at another time most strongly abhor:

— *magno curarum fluctuat aestu,  
Atq; animam nunc huc celerem nunc droidit illuc;  
In partesq; rapit varias, perq; omnia versat* (c).

This way and that he turns his Anxious Mind, Thinks, and rejects the Counsels he design'd. Explores himself in vain through ev'ry part, And gives no rest to his distracted Heart.

Mr. Dryden.

Neither is there a less difference in their Studies, their Institutions, and their Inclinations to employ and exert their Vigour of Mind, as appears from the numberless Professions, and the endless Methods of Living (d). Now as the more Voices there are, the more harsh and unpleasant would be the Sound, unless they join'd in Confort and Harmony; so would Human Life be nothing else but Noise and Confusion, were not the jarring Dissonance compos'd and sweetned by Law, and turn'd into a Musical Agreement. As things

stand, this exceeding Variety of Parts and of Dispositions, is at the same time an Ornament and an Advantage to Mankind; since when it is thus rightly temper'd, there naturally results from it so admirable an Order and Grace, as could not have been produc'd by an Universal Likeness. And besides, there was likely to be much less clashing and Contest in so vast a Multitude, whilst their various Humours and Inclinations led them to quite different Objects of Choice. The same wise Counsel Providence seems to have us'd in spreading so wonderful a Distinction of Features over the Faces of Men. For since different Offices are to be discharg'd, and different Behaviour to be us'd towards different Persons, there would arise a most wild and fatal Disorder, if all Men exactly resembled one another, and could not be distinguish'd but by Artificial Marks, which would be liable to so many counterfeiting Cheats (e). And there lies this farther Secret in that Natural Distinction, that one Face pleases the Fancy of one Man, and one seems more agreeable to another; so that out of the Universal Stock, every Man may chuse what he thinks most beautiful, and what may engage his Affection with the sweetest Confort and Delight.

VIII. Besides all this, it was inexpedient for Man to live without Law upon account of his exceeding Weakness; which is our last Reason. A few Days will set a Brute Creature in a Condition of providing for himself; nor is he in any great need of the Company of others for his Assistance and Support. But Man from his first coming into the World, undergoes a long, and tedious Course of helpless Infirmary (f). What a length of Years is requir'd, and what diligence of Information, to enable him by his own Strength to accommodate himself with Food and Clothing? Let us suppose a Man bred up by another, just so far as to be able to walk, and without hearing a Word spoken, insomuch that he shall be destitute of all Instruction and Discipline, and enjoying no Knowledge, but such as sprouts naturally from the Soil of his Mind, without the Benefit of Cultivation. Let us suppose the same Man to be left in a Wilderness or Desert, and entirely depriv'd of

(a) Add. Aristotle's Problems. Sect. 29. Quest. 7. Plin. Nat. Hist. l. 18. Proeme. Iamblichus Protrept. c. 20. That Men should maintain a Familiarity with one another, and at the same time live contrary to the Laws, is an impossible thing: For by this means they would suffer more Injury and Damage, than if every Man led a separate Life by himself. On these accounts, and for the Necessities, Law and Justice are to be admitted as it were for Sovereigns amongst Men, without the Government of which they could not continue or subsist. (b) Philemon in Stobæus, Speech 2. If a Man should get together thirty thousand Foxes, he'd find that they not only have all one Nature, but all one Method and Tenour of Life. But amongst US, as many Bodies are there, so many ways of living may we discover. PLIN. PAN. There are no things in the World more likely to displease all, than such as are done with the Aim of pleasing all. (c) Virg. Æn. 8. v. 19. Add. Charon de la Sageffe. l. 1. c. 38. (d) Quintus Calaber. l. 1.

— — — — — The Bar's but One,  
From which we start, but various Ways we run.

(e) Add. D. Cumberland, de L. N. c. 2. f. 28. (f) Quincilian Declam. 306. The Frailty of Human Nature appears most in its beginning and early Growth. The Beasts see their Young immediately after the Birth, a standing on their Feet, and seeking for the Dugg: But we are forc'd to take up the helpless Infant, and to protect him from the cold: And after all this Nicety and Care, it is not unlikely, he may die between the Arms of the Parents and the Bosom of the Nurse. Theocrit. Idyll. 26.

\*Αλλε δ' ἄλλον ἕδνη θεός γ' ἐπαδενεα φωνῶν.  
For Heaven made Man to be a Help to Man.

the Company and of the Assistance of others. What a wretched Creature should we at last behold! A mute and an ignoble Animal, Master of no Powers or Capacities, any farther than to pluck up the Herbs and Roots that grow about him; to gather the Fruits which he did not plant; to quench his Thirst at the first River, or Fountain, or Ditch, that he finds out in his way; to creep into a Cave for Shelter from the Injuries of Weather, or to cover over his Body with Moss and Grass and Leaves: Thus would he pass a heavy Life in most tedious Idleness; would tremble at every Noise, and be scared at the approach of any of his Fellow Creatures, till at last his miserable Days were concluded, by the Extremity of Hunger or of Thirst, or by the Fury of a Ravenous Beast. That Mankind therefore do not pass their Age in a more forlorn and a more deplorable Condition than any other living thing, is owing to their Union and Conjunction, to their Intercourse with the other Partners and Companions of their Nature. The Divine Saying, *'Tis not good for Man to be alone*, is not to be restrain'd to Matrimony, but seems to belong

in general to any Society with other Men. But now without Law, 'tis impossible that any Society should be either introduc'd or maintain'd in Strength and Quietness. And consequently unless Man had been design'd for the basest and the most wretched part of the Animal Creation, it was not by any means convenient that he should live loose from all Direction and Obligation of Law. *Plutarch's* Philosophy could teach him, that a general and unbounded Licence of acting, was disagreeable to the Condition and to the Dignity of Man. *Those Persons only* (says he (a) *who live in Obedience to Reason are worthy to be accounted Free. They alone live as they will, who have learnt what they ought to will. Those who give the Reins to unworthy practices and pursuits, use an imaginary Freedom, to purchase a real Dissatisfaction.*

From all these Remarks it is sufficiently evident, that the Natural Liberty of Man, such as really and truly agrees to him and not only in an abstracted Sense, must always be understood as guided and restrain'd by the Ties of Reason, and by the Laws of Nature (1).

(a) *De Audit.* (1) See *Buddes Elementa Philosophia practica*, Part II. Chap. 3. where he is both particular and large in shewing how People incorporated into Society are under a necessity of having Laws imposed upon them.

## CHAP. II.

### *Of the Natural State of Man.*

I. BY the Natural State of Man in our present Enquiry, we do not mean that Condition which is ultimately design'd him by Nature, as the most perfect and the most agreeable; but such a State as we may conceive Man to be plac'd in by his bare Nativity, abstracting from all the Rules and Institutions, whether of Human Invention, or of the Suggestion and Revelation of Heaven; for the Addition of these Assistances seems to put another Face on things, and to frame Human Life anew, by an exacter Model. By this wide Exemption we do not only exclude all the various Arts and Improvements, and the Universal Culture of Life, but especially Civil Conjunctions and Societies, by the Introducing of which Mankind was first brought under the decent Management of Order and Regularity. That we may be able to form clear and distinct Notions of this suppos'd State, we will first consider it *in itself*, and examine especially what Rights and what Inconveniencies attend it; that is, what would be the Condition of particular Men, if there were no Arts or Inventions set afoot, and no Communities form'd and establish'd in the World. And then secondly, we will consider it *in order to other Men*, whether in this regard it bears the Semblance of Peace or of War; that is, whether Men who live in a

Natural Freedom, so as neither to be Subject to one another, nor to acknowledge a Common Master, are likely to prove Enemies or Friends. In this second Consideration the State we are speaking of, is capable of a Subdivision, being either *full and absolute*, and so bearing an equal regard towards all Men in general; or else *limited and restrain'd*, as it has respect only to a certain part of Mankind. This double Notion of a State, is answerable to the Double manner in which we may consider the Men who are to compose it, either as each particular Man lives in a Natural Liberty towards all others; or as some Men have entred into a Society between themselves, but are join'd to all the rest of the World, by no other Ties, besides those of Common Humanity.

II. Now to form in our Minds some Image of this Natural State, such as it would be if destitute of all Arts and Assistances either invented by Men, or reveal'd by God, we must fancy a Man thrown at a venture into the World, and then left entirely to himself without receiving any farther Help or Benefit from others, than his bare Nativity; we must likewise suppose him to be furnish'd with no larger Endowments of Body or Mind, than such as we can now discover in Men, antecedent to all Culture and Information; and lastly, we

must take it for granted, that he is not foster'd under the peculiar Care and Concern of Heaven. The Condition of such a Person could not prove otherwise than extremely miserable, whether he were thus cast upon the Earth in Infancy, or in Maturity of Stature and of Strength. If an Infant, he could not but have sadly perish'd, unless some Brute Creature had by a kind of Miracle offer'd its Duggs for his Support; and then he must necessarily have imbib'd a fierce and savage Temper, under the Nursery and Tutelage of Beasts. If in Perfection of Limbs and Size, we must however conceive him Naked, able to utter nothing but an inarticulate Sound, a Stranger to all Institution and Discipline, amazed and startled at the things about him, and even at his own Being: The Admonition of Hunger would make him seize greedily on any thing that was near him, his Thirst would direct him to the first Water, and Dens or Trees would afford a Refuge from the Injuries of Weather. Should we suppose a Number of such helpless Wretches thrown together by Nature on some uninhabited Soil, we cannot but think that they would so long however continue in a brutal Wildness and Disorder, till at last, either by their own Wit and Experience, or by some Hints and Instructions taken from the Conduct of Mute Creatures, they should by degrees arrive at some Method and Elegancy of Living, and as *Virgil* says,

— *Varias usus meditando extunderet artes,*  
Studious Need might beat out Useful Arts.

This will easily be acknowledg'd by any one that looks about on the numerous Improvements and Assistances which we make use of in our daily Actions, and at the same time considers how difficult it would be for any Man to invent all these of his own Head, if he were not put in the way by the previous Labour and Guidance of others; and how great a part of these Ornaments and Conveniences of Life, would at once enter into the Thoughts of the Generality of Mankind. Hence it is no Wonder that the Heathen Writers, who understood not the true Origine of Men as deliver'd in the Holy Scriptures, should make so foul a Representation of their Primitive State.

*Quum prorepissent primis animalia terris (sant*  
*Mutum & turpe pecus, glandem atq; cubilia pren-*  
*Unguibus & pugnis, dein fustibus atq; ita porro*  
*Pugnabant armis quæ post fabricaverat usus.*  
*Donec verba quibus voces sensusq; notarent*  
*Nominaq; invenere; dehinc absistere bello,*  
*Oppida ceperunt munire, & condere leges,*  
*Ne quis fur esset, neu latro, neu quis adulter.*

When the first Fathers of our Human Brood,  
Dirty and Dumb crawl'd from the teeming Mud;  
A War began with Nails, and Filts, and Heads,

For Acorn Banquets, and for Leafy Beds.  
Cudgels came next in play; and riper Hate  
Arm'd them with surer Instruments of Fate.  
At length their voice grew Index of their thought,  
Joyful to name the things for which they fought.  
Now Rage began to cool, and Force to cease,  
And General Parlies work'd a Gen'ral Peace.  
Towns rose, and Laws were settled to remove  
Invading Thefts, and check Licentious Love.

This is *Horace's* Description, and we may expect a fuller from *Lucretius*.

*Et genus humanum multò fuit illud in arvis*  
*Durius, ut decuit Tellus quod dura creâsset.*

*Quod sol atq; imbres dederant, quod terra creatat*  
*Sponse suâ, satis id placabat pectora donum;*  
*Glandiferas inter curabant corpora quercus*  
*Plerumque.*

*At sedare sitim fluvii fontesq; vocabant.*

*Nec dum res igni scibant tractare, nec uti*  
*Pellibus, & spoliis corpus vestire ferarum:*  
*Sed nemora atq; cavos montes sylvasq; colebant.*  
*Et frutices inter condebant squalida membra,*  
*Verbera ventorum vitare imbresq; coacti.*  
*Nec commune bonum poterant spectare, nec ullis*  
*Moribus inter se scibant nec legibus uti.*  
*Quod cuique obtulerat prædæ fortuna, ferebat,*  
*Sponse suâ sibi quisque valere & vivere doctus.*  
*Et Venus in sylvis jungebat corpora amantum,*  
*Conciliabat enim vel mutua quamque cupido,*  
*Vel violenta viri vis atq; impensa libido.*

— *Illud erat curæ quod sæcla ferarum*  
*Infestam miseri faciebant sæpe quietem.*

*Inde casus postquam ac pelles ignemq; pararunt;*  
*Et mulier conjuncta viro concessit in unum,*  
*Castaq; privata Veneris connubia læta—*  
*Cognita sunt, prolemq; ex se videre creatum.*  
*Tum genus humanum primum mollescere cepit:*  
*Ignis enim curavit ut alia corpora frigus*  
*Non ita jam possent cæli sub tegmine ferre.*  
*Et Venus imminuit vires; pueriq; parentum*  
*Blanditiis facile ingenium fregere superbum.*  
*Tunc & amicitiam ceperunt jungere habentes*  
*Finitima inter se, nec cedere nec violare:*  
*Et pueros commendarunt muliebreq; sæclum,*  
*Vocibus & gestu cum balbe significarent,*  
*Imbecillorum esse æquum miserier omnium.*  
*Non tamen omnimodis poterat concordia gigni,*  
*Sed bona magnaq; pars servabant sædera casti;*  
*Aut genus humanum jam tum foret omne peremptum*  
*Nec potuisset adhuc perducere sæcla propago.*  
*At varios linguæ sonitus natura coegit*  
*Mittere, & utilitas expressit nomina rerum, &c.*

Then Man was hard, as hard as Parent-Stones,  
And built on bigger and on firmer Bones.

Contented they with the poor easy Store  
That Sun and Earth bestow'd, they wish no more:  
Soft Acorns were their first and chiefest Food.  
When

When thirsty, then did purling Streams invite  
To satisfy their eager Appetite.

They knew no use of Fire to dress their Food,  
No Cloaths, but wandred naked thro' the Wood.  
They liv'd in *shady Groves*, and *Caves* confin'd  
Were Shelter from the *Cold*, the *Heat*, and *Wind*.  
No fixt *Society*, no steddly Laws,  
No *publick* Good was sought, no *common* Cause.  
But all at War, each rang'd, each sought his Food,  
By Nature taught to seek his *Private* Good.  
Then to renew frail Man's decaying Race,  
Or *Mutual Lust* did prompt them to embrace,  
Or else the *greater Vigour* of the Male,  
Or some few *treacherous* Presents did prevail;  
Some *Acorns*, *Apples* some, some *Pears* bestow,  
*The thing the same, the Price was less than now.*

The most they dreaded was the furious Beast,  
For those i'th' dead of Night did oft molest,  
And lengthen into Death their slumbring Rest.

But when they built their Hutts, when Fire began,  
And skins of murder'd Beasts gave Cloths to Man;  
When One to One confin'd in chaste Embrace  
Enjoy'd *sweet Love*, and saw a *num'rous* Race;  
Then Man grew soft, the Temper of his Mind  
Was chang'd from *rough* to *mild*, from *fiere* to *kind*.  
For us'd to Fire, his Limbs refus'd to bear  
The *piercing* Sharpness of the open Air:  
Lust weaken'd him, and the sweet playing Child  
Tam'd his Wild Sire, and into Peace beguil'd.  
Then Neighbours by degrees familiar grown,  
Made Leagues and Bonds, and each secur'd his *own*.  
And then by *Signs*, and broken Words agreed,  
That they would keep, preserve, defend, and feed  
Defenceless Infants, and the Female Train;  
A Right which Pity urg'd them to maintain.

Tho' this fixt not an universal Peace,  
Yet many kept their Faith, and liv'd at ease;  
Or else, almost as soon as it began,  
The Race had fall'n, this Age ne'er seen a Man.  
Kind Nature power of framing Sounds affords,  
And these at length convenience turn'd to words (a)

Mr. Creech

However fabulous these Accounts appear, yet so far the Authors of them were in the right, that upon supposal of such an Origine of Mankind, the Face of Nature would have born all these Features which we now esteem so monstrous and extravagant. In the same manner being ignorant of the State of Paradise, they pleas'd themselves in making Descriptions, of a singular and constant Temperateness of Air, and of a spontaneous Fertility of the Earth, in the first and the Golden Age of the World. Because they thought it impossible, that Human Race could have been preserv'd, as according to their Notion they were produc'd, if the Weather and the Seasons had been then as changeable and as unsteady as now, and if the support of Food had not been more easy to procure (b). And indeed, though it is clear from the Authority of Scripture, that the Primitive Mortals by the Divine Direction and Assistance (1) arriv'd at a very early Knowledge of the most necessary Arts, which they daily improv'd and increas'd by their own Industry and Application; yet the Condition of Men had been most deplorable and base, if no Societies had been set on foot, but every one reign'd a separate Prince in his own Family, and suffer'd his Children, when once grown up, to seek their Fortunes

(a) We have much the same Story in Prose from *Diodor. Sic. l. i. c. 8.* They tell us, that Men at their first Origine led an Irregular Life, in the manner of Beasts; scattering themselves about in Search of Food, which was presented them by the savoury Herbs, and the Fruits which grew of their own accord. But being infested on every side with the wild Beasts, they learnt by Use the Security of Mutual Assistance; and being forc'd in Fear to unite in Society, they came acquainted by degrees with their Similitude of Figure and Shape. The first Men, before any Inventions of Conveniency and Use, supported Life with great Labour and Trouble; being, as yet, destitute of Cloaths, and Dwellings, unaccustom'd to the Relief of Fire, and Strangers to all Sweet and Regular Food. Being Ignorant of Stores and Provisions, they neglected to secure so much of the Fruits of the Earth as was Requisite for necessary Sustenance. And thus many perish'd in the Winter, by Hunger and Cold. But being afterwards instructed by Gradual Experience, to spend the sharp Season in Caves, and to lay up a Stock of Necessaries, and finding out the Use of Fire and other Comforts and Supports, they began to introduce many Arts, and many Advantages of Living. Add. lib. i. c. 43. *Cicero pro P. Seetio.* Who amongst you does not know the Condition of Nature to have been once such, that Men, in those Days, before the Settlement of Natural or of Civil Laws, wandred separately about the Fields, and possess'd no more than what they could get or keep, by Mutual Force and Wounds and Slaughters. Now between our present way of Life polish'd with Humanity and Civility, and that Rude and Barbarous Course, the only distinguishing Marks are Law and Violence. Vid. de Invent. l. i.

*Euripid. Supplic.*

I praise the generous Powers, that fenc'd our Life  
With Rules and Graces from the Lawless Herd;  
By giving first a Soul, and next a Tongue,  
The Soul's Interpreter; and Fruit for Food,  
And kindly Rain to breed a future Store:  
And close Abodes, to Skreen us from the Rage  
Of threatenng Skies; and Sails to wing our Course  
To distant Shore, to join the Globe in Trade,  
And mix the Common Treasures of Mankind.

It is a General Custom with the Poets to attribute to the Gods, the Invention of all things useful in Human Life. Vid. *Oppian Halient. l. 2. v. 16, &c.* (b) Vid. *Ovid. Metamorph. l. i. v. 107.* *Virg. Georg. II. v. 336.* *Luceet. l. 5.*

*At novitas mundi nec frigora dura ciebat,  
Nec nimios aestus nec magnis viribus auras.*

Nature whilst New no cruel Cold brought forth,  
Nor raging Heats; nor arm'd the stormy North.

(1) It is reasonable to believe, that God Almighty instructed Men at first in many things necessary to Life, which for want of Time and Experience they could not otherwise have found out. This appears particularly from *Genes. 3. 21.* where it is said, *God made Coats of Skins and clothed them;* or, as the Hebrew expresses it, *taught them how to do it.*

in a State of Natural Liberty. And then we might pronounce of all Mankind, as *Euripides* does of the *Cyclops*, they would be

Νομίδης, ἀνέει δ' ἔδεν ἔδειξ ἔδερδς·

as *Wandering Swains*, never hearing, and never heeding one another. *Hobbs* has been lucky enough in painting the Inconveniences of such a State. Out of Society (says (a) he) we are defended only by our single Strength; in Society, by the Strength of all. Out of Society no Man is sure to keep Possession of what his Industry has gain'd; in Society every Body is secure from that danger. To conclude, out of Society we have the Tyranny of Passions, War, Fear, Poverty, Filthiness, Barbarity, Ignorance and Wildness; in Society we have the Sway of Reason, Peace, Security, Riches, Decency of Ornament, Company, Elegancy, Knowledge and Benevolence (b): And I believe there cannot be a more effectual way found out to silence the Complaints and Murmurs of the Common People, when they pretend to find fault with the Mis-carriages and the Impositions of the Government; than if we would lay before them a true Prospect of the Misery and Confusion which attends a Natural State. Which trouble those Persons had certainly a right Notion of, who brought into a Proverbial Saying, *That unless there were such things in the World as Courts of Justice, Men would infallibly devour one another.*

III. What kind of Rights attend Men in a State of Nature we may easily gather, as well from that Inclination common to all living things, by which they cannot but embrace and practise with the greatest Readiness and Vigour all possible ways of preserving their Body and their Life, and of overcoming all such things as seem to drive at their Destruction; as from this other Consideration, that Persons living in such a State are not subject to any Sovereignty or Command. For from the former Reflexion it follows, that Men plac'd after this manner in a Natural State, may use and enjoy the Common Goods and Blessing, and may act and pursue whatever makes for their own Preservation, while they do not hence injure the Right of the rest. From the latter Supposition it is clear, that they may use not only their own Strength, but their own Judgment and Will (provided they are form'd and guided according to the Law of Nature) for procuring their own Defence and Safety. And in this respect likewise, the State we are treating of has obtain'd the Name of Natural Liberty; in as much as, antecedently to all Human Pact and Deed, every Man is conceiv'd to be perfectly in his own Power and Disposal, and not to be controll'd by the Pleasure or Authority of any other. On which account too, every Man may be thus acknowledg'd equal to every

Man, since all Subjection and all Command are equally banish'd on both sides. According to this Temperament, we ought to correct and explain those Assertions laid down by Mr. *Hobbs*, in the Beginning of his Book *de Cive*, *That the first Foundation of Natural Right, is the Liberty which each Man hath, to preserve, as far as he is able, his own Life and Limbs, and to apply all his Endeavours towards the guarding his Body from Death, and from Pains.* From which it follows, *That since 'tis in vain to have a Right to the End, if one has not likewise a Right to the Means, therefore every Man has a Right of using all Means, and of doing all Actions, without which he cannot defend and ensure himself.* But now since in a Natural State no Man is subject to another as to a Superior, to whose Pleasure his own Will and Judgment should be submitted, hence every Man is by *Natural Right* a Judge, whether the Means which he uses and the Actions which he performs, are necessary to the Preservation of his own Life and Limbs or not. For altho' in this case one Man should pretend to give Advice to another, yet the other not having subjected his Will and Judgment to his Control, may still judge of this Advice, whether it be proper and expedient to be follow'd or not. And therefore he may perhaps do according as he was advis'd, but then it will not be for the sake of the Counsellor, but because he himself approves of the Proposal; and consequently he will at last act by the Determination of his own Judgment. From all which he concludes, *That Nature has given to every one a Right to all things; that is in a meer natural State, or before Men had bound themselves to one another by any Covenants, it was lawful for every one, to do all things whatsoever and against whomsoever he pleas'd; and to possess, use, and enjoy all that he would or could. Whence it may be understood, that in a State of Nature, Profit or Utility is the Measure of Right.* Which Notions however Paradoxical they appear at first View, yet no Man can fairly draw from them a Licence of doing any thing to any Person, who considers that *Hobbs* even in this State of Nature supposes a Man Subject to the Laws of Nature, and to the Government of sound Reason. But since such an unbounded and injurious Licence could never by any Man in his Wits, be thought a likely Means for the lasting Preservation of himself, we must presume that it was never granted or intended by Nature. And suppose some Man should be so extravagant as to endeavour the putting it in Practice, it's plain his Experiment would turn in a high manner to his own Prejudice and Mischiefe. So that the only fair Sense of *Hobbs's* Principle is this; the things which make for the Preservation of Men, Nature has laid in common, before they have divided them amongst themselves by Covenant: And he that has no

(a) *De Cive*, c. 10. s. 1. (b) *Comp. Polyb.* 1. 4. c. 45. Where he relates the Miseries of the *Byzantines*, occasion'd by their endless War with their Neighbours the *Thracians*.

Superior, may by the Direction of his own best and soundest Reason, do any thing that is truly conducive to his lasting Safety. But if that Philosopher really intended his Words, with the same Harshness and the same gross Appearance which their Countenance bears, and to reject our kind and favourable Interpretation, the Fault is his own, and let him shift how he can to escape the perpetual Censure and Reprehension of wise Men. This is evident, that the Author of the *Theologico-Political* Treatise, who goes commonly by the Name of *Spinoza*, has describ'd that *Right of all Men to all things* which attend a Natural State, in most horrid and barbarous Terms; and therefore it may not be improper to take the Trouble of discussing his Notions on the Point. *By the Right and Institution of Nature*, he understands *nothing else, but the Rules of the Nature of every Individual thing, according to which we conceive every one of them to be naturally determin'd to a certain manner of Existence and of Operation.* For example, *Fishes are naturally determin'd to swim, and the bigger of them to eat the lesser; and therefore Fishes by the highest Natural Right, possess the Water, and by the same Right, the larger kinds of them prey on the smaller.* Here it is observable, that by the Term of *Right*, he does not express any Law directive of an Action, but only the Power of acting, and what may be done without Injury, and that therefore 'tis by no means a fair Conclusion; that one ought necessarily to do all those things, which one has a Right of doing. Farther, as it is an improper Acceptation of the Term of *Natural Law*, to make it denote that according to which every thing acts by a certain and determinate manner, so is it likewise improper to apply the Name of *Right* to that Power and manner of acting which appears in Irrational Beings: For he alone can be truly said to have a Right of acting, who acts on previous Reason and Deliberation. He proceeds to tell us, *that Nature absolutely consider'd has the highest Right of doing whatever it can; that the Right of Nature extends it self, as far as the Power of Nature: for the Power of Nature is the very Power of God, who hath the highest Right to all things.* Here, if by *Nature absolutely consider'd*, he mean God in Conjunction with all created things, we grant his Assertion, and willingly acknowledge in God the highest Right to all things, yet such a Right as is suited to the Perfections of his Essence. But if by *Nature* he understand the University of Created Beings, as contra-distinguish'd to the Creator, then we may deny the Power of Nature to be the Power of God himself, or that these two Powers have the same Latitude and Extent. The Power of Nature is indeed produc'd by God, but not in such a manner as to exhaust all the Power of the Divinity, but to contain it self within the Bounds prescrib'd by its Author. His next Inference runs thus, *Since the universal Power of all Nature is no-*

*thing else but the Power of all the Individuals taken together, it follows that each Individual has the highest Right to all things that it can compass, or that the Right of each Individual extends it self as far as the determinate Power of the same Individual.* But 'tis beyond me to apprehend the Conclusiveness of this Argument, *The Power of all Nature is the Power of all the Individuals together, therefore each Individual has the highest right to all things.* For is it not rather true, that each Individual has a certain and definite Share or Portion of Right; and that therefore no particular Individual can fairly arrogate to it self that Right, which is proper to all, as they make up one Universal Nature? He adds, *And because it is a supreme Law of Nature, that every thing endeavour as far as it is able to continue in its own State, and this not without any regard or respect to other things, but only to it self, hence it follows, that each Individual has the highest Right to this Advantage; that is, to exist and to operate as it is naturally determin'd.* Here, besides that *Law of Nature* is us'd in an improper Sense, it is apparently false as to Men at least, that their Nature is so determin'd, as to make them endeavour their own Preservation and Continuance with respect to themselves only, without any Care or Consideration for others. Properly speaking, those things are said to be *Naturally* determin'd which are tied to an uniform Method of acting, and are so contra-distinguish'd to Free Agents: And therefore Men as to those Actions which are left to their own Guidance and Direction, are determin'd to certain Ways and Courses not by Nature, but by some Law; and consequently they are not presently invest'd with a Right of doing all things within the reach of their Natural Powers and Abilities. But the Vanity of such Reasonings will more fully appear, if divesting them of their dark Turnings and Intricacies we thus clearly propose them; God has the Highest Right to all things; the Power of Nature is the Power of God, therefore Nature has a Right to all things: But the Power of Nature is the Power of all the Individuals together; therefore each Individual has a Right to all things. Let any Man judge whether the Connexion in this Argument be just or not. *Spinoza* very fallily declares, *that in this Point no difference ought to be made between Men, and the other Individuals of Nature; or between Men who understand and exercise Reason, and those who do not; nor between Men in their Wits, and Fools and Madmen.* For, as to the first part of this Assertion, the Question of Right ought not to proceed but about the Right of Men. And as to the latter part, although some Men may have a quicker and some a slower use of Reason, yet whoever has any use at all of that Faculty may at least understand thus much, that in order to his own Preservation he has no need of an unlimited Right to all things, and that therefore such a Right doth by no means

means belong to him. As for those who have no manner of use of Reason, 'twould be frivolous to dispute about their Right; nor from the unhappy Circumstances of diseas'd Persons, can we pronounce any thing about the Natural Condition of Mankind: Nor is it impossible for any one of these poor Creatures to be preserv'd otherwise than by a Right to all things. The Reason which he subjoins is equally vain and fruitless, *For whatsoever any thing acts by the Laws of its Nature, it acts with the highest Right; in as much as it acts as it is by Nature determin'd, and cannot do otherwise.* Because we deny Man when he acts by the Laws of his Nature, to affect a Right to all things, or to be determin'd by Nature to the Exercise of any such Right. *Spinoza's Conclusion therefore is false, Amongst Men, as they are consider'd to live only under the Command of Reason; he who is not come to a Knowledge of Reason, or who has not yet acquir'd a Habit of Virtue, doth as well by the highest Right live according to the Laws of his Appetite, as he who directs his Life by the Laws of Reason. That is, as a wise Man has the highest Right to all things, which Reason suggests, or according to the Rational Laws of living; so an ignorant and senseless Person has the highest Right to all things which his Appetite affects, or according to the Laws of living by Appetite.* But now the Natural State or the Command and Dominion of Nature, supposes Reason in Men, nor are other Laws prescrib'd to the sagacious and others to the simple. Those who are govern'd purely by Appetite, are Subjects incapable of Right or Law. But when the Appetite in Men proceeds contrary to their Reason, they are so far from living by any Right, or by any Laws, that they are continually guilty of transgressing the Laws. The Corollaries which he deduces, are no truer than the foregoing Propositions. *The Natural Right of each Man is not determin'd by sound Reason, but by Desire and by Power. For all Men are not naturally determin'd to operate according to the Rules and the Laws of Reason; but on the contrary, all are born ignorant of all things, and before they can attain to know the true and rational way of living, and acquire the Habit of Virtue, a great part of their Age, (although they have been well educated,) passes away; and yet notwithstanding all this, they are in the mean time bound to live, and to preserve themselves to the best of their Power; and this Obligation is fulfilled by obeying the sole motion of their Appetite, since Nature has yet given them no other Guide, denying them the actual Power of living by sound Reason; and therefore they are no more oblig'd to live by the Laws of true Sense and Judgment, than a Cat is oblig'd to live by such Laws as are proper only to the Nature of a Lion.* For to make a Man oblig'd to live according to Reason, it is not necessary that he should be naturally determin'd to act according to the Laws of Reason, that is, that he should not be able to act otherwise; but

it is sufficient that he has so much Natural Power, as may enable him to abstain from bringing Injuries and Troubles on other Men; than which nothing in the World can be more easy. Neither is the manner and method of preserving himself so very difficult and laborious, as to make him stand in need of a Right to all things. And then from him who through defect of Age is yet in absolute Ignorance, none can acquire a more accurate Direction of his Proceedings, than is consistent with his low Capacity, and his small and feeble Efforts of Reason. But that what is done in this State of Simplicity may not prove very hurtful or troublesome to others, Nature has carefully provided; by giving it so little Strength of its own, and by commending the Care and Guidance of it to those of maturer Years. The following Inference is as false as the former. *Whatsoever therefore any one, consider'd only under the Command and Guidance of Nature, shall judge convenient for himself, either by the Direction of Reason, or by the Impulse of his Passions, this by the highest Natural Right he may desire, and may seize upon by whatever he can, whether by Force, or by Fraud, or by Entreaty, or the easiest way he can think of; and consequently he may reckon every one his Enemy, who would hinder him from satisfying his Inclinations.* As also this, *Whence it follows, that the Right and the Institution of Nature, under which all are Born and the most part Live, is averse to nothing, besides that which none can desire, and which none can hinder; not to Contentions, not to Hatred, not to Anger, not to Deceit, nor absolutely to any thing which it's possible for the Appetite to pursue.* This Assertion if applied to Men is manifestly false and absurd. But if it includes all Living Creatures, and be meant in this Sense, that there is no way or manner of Self-Preservation, which some Animate Being doth not follow and make use of, out of Natural Instinct, then it is nothing to the purpose; since the only Question is, whether Men have such a Right to all things as they may use against all other Men. But that *Spinoza* intended the latter Sense is evident from what follows; *And no wonder, for Nature is not restrain'd to the Laws of Human Reason, which concern only the true Profit and Preservation of Men; but Comprehends an Infinity of other things, which fall under the Universal Order of all Nature, of which Man is but a little part.* He afterwards confesses, that it is more convenient for Men to live according to the Laws and infallible Dictates of Reason, which point out their true Interest and Advantage. But then what occasion was there for the feigning of such a Right, as Man, if he intended to be safe, must necessarily relinquish; while other Animals which exercise a kind of Right to all things, lie under no necessity of quitting it for their own Preservation? Neither indeed, could such an absurd Abdication be necessary for Man, upon supposal, that Nature

Nature had invest'd him with the same Right.

IV. We are ready to acknowledge it for a most certain Truth, that all Mankind did never exist together in a mere Natural State: In as much as upon the Divine Authority of the Scriptures, we believe all Human Race to have proceeded from one Original Pair. Now it's plain, that *Eve* was subject to *Adam* (a); And those who were born of these Primitive Parents, and so on, did immediately fall under Paternal Authority and under Family Government. But such a State might have befallen Mankind, if, as some of the Heathens believ'd, they had in the Beginning of their Being, leapt out of the Earth like Frogs, or had come up from Seed, like *Cadmus's* Human Crop (1). Which Fable is, methinks, a very exact Representation of that State of Nature, and of that War of all Men against all, which *Hobbes* would introduce; where

————— *furit omnis turba, suoq;  
Marte cadunt subiti per mutua vulnera fratres.*

Rage hurries all; and in so Blind a Fray,  
The sudden Brothers fall a Mutual Prey.

A State of Nature then did never naturally exist, unless qualified, and, as it were, in part; namely, while some Party of Men join'd with some more in a Civil Body, or in some Confederacy like that; but still retain'd a Natural Liberty against all others. (Tho' it must be own'd that the more and the smaller those Societies were, into which Men at first divided, the nearer Approach was made to a meer Natural State.) Thus of old when Mankind were parted into distinct Families, and now since they are fallen into separate Communities, those might have been then, and may now be said to live mutually in a State of Nature, neither of whom obey the others, and who do not acknowledge any Common Matter among Men. Thus in the Primitive Age, when Brethren left their Father's House, and set up Particular Families for themselves independent from any other, then they began to live in a Natural State or Liberty. Therefore not the first Mortals, but their Offspring did actually exist in such a State. Now a State of Nature thus temper'd and qualified is attended with none of those Inconveniences, which follow a meer Natural Liberty, especially if we apply it to Publick Communities: And besides, it passes for the highest pitch of Honour amongst Mortals, by Virtue of the united Strength of the whole Publick Body to acknowledge no Earthly Superior. So that Common-wealths, and the Governours of them, may fairly declare themselves to be in a State of Natural Liberty, while they are furnish'd with sufficient Strength to secure the Exercise of that Grand Privilege. Whereas, when Men live singly in a meer Natural

State, it is no manner of Pleasure or Advantage to them to own no Superior; in as much as upon account of their own small Force and Ability, their Safety must needs be in perpetual Doubt and Danger.

There are some indeed who maintain with great Eagerness, that such a Natural State either doth not at all exist, or is not rightly call'd Natural; and they form their Argument in the following manner. Nature inclines Men to an Orderly Society or Fellowship; now there being no such thing as Order without Government, it follows that there can be no Society without Government, and that therefore Government or Command, ought rather to be stil'd Natural than Liberty. To strengthen this Assertion, they alledge the Authority of *Cicero*; *Nothing* (says he (b), *is so agreeable to the Right and to the Condition of Nature, as Government: Without which, no House, no State, no Nation, not Human Race in General, not the Universal Nature of things, not the World it self could stand. For the World obeys GOD, and the Seas and the Earth obey the Superior Frame of the World, and the Life of Man is led in Conformity to the High and the Sovereign Law.* Hence they bring a general Accusation against *Hobbes*, for feigning such a State under the Name of Natural, as is unworthy of Human Nature, and more agreeable to that of Beasts, who are ignorant of Reason and of Speech. For that all Men should have a Liberty of doing, of desiring, of possessing all things, no Reason, no Nature truly and rightly judging can advise. Such Inclinations may indeed flow from deprav'd Nature, but cannot be the Dictates of right Reason, which by desiring Society, doth at the same time desire an Order in Society, and by that means cuts off all such licentious and irregular Motions. For what Order can be conceiv'd without tending to some first and principal Point? This first and principal Point must be Government, or the Sovereign Power in Society, without regard to which, no Society can be desir'd by Thinking and Speaking Beings. Nature it self instructs us, that Government is essential to all Society, but that such a Liberty as excludes all Government, tends to unnatural Confusion (c).

What may be return'd in answer to all this Process of Argument, is clear from the preceding Doctrine. A meer Natural State, is a Representation of Mens Condition abstracting from all Human Institution; but doth not suppose that Nature intended Man for such a way of Life. For by the same Allowance of Expression, an entire Ignorance of all things may be said to be Natural to Man, or to be born with him; without implying any such thing as that it should be repugnant to Nature for Man to acquire very high degrees of Knowledge. Besides, we have been so cautious as to attribute no such Natural Liberty to Man, as shall

(a) Genes. III. 16. (1) *Ovid, Metamorph. L. III. vers. 122, 123.* (b) *De LL. l. 3.* (c) *Add. Bacler. ad Grot. Proleg. be*

be exempt from the Obligation of Natural Law, or of Divine Commands. But such a Liberty as excludes all Human Sovereignty and Superiority cannot be said to contradict Nature, any more than it can be said to reach as far as Infinite it self. Government indeed is Natural; that is, it was the Design of Nature, that Men should constitute Governments amongst themselves. But this doth not make it e'er the less Natural, that he who himself bears the Supreme Government and Command amongst Men, should himself be exempt from all other Human Command, and in that Sense should enjoy a Natural Liberty: Unless in the same Order, we can fancy somewhat before the first, somewhat Superior to the Supreme. Upon the same account it is in General very agreeable to Nature, that he who hath no Lord or Master, should govern himself and his Actions, by the Guidance of his Private Reason.

V. There is a Dispute of much greater Consequence, whether this Natural State, in regard to other Men, bears the Semblance of War or of Peace: Or which comes to the same thing, whether they who live in a State of Nature, that is, who do neither obey one another, nor own a Common Lord, ought to be reckon'd Enemies amongst themselves, or quiet and peaceful Friends. And here our first and chief Business must be to examine the Opinion of *Hobbes*, who as he calls his meer Natural State not a single War, but a War of all Men against all, so he maintains, that when some Men have agreed to enter into a Society they immediately quit their hostile State in regard to one another, but still continue against all the rest of the World. Thus in his Book *de Cive* C. 9. §. 3. *Every Man is an Enemy to every Man whom he neither serves nor obeys.* (He ought to have added, *and with whom he has no Common Master*) And again, C. 13. §. 7. *The State of Common-wealths amongst themselves, is Natural, that is, Hostile. And tho' they cease to Fight, yet this Intermiſſion muſt not be call'd a Peace but a Breathing-time, during which each Enemy, observing the Motions and the Countenance of the other, rates his Security, not by Covenants, but by the Strength and Designs of his Adversary.* He should have added, *and by his own force* (a). He adds in his *Leviathan*, Cap. 13. *that War consists not in Battle only, or the Act of Fighting, but in a Tract of time, wherein the Will to contend by Battle is sufficiently known: And that therefore the Notion of Time is to be consider'd in the Nature of War as in the Nature of Weather. For as the Foul Weather lyeth not in a Shower or two of Rain, but in an Inclination thereto for many days together: So the Nature of War consists not in actual fighting; but in the known Dis-*

*position thereto, during all the time there is no assurance to the contrary.* Nor indeed was *Hobbes* the first Inventor of these Notions; for we meet with somewhat much of the same strain in *Plato's* First Book of Laws; where *Clinias a Cretan* is giving the Reasons why the Law-giver of that Country introduc'd a great Number of Ordinances in Reference to Military Affairs, he concludes *Ἄνοταν δὴ ποὶ δουρεῖ,* &c. *By which conduct he seems to me to have accus'd many Men of extreme Folly and Ignorance, in their not being sensible, that all Cities are in a perpetual War with all. And that which we call Peace is no more than a bare Name, while in Reality Nature has set all Communities in an Un-proclaim'd War against one another.*

We may observe by the way, that some Authors have given a very unaccurate Explication of this great Question; while they tell us, that by a Natural State is understood that Condition by which we are conceiv'd to live singly, or out of Society; and that this is a State of War, that is, of Inclination to possess what another hath, and to drive the Owner from it; so that their whole meaning amounts to this, that if Men liv'd without all Society, they would be engag'd in a perpetual Quarrel; or, if Men did not lead a Social Life, they would continue in a State of endless Discord. But now here's a great Impropriety committed, the opposing a State of Nature to a Social Life; for those who live in a State of Nature both may, and ought, and frequently do, consent to live Socially.

But since upon this Question rightly stated, are founded almost all the Pretensions and all the Debates which can fall out between the Governors of one Common-wealth, and their Neighbours of other Countries or Dominions; we imagine it will not be lost Labour, if we proceed to a closer and a stricter discussion of the Arguments alledg'd on either hand.

VI. That the State of Nature then is a State of War, *Hobbes* endeavours in this manner to demonstrate. The reason why Man is continually in fear of Man, and consequently in a State of War with him, he draws from this Principle, that Men have both the Power and the Will of hurting one another. That they have the Power of hurting one another, he shews by observing, that Men of ripe and settled Age, are commonly equal in Strength. For tho' one may frequently have the Advantage of another in Bodily Force; Yet 'tis possible that the Weakest may kill the Strongest, either by secret Machination or by Confederacy with others; in as much as the Stoutest Mortal has his Vital Parts no better ensur'd from extreme Violence, than the most Puny and Impotent Wretch (b). Neither is it probable that a larger degree of Natural

(a) Just as *Oppian* describes the State of Fishes. *Halient.* l. 2.

In Mutual War they swim, and Mutual Hate,  
The Weak the Strong, the Smaller feed the Great:  
Destructive Rage boils in the restless Flood;  
Each frights and fears, pursues and is pursu'd.

(b) *Seneca de Ira.* l. 1. c. 3. *There is no one so low or contemptible, who may not hope to wreak his Revenge on the Greatest Person: We are all strong enough to do Mischief.*

And hence the Scaly Tribes with wakeful Eyes,  
Still watch, and live and die upon Surprize.  
Unfix'd, unwearied, all their Age they stray,  
In Hopes or Fears to find or prove a Prey.

cunning (in which of two Men one commonly exceeds the other) should be able to secure a Man's Safety, while he has no Guard, and no Protector but himself. Farther, since the greatest Evil that Men can bring upon one another is Death, and since this may as well be brought on the stout by the weakly, as on the weakly by the stout, he says it follows that those who can bring on one another the greatest Evil, must, in effect, be of equal Power and Strength. As to the Will of hurting others, this, he says, is in some Men out of Necessity, and in some out of Lust and Pleasure. For while some are for living as they list, for arrogating to themselves undue Honours, and for petulantly setting on their quiet Neighbours, it's impossible but that those Neighbours, how modest soever they may be, and how willing soever to allow others an equal Liberty with themselves, must necessarily defend themselves against the Violence of their Assailants (a): Besides, he tells us, that the Will of hurting arises frequently from the Contention of Wit, while every Man thinks himself wiser than his Fellows, and yet at the same time cannot bear the same Arrogance in others. Hence, he says, it comes to pass, that it is not only odious to contradict, but likewise not to consent: For not to consent to another in a thing, is tacitely to accuse him of Error in that Matter; and to dissent in very many things, is as much as to count him a Fool, in not being able to apprehend such an evident Truth, as every one takes his own Opinion to be (b). Hence, since all Pleasure and Satisfaction of Mind consists in this, that one be able to prefer ones self to others, 'tis impossible but that now and then some Signs of Contempt towards others will break out; than which no Affront is more provoking to Human Minds (c). The

last and most frequent Cause of a mutual Desire of hurting, arises, according to *Hobbes*, from hence, that many desire one and the same thing at once, which frequently they neither can nor will enjoy in common, nor yet divide: From whence it follows, that it must be given to the stronger; and who is the stronger can only be known by fighting (d). Upon all these accounts he declares it to be impossible but that Men should live in perpetual Fear and Suspicion of one another. And that since not only Natural Passion but Reason too, recommends to every Man his own Safety in the highest manner, and indulges him in the Use of all Means for the attaining of that end, the Fitness of which, no Superior being yet admitted, is to be determin'd by each Man's particular Judgment; hence there must necessarily arise a desire rather of preventing others, than of yielding to their Invasion: From whence there will at last result a State of Infinite War, of all Men against all; the Consequence of which is, that it shall be lawful for any Man to do to any Man either secretly or openly, whatever he shall think expedient for his own Affairs: In doing which, altho' his Reason should sometimes fail him, yet he would not offer an Injury to any Body, since Justice and Injustice have nothing to do but with Societies and establish'd Corporations: Tho' a Man may indeed sin against Reason, by using unfit Means for his own Preservation.

VII. These Notions are in some measure tolerable, if propos'd only by way of Hypothesis. And that *Hobbes* design'd them for nothing more, we may be apt to conclude from those Words in the 8th Chapter of his Book *de Cive*, *But to return again to a Natural State, and to consider Men as if they were just now risen out of*

(a) It is very probable there may be some Person, like *Achilles*,

*Jura negat sibi nata, nihil non arrogat armis.*  
or like those whom *Manilius* describes,  
*Nec pacem a bello, civem discernit ab hoste,*  
*Ipse sibi lex est, & qua fert cunque libido,*  
*Præcipitat vires: laus est contendere cunctis.*

Scorning all Judges and all Law but Arms.

*Nulla quies placet, in nullo sunt otia fructu,*  
*Sed populum, turbamq; petit, rerumq; tumultus,*  
*Seditio, clamorq; jurat.*

Who make no difference between War and Peace,  
But Friends and Foes with equal Fury seize.  
They every thing to Wild Condition draw;  
Their Will their Ruler, and their Sword their Law.  
They scorn that Rest which Private Minds enjoy,  
But fawn upon the Croud and court Employ,  
Love Noise, and Stirs and Tumults ———

Mr. Creech.

(b) *Cicero*. *Off.* 1. To be mistaken, deceiv'd or put upon, is reckon'd no less Disgrace, than to doat or to be out of ones Wits. *Horat.* *Ep.* 1. 1. 2.

*Vel quia nil rectum, nisi quod placuit sibi ducunt,*  
*Vel quia turpe putant, parere minoribus, & quæ*  
*Imberbes didicere, senes perdenda fateri.*

Or making their own Taste the Rule of Wit;  
Or to their Juniors scorning to submit; } forget.  
That what they Beardless learnt, All Beard they should }

*Juvenal*, *Sat.* 15.

Numina vicinorum  
Odit uterque locus, quam solos credit habendos  
Esse Deos quos ipse colit.

Each calls the other's God a Senseless Stock,  
His own Divine; tho' from the self same Block  
One Carver fram'd them ———

Mr. Tate.

(c) *Cicero*. *Off.* 1. Whatever is of that Nature, as not to admit more than to excel in it at the same time, usually proveth the Subject of so much Strife and Contention, as exceedingly to endanger the Sacred Peace of Society. It is a Perverseness not peculiar to the Grecian Levity, to reproach those from whom they differ in Opinion. *Idem de Finib.* 1. 2. Add. *Charron de la Sageffe.* 1. 1. c. 40. n. 6, 7, 8. (d) Thus *Socrates* discourseth *Xenophon Apomnem.* 1. 1. Men have partly a natural Propension to Friendship. For they stand in need of each others Assistance, and are comforted with each others Pity, and make the return of Mutual Thanks, upon receiving Mutual Helps and Favours. And partly they are inclin'd to Enmity; for taking a fancy to the same things, as good and pleasant, they must needs fall into Quarrel and Opposition about them. Now Anger and Contention are the proper Marks and Characters of Enemies. And then Envy, and Suspicion, and Covetousness, never fail to produce the most violent Hatred. *Senec. de Ira* 1. 2. c. 34. The desiring the same thing, which ought to be the Band of Love and Friendship, is often the Cause of Hatred and Sedition. For these which they affect being perhaps small, and not to be possess'd by one, unless he can take them forcibly from another, administer occasion to fighting and reviling. Add. *Charron de la Sageffe.* 1. 1. c. 39. n. 8.

the Earth like a Mushroom, and of full Stature, without any manner of Obligation to one another. Yet in the 13th Chapter of the same Book, and frequently in other places, he calls the State of Publick Bodies, not by way of Supposition, but seriously and absolutely *Natural*, that is, as he explains it, *Hostile*. Which seeming Contrariety we may do him the Justice thus to reconcile; it shall be pure Hypothesis, that all Men did at any time live together in such a State of Nature, as they would have done if they had risen suddenly in a great Multitude from the Earth: But what he seriously maintains shall be only this, that such a Natural State doth really exist amongst some Men; that is, amongst such as are neither subject one to the other, nor to a Common Master, as is now the Case with all establish'd Communities. And this indeed is his own Judgment, as he has moderated it in his *Leviathan*. *Though (says he) there never had been any time, wherein particular Men were in a Condition of War one against another; yet in all times, Kings and Persons of Sovereign Authority, because of their Independency, are in continual Jealousies, and in the State and Posture of Gladiators, &c.*

But the contrary Opinion seems more reasonable, as what is clearly favour'd by the Origine of Mankind, as related in the Infallible Records of Holy Scripture; which represent the Natural State of Man, not Hostile, but Peaceful, and shew that Men in their true Condition are rather hearty Friends than spiteful Foes. From these Sacred Histories we learn, that the First Man being by Divine Power produc'd out of the Earth, a Companion was soon join'd to him different in Sex, whose Substance was therefore taken out of him, to engage him immediately in the deepest Love and Affection for her, as being *Bone of his Bone, and Flesh of his Flesh*. This Primitive and Original Couple GOD ALMIGHTY was pleas'd to unite in the most solemn manner, and with the most sacred Tie; and since from them all Human Race orderly descended, we may conceive Mankind mutually engag'd, not only by such a vulgar Friendship as might result from Similitude of Nature (a), but by such a tender Affection as endears Persons allied by a nearness of Race and of Blood: Altho' the Sence of this kind Passion may be almost worn off amongst the Descendants, by

reason of their great distance from the Common Stock. Now if any Man should pretend to divest himself of this Affection, and entertain a temper of Hostility against all others, he ought to be censur'd as a Revolter from the Primitive and Natural State of Mankind. Nor will it signifie much here to object, that even from this Account of Matters it follows, that the Natural State of Men is a State of War; in as much as if Societies were therefore instituted at the beginning of the World, to make Men live peaceably together, it must be true on the contrary side, that without Societies Men would not have liv'd Peaceably, and that hence arose the Necessity of making Societies be born with them. To which we reply, that our present Enquiries are not made after such a Natural State, as may be conceiv'd by the help of Abstraction, but after such an one as really has been and is now in the World. And that therefore, since the first Mortals were plac'd in such a State as inspir'd them with Love and not with Enmity, and since from this State all the rest of Mankind descended, it is plain if Men were mindful of their first Original, they might be rather accounted Friends than Foes. Nor were Societies therefore establish'd amongst Men from the Beginning, to hinder a Natural State from taking place, but because Human Kind could not otherwise have been propagated and preserv'd. But a State of Nature did then arise, when Men being largely multiplied could no longer be contain'd in one Society. Hence it's Non-sence to say, that without the help of a Social Condition, Mankind at the beginning of their Being would have liv'd like Enemies one to another, unless we first suppose, that in the beginning of things a Multitude of Men started up together, without being beholden to one another for their Production (b).

VIII. As to Mr. *Hobbes's* Reasons they are easily answer'd. In the first place, those cannot immediately hurt one another, who are divided by distance of Place; for he who is absent cannot hurt me, except by some-body else who is present, and my Possessions cannot be destroy'd unless by one upon the Spot: Therefore, since those who live separately or at a distance from one another, can offer no mutual hurt so long as they continue thus distant, it doth not appear why such Men should not rather be reckon'd Friends than Enemies.

(a) And such as is spoken of in *L. 3. D. de Justit. & Jure*. (b) *Aristot. Rhetor. 1. 1. c. 11. Because whatever is according to Nature, is pleasant and agreeable, and because those things which are allied in their Original have a Natural Resemblance to each other, all things that are thus related and thus alike are, commonly speaking, as mutually delightful as Man to Man. Cicero de Fin. 1. 3. Nature hath given Men an Universal Recommendation to each other; on which account, every Man owes so much to his Neighbour barely for the sake of being a Man, like him self, as should hinder him from showing any Unkindness or Strangeness. Idem de Nat. Deor. 1. 1. Do you not see how full Nature is of Charms and Engagements, as if she intended to act the kind Procureess to her self? Do you imagine there is any Monster of Land or Sea, which is not delighted with the Fellow-Monster of its own Race and Shape? And is it any Wonder then, that she should have instill'd this Principle into Man (the most Noble Member of her Family) to think nothing so beautiful as Man? Quincil. Declam. 5. There is a Publick, or Universal, Kindred amongst Men, derived from Nature their Common Mother. Add. M. Antonin. 1. 9. f. 9. Where he prosecutes at large, the Argument of the Likeness of Nature, inclining Men to Unity and Love. Add. & D. Cumberland. de L. N. c. 2. f. 18. We must interpret only of particular Love and Hatred that Saying of *Belisarius* in *Procop. Hist. Vandal. 1. 2. By Nature Men have neither Mutual Affection nor Mutual Aversion. But their particular Actions, either by their Agreeableness inviting our Company and Friendship, or by their contrary Dispositions provoking our Hostility, render some the Objects of our Love, others of our Hate.**

For if any Person is more inclin'd to call them *Neuters*, he ought to understand, that the Term of Friendship may be there fairly applied, where there is neither Will nor Power to injure (1). And then as for that Equality of Strength which *Hobbes* asserts, it is certainly more fit to restrain, than to provoke a Desire of hurting. For no Man in his Wits is very fond of coming to an Encounter with his Equal, unless he is either driven upon it by Necessity, or by the Fairness of the Opportunity put in hopes of Success. Otherwise, to engage in an unnecessary Fight, where the Blows one gives will be return'd with no less Force, and where the Event is merely dubious, is no better than Fool-hardiness. For when two equal Combatants are so far engag'd as to put both their Lives in danger, neither of them can possibly gain so much by the Victory, as he must lose who is kill'd in the Fight; nor is it so much to have taken away Another's Life, as to have hazard-ed ones own. For the Danger to which I expose my Life, takes from me more Good, than can possibly accrue to me from my Enemies Life being in the same Danger; nor is his Safety increas'd upon account of the Uncertainty of mine: But each Party is a Loser, and yet the Loss of neither turns to the Advantage of the other (a).

Besides, the Causes alledg'd by Mr. *Hobbes*, why Men must have a mutual Desire of hurting, are only particular, and therefore cannot infer a necessity of an Universal War of all Men against all, but only a War of some particular Men against some others. And then it doth not always happen, as he would suppose, that modest and civil Men, should have a more Fierce and Insolent Generation living near them; or if the case be so, yet it is not necessary that the latter should be in a humour of invading the former. *Contention of Wit*, prevails only amongst Men exalted above the Ordinary Level; the Greater and Vulgar part of Mankind have none or but very slight touches of that Disease. Nor has the All-wise Creator been so unkind or so sparing in his Provisions for Human Race, that two Persons must always lay claim to the same thing. Farther, the general Wickedness of Men may have so much effect as to hinder any one from rashly trusting, or offering (as it were) his bare Breast to another, especially if he has not a Knowledge of him (b): But that this Suspicion or Diffidence should proceed so far as to the seizing or the oppressing another, unless

he hath declar'd a particular Desire and Design to hurt us, no Man of Sense will admit (c). *Hobbes* is the more inexcusable for maintaining that his Natural State cannot be remov'd and broken up, but by letting in the Sovereignty of another, and by uniting in the same Commonwealth. For that those Commonwealths how distinct soever, which are allied by Friendship and by Leagues, should still continue in a State of Mutual War, is a Contradiction evident to the common Sense of Mankind. Nor should we (as he would have us,) discard all Peace, as not deserving that Name, which is not sufficiently firm and certain, any more than we should forbear saying, that such a Man is in Grace and Favour with another, because the Wills of Men are subject to continual Alterations.

IX. We must likewise take special Care to observe, that we are not disputing about the Natural State of a meer Animal, govern'd by the sole Impulse and Inclination of the Sensitive Soul; but of an Animal whose Noblest and Chiefest Part is Reason, the Soveregin and Controller of all other Faculties; and which even in a Natural State has a common, a firm and an uniform Measure to go by; namely, the *Nature of things*; which lastly, is very free and ready in offering it self so far as to instruct us in the general Precepts of Living, and the Dictates of Natural Law. And those who would rightly design and represent a State of Nature; ought by no means to exclude the just use of this Reason, but should join it with the Operations of the other Faculties. For as much then as Man has not only the rash Cry of his Lusts, but also the sober Voice of Reason (not measuring it self purely by private Interest) to hearken to, if his wild Affections incite him to a War, such as that extravagant one of all Men against all, his Reason will be more powerful in dissuading him from it; and that chiefly by giving him these two Intimations, that a War undertaken without Provocation from the other Party, is both unseemly and unprofitable. For it is easy for any Man to gather thus much, that he did not exist of himself, but was produc'd by some Superior, who consequently retains a Power and Authority over him. And when he finds himself spurr'd on as it were by a double Principle, of which one is wholly fixt on things present, the other can embrace in its Thought what is absent or future; of which one drives him furiously

(1) This is contrary to *Aristotle's* Notion of Friendship, who makes it to consist, not only in doing no Injury to others, but in the real and outward performance of Kindness towards them. (a) See D. Cumberland de L. N. c. 2. f. 29. Thus the *Scythians* argue in *Q. Curtius* l. 7. c. 8. *The firmest Friendship is between Equals, and those seem properly to be Equals, who have not made Experience of each other's Strength.* So *Cæsar* (de B. C. l. 3.) admonisheth *Pompey*, that this was the only time to treat of Peace, whilst both seem'd Equal, and each had good confidence of his own Power. *Florus* makes the like Remark on another occasion. *The ROMANS and the PARTHIANS*, says he, having try'd their Force against each other, and *CARSSUS* on the side of the former, and *PACORUS* of the latter, having given them Examples of their Mutual Abilities, they renew'd their ancient Friendship with equal Deference and Respect. In *Thucydides*, l. 3. *Mutual Fear* is asserted to be the surest Guard of States, because on either side the doubting of their Safety would keep them from any open Attempt of Violence, though it were never so much in their Desires. (b) *Plautus* *Asinar.* A Man doth not shew himself a Man, but a Wolf, to another, whose Temper and Designs he is not acquainted with. (c) *Cicero* (Off. 1.) rightly calls it, an Injury out of Fear, when he that is contriving to do another Man mischief, doth it by way of Prevention, supposing he should otherwise suffer Hurt from the Quarter where he now offers it.

on Dangers, Doubts, and Disorders, the other conducts him to nothing but what is Comely and Safe, he will conclude without any Difficulty, that 'tis the Pleasure of his Creator, he should rather follow the latter Guide than the former. And when to this Consideration is added the exceeding great Benefit and Advantage of that quiet Condition which Reason advises, a Man cannot but naturally incline to Peace. Especially, since if at any time he should happen to neglect his Reason, and follow his blind Passions, he would find by the sad Event that he took wrong Measures, and would be ready to wish those things to be undone, which were done against the Orders and Directions of his Noblest Faculty. From all which we conclude, that the Natural State of Men, although they be consider'd as not united in Commonwealths, is not War, but Peace. And this Peace chiefly depends on the following Laws and Conditions; that no Man hurt another, who doth not assault and provoke him; that every one allow others to enjoy their own Goods and Possessions; that he faithfully perform whatever shall be covenanted for, and voluntarily promote the Interest and Happiness of others, in all Cases where a stricter Obligation doth not interfere. For since the Natural State of Man includes the use of Reason, we must by no means separate from it those Obligations which Reason tells us we lie under. And because every Man may discover it to be most for his Interest and

Advantage, so to manage his Behaviour as to procure rather the Benevolence than the Enmity of others; he may easily presume from the likeness of Nature, that other Men have the same Sentiments about the Point as himself. Therefore it is very foul Play, in describing this Imaginary State, to suppose that all Men, or however, the greatest part of them do act with Disregard and Defiance to Reason, which is by Nature constituted supreme Directress of Human Proceedings; and such a State cannot without the highest Absurdity, be call'd *Natural*, which owes its Production to the Neglect or to the Abuse of the Natural Principle in Man (a).

X. It will be in vain for any one here to object, the strange Barbarity which reign'd among most of the Ancient Nations and People; who seem to have had scarce any other Pleasure, or any other Business, but the Pursuits of Plunder and Prey; and amongst whom Robbery pass'd for one of the particular Professions and ways of Living. For thus *Aristotle* in his Politicks, reckoning up the several Callings or Lives of the Herdsmen, the Husbandmen, the Fishermen and the Hunters, adds to the rest the βίη ἀνοσιεύς, *the Life of Thieves* (b).

In return to this Vulgar Argument, 'tis sufficient to say, that in those blinder Ages of the World, the Dictates and Informations of sound Reason, were chok'd and stifled by the Prevalency of corrupted Manners. Yet

(a) This is most largely demonstrated by Bishop *Cumberland*, to whom the Reader is recommended for fuller Satisfaction. (b) And afterwards, *War is in some sort, a Natural way of acquiring Possession. For Hunting, or violently pursuing, is one of its chief parts; and this may not only be used against Beasts, but likewise against such Men as tho' they were born to obey, do yet refuse Subjection.* We have numerous Testimonies to this purpose in Ancient Writers. Vid. *Homer. Odyss. g. v. 73. & Odyss. i. v. 252.* on which place *Didymus* tells us, that the Profession of Robbers amongst the Ancients was not Infamous but Glorious. *Diodor. Sic. l. 3. c. 49.* The Libyans on no account observe any manner of Right, or any manner of Faith towards Strangers. *Cæsar* reports of the Germans, that those Robberies do not fall under Censure or Reproach, which are practis'd beyond the Bounds of each particular State: And the Excuse they alledge for them is, that they serve for the Exercise of Youth, and the Discouragement of Idleness. de B. G. l. 6. He tells us farther, that every State reckon'd it the greatest Honour and Glory to have as large Solitudes round them as possible, caus'd by their own Devastations: esteeming it a noble Testimony of their Valour, that their Neighbours were forced to quit the Country, and that none are so hardy as to live near them. *Mela, l. 3. c. 3.* gives the like account of the Germans in general: but *Tacitus* speaks in manner only of the *Vendredi*, a particular People amongst them. Of the Spaniards *Plutarch*, (in *Mario*) reports, that Robberies pass'd amongst them till that time for Gallant Adventures. And *Thucydides* says as much of the Ancient Grecians. l. 1. To the same purpose some produce the Roman Law, (l. ult. D. de Colleg.) where those Covenants are declar'd Valid which pass between ἄσθη λείων ἐρχομένων, or οὐρχομένων, Persons who unite on the account of Booty or Prey. Though *Salmasius* (de Usuris l. 1. c. 22.) corrects the ancient reading into εἰς ὑπὸ λείων, on the account of a Drinking Match. *Polybius* (l. 3.) mentions it as a Clause in a League between the Romans and Carthaginians, that the former should neither drive Booty to Mastia and Farseium, beyond the Fair Promontory, nor exercise Merchandize: As if both those Practices had been then esteem'd equally Lawful. *Justin. l. 43.* says of the People of Phœcis, that they supported themselves by Piracy, which at that time was look'd upon as Glory. *Sextus Empiric. Hypot. l. 3. c. 24.* To rob and spoil is reckon'd by no means disgraceful amongst many of the Barbarous Nations: Nay, the Cilicians are said to have accounted these Adventures most highly creditable and renown'd, so as to pay Honours to the Memory of such as died in their Prosecution. And *NESTOR*, in the Poet, having kindly receiv'd *TELEMACHUS* and his Company, asks them,

What, are you Rovers of the Plundering Trade — ?

Now if Robbing had been then scandalous, it is not likely he would have entertain'd with so much Civility Persons whom he suspected of such a Course. L. 2. D. de Captio & Postlim. If there be a Nation, with which we have no tie of Friendship, Hospitality, or League, we must not presently esteem them Enemies. Yet whatever of ours comes into their Possession belongs to them; and even a Free Man of our Country if taken by them, becomes their Slave. Comp. l. 118. de verb. Signific. *Diocassius, l. 54.* speaking of the *Rhatians*, often plundering, says he, their Neighbours the Gauls, they had driven Booty from the Borders of Italy, and had infested the Romans and their Allies in their Passage through those Parts: and it was then a receiv'd Custom amongst them, to deal in this manner with all those whom they were united to by Solemn Leagues and Agreements. *Isocrates* (*Panathen.*) observes of the Triballians, there are no Men who observe a stricter Concord amongst themselves; but then they endeavour utterly to destroy all besides; not only their Borderers and Neighbours but any People to whom they can force an Access. Add. *Grot. l. 2. c. 15. f. 5.* This Ancient Hostility, amongst other Reasons that are given for it, might proceed in a great measure from the gross Superstition and Idolatry of those Nations, by which every People imagin'd themselves to have peculiar Gods, and those only true ones. Vid. *Juvenal. Sat. 15.*

it doth not follow from hence, that there was no Man even in those Nations, sensible enough to apprehend that the Laws of Nature were violated by this Course of Robberies and Spoils, or to disallow that State to be *Natural*, into which wild and ungovernable Men had thrown themselves, in neglect and in contempt of the noblest Part of their Being. For that a promiscuous Liberty of Rapine doth not flow as a Consequence from a State of Nature, is evident, because the like ill effect is not seen in the State which different Commonwealths now bear to one another, which is really Natural. Nor must we admit what *Hobbs* farther asserts, that *supposing Matters stood thus, Robbery or Pillaging would be contrary to the Law of Nature*. For those who had plunder'd us in this manner without Provocation, we might have treated with the like Violence, and have made Reprisals on their Possessions for the Loss of our own: But then we could not have shown such rough Usage to a third Person, who had offer'd no Injury or Molestation to us before. The Impudence of some Persons in breaking the Law of Nature, is no justifying Example for us to imitate. Nor is the Remark more tolerable which *Hobbs* subjoins, that *this kind of Life was not without Glory to them who exercis'd it Valiantly, and yet not Cruelly. As it was the Custom of some; who laid violent hands on every thing else, to spare the Persons Lives, and to pass by the Ploughing Oxen, and all the Instruments of Husbandry. Which they did not as if they were oblig'd to it by the Law of Nature, but purely consulting their own Glory, lest their Cruelty should betray their Cowardice*. A wondrous Glory indeed, to accomplish only half a Villany, when to have carried it through, would not have turn'd to so much Advantage!

XI. When we affirm that the Exercise of a Peace towards all Men *as such*, is the Natural State of Man, we imply that it is instituted and establish'd by bare Nature, without the Intervention of any Human Deed; and that therefore it depends solely on that Obligation of Natural Law by which Men are bound as they are reasonable Creatures; and doth not owe its first Introduction to the Agreement and Covenant of Men. Hence to us it seems usefess to frame any Pacts or Leagues, barely for the Defence and Support of this Universal Peace. For by such a League or Bond, nothing is superadded to the Obligation of the Law of Nature; or, no Agreement is made for the Performance of any thing, which Men were not before by the Law of Nature bound to perform: nor is the former Obligation rendered streighter or firmer by such an Addition. For we suppose both Parties to remain in a Natural Equality, and consequently not to be

held to their Covenant by any other Tie, than that of Reverence towards God Almighty, and Fear of such Evil as may fall on them, if they break the Agreement. Though indeed there appears somewhat of Baseness and Foulness, in refusing a thing which one has expressly engag'd to perform. As for the Power and Liberty which the injur'd Party hath, of proceeding against such a Violator of Nature's Law, this is altogether the same, whether any antecedent Covenant hath been made, or not. Men of any tolerable Culture and Civility must needs abhor the entering into any such Compact, the Heads and Conditions of which imply only thus much, that the Party concern'd shall not offend in some Point, which was before an express Command of Nature. Besides, we should be guilty of Great Irreverence towards God, should we suppose, that his Injunctions had not already laid a sufficient Necessity upon us, unless we our selves voluntarily consented to the same Engagement; as if our Obligation to obey the Divine Will, depended on our own Pleasure. Therefore in every Covenant, some Matter is to be inserted, the Performance of which the other Party could not have required from me, by a bare Right of Nature, or which by Virtue of that Right only I did not fully and perfectly owe him; tho' it now becomes a true and absolute Debt upon my Declaration, and his Acceptance of my Consent. Thus, as a Man who lets himself out to hire as a Servant to another, doth not set it down Expressly and Immediately amongst the terms and conditions of the Bargain, that he will not act perfidiously towards him, or that he will not pillage or plunder him; so *that* would be a shameful Agreement, in which a Man should only bind himself not to break the Universal Peace towards another; that is, not to use such a Right against him, as he obtains and exercises over Beasts. Yet supposing any such Robberies and Depredations, as we have been lately speaking of, to prevail amongst some Barbarous Nations, then in order to restoring the *Universal Peace*, there would be occasion to enter into Covenant, by which all Parties should tie themselves to the Practice of the Law of Nature towards one another. The Case is much the same, when two Nations hitherto engag'd in War, shall by Agreement, lay down their Arms on both sides; for supposing that they do not come to any Terms of Settlement about particular Matters and Performances; then the only thing concluded on and establish'd, is that General and Common Peace. We find indeed in History, many Examples of Commonwealths reduc'd to such Extremities, as to purchase of their Spoilers this Universal Peace and Forbearance of Injuries, not only by Compact, but by Tribute (a).

(a) *Claudian de Laudib. Stilicon. L. I. v. 210, 211.*

*Illi terribiles, quibus otia vendere semper  
Mas erat, & fœda requiem mercede pacisci.*

Those dreaded Foes,  
Traders in Peace, and Hucksters of Repose.

If between Nations or People, hitherto not known to one another by Benefits or Injuries, by Peace or War, any common Leagues are made, without descending to particular Points and Conditions; such Leagues are suppos'd to be entred on for the Establishment of a Friendship, which is reckon'd to imply a clofer Union, than is produc'd by that General Peace of Nature. Or else we may take them only for solemn Proteftations made by both Parties, that they will for the future observe their Mutual Offices and Duties. In the same manner as Persons related, at their first Meeting, or their first Knowledge of one another, are us'd to make long Declarations and Promises to express their mutual Benevolence and Love.

XII. After all, it must be confess'd, that this Natural Peace is but too weak and uncertain, and such as without other Assistances, would prove but a very mean Defence to the Safety of Mankind; so that we might well enough express, and represent it in *Ovid's* Verse (1),

*Pax tamen interdum est; pacis fiducia nunquam,*  
A Peace which all pretend, yet none can trust.

The Cause of which Unhappiness is the great Wickedness of Men, their unbridled Lust of Power, and their desire of inroaching on the Rights and Possessions of others. When *Micipsa* in *Salust* (2), grew Jealous of the growing Power of *Jugurtha*, we are told the chief things that frighted him and set him on his Guard, were *the Nature of Mankind, covetous of Dominion and Government, and violently bent on gratifying its Desires; and then the Advantage of Opportunity, which by the fair Hopes of Gain and Success, is able to seduce Men to ambitious Practices, who were otherwise moderate enough in their Wishes and in their Pursuits.* Indeed these pernicious Charms of Avarice and of Ambition have taken so fast hold on Human Minds, that even the most mild and gentle Doctrine of our Saviour CHRIST, which is perpetually inculcating the Rules of Peace, of Kindness, of Good Will, of Propension to forgive Injuries, of Humility, of Contempt of Riches and Worldly Power; hath not been able to extinguish the most unjust Oppressions, Treacheries, and Wars amongst the Professors of that Holy Religion. So that *Plutarch's* (3) Description will too exactly hit the Character of some Christian Princes, whose Desires, not Seas, nor Mountains, nor Desarts, can stop and conclude; not the Bounds which separate Europe and Asia can circumscribe. When such Ambitious Spirits border one another's Possessions, it is scarce possible that they should live satisfied with their proper Shares, and abstain from mutual Injuries and Invasions.

*In effect they are continually engag'd against each other, Envying and Plotting being the necessary Consequences of their Temper. As for the two Names of Peace and of War, they use them just as they do Money, not as they are determin'd by Reason, but according to Custom and Convenience. Nor doth Paterculus's Remark affect only the Romans and Carthaginians, when he says (4), Amongst those People, there was perpetually either a War, or a Preparation for War, or a deceitful Peace. Therefore, as it is the Duty of an honest and good Man to rest contented with his own Lot, and not disturb the Portion of his Neighbour either by actual Invasions, or by covetous Desires: So it becomes a cautious and wary Man, and one who has a true Care and Concern for his own Safety, in such a manner to believe all Men his Friends, as that they may soon turn his Enemies; in such a manner to observe this Peace with all the World, as a State which may suddenly be converted into War (a). And the famous Saying of *Dionysius Halicarnassæus* (5), should often run in your Thoughts: So long as wicked Men have the Power of doing Mischief, they can never want the Will. For which Reason *Euripides* (6) tells us, that a Prudent Diffidence is a most useful and advantageous Quality: And that a wise Man ought neither to act like a Sheep, nor like a wild Beast, to be neither tame in suffering Violence, nor furious in offering it (b).*

*Tacitus*, in describing the Manners of the German Nations, hath left these two Characters of the *Chauci* and the *Cerusci*, very remarkable for their Opposition (7). The former he calls a most Noble People, who chusing to maintain their Greatness by their Justice, live in Secrecy and Quiet, without Ambition, and without Insolence, by never inviting War, they never feel it; by never doing, they never suffer, Violence and Spoil. And this is the Principal Mark of their Virtue and of their Power, that their Superiority is not obtain'd by Injury. Yet they have always Arms ready at hand for their Defence; and upon occasion, could bring together a mighty Army: And their Numbers of Men and Horses make them Famous and Terrible, in the midst of their Peaceful Repose. The latter, he tells us (8), were too fond of cherishing a long and a decaying Ease. This was more pleasant to them than safe. For amongst Stout and Daring People, 'tis never the true way to lie still; and where Men are busie in Action and Contention, Honesty and Probity belong to the Titles of the Conqueror. Thus the *Cherusci*, who had once the Repute of Equity and Justice, now lie under the Imputation of Folly and Cowardice. So true is the Observation of *Dio* the Orator (9), that those who are best prepar'd for War, may most securely live in Peace.

(1) *Vid. de Trist.* l. 5. Eleg. 2. v. 71. (2) *Salust. Bell. Jugurth.* c. 2. (3) *Plutarch. in Pyrrho.* p. 389. Ed. *Wechel.*  
(4) *Vid. l. 1. c. 12.* (a) *Comp. Sophocl. Ajax. Flagell.* v. 688, &c. (5) See B. 6. (6) *Eurip. Helen.* v. 1633, 1634.  
(b) *Add. Hobbs de Cive,* c. 13. l. 7, 8. (7) *Tacit. de Morib. German.* c. 35. (8) C. 36. (9) *Orat. 1. de Regno.* p. 6. Ed. *Par. Morell.*

## CHAP. III.

## Of the Law of Nature in General.

I. **S**ince then it appears inconsistent with the Nature and the Condition of Man, that he should live entirely loose from all Law, and perform his Actions by a wild and wandering Impulse, without regard to any Standard or Measure; it follows, that we make enquiry into that most General and Universal Rule of Human Actions, to which every Man is oblig'd to conform, as he is a Reasonable Creature. To this Rule Custom hath given the Name of *Natural Law*, and we may call it likewise the *Law Universal* or *Perpetual*; the former, in regard that it binds the whole Body of Human Race, the latter, because it is not subject to change, which is the Disadvantage of *Positive Laws*. What this Law is, whence the Knowledge of it arises, what are the chief Marks and Tokens by which it is discover'd, what Matters are to be referr'd to that, and what to *Positive Constitutions*; are Points which require the more careful Examination, because if this Basis and Groundwork should be ill laid, whatever we afterwards build upon it, must fall of Course (a).

II. The *Roman Lawyers* defin'd the Law of Nature, to be *that Law which Nature teaches all Living Creatures* (1); which therefore is not peculiar to Man, but is apprehended and observ'd by other Animals. So that according to this Hypothesis, those things must be said to belong to the Law of Nature, which Brute Creatures either affect and pursue, or avoid and abhor: Whence it naturally follows, that there must be a Law common to Men and Beasts. Which Opinion it's likely might proceed from that famous old Notion about *the Soul of the World*, of which all other Souls were a kind of *ἄτομα* or Particles, being in themselves all of the same Nature, but exerting different Operations, according as they fell on different Bodies, and met with different Organs for the Conveyance of their Strength and Powers. Nearly allied to this Fancy was the *μετεμύχσις* or Transmigration of Souls, according to which Men and Beasts

were thought to differ only in their Corporeal Figure, having Souls altogether of the same Nature, and mutually lending to each other (b). But the General Consent of Learned Men hath discarded this Common Law of Animate Beings: In as much as it is impossible to conceive how a Creature should be capable of Law, and at the same time incapable of Reason (c). And altho' there are several Actions of Men and Beasts very much alike, on the Performance of which the former are said to have fulfill'd the Law; yet in Strictness and in Reality, they are extremely different, since they are done by Brutes out of simple Inclination of Nature, but by Men out of Obligation, of which those other Creatures have no Sense. And therefore we must suppose Authors to speak figuratively, when they attribute to such inferior and dumb Animals, Justice, Fortitude, Pity, Gratitude or Chastity; only because they perceive in some of their Proceedings the Shadow and Semblance of these Vertues (d). For things which seem alike in their external Face and Appearance, are by no means the same, if they proceed from different internal Principles. As for *Grotius's* Opinion (e), that some Acts of other Creatures are dispos'd in an extraordinary manner by an external Reason or Principle, as the Works of Bees and of Ants, and the Frugality which some seem to use about what they have got, for the Benefit of their Kindred and Off-spring; this is allowable only if we mean by it, that the Nature of these Creatures is in such a manner temper'd by the Divine Creator, as to be capable of producing such Actions; not that any outward Principle violently guides and steers them, as a Pilot doth a Vessel. Nor is it difficult to understand why they do not discover the same Cunning in other Matters equally obvious; if we suppose with the New Philosophers, that whatever Form Irrational Animals enjoy, arises purely from the Figure and Disposition of Material Particles, and from the Variety of their Move-

(a) 'Tis a good Rule of *Plato* (in *Cratyl.*) p. 299, Ed. *Francof.* A Man ought to be very strict and accurate in examining the first Principle and Foundation of things, and no less copious and distinct in explaining them; in as much as these Points being once clearly settled, the whole Scheme of Doctrine regularly follows. And so much the more ought this Rule to be observ'd in our present Subject, the more Truth there is in that Remark of *Lactantius* (l. 3. c. 7.) p. 224. Ed. *Oxon.* Because in forming the Manners and framing the Model of Life, it is the highest and most fatal Danger to mistake; we ought to apply the stricter Diligence to the Study of our Duty. In this great Point there is no Allowance for Error or Disagreement, all ought to be of one Opinion, and to declare with a Common Mouth the same Doctrine: Since the least slip may overturn the Rule and Order of Living. To the same purpose *Diogenes Apolloniast.* (in *Diog. Laert.* l. 9.) *Segm.* 57. Every Discourse, in my Judgment, ought to take its rise from some clear and manifest Principle; and the Style first made use of, should be plain and grave. (1) See *Dig. B. I. t. 1. Of Justice and Law.* See *Instit. B. I. t. 2. f. 1.* (b) *Vid. Virgil. Æn. VI. v. 724, &c. Ovid. Met. l. XV. v. 75, &c.* (c) *Hesiod. Op. & Dier. l. 1. Τὸν δὲ γὰρ ἀνθρώπου, &c.*

This Law did *Jove* for Human Race ordain:  
The Beasts, the Fishes, and the Feather'd Train  
He left to Mutual Spoil and Mutual Prey,  
But Justice gave to Men.

(d) *Vid. Selden. de L. N. & G. Secund. Hebr. l. 1. c. 5.* (e) *Prolegom. de J. B. & P. & l. 1. de Ver. Rel. Christiane.* ments.

ments. Especially since even amongst Men we may find those, who are extremely quick and ready at some sorts of Business, yet strangely dull and heavy about others, not more difficult and abstruse: Which can proceed from nothing else, but from the particular Disposition of their Parts, especially of the Brain and Spirits (a). Those therefore who will have a *Law of Nature* in Brutes, because they see them acting now and then with some Appearance of Regularity and of Design, abuse the Term of *Law*, by an undue and unnecessary Application.

Besides there can be found no Dumb Creature which performs all the Duties and Offices of Man; on the contrary, there is scarce any Rational Proceeding, to which some Brutes do not act directly opposite. Yet in Harangues to the People, it is reckon'd a high Aggravation of a Crime, to show that even Brute Creatures abhor the Commission of such Enormities. Thus *Plato* (b) says, that in arguing against the Unnatural Vice of Pollution with the same Sex, it would be proper to appeal to the Nature of Beasts, in whom we do not discover the same foul and monstrous Practices (c).

III. Some Persons indeed (rather I believe to show their Wit, than out of any serious Design) have asserted this Community of Law between Men and Beasts, and back'd their Assertion with a numerous heap of Arguments, all which have been long since most solidly confuted. It shall be enough for us to touch lightly on the Proofs which they draw from Scripture. That Text then in *Gen. 9. 5. Your Blood will I require at the hand of every living thing*, according to some Expositors imports only thus much, that God would revenge the Murder of a Man committed, not only by the Hands or the Weapon of another, but by the Fury of Wild Beasts set on him by the others Command. In as much as in the Antediluvian Times, many violent Tyrants and Oppressors us'd to keep wild Beasts, to serve for Executioners of those who displeas'd or affronted them (1). Others give this Interpretation, that God will sometimes make even Wild Beasts the Instruments of punishing Murderers. Others again understand by *every living thing*, only *every Man*, as if God only declar'd that no Human Murderer should escape his Justice. In *Leviticus XVIII. 23. and XX. 15, 16.* Command is given, that if

any Man or Woman are found guilty of Bestiality, the Beast shall be ston'd, without any difference of Age. Yet the *Jews* observ'd such a difference of Years in regard to the Human Parties of both Sexes; so that if a Boy were not above Nine and a Girl above Three Years old, they maintain'd that no Punishment ought then to be inflicted either on the Person or on the Beast; because they would not allow that the Pollution forbidden in the Law could be actually committed at such an Age. Now when they ston'd the Beast, they did not do it because the Beast had properly offended; but partly lest the Sight of that Creature should incite some other Person to the like Foul Passion, and partly lest the Beast remaining alive should keep up the scandalous Remembrance of the Human Offender, who had suffer'd Punishment (d). Thus too *Deuteron. XIII. 15, 16.* God commands the *Israelites* in rooting out the Idolatrous Nations to destroy the very Beasts; only to show the Heinousness of that Crime, not as if the Beasts could be Partakers of it. It is observable, that if a *Gentile* living amongst the *Jews* had been polluted with a Beast, the Man only suffer'd Death, but the Beast escap'd (e). According to the Law in *Exodus XXI. 28.* the goring Ox was to be ston'd; not because he had properly committed a Fault, but that he might not offer the like Hurt another time, and that the Owner who had negligently kept him, might be punish'd by his Loss: And hence they were not allowed to eat the Flesh of such an Ox. This Punishment was thought sufficient when the Owner was but slightly in Fault, or when he was ignorant of the Fierceness of the Beast: Whereas if he knew him thus furiously dispos'd, and still neglected to keep him up, he paid for the Mischief with his own Life, being made a sad Partner in the Punishment. And here again the *Rabbins* tell us, that the Ox was ston'd only when he had kill'd a *Jew*; not if a *Gentile* had perish'd by his Violence. And indeed it was a Custom in several other Nations to destroy such things as had been the Instrument of any Mischief, or of any Misfortune. Thus it appears from the Orations of *Demosthenes* against *Aristocrates*, and of *Aeschines* against *Ctesiphon*, that by the *Athenian* Laws, Stones, Clubs, Axes, and several other such things, when they had been made use of in the Commission of Murder, were brought

(a) *Comp. Plat. Conviv. Sept. Sapient. p. 163. Ed. Wech.* (b) *L. 8. de LL. p. 913. Ed. Francof.*  
 (c) *Senec. Hyppol. v. 910, 911.*

*Fera quoque ipsæ Veneris evitant nefas,  
 Generisque leges inscius servat pudor.*

The Beasts themselves avoid enormous Love;  
 And Modesty unconscious and untaught  
 Preserves the decent Laws of Sex and Kind.

Add. *Oppian. Cyneget. l. 1. v. 239, &c. & Halient. l. 1. v. 702, &c.* which last place may well be urg'd against Parents who seem to have lost their Natural Affection. (1) This is but a Vision of some *Rabbi*. See *Selden* of the Law of Nature and of Nations among the *Hebr. B. 1. c. 5. Ed. Argent.* (d) *Gratian. Caus. 15. quest. 1. c. 4. The Reason why the Beasts were order'd to be kill'd, seems to have been because they would renew the unhappy Remembrance of the foul Crime. Philo Judæus (de speciat. leg.) adds, lest the Beast should bring forth any detestable Monster, such as usually proceed from Unnatural Impurities, and such as no Pious Man can bear the Sight of.* (e) Add. *Selden. de J. N. & G. l. 1. c. 4. & Mornac. ad. Leg. 7. D. de his qui effud. vel dejec.*

formally

formally into Court, as it were in order to undergo a Penalty. Thus the Statue of *Theagenes* in *Thafos* having unfortunately kill'd a Man by falling on him, the People order'd it to be dragg'd into the Sea (a). St. *Ambrose* (b) calls the Copulation of Affes and Mares, by which Mules are produc'd, *forbidden*, not because the Beasts contract any Guilt in those Practices, but because Men are forbidden to procure any such Unnatural Mixture (c).

We may excuse those Learned Compilers of the *Roman Laws*, by urging in their Defence, that by the Term of *the Law of Nature* (d), they meant that Order instituted by the Great Creator, chiefly in those things which make directly for the Preservation of Nature, or of the Species and Individuals of all Animate Beings. And it is the more probable that they took it in such a Sense, because they set down as the chief Heads of this Law, only the Conjunction of Sexes, the Procreation and Education of Off-spring, and Self-defence. Many other Authors have us'd the same Terms in the same improper manner; as particularly Mr. *Yves of Paris*, in his Treatise concerning the *Natural Law ordain'd by God over all Created things*, and *Des Cartes* in his Principles of Philosophy. We may conclude this point with the excellent Observation of *Plutarch* (e), *Nature* (says he) *as in those Trees and Shrubs which we call Wild, she hath sown the crude and imperfect Principles of true and pleasant Fruits; so in Brutes hath implanted an imperfect Love of their Off-spring, not belonging to the Head of Justice, nor reaching beyond the Inducements of Profit and Advantage. But in Man whom she produc'd for a Rational and a Civil Being, for the Worship of God, for the Observation of Justice and of Laws, for the building of Cities and for a Social and Friendly Life; in Man, I say, she has fix'd the Seeds of this Love in a fairer and in a more plentiful manner: And in this she hath follow'd the first Principles of his Body, and the Original Ingredients of his Constitution.*

IV. Others make the Object of Natural Law to be such Acts as do in themselves include a Moral Necessity or Turpitude, and which are therefore in their own Nature either absolutely Requisite or Unlawful, and which we must of Consequence suppose to be necessarily commanded or necessarily forbidden by God. And this Mark, they say, distinguishes Natural Law, not only from Human, but from the Divine Positive Law, which doth not command or forbid things in their own Nature necessary or unlawful, but by forbidding things makes them unlawful, and by commanding things makes them necessary: while the things forbidden by the Natural Law are

not therefore Evil, because God hath forbidden them, but God therefore forbade them, because they were in themselves Evil: And on the other hand, the things enjoin'd by the same Law, are not made good or necessary by God's enjoining them; but were therefore enjoin'd by God, because they were in themselves simply good and necessary (f). But now besides that upon admitting this Opinion, it would remain a most perplexing Doubt what those Acts are which we thus suppose in themselves Unlawful, and by what distinguishing Token they may be clearly known from others; We have already shewn in our former Book (g), that no Actions are in themselves Good or Bad, Honest or Vile, till they are made so by some Law. Nor ought any Man to be shock'd with such a Scruple as this; 'if all the Morality of Human Actions depends on some Law, might not God therefore have so fram'd the Law of Nature, as to enjoin things directly contrary to the present Duties; for example, if amongst the mutual Offices, due from Men to one another, He should have put, Killing, Stealing, Fornicating, and bearing False Witnesses; and amongst the prohibited Actions, Gratitude, keeping Faith, paying Loans, and the like. For here, tho' it seems altogether a needless and an impudent Curiosity to enquire what God might have done, when it appears plainly what He hath done; yet if any Man should persist in such Vanities, we may assure him, that such a Doubt as we have been proposing, implies a manifest Contradiction. For although God was not oblig'd by any Necessity to create Man; (as I think those Persons have but a very narrow and unworthy Notion of the Divine Power, who believe it would have diminish'd any thing from God's Glory not to have made these poor Inhabitants of the Earth (h)); yet when He once decreed to create him a Rational and a Social Being, it was impossible but that the present Natural Law should agree to him; not by an absolute, but by an Hypothetical Necessity. For should Man have been engaged to the contrary Performances, not a social Animal, but some other Species of barbarous and horrid Creatures had been produc'd. Notwithstanding all which, it remains for a certain Truth, that antecedently to the Imposition of any Law, all Actions are to be esteem'd indifferent. For by decreeing to create Man, that is, to create an Animal whose Actions should not be all Indifferent, God immediately constituted a Law for his Nature. Neither from our Assertion that all Actions are in themselves indifferent, before the Application of Law, doth it follow, that God could have order'd our worshipping Him with Blasphemy, or with Contempt; as

(a) Vide *Dio. Chrysof.* in *Rhodiac.* p. 340. Edit. *Morell.* (b) *Hexaemeri*, l. v. c. 3. (c) *Levit.* XIX. 19. Vide *Selden.* & *Ant. Matth.* de *Crimin. Proleg.* c. 2. f. 1. The Account which *Thuanus* (l. 5.) gives of the Process against the Mice in *Burgundy*, is no more than a Jest. (d) L. 1. t. 1. *D. de Just. & Jure.* (e) *De Amore prolis*, Edit. *Wachel.* p. 495. (f) Vide *Gror.* l. 1. c. 1. f. 15. n. 1. (g) C. 2. f. 6. (h) Vide *Job XXXVIII.* v. 4.

*Vasquez* (a) rashly maintains. For a Rational Creature, that is, a Creature indued with the Faculty of apprehending things as they truly are, cannot form any other Conception of God than to acknowledge him, a Being not only vastly his Superior in Nature and Dignity, but likewise his proper Lord and Governour in the highest degree. For otherwise he would conceive a meer Idol, or indeed any thing rather than a God. But now it is plainly contradictory, to suppose a Being at the same time the most Eminent, and the most Despicable; a Governour design'd purely to be insulted on by his Subjects: and to express our Acknowledgment of the Excellency and the Power of the Divine Nature, by such Signs as denote directly the contrary. Therefore to say that God cannot establish such horrid Absurdities by a Law, doth no more detract from his Omnipotence, than to say, that He cannot die, that He cannot be untrue, that He cannot make things undone, which have been already done.

We may observe farther on this Argument, that if the Definition of Natural Law is to be founded on that necessary Honesty or Turpitude of some Actions, it must be always perplex'd and obscure, and run round in an un-concluding Circle; as will appear to any Man who examines the Definition laid down by *Grotius* (1). And Dr. *Cumberland* excellently remarks (b), that in defining the Law of Nature, when we use the Word Good, we must mean Natural and not Moral Good; since it would be the highest Absurdity to define a thing by such Terms as suppose it to be already known; those very Terms being deriv'd as Consequences from it, and depending on it as to their own Evidence and Certainty.

V. Those Authors who search for the First Pattern or the Original Draught of Natural Law in God himself, are divided into two Parties. For some, placing the Spring and Fountain as it were of it in the Divine Will, do thence conclude, that in as much as that Will is in the highest manner free, the Law of Nature may therefore be chang'd by God, or the contrary be commanded, as is the Case and the Condition of Positive Laws. Others affirm this Natural Law to be founded after such a manner in the essential Holiness and Justice of God, as to represent and express a kind of Image or Copy of those Attributes. And hence likewise, they say, proceeds the Immutability of the Law of Nature: In as much as the Divine Justice and Holiness are utterly incapable of Change or Alteration. Concerning the former of these Opinions we have this to remark, that it was indeed at

first entirely free to the Divine Pleasure to produce or not to produce an Animal to whom the present Law of Nature should agree. But that since God Almighty hath been pleas'd to create Man, a Being not possibly to be preserv'd without the Observation of this Law, we have no manner of Reason or Colour to believe that He will either reverse or alter the Law of Nature so long as He brings no Change on Human Nature it self; and so long as the Actions enjoin'd by this Law do by a Natural Consequence promote Society, in which is contain'd all the Temporal Happiness of Mankind; while the contrary Actions do by as strong a Necessity destroy that Society: That is, so long as Beneficence, Kindness, Fidelity, Gratitude, and the like Practices shall have a Power of engaging and of winning on Men's Minds; and Injuriousness, Treachery, and Ingratitude, a Power of raising and provoking them. And therefore supposing Human Nature and Human Affairs, to be fixt and constant, the Law of Nature though it owed its Original Institution to the free Pleasure of GOD, remains firm and immoveable (2); Unlike to those Divine Positive Laws, which depend in such a manner on the Divine Will, as not to seem so necessarily requisite to the good and safe Condition of Mankind in General. Besides, though this Opinion be so far right as it makes God the Author of Natural Law, a Truth which no Man in his Wits can doubt of; yet it still remains an Uncertainty, by what means this Divine Will is to be known, and what Tokens there are to evince, that God intended to comprehend such or such a thing under the Law of Nature. And the same Inconvenience attends likewise on the latter Opinion. For though no one can be guilty of such horrid Impiety, as to assert that the Law of Nature contains any thing in it repugnant to the Divine Holiness or Justice (c); yet it would be very difficult to prove, that the same Law is so exact a Copy or Resemblance of those Attributes, that in what manner soever God Almighty is pleas'd to deal with his Creatures, particularly with Men, in the same manner the Law of their Nature commands Men to deal with one another (d). Nor doth it appear how a Right which is to obtain amongst Persons by Nature equal, can be copied from that Transcendent Right, which the Creator useth towards His own Works; That is, how a Law imposing a mutual Obligation on Men, can represent any Image of Omnipotency, which no Laws, no Obligations can restrain. For that Argument drawn from Scripture, about Man's being created in the Image of God, is of no force as to the present Case. For even those who con-

(a) Controv. Illustr. l. 1. c. 27. n. 9, &c. As for the Rites of *Hercules Lindius* mention'd, amongst others, by *Lactantius*, l. 1. c. 21. p. 98, 99. Edit. Oxon. they are only the extravagant Fancies of Mad-men.

(1) L. 1. c. 1. f. 10. n. 1. (b) C. 5. f. 9. (2) See D. B. 1. t. 1. *De Justitia & Jure*. (c) In which Sense we allow the Saying of *Euripides* (*Hecub.* v. 800.) *God himself acts by a Law*. (d) Add. Dr. *Cumberland*. Proleg. f. 6. & c. 5. f. 13.

self that Image to be lost, do yet acknowledge the Sense of Natural Law to have still remain'd in Man. Amongst our selves we usually call him a Holy or Righteous Person, who abstains from grosser Sins, and regularly observes his Duty: But now, who ever fram'd a Notion of the Divine Holiness by so unworthy a Model? He amongst Men is accounted Just, who makes it his constant Purpose and Resolution to hurt no body, and to pay every one their due: But in God it is Justice to destroy his Creatures, even in the most grievous and painful manner. Neither can he so owe a Person any thing, as to be accus'd of doing an Injury upon withholding it. If he hath been pleas'd to promise any thing to Mortals, he indeed performs it: Not because by Virtue of such a Promise they obtain a Right against GOD; but because it would be some kind of Derogation from his Greatness and Goodness, to command Men to expect any Favour from him, and afterwards to frustrate their Expectations. For he who breaks his Promise, either wants Power to perform it, or else through Inconstancy or Dishonesty falls from the Engagement he had once well made, or else at the same time of making his Promise, he was ignorant how the State and Condition of things would be, when it was afterwards to be fulfilled; all which Cases imply some kind of Failing and Imperfection. Hence God cannot but observe his Promises, and Men ought not but to observe theirs: Hence Human Promises turn into *Debts*, but Divine Promises are made good out of pure *Favour*. What Rules the Vindictive Justice of God proceeds by, is far above our Apprehension to discover. But thus much is certain, that they are not altogether conformable to the Methods of Human Judicature (a).

From this Consideration, that we ought not to admit any Law common both to God and Man, we may draw an easie Answer to those Instances, which some give of God's dispensing with the Law of Nature, as when he commanded *Abraham* to kill his Son, and the *Israelites* to rob the *Egyptians*, of their Vessels of Silver and Vessels of Gold. For God the supreme

Lord and Disposer of all things, hath a much higher and fuller Right over his Creatures, than one Man can have over another, who is by Nature his Equal. Therefore we cannot properly call it a Dispensation of the Law of Nature, when a Man by express Command from Heaven, executes God's Right upon other Men, meerly as *His Instrument* (b).

VI. But neither do the Arguments which the Author (1) of the Treatise *de Principiis Justi & Decori* produces, seem forcible enough to establish a Twofold Natural Law, *Divine, and Human, which, supposing the present Order of the World to continue, do fall in with one another*. For in as much as all Law implies Obligation, and that again presupposes some external and superiour Principle, it doth not appear how we can without Absurdity, apply any such matter to God. And it is a like Impropriety to say, that *God is oblig'd by Himself, or by His own Essence*. Nor will that Text which he alledges of *Rom. I. 32.* ever prove such a Law to be in God. For since the Gentiles from the Dictates of their Reason, were able to gather the Knowledge of the Law of Nature, the next thing which they must infer, was that God the Legislator would not suffer the Law to be violated without punishing the Offender. Therefore upon the Violation of that Law, there arises a Right to God (if it be decent so to speak) of exacting Punishment; or upon Commission of the Sin, God most justly executes what He before threatned. But who can conclude from hence, that God is obnoxious to a Law? What follows is an ambiguous Expression, *that the supreme Right of God over His Creatures is discover'd by Natural Reason from those Principles, which make the Foundations of Natural Right and Equity amongst Men*. For if this only be the Sense of it, that in many Cases God doth proceed in the same manner in his Dealings with Men, as He would have them follow in their Transactions with each other; it will easily pass without Contradiction (c). For thus God by the Natural Law, hath enjoin'd Men to keep their Promises, as he will firmly keep those which He makes Himself (d). So

(a) *Arist. Ethic. 1. 10. c. 8.* What kind of Actions ought we to attribute to the Gods? Shall we say they are Just? But alas! It would seem most ridiculous to fancy, that they are concern'd in driving Bargains, in restoring Loans, and the like Performances which we reckon Honest amongst Men. Shall we call them Valiant and Brave, able to endure Hardships and encounter Dangers? Shall we pronounce them Liberal? Who then shall be the Object, or what the Matter of their Bounty? Certainly we must not oppress them with the Load of Money or Treasures. In like manner it would be an impertinent and troublesome Commendation, to say they are Temperate; in as much as they have no inordinate Affections to govern and restrain. And so thus, if we run through the whole Train of Human Actions, we shall find them all so mean and contemptible, as to be infinitely unworthy of the Heavenly Natures.

Catull. ad Manl. 68. lin. 141. *Atqui nec divus homines componere equum est.*  
No Just Comparis'n 'twixt Gods and Men.

(b) *Comp. Grot. 1. 1. c. 1. f. 10. n. 6.* None, I believe, can be so simple as to imagine, that when the Object is chang'd, or the Circumstances varied, the Law it self suffers Alteration. When the Creditor hath forgiven a Debt, it loseth that Name, and therefore is no longer comprehended under the Law which enjoins Payment. And as for the other Instance, when the Goods of a Person who gave a thing in Trust, are adjudg'd to the Publick Treasury, neither the Law is chang'd nor its Object. For thus runs the Law, *He who receives a thing in Trust, ought to restore it either to him who committed the thing (being his own) to his Charge, or to him on whom the Right descends.* Now this Law cannot affect the Thief, because the thing was not his own; nor to the former Owner, who is suppos'd to be at present a Banish'd Man, because the Propriety of all that was his passeth to the Publick.

(1) *Veltbuisen, p. 253.* (c) See *Luke VI. 35.* (d) *Rom. III. 4. Hebr. VI. 17, 18.*

He forbids Human Judges to condemn the Innocent, declaring that He himself will acquit them in His own Judgments (a). But if it be meant to assert that God hath no more Right over His Creatures, than Men are allow'd to obtain over each other; there will be need of more convincing Arguments to make us believe, that the Supreme Lord and Master hath no fuller Right over His Servants, than the Servants have over their Fellow-Servants, with whom Nature has set them on a Level: Or, to use *Grotius's* (1) Terms, that the *Jus Recltorium*, and the *Jus Aquatorium*, the Right of Governors, and the Right of Equals, are exactly the same thing.

Neither must we let that Assertion pass by uncensur'd, which the Author of the same Treatise lays down, pag. 52. that God ought necessarily to esteem the Laws of Nature as just, the Order of the Universe being establish'd in the manner we now behold: And that He cannot but own every Deviation from them to be indecent and unjust. For without doubt those Imperious Terms, God ought necessarily, are very unfuitable to the Majesty of an Omnipotent Legislator. Nor is here any necessity to be discover'd in the Case, except such as owes its Original meerly to the Divine Pleasure. The Reason which he subjoins, is not strong enough to maintain his first Position; *All things* (says he) *which our Thoughts can imagine, have always some kind of order or Relation, arising from the intrinsic Nature of the thing, and which cannot be separated from the thing, without offering Violence to Reason.* For this Nature, and this adhering Relation, things have not from themselves, but from the free Will of God; and the Decrees of His Will cannot properly be called His own Law. Thus, the reason why amongst Men one Benefit obliges to the return of another; why Violation of Covenants, Inhumanity, Pride, Slander, can never be allowable, is, because God hath given Man a Sociable Nature, and as long as that Nature remains unalter'd, those things which are agreeable to it must be Good and Honest, and those which are repugnant to it, Uncomely and Unlawful. But who can hence infer, either that there is but one Law, common to God and Men, or that things are indued with any *orders* or Habitude, independent from the Divine Disposal?

VII. Those who found the Law of Nature on the Consent of Mankind in general, or on the Agreement either of all, or however of the most, and the most polish'd Nations, seem chiefly to follow *Aristotle*, as the Author and Patron of their Opinion. He, in his *Ethicks* to *Nicomachus* B. 5. C. 10. calls that *Natural*

*Justice, which bears the same Force in all Places, and doth not depend on particular Sentiments.* And in his *Rhetorick*, B. 5. C. 13. he tells us, *there is a General Right and Wrong, or Just and Unjust, believ'd and profess'd by all Men; although no Society should be instituted amongst them, and no Covenants be transacted* (b).

Now besides, that this way of proving the Law of Nature is only *à posteriori* (2), and therefore cannot shew the Cause and Reason of the thing; so is it very slippery and uncertain, and involv'd in an endless Maze of Doubts and Perplexities. To appeal to the Consent of all Mankind, Mr. *Hobbs* (c) observes to be inconvenient upon this account, because at this rate it would be impossible for a Man, actually using his Reason, to sin against the Law of Nature. In as much as his Consent being wanting who is a part of Mankind, the common Agreement, must needs be maim'd and imperfect. Then again, because it would not be fair to gather the Laws of Nature from the Consent of those, who break them more frequently than they observe them. For as *Isocrates* speaks (d), *It is a Natural Misfortune which we all lay under, that we should more frequently Transgress than Perform our Duty.*

Nor will it be a more happy way of arguing, to appeal to the Consent of *all Nations*. For were it possible for us to understand all the Languages of Ancient and Modern People, yet we should be still far enough to seek in the Knowledge of their Manners and of their Institutions. We cannot hit off this Difficulty by saying, that the Consent of the most Civiliz'd Nations is sufficient, and that the Opinions of Barbarians are not to come into the Account. For, what Nation any ways able to manage and to preserve it self, will own the Title of Barbarous? Or what Nation can take so much on it self, as to desire its own Manners and Proceedings should be the Standard in trying all others, and that whatever People did not exactly conform to its Model, should be immediately pronounc'd Barbarous and Savage? Heretofore the Pride of the *Grecians*, censur'd all as *Barbarians*, who liv'd without the Bounds of their Country. The *Romans* afterward succeeded them, as well in their Arrogance as in their Empire. And at the present, some few Nations here in *Europe*, have the Vanity to prefer themselves to the rest of the World in the Opinion of their own Civility and Improvements of living. But there are not wanting other People, who imagine themselves to have the Advantage of them in all respects: And 'tis an old Proverb amongst the *Chinese*, that themselves only have two Eyes, only the *Europeans* one, and

(a) 2 *Chronic.* XIX. 6, 7. *Rom.* II. 2. (1) *L. i. c. 1. f. 3. n. 2.* (b) *Cicero.* *Tusc. Quæst.* I. 1. 13, 14. *The Consent of all Men in any Point, is to be esteem'd a Law of Nature: And again, The Consent of all Men is the Voice of Nature.* (2) That is, not from the Nature of the Thing it self, but from some External Principle, as from the Consent of People. (c) *De Cive.* I. 2. f. 1. (d) *Orat. ad Philipp.*

all the rest of the World are stark blind (a).

Some too there are, who fall foul upon our Learning, in prosecuting which we spend so much Good Time; they will have it be no better than a Prop, or a Crutch to support and assist our Dulness: In as much as the good Disposition of many Men carry them on to a Natural Innocence and Probity, without Improvement or Ornament of Letters; and because it requires no great Clerkship to be an Honest Man. It is likewise too evident, that high Attainments of Knowledge are not always bless'd with the Attendance of Good Manners or of Good Temper (b). Many Nations we see pride themselves in the tedious Pageantry of vain unnecessary things; despising those who lead a Life of less Gallantry and of more Simplicity. Yet were we to seek for Innocency and Integrity, we might perhaps find them much sooner amongst these plain and unartificial Mortals, than amongst their stately and formal Neighbours (c).

Besides, that such a Consent can be of no force, appears from this farther Reflection; that the number of Fools far exceeds that of wise Men; and that few Persons have form'd their Opinions upon a full search into the Foundations of things; but most Men follow on in the track of others, and yield an implicit assent to their Notions, without applying their own Thoughts or Judgments to the Points in Debate. Farther, altho' we have a tolerable Assurance of the consent of most People, at least as to the General Precepts of Natural Law; and altho' we may presume on the Consent of the rest, from the Principles of those who are better known to us; Yet it is more safe to conclude hence, what those Nations esteem just and equal amongst themselves, than what they think fair ways of dealing with Strangers; all whom, are by some People accounted Enemies, and treated accordingly (d).

VIII. Tho' the common Use and Custom of many Nations may seem to be alledg'd with more force for proving a thing to be lawful or allowable, than for the proving it to be actually commanded by the Law of Nature; yet that we cannot with any Security make so much as the former of these Conclusions, seems probable from the great Variety and Contradiction discoverable in the Manners and in the Institutions of the most famous People upon Record. So that we may well apply to the present Case, that saying of Socrates (e), *ἐκ εἰς ἀπειράτους καὶ ἀδιστακτικούς καταφύγει, εἰς τὸ πᾶσι ἀναόρετον.* You consult no very expert Masters,

when you refer your self to the Multitude for Instruction. To the same purpose Plutarch (f) observes, that *the Laws of Men are vastly different, some making one thing to be good and some another: And Tacitus's Description of an Army compos'd of various Nations may serve to represent the same wide Disagreement. Their Languages, their Manners, their Desires, (says he) are different; and while some will have one thing to be lawful, and some the contrary, amongst them all, nothing can escape as Unlawful (g).* To give some account of this Variety by way of Specimen. Aristotle (h) reports of some Savage Nations on the Confines of Pontus, that it is customary with them, to borrow one another's Children, to furnish out their Feasts. And these People he presently after calls *Irrational, Wild, and living only by Sense.* Eusebius, in his Book *de Præparatione Evangelicâ* (i), reckoning up the foul Customs and Manners which had been corrected by the Doctrine of the Gospel, amongst others, mentions the Pollution with Mothers and Sisters in Persia, (which Diogenes Laertius (1) too takes notice of from the Authority of Socion,) the eating of Human Flesh, and the murdering of Children under a Religious Pretence amongst the *Scythians*: He adds that the *Masageta*, and the *Derhices* us'd to kill their Relations when they grew very old, and make an Entertainment with their Bodies: That the *Tibareni* in *Cappadocia*, threw their Ancient Persons down Precipices; that the *Hircanians* cast out their Dead to the Birds, and the *Caspians* to the Dogs to be devour'd. Hither also may we refer those foul Watchings and other Ceremonies, design'd for the Honour of their Gods, but mixt with all the Licentious Practices of Adultery and Lewdness; as also, the Human Sacrifices barbarously murder'd on their Altars. The same excellent Author (k) gives the following Relations out of *Bardesanes the Syrian.* 'Tis a Law amongst the *GETULIANS*, that the Women offer their Bodies to whomsoever they please, especially to Strangers; and that their Husbands shall not accuse them on these accounts, or pretend to censure them as guilty of Adultery. The same Liberty obtain'd amongst the *BACTRIANS*. Whereas on the contrary, amongst the *ARABIANS*, all Adulteresses were punish'd with Death, and if suspected only, underwent some lesser Penalty. In *PARTHIA* and *ARMENIA* it is provided by Law, that no Man shall be accus'd for killing his Wife, his Son, his Daughter, or his Unmarried Brother or Sister. Amongst

(a) Add. *Charron Of Wisdom*, l. 2. c. 8. and l. 1. c. 39. Where he reckons it in the List of foolish Opinions, to condemn and reject a thing as Barbarous and Evil, only because it differs from our own Common Manners and Opinions. *Vid. &* l. 2. c. 2. n. 39. (b) *Plato Epist. X.* Firm Integrity, Faith and sincere Dealing, this I take to be the true Philosophy. (c) 'Tis a shrewd Remark of *Justin* (l. 2. c. 2.) speaking of the *Scythians*; It seems wonderful, says he, that meer Nature should give them, what the Grecians, with the long Institutions of their wise Men, and the Precepts of their Philosophers could never attain; and that the politest Manners should be distanc'd and out-done in the Comparison with Barbarity. Of so much greater Benefit on one side was the Ignorance of Vice, than on the other the Knowledge of Virtue. *Vid. Valer. Max.* l. 1. c. 1. f. 2. Extern. & Sext. *Empiric. Hypotyp.* l. 2. c. 5. where we meet with several things to the same purpose. (d) Add. *Montaigne's Essays*, l. 1. c. 30. (e) *Plato Alcibiad* 1. (f) In *Themistocl. Pyrrhon. Hypothef.* l. 2. c. 5. p. 125. Ed. *Wech.* (g) *Hist.* 3. l. 3. c. 39. in fin. (h) *Ethic.* 1. 7. c. 6. (i) l. 1. c. 3. (1) See His Preface, f. 7. with *Menage's Notes.* (k) l. 6. c. 8.

the *ATRIANS* Petit Robberies are punish'd with Stoning; amongst the *Bactrians* only with the Ignominy of being publickly defiled with Spittle. The Wise Men of *GREECE*, are not ashamed to court the Love of little Beautiful Boys. In *BRITAIN* many Men possess one Wife; in *PARTHIA* many Women belong to one Husband. *Sextus Empiricus* (a) the Sceptick, to shew that there is no Certainty in the Notions of Honesty or Dishonesty, hath raked up a great Heap of these contradictory Customs and Institutions. But he hath stumbled very fatally in the very entrance of his Design, while he talks in this manner: Amongst us Pollution with the Male Sex is unlawful and abominable; yet amongst the Germans, as is reported, it is no Disgrace, but rather a fashionable Practice. For the Grecians were so scandalously addicted to this unnatural Vice, that *Plato* in his 8th Book of Laws, thought there was need of urging some Reasons to prove the Possibility of restraining it by Publick Edicts. And that the *Bæotians*, *Sextus Empiricus's* Country-men, ought not to stand excepted from this Imputation, may be gather'd from a Passage in *Cornelius Nepos's* Life of *Epaminondas*: Tho' perhaps the vile Custom had ceas'd in those parts before this Sceptical Philosopher wrote. That it once prevail'd there, he himself afterwards relates. But what he reports of the Germans, is so groundless a Falsity, that 'tis wonderful how it should enter into the Head of any one, who is the least acquainted with the Manners and the Story of that Nation. He adds, that the *Cynick* Philosophers, and *Zeno*, *Cleanthes* and *Chrysippus*, esteem'd the same foul Enormity an indifferent thing. That some of the *Indians* thought it no Indecency to be familiar with their Wives in Publick. That in several Parts of *Egypt* for Women to prostitute themselves was look'd on as a Creditable Profession; and that 'twas usual for the younger sort first to get themselves a Fortune by the Jilting Trade, and then to marry. That the *Stoicks* held it to be no irrational Practice, either to frequent the Stews, or to maintain one's self by Pimping. That the *Persians* contracted Marriages with their Mothers, and the *Egyptians* with their Sisters: The former of which, *Zeno* maintain'd to be agreeable to Reason (b). That *Chrysippus* permitted a Father to have Children by his Daughter, a Mother by her Son, and a Brother by his Sister. That *Plato*

allow'd the Community of Wives. That 'twas a receiv'd Custom with many of the Barbarians to feed on Man's flesh; which the *Stoicks* themselves approv'd of. That amongst many others, Adulteries pass'd for indifferent Matters. That the *Scythians* offer'd Strangers to *Diana*; and kill'd their own Parents, when they arriv'd beyond the Age of Sixty Years. That by a Law of *Solon's* at *Athens*; the Parents were empower'd to put their Children to Death. That the *Roman* Gladiators, after the Performance of their Murther, receiv'd Honours and Rewards. That Thieves amongst the *Spartans* were punish'd, not for stealing, but for letting themselves be catch'd. That the *Amazons*, if they happen'd to bear Male Children, wilfully made them Cripples; to prevent their Performance of any Manly Actions or Exploits. He enlarges farther about the different Opinions in reference to the Divine Nature, about the Diversity of Religious Rites and Ceremonies, about the various manners of Burial, and the absurd Procurements of Death (c). *Tully* (d) reports that the *Egyptians*, having their Minds overcome by wicked Errors, will sooner let themselves be cut in pieces, than they will hurt a Serpent, an Asp, a Cat, a Dog, or a Crocodile: And if they happen unawares to do any of these Creatures a Mischief, they voluntarily undergo any Punishment. *Busbequius* (e) informs us, that Theft is an honourable Practice amongst the *Colchians*: And *Fran. Alvarez* that in *Abyssynia* the Custom is, for the Thieves to present a part of their Booty to the King, keeping the rest without Scandal for their own use (f).

IX. But that Notion of extracting the Law of Nature from the Manners and Customs of the World, is accompanied with this farther Inconvenience; that 'tis almost impossible to find any Nation, which is govern'd purely by Natural Law; but every Country hath its own particular Laws superadded, either in Writing or otherwise; to be made use of when the People have any Bargains or Tranfactions with their Fellow-subjects. And many times Affairs in debate between whole Nations are decided either by Civil Law common to both; or by the Law of Nature as it is not Naked, but Cloath'd, as it were, with many Positive Additions. So that it is no easy matter to distinguish what those Nations admit for Natural Law, and what for Positive and Civil. We may add to this Consideration,

(a) *Pyrrhon. Hypothef. l. 3. c. 24.* (b) *Ibid. Chap. 25.* *Zeno's* Speech as there represented, reacheth the highest Degree of Loosness and Impudence. (c) *Add. Diog. Laert. in Pyrrho. l. 9.* (d) *Tusc. Quæst. l. 5. c. 27.* (e) *Epist. 3.* (f) *Philo Judæus de Temulentia, p. 208, 209. Ed. Genev.* And these things may give us warning not easily to credit those Uncertainties, which being diffus'd through almost the whole World, have thrown both Greeks and Barbarians into Common Errors of Judgment. I mean those early Institutions, those National Customs, those Ancient Laws, through the whole Summ of which we cannot find one in which all agree; but in every Country, People, City, Street and even in every House, the Men, at least, differ from the Women, and the Children from both. And indeed I do not wonder, that a confus'd and miscellaneous Rabble, meer Slaves to Laws and Customs, however introduc'd, inur'd from the Cradle to yield Obedience to them no less than to Masters or Tyrants, and having their Mind cow'd and broken by Severity and Blows, and not able to aspire to any Great and Manly Attainments, should believe the Traditions they receiv'd from their Ancestors, and letting their Reasons lie without Use or Exercise, affirm things or deny them unexamined and unobserv'd. But I cannot forbear wondering at the Philosophers; who, whilst the greatest part of them pretend to hunt for the real Truth and Certainty of things, dividing themselves into so many Troops and Orders, pronounce of almost every Matter, Great or Small, ever with Difference, and often with Contradiction. Add *Montaigne's* *Ess. l. 1. c. 22.* & *Charron of Wisdom, l. 2. c. 8. f. 4. 7.*

that meer Use and Custom when it hath born a long and an unquestion'd Sway, frequently puts on the Face and Semblance of Natural Reason. 'Tis manifest, says *Agathias* (a), that whatever Law or Institution hath obtain'd thro' a long Course of time amongst many People, they certainly cry it up for most excellent and most equitable; and if any thing be attempted contrary to it, this they reject as ridiculous, and unworthy of all Credit and Allowance. We have a famous Example to this purpose in *Herodotus* (b). *Darius*, for Experiment's sake, put the question to the Greeks who were under his Command, what Summ of Money he should give them, to feed on the Bodies of their deceas'd Parents, after the manner of the *Indians*. Upon their refusal to comply on any Considerations; he ask'd some of the *Indians*, what they'd take to burn their dead Parents after the *Grecians* Fashion, and not to eat them. But they setting up a General Outcry, desir'd the King to have better thoughts of them. Besides, to have been inur'd to any Opinion from ones Infancy, is so forcible a Prepossession, that altho' the Opinion be false, yet it scarce enters into any Person's Head to question it; at least it passeth with an uncontroll'd Currency amongst Men of vulgar Parts and Capacities (c). To the greatest part of Mankind we may apply *Sextus Empiricus's* Saying, they follow the usual ways of Life, without thought or reflection (d). And *Euripides's* Observation is no less true, that the Traditions which we receiv'd from our Parents, and which are grown up with us, no Reason can confute, no strength of Wisdom can over-rule (e). To the same Head we may refer that Text of the Apostle, *1 Corinth. XI. 14.* and that Remark in *Plato* in his seventh Book of Laws, that our using one of our hands more readily than the other, proceeds purely from Custom: In as much as Nature equally favours both. Amongst many People Honour and Respect are measur'd by the length of Beards (f); whereas on the contrary, the greatest part of the *Americans* think it a Brutish Indecency to appear with any Beard at all (g).

But all this while, we do not ascribe too much force to Custom, that it should be able in such a manner to deprave and seduce the Judgment of Reason, as to render the Truths concerning Natural Laws impossible to be apprehended (h).

X. This strange diversity of Laws and Manners, by which most Nations in the World

contradict each other, hath without doubt been the occasion why some Men have asserted that there's no such thing as Natural Law, but that all Law first arose from the Convenience and the Profit of Particular States, and is incapable of any other Measure. Thus *Horace Serm. l. 1. Sat. 3. v. 98. 111, &c.*

————— *Utilitas, justi prope mater & æqui.*

*Jura inventa metu injusti fateare necesse est,  
Tempora si fastosq; velis evolvere mundi.  
Nec Natura potest justo secernere iniquum,  
Dividit ut bona diversis, fugienda petendis.*

Of Mother Profit, Just and Right were born.

Turn o'er the Musty Annals of Mankind,  
And you'll confess that Laws were first enjoin'd,  
Thro' fear of Wrong: Meer Nature never knew,  
Or Good, or Bad to shun, or to pursue.

*Ovid Ep. Heroid. 4. v. 131, &c.* makes his *Phædra* declare her Mind to the same purpose.

*Ista vetus pietas ævo moritura futuro,  
Rustica Saturno regna tenente fuit,  
Jupiter esse pium statuit quodcumque juvaret.*

That Thread-bare Virtue only held its Sway,  
Whilst heavy *Saturn* rul'd the Sons of Clay.  
*Jove* broke the dull Restraint; by *Jove's* Decree  
Profit is made the Test of Piety.

*Photinus's* wicked Counsel in *Lucan B. VIII. v. 488.* Et seqq. proceeds on the same Principles.

————— *Sidera terrâ  
Ut distant, & flamma mari; sic utile recto.  
Sceptrorum vis tota perit, si pendere justa  
Incipit; evertitq; arces respectus honesti.  
Libertas scelerum est quæ regna invisâ tuetur.*

As Fire from Water, as each Heavenly Light  
From Earth, so Profit stands remov'd from Right.  
If nice regards to Faith and Truth are shown,  
Your Scepter drops, and you unhinge your Throne.  
The way to fix all hated Reigns has been  
To grant a General Liberty of Sin.

*Aristippus* too, and *Pyrrho* in *Diogenes Laertius* (i), deliver themselves very grossly concerning the Origin of Just and Unjust. But

(a) L. 2. c. 10. (b) *Thalia. p. 112. Gr. Ed. H. Steph.* (c) *Aristot. Problem. Sect. 18. qu. 6.* Those things which Men have at first made choice of, and to which they have been accustom'd, in these they are not able to judge for the better. For their Mind is already corrupted by evil Prejudices and Prepossession. *Cicero. Quest. l. 4. Tusc. c. 3.* Some Persons are tied and restrain'd in their Notions, before they are capable of judging what is best, and afterwards, in the weakest part of their Age either following the Opinions of some Friends, or taken with the Speech of the first Master they have heard, they give their Verdict on Points which they do not in the least understand, and being carried with the Violence (as it were) of a Tempest, to some particular Doctrine or Sect, they cleave to it as if they were hugging a Rock to save their Lives. And a little after, I know not how it comes to pass, that most Men had rather continue in a Mistake, and quarrel and fight in defence of an Opinion which they have once lov'd and embrac'd, than to examine without Obstinacy or Partiality, what is deliver'd with most Agreement on all sides. Add. *Mish. Montaigne's Ess. l. 1. c. 22. Philo Jud. de Abrahamo p. 294. B. Ed. Genev.* Inordinate Custom usually bears as much force as Nature it self. (d) *Pyrrhon. Hypoth. l. 3. c. 24.* (e) In *Bacchis. v. 201. &c.* (f) *Vid. Arrian. Epictet. l. 1. c. 16.* (g) *Vid. Rochefort. Descript. Antill. p. 2. c. 8. f. 6. & c. 9.* (h) Add *Selden de J. N. & G. Secund. Hebræos. l. 1. c. 6.* (i) See B. II. and B. IXth.

of all the Ancients none disputed this Point so largely, as *Carneades* is said to have done. His Arguments as *Lactantius* (a) hath contracted them, are to this effect. That Men first instituted Laws to secure and to promote their own Advantage; whence they came to be so various according to different Manners, and different Times; but that there was no such thing as Natural Law in the World. That Mankind and all other Animate Beings, are by the Guidance of Nature carried on to the pursuit of their own Profit; and that consequently there can be no Justice; or if there be, that it must be the highest Folly, in as much as it would make a Man injure himself, by consulting the Conveniences of others. That all Nations famous for Empire and Command, and the *Romans* themselves who then reign'd Masters of the World, if they would be just, that is, if they would restore every one his own, must return to their Ancient Cottages, and to their Primitive Poverty (b). In clearing up these Objections, it will not be amiss to begin with *Tully's* Remark in his Second Book of Offices, c. 3. *Profitable* (says he) is a Word which by the Corruption of Time and Custom is perverted insensibly to the Signification of somewhat, that may be separated from *Honesty*; so as to make something *Honest*, which is not *Profitable*, and something *Profitable* without being *Honest*: An Error of the most pernicious Consequence to the Life of Man. On which account in his third Book of the same excellent Work, c. 3. he tells us, that *Socrates* us'd to curse the Authors who first divided these Names in Notion and Opinion, which were in Nature so inseparably united. For those Masters of False Politicks cheated the heedless Vulgar with the Ambiguous Term of Profit; which is of two kinds, as it is rated by two different Principles. One sort of Profit, is that which appears such to the deprav'd Judgment of ill compos'd Affections; these being mov'd chiefly by present and transitory Advantages, and very little sollicitous about future Concerns. The other and the true Profit is adjudg'd so by sound Reason, which doth not only consider things at hand, but weighs and examines the Effects and Consequences which they are likely to produce. Which therefore must pronounce that alone to be truly profitable, which is universally such, and which gives Assurance of Constancy and Duration (c), but can never judge it a desirable thing, to enjoy a Momentary Advantage, drawing after it a Train of endless Mischiefs. 'Tis a most unhappy and a most dangerous Pleasure, in the heat of a Fever to relieve our selves with cold Water, which will be sure afterwards to redouble our Tortures. Actions perform'd in Conformity to the Law of Nature have a double Excellency, not being only *Honest*, that is conducive to the Preservation and to

the Increase of the Honour and the Good Credit of Men; but likewise *Useful* and *Profitable*, promoting their Interest and Advantage, and contributing largely to their Happiness. And this latter Quality is so far from being an unworthy Attribute of Virtue, that even in Holy Scripture (1), *Godliness* is said to be *Profitable to all, having both the Promises of this Life, and of that which is to come*. On the other hand, those Actions which contradict the Law of Nature, are always base and *Dis-honest*, and tho' they now and then bear some Appearance of Profit and of Pleasure, yet these Charms are quickly over and never fail of being attended with a more considerable Crowd of Evils and Misfortunes (d). *Tully* in his first Book of Offices, Chap. 4. talks admirably for our present Business. *Betwixt a Man and a Brute*, says he, *there is eminently this difference; the one is carried on by Sense, and to that only which is present, with little or no regard to what is either past or to come: Whereas the other by the Benefit of Reason sees the Consequences of things; their Rise and their Progress, and couples together Causes and Effects; compares Resemblances of Actions and Events; tacks the present to the future; and so taking in his whole Life at a view, he prepares all things necessary for the Use and Comfort of it*. Therefore 'tis so far from being true, that Civil Laws were first instituted for the sake of this Momentary and Bastard Profit, that it appears to have been their chief end and design, to hinder Men from squaring their Actions, by so false a Measure. For should anyone resolve to direct all his Proceedings to his own Private Advantage, without any regard to the rest of Mankind; since all other Men might as well take the same Course, there could not but arise the deepest Confusion, and a kind of War of All against All, a State the most Unprofitable, and the most Inconvenient in the World. On the contrary it is very manifest, that he who by observing the Law of Nature endeavours to win the Affections and the good Grace of others, may conceive much surer hopes of Profit attainable by their Assistance, than he, who trusting to his own single Power, takes the Liberty of treating others as he lists (e). Nor is it possible for Men to frame a Notion of any Profit, which will be their own Peculiar, or to which all Men will not have as good a Title as themselves; since Nature hath never given any Man so large a Privilege, as to let him exercise any kind of Right against others, the use of which they are not allow'd to turn again upon him. Therefore 'tis a great Mistake to fancy it will be *Profitable* to you, to take away either by Fraud or Violence what another Man hath acquir'd by his Labour (2); since others have not only the Power of resisting you, but of taking the same Freedom with your Goods and Possessions.

(a) *Divine Institut.* l. 5, c. 17. (b) *Add. Grot. Prolegom.* N. 16, &c. (c) *Marc. Antonin.* l. 7, f. 74. *Those Actions are Profitable or Advantageous which are agreeable to Nature.* (1) *1 Tim.* Chap. IV. v. 8. (d) *See Prov.* XX. 17. V. 3, 4. IX. 17, 18. XXI. 6. (e) *Add. D. Cumberland,* c. 2, f. 2, g. n. 2. (2) *See Prov.* I. 13, 14, &c.

And you have as little Reason to think it will prove *advantageous* to you, to break your Faith; since your own Example may be made use of to your own Prejudice (a). Nor should any presume so much on his own Strength and Power, as to imagine that others will not repay him with such Usage as they receive from him. For all true Power arises from a Conjunction with other Men, whom 'tis impossible to keep together by your single Force. So that if that false and spurious Profit were to be the measure of all our Proceedings, the Life of the stoutest Mortal would be as often in danger, as it should seem profitable to any one to rid him out of the way: And whoever took such a Course would only set a fatal Pattern, and chalk out the way to his own Destruction. On the whole matter then, not Justice, but Injustice is really the highest Folly; which tho' it may seem to succeed for the present, yet is neither general nor lasting; and tends to the Dissolution and Destruction of Human Safety; Men being chiefly guarded and secur'd from Dangers by Society and by Friendliness. Nor will this hold true only of particular Men, but likewise of whole States and Communities; there having never been any Commonwealth so Powerful, or so well establish'd, as not sometimes to stand in need of their Neighbours Assistance; since no single Kingdom could long bear up against the united Forces of a strong Confederacy.

Quintilian observes (b), that an *Ill Example can never be truly advantageous*; for tho' it may give some Delight as the Occasion now stands, yet it afterwards draws on us a heavier Load of Mischiefs. It is impossible (says Demosthenes, *Olynthiac. 2.*) to obtain any firm and durable Power, by Injuries, by Perjury, and by Lies. Epicurus himself in his Notions of Justice, was very honourable and very fair, as Gassendus hath given us this short Representation of them (c). *Justice not only never hurts any one, but on the contrary always carries along with it something conducing to the Ease and Tranquillity of the Mind; which it likewise farther supports with the hopes of wanting nothing that uncorrupted Nature can desire. A Soul where Injustice hath taken up its Seat, cannot but be in perpetual Disorder and Confusion, whilst*

*when it attempts any thing with never so much Secrecy, yet it hath no Assurance that the Fact will always be undiscover'd (1). And since Justice is design'd for the Promotion of the Common Good, it's plain that nothing can be just which doth not tend to the Advantage of whole Societies, and of each Member in particular. And because every one by the Guidance of Nature, desires and pursues what is Good for him, it is necessary, that whatever is just should be according to Nature, and should therefore be call'd Natural. And this Justice is nothing else but the Pledge and Assurance of General Profit: For while it takes place by the Universal Consent of all Parties, there arises this Common Advantage, that Men do not mutually give, and receive Injuries, but live in Peace and Quietness together: Which as it is Good and Profitable, so doth Nature incite every Man to embrace and to pursue it (d). Though it must be observ'd by the way, That what Gassendus afterwards delivers about a different Profit among different Persons, and about a variable Justice, must not be admitted in regard to Natural Law, but only to Civil Constitutions.*

In short, any is able to judge what a Contradiction it is almost to common Sense, to make such a Profit as is opposite to Justice, the Standard of Acting. The Sophist Protagoras in Plato, pag 225. Ed. Franc. Ficin. though a Trifler in other Matters, yet had Wit enough to speak smartly on this Point. *In other Habits, says he, if a Man pretend, for example, to be an excellent Piper, when he doth not understand a Note, he either raises the Laughter or the Indignation of those that hear him; and his Friends admonish him of his Madness and Vanity. But the Case is quite otherwise in Injustice. For suppose some Persons know another to be really Unjust, yet should the Man himself confess that he is guilty of that Vice before Strangers, they would take it for granted that he was out of his Wits; maintaining that such a Wickedness is never to be discover'd, but the contrary Virtue always to be pretended to, whether it be really practis'd or not. Not to counterfeit Justice therefore they take to be a Senseless Extravagance; since whoever makes a contrary Profession deserves to be driven out of Human*

(a) *Isoctates in Areopagitic. p. 252. They judg'd those who break Faith and Contracts, to injure the Poor more than the Rich. The latter, by losing their Dependants, could suffer only some little Damage in their Revenues. The former, if they were thrown off by their Patrons, whose Support and Assistance they continually needed, must be reduc'd to extreme Indigence and Misery. The same Orator (in Orat. de Pace p. 285. Ed. Paris.) placeth the chief Strength and Foundation of all his Advice to his Country-men in this Principle, that there is more Gain and Profit in a Peaceful Competency, than in a needless pursuit of Abundance: That Justice is much more eligible than Injury, and the Care of their own Possessions, than the Desire of other Men's. Which Assertion he afterwards proves at large, and which is much more to the present Purpose than that above-mention'd by our Author. (b) *Declam. 255. (c) Syntagm. Part. 3. c. 24, & 25. Vide Ciceron. de Fin. Bonorum & Malorum, B. 1. c. 16.**

(1) *Lucret. l. 5. 1151, &c.*

*Circumretit enim vis atque injuria quemque,  
Atque unde exorta est ad eum plerumque revertit.  
Nec facile est placidam ac pacatam ducere vitam,  
Qui violat factis communia fœdera pacis.*

Because *diffusive Wrong* can spread o'er all,  
No State's secure; nay, oft the Wrongs recoil  
With double Force on the Contriver's Fall.  
Nor can those Men expect to live at Ease,  
Who violate the Common Bonds of Peace.

Mr. Creech.

(d) *Diodor. Sicul. l. 25. Eclog. 1. Epicurus in the Book which he calls Settled Notions, affirms that a Life led according to Justice is free from all Trouble and Disquiet; but that Injustice was full of Disturbance and Disquiet*

*Converse and Society.* No Man is so bad (says *Quintilian* (a) as that he desires to seem Bad. And almost every Body speaks more honestly than he either thinks or acts.

But the Divine Providence hath sufficiently confuted this pernicious Opinion, by making its boldest Patrons and Assertors feel the fatal Consequences of it. To give an Instance or two. 'Lysander, that crafty Designer, who 'manag'd most Affairs by Cheats and Shuffles, 'who plac'd all Right in Profit, who affirm'd 'Truth and Lyes to be indifferent things, and 'either to be most valuable as it was most advantageous; who bragg'd that Men were to 'be deceiv'd with Oaths as Children with Dice 'or Bounding Stones; as *Plutarch* (b) and *Polyænus* (c) give his Character; did he build his Fortunes on a firmer Bottom, than if he had made Truth and Honesty the Mark and the Standard of his Proceedings (d)? *Agésilæus* (1), who at other times and in other Speeches, us'd to cry up Justice for the Queen of Virtues, without which, Valour and Fortitude would be of no use, yet when *Phœbidas* had without Orders possess'd himself of the Fort *Cadmea*, defended that Boldness by such kind of Rhetorick as this: That the Action of Phœbidas was to be rated and judg'd of according to the Benefit and Advantage it brought to the State. Since whatever conduc'd to the Publick Good of Lacedæmon, was to be done at a venture; whether Men were empower'd by Commission for such Performances, or not. But was not this very Exploit the occasion of the Spartans miscarrying in their Design of rendring themselves Masters of Greece?

XI. These Foundations being settled, 'tis easy to solve the Objections of the opposite Party. 'Tis ridiculously weak to conclude, that supposing different States to have set up different Laws upon the account of Profit, therefore there can be no Perpetual or Natural Law. For all Civil Laws do either presuppose or include the chief Heads of the Law of Nature, those by which the Safety of Mankind is secur'd: neither are these in the least injur'd or impair'd by the particular Ordinances, which each Commonwealth finds a necessity of superadding, for its separate Interest and Benefit. Penal Laws, or Sanctions, we acknowledge to have been instituted out of fear of Justice; or to restrain the Wickedness of Men, when the bare Dictates of Natural Law were found insufficient for that purpose. When *Horace* denies that Nature is able to distinguish betwixt Right and Wrong; we agree with him, if he means only that Nature which Man bears in common with Brutes; whereby Brutes themselves through the Information of their Senses do perceive, what is agreeable to their Body and what not; without the least Apprehension of Honesty or

of Dishonesty. But if he means the Rational Nature we deny the Position, as absolutely false. As for *Carneades* his Argument, that if the Romans would be just, that is, if they would restore every one his own, they must return to their primitive Cottages; and that therefore Justice is Folly; in vulgar esteem this may bear some Semblance of a plausible Truth; but to those who look farther into it, it will appear exceeding empty and trifling. For since whatever Right we assume upon others, they may in like manner use against us; it can by no means be Profitable for us by injuriously seizing on other Mens Goods, to invite them to make Reprisals on our own. And in stating the Nature and the Definition of Profit, we are not to consider, what seems advantageous to such or such a Man at such a particular time, to the Prejudice of others; but what is of universal and perpetual Benefit and Expediency. Thus for instance, let us suppose an Officer to have rais'd a vast Estate by robbing the Publick Treasury: such an one certainly imagines it would be Folly in him, to make an exact Restitution, and so to return to his first narrowness of Fortune. But when the Prince upon convicting him of Extortion, hath adjudg'd his Goods to the Treasury, and his Person to the Gallows, do we then think he took a wiser Course to raise himself in the World, than another Person who rests contented with a competent Maintenance, innocently acquir'd? Thus, I know not whether it had not been better for the Roman People to have fate down with Satisfaction in the Enjoyment of that moderate Wealth which at first they got together without the Expence of their Virtue or Honour; than when they had rifled and plunder'd the whole World, to turn their Weapons upon themselves, and to expose the feeble Carcasses of their Empire to be torn in pieces by the Barbarous Nations. Nor do the other Arguments of *Carneades* as set down by *Lactantius* (2), require any long or any laborious Reply. For if any think it a piece of Wisdom in the Seller of a House, to dissemble its being infected with the Plague, certainly it must be own'd for Wisdom in the Buyer, if he either give false Money for his false Goods, or to punish the Author of the Cheat by the severest Methods. Lastly, as for those Cases, whether it be fair in a Shipwreck for a stronger Man to force a Plank from the Arms of a Weaker, or in a Flight for a sound Man to dispossess a wounded Souldier of his Horse, preferring his own Preservation to the Safety of his Fellow, we shall hereafter find occasion to discuss and to determine them (3). It will be sufficient for the present to make this short Remark, that Actions done upon extreme Necessity, and out of Consternation of

(a) *Institut.* l. 3. c. 8. Ed. Lugd. Bat. p. 251.

(d) Vid. *Cornel. Nep. Lysand.*

(3) See Chap. VI. of this Book.

(b) *Plutarch. Apothegm. Læcon.* p. 229. Ed. Wech.

(1) See *Plutarch. in Agésil.* p. 608.

(2) *Div. Institut.* l. 5. c. 7.

Mind arising from Imminent Danger, and which do therefore meet rather with Excuse, than with Approbation; ought by no means to be establish'd for common Rules of Proceeding (a).

XII. The Author of the Treatise *De Principiis justæ & decori*, in searching after the right Notion of the Law of Nature, follows this Method. In the first place he lays down this Confess'd Principle, *that there is a God, and that He created the World in Wisdom*; which no Man in his Senfes will dispute. He adds, that *God hath declar'd His Resolution of exercising the Virtues of Truth and Justice in His Government of the World* (b). But here, besides that it scarce seems right to conceive the Divine Justice or Truth after the manner of *Virtues*; it is sufficiently manifest, that the Disposition or the Inclination to Justice which we attribute to God, is very different from that which Men are to exercise towards one another: In as much as the former denotes that Method by which an infinitely Great and Good Creator is pleas'd to govern His Intelligent Creatures; whereas the latter obtains only amongst Persons by Nature equal, and subject all alike to a Common and a Supreme Lord. Neither can it be at all made out that Divine and Human Justice are capable of the same Measure, from this Argument, that in Holy Scripture, we are frequently referr'd to the Example of God (c): For in those Passages the Holy Spirit is pleas'd to follow the usual way of Reasoning *from a Greater to a Less*. But from these Principles the said Author pag. 9, 10. concludes, that *in the Creation of the World God propos'd to Himself some End. That He hath appointed Means sufficient for the obtaining that End. That a Man shall certainly be punish'd, if he deviates from that Order which God would have us observe, in the Prosecution of the End propos'd by Him to Himself, and to Mankind. And on the contrary, shall certainly be rewarded, if he direct his Life according to the Order prescrib'd by his Creator.* In fine, that *the Justice of God implies nothing else, but His lawful Distribution of Rewards and Punishments.* In regard to this Doctrine, I question whether it can be said with any tolerable Sense, that *God hath constituted any End, common to Man with Himself*; or that the Order prescrib'd by Him to Man, that is, the Observation of the Law of Nature doth produce the End for which God created the World. Nor can the Crudenefs of the following Aphorism pass with ordinary Digestions: *That the Natural Necessity which is in God doth lay on Men a Necessity of pursuing Virtue, and of flying Vice.* Yet suppose we should be brought to grant all this, and then should guide our Search after the Law of Nature by

some such general Maxim and Rule, *Whatever things are by Nature so dispos'd, as to hinder the End which God propos'd in the Creation of the World; all those things are prohibited by the Law of Nature: But whatever things are so naturally order'd, that the End before-mention'd cannot be obtain'd without them, those are certainly enjoin'd or commanded by the same Law:* We shall still be at a loss to understand what necessary Relation every particular Precept of the Law of Nature bears to that End; whilst the End it self is not perfectly discover'd by us. Thus, for Example, there would be need of a Train of Deductions, to make me apprehend, that the End for which the World was created cannot be attain'd without honouring one's Parents, or that Theft is repugnant to the said End. 'Tis meer trifling therefore to stick upon such General Terms, without calling in the Assistance of nearer and more distinct Principles. And the Foundation of the Law of Nature must be always left in the dark by him, who can make no farther Progress in the Question, than to tire us with such Repeitions, that *since the World was made in Wisdom and Order; and since Man hath his part assign'd him in the Universal Harmony; therefore that Order ought necessarily to point out to every Man his Duty, in every Action or Proceeding.*

XIII. Thus far most are agreed, that the Law of Nature is to be drawn from Man's Reason; flowing from the true Current of that Faculty, when unperverted (d). On which account the Holy Scriptures declare it to be written in the Hearts of Men (1). This we judge to be a most manifest Truth, that although the sacred Writings do throw in a more enlarged Light to direct us in the clearest View of Nature's Law: Yet the same Law may without that extraordinary Assistance be found out and solidly demonstrated, by the bare force of Reason, such as God first implanted and still preserves in Mankind. Yet here we by no means think it Necessary to maintain, that the General Principles of Natural Law, are *Innate*, or imprinted as it were upon Men's Minds from their very Birth, in the manner of distinct and actual Propositions; so as to be readily express'd and utter'd by them, as soon as they arrive at the use of Speech, without farther Instruction or Meditation. For that these Native Ideas or Original Characters are no better than unwarrantable Fictions (2), any one may discover, who will be so curious as to observe nicely the Steps by which Children make their Progress in Knowledge, clearing themselves by little and little from the Ignorance of their Infant State. Nor is it a Consideration of little Weight in this point, that the Holy Scriptures

(a) Add. *Velthuyssen. de Principiis Justæ & Decoræ. p. 114, &c.* (b) *Psalm XCVI. v. ult.* (c) *Luke VI. 36. Matt. V. 44, 45. XVIII. 33.* (d) *Dio Chrysoſt. Orat. 10. de Servis, p. 150. Ed. Morell. Being endued with a Soul, you may know from your self, what and how you ought to act.* (1) *Romans II. 15.* (2) See our Author in his *Apology, c. 24.* and in his *Specim. Controversæ. c. 4. f. 23.* Mr. Lock in his First Bqok of Human Understanding treats of this at large.

frequently describe Infancy and Childhood, by the Ignorance, and Riper Age by the Knowledge of Right and Wrong (a). Dr. *Cumberland* must be our Guide and Master in these Disquisitions, who hath most clearly demonstrated (b), that although we reject the Notion of those Innate Propositions, yet the Knowledge of the Law of Nature is truly and really imprinted on Human Minds by God, as he is the first Mover and Director of them: Whence likewise any one may readily discover that 'tis his Will and Command, we should act according to that Law. That Phrase in *Romans II. 15.* which is urg'd so hardly by some Authors is certainly Figurative (1), and implies no more than a clear and certain Knowledge treasur'd up in the Memory; of which the Persons spoken of are convicted in their own Consciences, by what means soever those Notions first enter'd into their Thoughts. Thus too those Sins which in *Jeremiah XVII. 1.* are said to be *engraven on the Tables of the Heart*, in as much as they were actual Transgressions, could not be discover'd at the Nativity of the Offenders (c). That Readiness which we see in Children and in the Ignorant Multitude, to distinguish Right from Wrong, is owing in a great Measure to Exercise and Use; whilst from their early Years and the first opening of the Reason, they observe Good Things to be approv'd of, and Evil Things to be exploded; the former to be attended with Praise, the latter with Punishment (2). Their Minds are so fix'd and dispos'd by daily Practice, and by the whole Series of common Life, that few of them so much as doubt whether they may not proceed by other Methods. Whoever considers this matter accurately will discover that 'tis very hard to give a Reason for many Practices, which yet the common People undertake without Scruple or Hesitation. To borrow an Instance from a late Author (d), *If a Man be found Committing a Robbery, the Multitude presently join Hands and Minds to pursue and to seize the Thief: But if upon a Quarrel one Man hath kill'd another, every Body wishes he may get off safe; at least no Body willingly assists in the taking of him.* The reason of such a Difference the Vulgar understand not, which is this; *Every one is more in danger from a Thief, who designs to plunder wherever he can meet with Booty; than from an Actor of Man-slaughter, who intends Mischief to none but to the Person who gave him Provocation.* Therefore when we acknowledge the Law of Nature to be the Dictate of Right Reason, our Sense and Meaning is this, that the Understanding of Man is endued with such a Power, as to be able from the Contemplation of Human Condition, to discover a Necessity of living agreeably to this Law; as likewise to find out some Prin-

ciple, by which the Precepts of it may be clearly and solidly demonstrated (e). Nor is it any Rub or Prejudice to this Doctrine, that the artificial Method of demonstrating these Natural Precepts, is not known or apprehended by all Men; and that most Persons both learn and observe the Law of Nature by Custom, and by the common Course and Tenour of living. For we see every day the common Mechanicks and Artificers performing many things, either by Imitation, or by the compendious Direction of Instruments, the Proof of which they do not in the least understand: And yet this doth not hinder such Operations from being truly Mathematical, or from being founded on solid Principles of Reason. Hence it likewise appears what Rule we are to measure our Reason by, in judging of its Fitness for the Discovery of Natural Law: or whence we may be assur'd whether such a Dictate proceeds from Right, or from deprav'd Reason. The Dictates of Right Reason are true Principles, which agree with the Nature of things well observ'd and examin'd; and which are deduc'd from other true and first Principles, by the Rules of Good Consequence. On the contrary, those are Dictates of deprav'd Reason, in which a Man either lays down false Principles, or by a wrong Method deduces false Conclusions. For at the same time as we affirm the Law of Nature to be imprinted on us by the Nature of things, we imply that it is most true and infallible: Since Nature presents us with Nothing but what really exists, and produces no Effect that can be charg'd with Falshood: All Falshood arising from the Mistakes of Men, whilst they either divide such Notions as naturally cleave together, or join such together as Nature hath separated and plac'd at a distance (f). And this Course of Judging being duly follow'd, we need not fear that any one shall be able to foist upon us for Natural Law, either the frantick Notions of his ill purg'd Brain, or the irregular Desires of his misguided Mind. For 'tis in vain for that Man to make his Appeal to Reason, who cannot demonstrate his Assertions from Principles of unquestion'd Truth, and such as agree with the Nature of things; in as much as all Truth and all Rectitude consists in the Agreement of Conceptions and of Propositions with the things themselves, which they are intended to express. And he who hath not Parts enough to frame and unite the Chain of a Demonstration, must supply that defect by an exceeding Stock of Impudence, if he desires any regard should be had to his vain Conjectures, when they run astray from the receiv'd Opinions of Mankind. Moreover, it is manifest to all those who understand the force and the manner of Demonstrations, that there is not only a Necessity that

(a) Vid. *Jonah IV. 11. Deuter. I. 39. Isaiah VII. 14, 15, 16.* (b) *Prolegom. f. 5, 7, 8.* (1) See *Grotius* in his Notes upon this Passage, and *Le Clerk's Ars Critica* p. 194, &c. Tom. 1. 2d Edit. (c) Add. *Luke II. 51. Proverbs VII. 3.* (2) See *Lock* of Human Understanding, l. 2. c. 28. f. 10, 11, 12. (d) *De Principiis Justi & Decori*, p. 81. (e) Add. *D. Cumberland. de L. N. c. 4. f. 3.* (f) *Idem c. 5. f. 1.*

the Principles made use of be true, and the first or highest that we can ascend to, but likewise that they be proper, and peculiar to the Question in Debate, and so very clear, that the Mind apprehending by their Means the Cause of the thing asserted, may rest satisfied, and neither desire nor want any farther Proof. Now against this Rule of finding out the Dictates of Right Reason, those Authors have not only transgress'd, whose Foundations of Natural Law we have already examin'd: But those too, who think it sufficient to build that Law on so slender a Bottom as this, *that Natural Honesty consists in the Agreement of Reason and Appetite; the Rule of which Honesty is the Excellency and the Dignity of Human Nature, and that most Noble End, for which Providence seems to have given us the Dominion and the Possession of the World.* For though we could argue never so fairly, this Action is suitable to the Excellency and the Dignity of Man, and therefore honest and to be perform'd; yet this doth not furnish us with any clear and certain Knowledge, in which our Minds may rest safely without farther Enquiry: But the Question still remains in what that Excellency consists, and by Virtue of what Cause it comes to agree to Mankind. Thus if one should say to a Clergy-man, it doth not become you to frequent Taverns and Houses of Debauchery, because such Courses are repugnant to the Dignity of the Sacerdotal Office; he says nothing but Truth, in all this, but he doth not alledge the last and the strongest Reason, so as to set the Matter beyond Doubt and Dispute (a).

Although, as hath been already observ'd, it is not in the Power of every Man, to deduce the Law of Nature artificially from its Principle: yet that it may be properly said to be known to all Men enjoying the use of their Reason, it is sufficient, if even Persons of tolerable Heads are able to apprehend the Demonstration, when propos'd by others, and clearly to perceive the Truth of it, by comparing it with their own Natural Condition. As for the lowest degree of Mortals, who are acquainted with the Law of Nature, chiefly by Popular Information and by common Use, they ought to require no farther Proofs of its Certainty, than that first the Exercise of it is maintain'd by their Superiors, by whose Authority they are to be guided; and then secondly, that they themselves cannot find any

probable Reasons, by which they might either confute or weaken its Force; and lastly, because they are every day sensible of its Usefulness, and of the Benefits which it confers upon Mankind. And upon this account the Law of Nature appears to be sufficiently promulgated; so that no Person of competent Years and of sound Understanding, can by any means plead invincible Ignorance of it.

For the easy Knowledge of what the Law of Nature dictates, *Hobbes* (b) commends the Use of this Rule, *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 others room.* For by this means, when Self-love and the other Passions, which weigh'd down one Scale, are taken thence and put into the contrary Scale, 'tis easy to guess which way the Balance will turn. And indeed this is no other than that Great Rule prescrib'd by our Saviour himself (c), of *Doing to Men as we would be done by.*

*Dr. Sharrock* is of Opinion (d) 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: 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: Or I must clean my Servant's Shoes, because I require him to clean mine. But the Rule will still remain unhaken, if we observe, that not one Scale only but both are to be consider'd; or that I am not only to weigh and examine 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. Yet we must confess, that this Precept cannot be esteem'd a Fundamental Axiom of the Law of Nature; since it is only a Corollary of that Law which obliges us to hold all Men equal with our selves; and therefore may be demonstrated *a priori*.

XIV. According to our Judgment, there seems no way so directly leading to the Discovery of the Law of Nature, as is the accurate Contemplation of our Natural Condition and Propensions. Altho' in this Consideration regard must be had to some things which are extrinsecal to a Man, and chiefly to those which are likely to promote his Interest, or to procure his Damage and Inconvenience. For whether this Law was impos'd on Man to ad-

(a) *Comp. Rachel. Prolegom. ad Offic. Ciceronis, l. 38, &c.* (b) *De Civitate c. 3. l. 26. & Leviath. c. 15.*  
(c) *Matth. VII. 12. Moschus Idyll. V. v. ult.*

Στρέψατε τὰς φιλέοντας, ἵν' ἢν φιλέητε, φιλήσθε.  
Love those who Court, that those you court may love.

Add. *Selden. de J. N. & G. l. 7. c. 12. Aristotle* (in *Diogenes Laertius l. 5. Serm. 21.*) being ask'd how we ought to behave our selves towards our Friends, answer'd, *as we wish they would behave themselves towards us. L. 2. t. 2. D. quod quis juris in alterum, &c. Senec. de Ira, l. 3. c. 12. Let us suppose our selves in the same Circumstances as the Person with whom we are angry: That which now puts us in a Passion, is only the wrong Opinion and Estimate of our selves: We are unwilling to SUFFER what we are willing to D.O.* 'Tis a Saying of *Confucius* (in *Marcinus's Hist. Sin. l. 4. c. 25*) *Never do to another what you are unwilling to suffer from him.* The same Precept was made use of by *Ynca Manco Capac*, the Founder of the *Peruvian Empire*; in order to the reducing his Subjects to a Life of Civility. *De la Vega. l. 1. c. 21. (d) De Officiis C. 2. n. 11.*

vance his Happiness, or to check his Wickedness, (which might otherwise break out to his own Destruction) we cannot proceed more clearly in gaining a Notion of it, than by examining in what Points and Respects he hath need of Assistance, and in what he hath occasion for Restraint and Control. In the first place then, Man hath this in Common with all other Creatures endued with a Sense of their own being, that he loves himself as highly as is possible, that he endeavours by all ways and means to secure his own Preservation, to obtain what appears conducible to his Good, and to repel what is in his Judgment Evil (a). And this Self-Love (regularly speaking), is so very strong as to supersede any Inclination which a Man may have for another. Sometimes indeed Men seem to affect others with a more tender Passion than themselves, to be more delighted with their Happiness, and more disturb'd at their Misfortunes than at their own. Thus *Des Cartes* (b) observes, that the Love which a Good Parent bears towards his Children is so very pure, as to make him desire, neither the gaining of any thing by them, nor the possessing them in any other manner than he doth at present, nor the being join'd to them by any stricter Engagements, than those of the present Union. But considering them as his *other self*, he seeks their good equally with his own; or rather with greater Care, in as much as he reckons himself and his Children to make up but one entire thing, of which not thinking himself the better part, he frequently prefers their advantage to his own, and is not afraid to secure their Safety by his own Destruction (c). But now besides that, this Love is not always constant there are other Reasons why Parents are sometimes willing to have the Misfortunes of their Children transferr'd on themselves, namely, because they think themselves more able to sustain them; or because they cannot but confess that Persons of those tender Years are more worthy of Life and of Safety. And a reason why on the other hand Parents are so highly satisfied and pleas'd with the Success and Prosperity of their Offspring, may be, because they are sensible a great part of the Glory will redound to themselves, for bringing such excellent and worthy Persons into the World (d). *Qui tanti talem genuere Parentes* (e)? It is likewise evident, that many Persons have contentedly suffer'd Death for other Persons, whom they either lov'd with

an entire Affection, or to whom they devoted themselves with an absolute Service. For these Men fancied themselves to be join'd to such Friends or Masters as lesser parts of the whole, and therefore chose to be themselves destroy'd for the Preservation of the greater Part (f). *Procopius* (g) tells us, that amongst the *Epthalite Hunns* the more Wealthy Men pick out about Twenty, or perhaps more Persons for their special Friends; these are constant Guests at their Tables, and have the Use and Command of all their Riches and Possessions, being allow'd a kind of a Common Right over all things: And when their Patron happens to die, Custom obliges them to be put alive with him into his Grave. And that such ways of Mens devoting themselves are still practic'd in *Japan*, we are assur'd by the Authors who describe that Country and People (h). The Truth is, in the Opinion of such Persons, the Boasts of Faith and of Affection with the Glory thence arising, are of more Value than all the things in the World besides, and are not over-purchas'd at the Expence of Life it self. Some too being depriv'd of a near Friend or of a singular Benefactor, do cast away their own Lives only out of Impatience and Despair, imagining it is impossible they should be otherwise than very miserable, having lost him on whom alone all their Hopes and Fortunes depended. Certain it is, whatever a Man doth for others, he never forgets himself; and Satan (in *Job* II. 4.) well express'd the common Temper and Inclination of Mankind, when he said *Skin for Skin, and all that a Man hath, will he give for his Life.*

Besides this Self-love, and this Desire of preserving himself by all Means and Methods, there is discoverable in Man a wonderful Impotency and Natural Indigence; so that if we should conceive any single Person quite destitute of the Assistance of others, we should conclude his Life was given him rather for a Punishment than for a Blessing. It is farther manifest, that, next to the Support and the Defence of Heaven, Men draw their chief Help and Comfort from one another. For, as the Strength of particular Persons is so unable to compass their Preservation and their Maintenance, that to live happily and conveniently they have continual Occasion for the Works and for the Supplies of their Neighbours, in as much as their own time as well as Power, would fail them to procure the most

(a) Cicero de Fin. l. 3. c. 5. So soon as any Animal is born it is endear'd, and as it were, recommended to it self for its own Preservation, and for the loving of its own Condition and of every thing that tends to the preservation of it: Being at the same time made averse to Destruction, and to all things which seem pernicious. Valer. Flacc. l. 5. v. 644.

*Est amor, & cunctis rerum tutela suarum.*

By Nature all love and protect their own.

Add. Diog. Laert. l. 7. in Zen. Marc. Antonin. l. 11. f. 8. Epictet. Enchirid. c. 38. n. 2. Cic. de Officiis l. 1. c. 4. (b) De Passionibus. Art. 82. (c) See 2 Sam. XVIII. 33. Euripid. Alcest. v. 653. usq; ad 705. (d) See Luke XI. 27. (e) *En.* l. 610. On the other side, it was a Gallant Saying of Epaminondas, that amongst all the Good and Fortunate Accidents of his Life, none struck with so real a Pleasure, as that he won the famous Victory at *Leuctra*, before he had lost either of his Parents. Plutarch. Apothegm. p. 193. Ed. Wech. (f) Vid. *Cartes*, de *Passion.* Art. 83. *Cesar* de B.G. l. 3. c. 22. concerning the *Soldurii*. (g) De Bello Pers. l. 1. c. 3. (h) Vid. *Franc. Carron.* in *Descript. Japan.* c. 7. Of the *Aethiopi*ans see *Diod. Sic.* l. 3. c. 7.

useful and the most necessary things; So on the other hand, particular Men have Convenience of furnishing others with many things which they themselves do not want, and which therefore would turn to no use or account, unless they were thus bestow'd and dispens'd (a). And as Men thus appear to be so vast a Support and Help to each other, so may they likewise in as eminent a manner prove a mutual Plague and Mischief; and they do often actually prove so, either upon the Instigation of Brutish Passions, or being compell'd by the necessity of defending themselves from the Injuries and the Assaults of others. The Truth of all which, is clear to us from daily Experience, and hath been insisted on more largely by us in the first Chapter of this Book (b). But we desire it should be well observ'd, that in seeking out the true Condition of Men, we have assign'd the first Place and Influence to Self-love, not, as if each particular Man ought in every respect to prefer himself to all others, or to measure all things by his own private Advantage, establishing his separate Interest for his chief End and Design; but because a Man is by Nature sooner sensible of the Love he bears towards himself, than of that which he bears towards others, in as much as it is natural for him sooner to perceive his own Existence, than the Existence of others. And farther, because the Care of me and of my Affairs, belongs to no body so properly as to my self. For altho' I propose the Common Good for the Mark of acting, yet since I likewise am a part of Mankind, to the Preservation of which some Care is due, this Care must needs lie more especially and more forcibly on me my self, than on any Person else in the World.

XV. Thus much being granted, it is an easy matter to discover the Foundation of Natural Law. Man is an Animal extremely desirous of his own Preservation, of himself expos'd to many Wants, unable to secure his own Safety and Maintenance without the Assistance of his Fellows, and capable of returning the Kindness by the furtherance of Mutual Good: But then he is often malicious, insolent, and easily provok'd, and as powerful in effecting Mischief, as he is ready in designing it. Now that such a Creature may be preserv'd and supported, and may enjoy the Good things attending his Condition of Life, it is necessary that he be *Social*, that is, that he unite himself to those of his own Species, and in such a manner regulate his Behaviour towards them, as that they may have no fair reason to do him harm, but rather incline to promote his Interests, and to secure his Rights and Concerns (c). This then will appear a

Fundamental Law of Nature, *Every Man ought as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of Human Race in General.* For by *Sociableness* we do not here mean a bare Readiness or Propension to join in particular Societies, which may possibly be form'd on ill Designs, and in an ill manner; as the Confederacies of Thieves and Robbers; as if it were sufficient only to join our selves with others, let our Intentions be what they will. But by this Term of *Sociableness*, we would imply such a Disposition of one Man towards all others, as shall suppose him united to them by Benevolence, by Peace, by Charity, and so as it were, by a silent and a secret Obligation. It would therefore be a Charge most notoriously false, should any insinuate, that the Sociableness which we establish is perfectly indifferent, and hath an equal regard to Good Society and to Bad. We said it was the Duty of every Man to promote and to practise Sociableness *as far as in him lies*; because, for as much as it is not in our Power to oblige all other Men to behave themselves towards us, as they ought; we have done our Duty when we have omitted nothing which we were able to perform, in moving and engaging them to exercise the like Sociableness towards us. From all which it follows, that, since he who obliges us to any *End*, cannot but at the same time be suppos'd to oblige us to those *Means* which are necessary to the attainment of that *End*, *all Actions which necessarily conduce to this mutual Sociableness, are commanded by the Law of Nature, and, all those on the contrary, are forbidden, which tend to its Disturbance, or Dissolution.*

This Method of discovering the Law of Nature, doth not only appear upon Examination to be the most plain and easy, but it is likewise own'd for the most proper and genuine way by full Consent of the greatest part of Learned Men. There's no need of heaping up Testimonies and Authorities, but we may let *Seneca* (d) speak for all the rest. *By what other means (says he) are we preserv'd, but by the mutual Assistance of Good turns? This Commerce and Intercourse of Kindnesses, adds Strength and Power to Life, and, in case of sudden Assaults, puts it into a better Condition of Defence. Take us all asunder, and what are we, but an easy and an unequal Prey to Wild Beasts. Man by Nature is weak on every side, Society fortifies his Infirmary, and arms his Nakedness. Those two Excellencies of Reason and of Society render him the most potent of all Creatures, who would otherwise be obnoxious to Injuries from every thing about him. Thus by the help*

(a) *Senec. de Ira*, l. 1. c. 5. *Men are born to be Helps to each other. Marc. Antonin. l. 2. c. 1. We are born for Mutual Support and Assistance, and have each of us our proper Office to discharge for the General Benefit; as the Feet, the Hands, the Eyelids, the Teeth, or any Members of the Body.* (b) *Add. Dr. Cumberland. c. 1. f. 15, 16.* (c) *Cicero. de LL. l. c. 10. You will see clearly that Right doth not depend on Opinion, but on the Establishment of Nature; if you consider the necessary Union and Alliance of Mankind. Iamblich. Protrept. c. 20. That Men should live together, and yet without Law, is absurd and impossible; for at this rate, Society would be more dangerous and prejudicial to them, than if they dwelt separately and singly, without any Communication.* (d) *De Benef. l. IV. c. 18,*

of Union he commands the World, who, if divided would scarce be a Match for any living Rival. And it is Society alone, which gives him his Sovereign Sway over the Inferior Creation. This was the thing which first restrain'd the Violence of Diseases, which lent Crutches and Supports to Old Age, and administred Consolation to Grief. Take away this, and you cut asunder the Band of Union, the Vital String of Mankind (a).

There are other less Principal Causes, or rather Arguments of a Sociable Nature in Men. For Example, because nothing is more sad and disagreeable, than perpetual Solitude (b): Because, otherwise we should have no use of our Tongue, that most Noble Instrument, by the help of which Mankind have this Advantage above all living things, that they are able to express their inward Sentiments in articulate Sounds (c): Because every Good and Excellent Person is desirous of showing his Worthy Deeds amongst others. Amongst these Secondary Reasons of Sociality, is that which Tully takes notice of in his first Book of Offices, c. 44. *There are some People, says he, that fancy all Leagues and Associations amongst Men, to arise from the need that one Man hath for another, toward the supplying of our Natural and Common Necessities: Because (say they) if Providence hath deliver'd us from this Care of looking after Food, and Cloathing, by appointing some extraordinary way for the Procurement of it: no Man of either Brains or Virtue, would ever trouble his Head about Business, but wholly deliver himself up to the attaining of Wisdom. But this is a Mistake; for even in that condition, a Man would fly Solitude, and wish for a Companion in his very Studies: He would be willing to Teach and to Learn, to Hear and to Speak.* He talks to the same purpose in the third Book of that Work, c. 5. *It is more according to Nature, for a Man to undergo all sorts of Labours and Troubles for the Service and the Conservation (if it were possible) of the whole World, after the Example of Hercules, whom the Gratitude of Men hath plac'd for his Virtue among the Gods; than to live in Solitude, and not only free from Cares, but even wallowing in Pleasures and Plenty, with all the Advantages of Strength and Beauty over and above. This it is that makes all Great and Glorious Spirits prefer the former kind of Life to the latter.* What the same Author observes in his *Laelius*, is rather applicable to Particular Friendship than to Common Society: *Friendship first arose rather from Nature than from Weakness; rather from the Bent and Inclination of Mens minds, than from the Consideration of the Profit it would produce.*

We would have it observ'd, that the Fun-

damental Law of Nature establish'd by us, doth not disagree with that which Dr. Cumberland hath laid down in his Work on that Subject (d), concerning the Study and Endeavour after the Common Good, and the demonstrating all possible Benevolence towards all Men. For we, when we maintain that a Man ought to be Sociable, do at the same time intimate, that he ought not to make his own separate Good the Mark of his Proceedings, but the Benefit of Mankind in Common; that no Person should pursue his private Advantage, by oppressing or by neglecting other Men; and that none hath reason to hope for Happiness and Success, who either injures or despises his Neighbours.

From this Social Nature of Man, and from the Consideration that every one is born not for himself alone, but for all Human Kind, the Lord Bacon, in his Work of the *Advancement of Learning*, Book 7. c. 1. deduces several excellent Corollaries; as that an Active Life is preferable to a Contemplative one; that the Happiness of Man is to be sought for in Virtue, not in Pleasure; that the Fear of sudden and unexpected Accidents ought not to deter us, either for managing Publick Affairs, or from maintaining Society and Commerce with other Men: Lastly, that we ought not to withdraw our selves from Civil Business, out of a tender and scrupulous kind of Humour, or out of an Aversion to the usual Methods of Complaisance. In which place the same Noble Author farther observes, that there never was any Philosophy, Religion, Law, or Discipline found out in the World, which so far exalts the publick Good, and debases private Interest, as the Christian Institution appears to have done.

XVI. Let us consider now whether or no the Doctrine asserted by *Hobbes*, in his Book *de Cive* (e), clashes with what we have been delivering on this Head. Certainly he hath been interpreted with very great Rigour, and with very little Reason by some Learned Men, when they censure him for teaching, that *Nature did not institute Society, but Discord, amongst Men*, and as they hence infer, that *all kind of Human Society is against the Design of Nature* (f). Which is much the same thing, as if I should talk thus, *Speech is by Nature actually born with no Man; therefore all Speech which is afterwards learnt, runs against Nature's Intention.* Or thus, *All Men by Nature come into the World little; therefore it is against Nature that they should grow up to larger Dimensions.* Or, *Men are by Nature subject to Diseases; therefore it is against Nature, to make use of Diet, or Physick, to pre-*

(a) *Avng d' d' d' q,* &c. Men are the Defence of Men, Cities of Cities; as the Hand rubs the Hand and the Fingers wash the Fingers. All Safety is Confederacy. Plin. N. H. 1. 9. c. 46. Add. Marc. Antonin. 1. 4. f. 4. & 1. 5. f. 16. & 29. where he calls Society the Good, or Happiness of a Rational Creature; as it is frequent with him to term Man a Creature Sociable by Nature. Vid. & 1. 7. f. 55. Liban. Declam. 19. p. 499. Nature appointed Man to be a Companion, and an Assistant to Man. (b) Cicero de Fin. 1. 3. c. 20. No Man would be willing to lead a Life of Solitude, though in an Infinity of Delights and Pleasures. Whence 'tis easy to apprehend, that we are Born for Natural Conjunction and Community. (c) Vid. Quintil. Institut. 1. 2. c. 16. (d) C. 1. f. 4. (e) C. 1. f. 2. (f) Comp. Coving. in Jure Civili, c. 14. in fin.

vent or to cure them. We must confess that this Notion of *Hobbes*, looks at first view extremely paradoxical; especially if a Man doth not consider diligently the Ambiguity of the Word *Nature*. But for fear any one should hereafter be cheated by the same doubtful Philosophy, and led fatally into Error; let us first observe, that Self-love and Sociableness ought by no means to be made Opposites; but those different Inclinations are in such a manner to be temper'd, that the former do not overthrow or disturb the latter (a). When by the Enormity of wild Lusts this Temperament is broken, and so all take up a Resolution of seeking each his own Advantage to the Injury of others; then arise those Heats and Contentions which divide and confound Mankind. For the avoiding which, the bare Care of our private Safety commands the Observation of Social Laws, since we cannot ensure our own Persons without their Assistance and Protection. As for *Hobbes's* Demonstration, in which he Ingeniously enough deduces those Laws which we call Natural from the Principle of Self-Preservation, the first Remark that we shall offer concerning it is this; that, such a way of Proof doth indeed clearly enough make out, how conducive it is to the *Safety* of Men, that they act according to those Dictates of Reason. But it is not an immediate and direct Conclusion to say, a Man hath a Right of using those means for his Preservation, therefore he is oblig'd as it were by a Law to observe and to pursue them. For to give those Dictates of Reason the Force and Authority of Laws, there is need of proceeding on some other Principle, than what he lays down.

In the next place, great Care is to be taken lest any should conclude from such Arguments and Positions, that when he hath once ensur'd his own Safety, and set himself out of danger, he need not trouble himself about the Security of other Men; or that he may insult how he please, over such a Person as doth not contribute to his Quiet and Happiness, or hath not Strength enough to disturb it. For we therefore give Men the Name of sociable Creatures, because they of all Living things are the fittest and the most able to promote the Advantage of each other: Neither is any inferior Creature capable of receiving so great Benefit (1) from Man, as Man himself. Again, the Excellency and Perfection of any particular Person rise the higher, the more he deserves of the Community by his publick Benefactions; and Works of this kind are reckon'd the most noble, being suppos'd to proceed from the greatest Wisdom: Whereas any worthless

Wretch, or a meer Fool, may be able to trouble or to hurt his Fellows. Besides, supposing every Man's private Advantage were establish'd for the Mark of his Actions, if many Persons should happen to fix that private Advantage on the very same thing (2), there will either be a necessity of saying that these many Desires including a plain Contradiction are consistent with Reason, which is the highest Absurdity: Or, since none can pretend that his Desire should have the Preference of the rest, we shall be forc'd to admit it for a Truth, that no Man ought so to make his own Profit the Aim of his Proceedings, as not to consider and to regard the Good of others. Farther, whoever attempts to draw every thing to himself and to his own Interest, without looking towards his Neighbour, will not only labour in vain, (it being impossible that all Persons and all things should be dispos'd according to the contradictory Desires and Wills of Particular Men) but he will likewise invite others to plunder and to destroy him. Moreover, if that only can be said to be *Good* to a particular Person, which conduces to his separate Interest, it follows, that in respect of all other Persons it must be *Evil*, in as much as their Interest or Profit is not further'd by it: And so what one covets and pursues, all the rest will oppose and keep off, which cannot but raise perpetual clashing and contending amongst Men (b). Lastly, although another Person hath done me neither Good nor Hurt, and though he hath nothing in him to raise either my Fear or my Love; yet Nature obliges me to esteem even such an one as my Kinsman and my Equal. Which Reason alone, (had we no others) were sufficient to enforce the Practice of a Friendly Society and Correspondence amongst Men. And upon this Consideration, supposing there was a Nation in the World maintaining Peace and Justice amongst themselves, and of such mighty Strength as to be formidable to all others, and so not restrain'd from hurting them by the Fear of a like return; yet should this Nation or People assault, drive, kill, or drag, into Slavery their weaker Neighbours, as often as they thought convenient, we should pronounce them actually guilty of a Breach of the Law of Nature. And yet (as we suppose) these People might *preserve* themselves, whether they allow'd any Rights to others, or not (c). In the same manner, none will commend the Life and Profession of Robbers, because they exercise some little Justice towards those of their Gang, because their Captains divide the Prizes equally amongst them, and because he who either openly or secretly robs one of the Crew, is (even by Thieves,) ad-

(a) *Arrian. Epictet. l. 1. c. 19. God has dispos'd the Nature and Constitution of Rational Creatures after such a manner, that they can't advance their Private, without contributing something to the Publick Interest. Community doth not exclude the Pursuit of Private Advantage.* (1) Our Author must mean *Harm*, for to say *Benefit*, would not be agreeable to right Reasoning. (2) Again, our Author is guilty of an Inadvertency, for instead of saying, *on the very same thing*, he doubtless meant to say, *on things very different from one another*, as appears from his Reasoning afterwards. (b) Vid. *D. Cumberland. c. 5.* where he prosecutes this Argument at large. *It is a Poor Centre of a Man's Actions, himself: says my Lord Bacon, Ess. 23.* (c) *Cicero de Fin. l. 3. c. 19. A Betrayer of his Country is not more foully scandalous, than he who deserts the Common Benefit or Safety for the Procurement of his own.*

judg'd unworthy of farther Partnership and Society with them (a). This Rule of extending our Care beyond our own Persons, is so much the more diligently to be attended to, the more evident it is, that a Man of more Strength and Power than ordinary, is likely to be tempted to the Violation of Natural Law, by the Thoughts of his own Self-sufficiency; that since his private Safety is abundantly provided for, he need not give himself the trouble of maintaining Peace and Friendship with his Neighbours.

But to conclude this Point, as the Care of our own particular Preservation doth not exclude a Concern for Society, so neither doth a kind regard to Society suppress our Affection to our Persons, but they are both extremely agreeable and consistent, as appears sufficiently from the Rule propos'd by our Saviour, when he commands us *to love our Neighbours as our selves* (b). Indeed Reason plainly informs us, that whosoever hath a hearty desire for his own Security must not, cannot neglect the Care of his Fellows. For, since our Safety and Happiness depend for the most part on the Benevolence and on the Assistance of others, and since the Nature of Men is such, that for Benefits conferr'd they expect a return of Kindness, and when no such return is made, refrain from farther Favours: No Person in his Wits can stick so close to the Pursuit of his separate Advantage, as to divest himself of all regard to the rest of the World: But rather the more rationally he loves *himself*, the more earnest he will be in endeavouring by Good turns to procure the Love of other Men. For no one hath any reason at all to hope, that Men will voluntarily contribute towards advancing *his* Happiness, whom they know to be malicious, perfidious, ingrateful, and inhuman, and that these wicked Practices are the Requitals which he will make for their Bounty: on the contrary it should be expected, that they will all join together in ridding the Earth of such a Monster, or at least in restraining him from doing farther Mischief.

XVII. Neither is the following Argument which the *Hobbiſts* make use of at all conclusive; 'Particular Men when they join Society or Company with certain others, have regard to some peculiar Good or Benefit, which is likely to redound to themselves: therefore Human Nature in General is not determin'd to Society, or, I am not oblig'd to behave my self in a social manner towards him, from whom I do not expect some particular Ad-

vantage. For thus much indeed is evident, that the reason why certain Men join in any certain Species of Society, is either because they have a peculiar Resemblance and Agreement in Disposition of Mind, or in other Qualities; or else because they think they shall better obtain some end which they drive at, amongst these Persons than amongst others. But, (besides that, regularly speaking, no Man hath the Property of belonging to no particular Society,) even amongst Men who are united only by the common Tie of Humanity, that general Sociableness and Peace are to be observ'd and cultivated; which implies little more than this, that they abstain from hurting one another unjustly, and that as far as their stricter and particular Obligations leave room, they mutually promote and communicate their Interests and their Goods.

XVIII. Hence it is clear what Answer should be made to that Objection, *if one Man lov'd another naturally, that is, upon account of his being a Man, then there can be no reason given, why every one should not love every one equally, all being equally Men: Or why a Man should chuse to frequent their Company most, from whom he receives either greater Honour or greater Profit.* In this Fallacy, common Society is confounded with particular and stricter Confederacies, common Love, with such as arises from peculiar and singular Causes. For to deserve that common Affection, no Property is requir'd but barely the being a Man. Nature having for the Reasons above assign'd, really constituted a general Friendship amongst Men, from which no Person is excluded, unless he hath rendred himself unworthy of it by his monstrous Villanies. Now although by the Good Disposal of the All-wise Creator, our Natural Laws are so fitted to Human Condition, that the Observation of them is join'd with the Interest and Advantage of the Observers; so that even this common Love is exceedingly profitable to Mankind: Yet in assigning the Cause and Reason of it, we are wont to have recourse, not to the Benefit proceeding from it, but to the General Nature in which it is founded. For Example, if we are to give a Reason why one Man ought not to hurt another, we do not usually say, because an abstaining from mutual Violence is profitable, (although it is so indeed in the highest degree) but, because the Person being another *Man*, that is, another Animal related to us by Nature, it would be a Crime to offer him any harm (c).

(a) Vid. *Cicero*. Off. 2. c. 11. (b) *Matth.* XXII. 39. 'Tis a Saying of *Chryſippus*, recorded by *Tully* in his III<sup>d</sup> Book of *Offices*, c. 10. In the running of a Course, a Man may be allow'd, nay he ought, to stretch and contend his utmost for the Victory: But he must not, on any account, trip up his Antagonist's heels, or thrust him out of the Lists by main Force. So in Life, it is very fair and allowable, for every Man to get, by honest means, whatever makes for Use and Advantage; but 'tis by no means Lawful that he should take it away from others. (c) *Lucian* in *Amoribus*, Tom. 1. p. 893. Ed. *Amst.* We do not, like Brute Creatures, affect Solitary Meditations, but joining together in a Friendly Society, we make our Joys to be the greater and our Affections the less, by being mutually communicated: And our Pleasures having many Sharers in them, fill us with the truer Satisfaction and Delight. *Dio Chryſostom.* (Orat. 12.) tells us, that the Reason why *Jupiter* hath often the Title of *φίλιος* & *ἑταίριος*, The Kind and the Friendly, is because he gathers, as it were, all Mankind into Unity and Society, and would have them prove Friends to each other, without the least mixture of Hatred or Opposition. In like manner (says he) he is call'd *ξένιος* or Hospitable, because we ought really to think no Man a stranger to us.

Yet besides this Common and Universal Affection, some Circumstances may make a Man love one Person in a higher degree than another: Suppose because their Inclinations particularly agree, and their Heads lie the same way; or because this Person is more able or more willing to promote his Advantage; or because their Race or Original makes them allied to each other. As to that Observation about Mens being more willing to frequent such Company, where they find themselves prefer'd to others in Honour and in Profit; the reason of the thing is this, because every one must naturally love his own Interest, if he have Wit enough to understand it. But this Love is by no means repugnant to the sociable Nature of Mankind, if it doth not rise to such a guilty height, as to disturb the Harmony and Agreement which is universally to be maintain'd amongst Men. For Providence did not for this reason give us a sociable Nature, that we should therefore neglect our selves and our own Affairs. But rather we are studious of Society on this very account, that by a mutual Communication of Assistance and of Goods, our own Concerns may be manag'd with more Conveniency, and with more Success. And altho' when a Man unites himself to any particular Society, he hath a prime Regard to his own Interest, and but a secondary one to the Interest of his Companions; not being able to carry on his own Matters without such a Conjunction; yet this doth not hinder him from being oblig'd, so to pursue his private Ends and Advantage, as not to injure either the Corporation in general, or any single Member of it; and sometimes to postpone his separate Good, for the Advancement of the common Benefit.

What is urged about the Original of great and lasting Societies, or *States*, (it being said that they are not deriv'd from mutual Benevolence, but from mutual *Fear*; by which word they mean any kind of Precaution, or Foresight,) is entirely beside the purpose. For as the Question doth not at present proceed about the rise of Civil Society in General; so farther, it is highly agreeable to our Natural Condition, that whereas single Persons, or a few join'd in Confederacy might lie perpetually expos'd to the Insults of such Wretches as pursue their private Ends without regard to their Neighbours; many should unite in a Body and so strengthen their Guard against farther Assaults and Mischiefs. Neither is it indeed absolutely necessary to the proving any Society agreeable to Nature, to say that it arose entirely from Mutual Benevolence. And yet even this Principle must be allowed some little Share at least in the forming of States, since the Persons who first begin them are commonly join'd on the account of Kindness and Good liking, though many others may afterwards engage in the same Union, by the In-

ducement of Fear. But as for this *Fear* which is look'd on as the Cement of States, as likewise for that Dispute, whether or no Man by Nature be ζῶον πολιτικόν, we shall examine them more at large when we come to enquire into the Rise and the Original of Commonwealths.

XIX. This Principle which we have establish'd for deducing the Law of Nature, as it is the most Genuine and the most Clear, so we take it to be in such a high degree adequate and sufficient, that there is no Natural Obligation bearing a regard to other Men, the reason of which is not terminated here, as in the chief Head and Fountain of Duty. Yet, as we shall hereafter show, to give these Dictates of Reason the Force and Authority of Laws, there is a necessity of supposing that there is a God, and that his Wise Providence oversees and governs the whole World, and in a particular manner the Lives and the Affairs of Mankind. For we cannot by any means subscribe to the Conjecture which *Grotius* starts in his *Prolegomena*, or Introduction, N. XI. *That the Laws of Nature would take place, should we (as we cannot without the most horrid Impiety) deny either the Being of God or His Concern in Human Business.* For should any Wretch be so horribly senseless as to maintain that wicked and absurd Hypothesis in the rankest way, and so hold Men to have deriv'd their Being wholly from themselves; according to them, the Edicts of Reason could not rise so high as to pass into a Condition of Laws; in as much as all Law supposes a Superior Power. 'Tis a good Observation of *Tully*, *De Naturâ Deorum*, l. 1. c. 2. *I know not (says he) but that upon taking away Religion and Piety towards the Gods, all Faith and Society of Human Kind, and even the most excellent Virtue of Justice must be banish'd the World* (a). Unless the Rules would be observ'd out of a bare regard to Interest, as those are which the Physicians prescribe in the Regimen of Health. *Grotius* seems to have taken the Hint of that Notion from a Passage in *Marcus Antoninus* (1); *If (says the Emperour) the Gods do not consult about any of our Affairs, which the vilest Impiety can scarce believe; why then 'tis fit that I should consult or deliberate about my own Concerns: And all my Deliberation must be concerning what is most Profitable for me. Now that is most Profitable to every one, which best agrees with his Nature and Constitution. And my Nature is to be Rational, and to be a Sociable Member of some City or State. My City and Country, as I am Antoninus, is Rome, as I am a Man, is all the World: Those things therefore which are Profitable to these Communities are the only things which are Good and Expedient for me.*

As to what a certain Learned Man objects, that particularly the Virtue of *Fortitude*, can-

(a) *Liban. Declam.* 3. p. 250. c. Ed. Paris. *Where there is no Honour of the Gods, there can be no Fidelity amongst Men.* (1) See his *Moral Reflections*, B. 6. f. 44.

not be demonstrated from our Principle, unless we farther suppose the Immortality of the Soul; since otherwise there would be no Reward to a Man who should throw away his Life on a good Cause: This will require no great pains to answer. For although really to deny, or so much as to call in question so certain a Truth be extremely impious; yet without bringing this High Point into the Argument, it is possible to demonstrate, that a Soldier may fairly be commanded to fight to Death in the Behalf of his Country. For, besides that, there appears yet no clear Reason why we must sacrifice (as it were) every good Action to some external Reward; thus much is universally agreed on, that 'tis in the power of the Sovereign to arm the Subjects, and to lead them out against the Enemy in defence of the State; and farther, when they find it requisite to forbid every one under pain of Capital Punishment, to quit his Station by Flight. Now of two Evils the lesser is most certainly to be chose. But it is a less Evil to fight with extraordinary Danger, and even to the last Breath, than to suffer unavoidable Death for running away. And therefore that Soldier must be the greatest Fool as well as the greatest Coward, who would not chuse rather to fall honourably by the Enemies hand, having first anticipated his own Revenge, than to deliver up himself to be ignominiously dispatch'd by the Executioner (a). It seems sufficient that a Man fight with all his Force and Ability, let his Inducement to this Behaviour be what it will. Nor is it requisite to the Preservation of States, or of Society amongst Men in general, that every particular Person should be endued with such a Firmness of Mind, as the Terrors of Death cannot shake or overcome; all Souls not being capable of this Noble pitch of Valour. Besides, the use of Fortitude doth not only discover it self in bearing Death undauntedly upon extreme occasion; but is chiefly employ'd in vigorously withstanding, and in driving off the Danger of Death, as it presses on us. Many Difficulties are not otherwise to be avoided than by undergoing others of almost equal Hazard: And Fate sooner overtakes the Coward (1), than it masters the Valiant. It is farther observable, that setting aside the Supposition of the Soul's Immortality, it doth by no means appear that the chief End and Happiness of Man consists in Pleasure. For besides that in the Doctrine of Natural Law, treated of in this manner, the Immortality of the Soul is by no means denied, but only abstracted from it; it's plain that the Pleasure of the Body, in which *Epicurus* is vulgarly thought to have plac'd his *Summum Bonum*, is so far from promoting,

that it rather contradicts and hinders the Preservation, the Sociableness, the Peace and the Tranquillity of Mankind. But the Genius and the Scope of Christianity differs vastly from these meer Natural Schemes; and the Holy Apostle had good reason to affirm, that *if in this Life only we had hope in Christ, we should be of all Men the most miserable.* 1 Cor. 15. v. 19.

XX. But to make these Dictates of Reason obtain the Power and the Dignity of Laws, it is necessary to call in a much Higher Principle to our Assistance. For altho' the Usefulness and Expediency of them be clearly apparent, yet this bare Consideration could never bring so strong a Tie on Mens Minds, but that they would recede from these Rules, whenever a Man was pleas'd either to neglect his own Advantage, or to pursue it by some different Means, which he judg'd more proper, and more likely to succeed. Neither can the Will of any Person be so strongly bound by his own bare Resolution, as to hinder him from acting quite contrary, whenever the Humour takes him. And altho' we should suppose many Persons standing in a Natural Liberty, and combining to keep these Precepts, yet the Force of them could then last no longer, than the Agreement from whence they deriv'd it. Nor would the Obligation then only cease when all the consenting Parties should please to alter their Minds; (as is now the manner of receding from mutual Covenants by common Consent;) but even during the General Agreement, the Power of obliging would be wanting to the Compact: In as much as we suppose, *that Dictate of Reason which commands us to stand to our Bargains and Promises,* not yet to have obtain'd the Authority of a Law; and therefore 'tis at every ones Pleasure to renounce the Covenant, whether the other Persons concern'd are willing or not. Lastly, the meer Force of Human Command seems insufficient to invest these Dictates with the Power of Obligation. For since no such Command could take place otherwise than by the Intervention of Covenants, and since Covenants, owe all their Strength to some Law, it doth not appear how there could arise any Human Sovereignty capable of imposing Obligations, unless the Dictates of Reason were beforehand receiv'd for Laws. Or should we grant the Fancy of some, that Human Government depends only on Human Consent, and then make these Rational Duties be enjoin'd the Subjects like other Laws; yet even thus they would obtain no more Power than Positive Constitutions, which depend on the Will of the Legislator, both as to their Original, and their Duration (b). It is therefore on all ac-

(a) *Iamblich. in Protrept. When the Valiantest Men sustain Death, they do it for fear of greater Evils.*

(1) *Horat. l. 3. Od. 2. v. 14, &c.*

*Mors & fugacem persequitur virum;  
Nec parcat imbellis Juventa  
Poplitibus, timidoque tergo.*

(b) *Comp. Selden de J. N. & G. l. 1. c. 7.*

counts to be concluded and to be maintain'd, that the Obligation of Natural Law proceeds from GOD himself, the Great Creator and Supreme Governour of Mankind; who by Virtue of his Sovereignty hath bound Men to the Observation of it. And thus much may be demonstrat'd by the sole Light of Natural Reason. Here then we lay it down as a Granted Truth, that GOD ALMIGHTY is the Creator and Governour of the World, since it hath been shown with so much evidence by Wise and Learned Men, and since no Person of Sense and Understanding, ever call'd it in question (1). Now this Supreme Being having so form'd and dispos'd the Nature of things and of Mankind, as to make a Sociable Life necessary to our Subsistence and Preservation; and having on this account indued us with a Mind capable of entertaining such Notions as conduce to this End, and having insinuated these Notions into our Understandings by the Movement of Natural things, deriv'd from Him the first Mover; and likewise most clearly represented to us their necessary Connexion and their Truth: Hence it follows, that it is the Will of GOD, Man should frame his Life according to that Disposition and Method which he seems peculiar to have assign'd him, above the Life of Brutes. And since this cannot otherwise be achiev'd and compass'd, than by the Observance of *Natural Law*, it must be suppos'd that GOD hath laid an Obligation on Man to obey this Law, as a Means not arising from Human Invention or changeable at Human Pleasure, but expressly ordain'd by GOD himself for the Accomplishment of this Design. For when any Sovereign enjoins his Subject the pursuit of such an End, he is at the same time suppos'd to oblige him to make use of those Means, without which the End cannot be attain'd (a). Nor is this the only Proof of Man's being oblig'd to a Social Life by the Command of GOD, that as the Condition of Mankind stands at present, we could not support and secure ourselves unless this Perswasion were firmly rooted in our Minds; and that by Order of the Divine Providence it so falls out, that by a Natural Consequence our Happiness flows from such Actions as are agreeable to the Law of Nature, and our Misery from such as are repugnant to it: But it is farther confirm'd by

this Consideration, that in no other Animal there is discoverable any Sense of Religion, or any Fear of a Deity (2). To which may be added, that tender Sense of Conscience inherent in the Minds of Men that are not corrupted and debauched with Vice; by which they are convinc'd, that to sin against Nature's Law, is to offend Him, who hath a Sovereign Power over Mens Souls, and who is to be fear'd, even when we do not apprehend any Danger from Human Punishment (b).

The Laws of Nature would have a full and perfect Power of binding Men, altho' GOD ALMIGHTY had never propos'd them anew in his Reveal'd Word. For Man was under Obligation to obey his Creator, by what means soever he was pleas'd to convey to him the Knowledge of his Will. Nor was there any absolute necessity of a particular Revelation to make a Rational Creature sensible of his Subjection to the supreme Author and Governour of things. No one will deny but that those Persons who were not acquainted with the Holy Scriptures, did yet sin against the Law of Nature: Which we could not affirm, did this Law derive its force from the Promulgation made of it in the Sacred Writings. On this account we can by no means admit of that Notion started by *Hobbes* (c), *Since those Laws* (says he) *which we call Natural, are nothing else but certain Conclusions apprehended by Reason, concerning things to be done and things to be omitted; And since Law in a proper Sense is only the Speech of him, who by Virtue of his Right commands Men to execute or to abstain from some Performances; therefore they are not Laws as they proceed from Nature, but only as they are enacted by GOD in Scripture.* For we do not take it to be essential to a Law, that it be convey'd to the Subject's notice in the form and manner of a Proposition; but we reckon it sufficient that the Will of the Sovereign be gather'd and understood any way, whether by internal Suggestion of the Mind, or from the Contemplation of our State and Condition, and of the Nature of those Affairs and Transactions which are to engage our Life. And indeed he himself acknowledges as much in another part of the same Work (d), where he observes that *the Laws of GOD are declar'd three ways; first by the tacite Dictates of Right Reason, &c.* Besides, the Laws of Na-

(1) The Strongest and most Natural proofs of this Fundamental Truth may be found in *Lock's Essay of Human Understanding*, B. IV. c. 10. f. 9, &c. See *Le Clerk's Treatise of Pneumatology*, Part the third, c. 1. (a) Vid. *M. Antonin.* l. 9. f. 1. (2) Vid. *Protag. de Platon.* p. 224. Ed. *Wech. Ficin.* (b) 'Tis remarkable what *Tacitus* says (*Ann.* 6. c. 6.) of *Tiberius*. His own Crimes and Villanies were by his Conscience turn'd into the greatest Punishments to him. And it was not without Reason, that the Great Master of Wisdom us'd to affirm, that could we open the Hearts of Tyrants, we should discover the Strokes and Wounds of Guilt: The Body not being more cut and tormented with Stripes, than the Mind is with Cruelty, Lust, and ill Designs. *Cicero de Finib.* l. 1. c. 16. If there be any who think themselves sufficiently guarded and secur'd against the Discovery of Men, they yet dread the Majesty of the Gods: And judge all those Cares and Disquiets which Night and Day prey upon their Minds, to be sent from Heaven, as a present Punishment for their Crimes. *Seneca* (*in Laëtant.*) l. 6. c. 24. Vain Mad-man! what can it profit thee to have had no Witness of thy Villany, when thou always carriest a Conscience about with thee? *Albrius de Deorum Imagin.* A wicked Man is never Master of his own Countenance. *Add. Juvenal, Sat.* 13. The Advantage of a Good Conscience *Martial* hath thus happily express'd, l. 10. Ep. 23.

*Ampliat aetatis spatium sibi vir bonus: hoc est Vivere bis, vita posse priore frui.*

Good Men live twice: It doubleth every Hour To look with Joy on that which pass'd before.

*Add. Philostrat. de Vit. Apollon.* l. 7. c. 17. (c) *De Civ.* c. 3. f. ult. (d) C. 4. f. 3.

ture as they are deduc'd by Ratiocination, cannot be apprehended otherwise than in the manner of Propositions, and therefore in this respect they may be allow'd to bear that Name. But as in Civil Laws it matters not, whether they be promulgated in Writing, or *viva voce*; so the Divine Law is of equal Obligation, whether it is discover'd to Men either by GOD Himself in a visible Shape, and with the Resemblance of a Human Voice, or by Holy Men peculiarly inspir'd from Heaven; or whether, lastly, it be work'd out by Natural Reason from the Contemplation of Human Condition. For Reason, properly speaking, is not the Law of Nature it self, but the Means, upon a right Application of which that Law is to be discover'd. Nor doth the manner and the method of promulgating a Law belong to its inward Essence and Constitution. Farther, altho' it seem a more clear and a more compendious way of revealing ones Will to another, to force it upon his Senses by express Words and Speeches: Yet that is likewise reckon'd to be sufficiently reveal'd, which we must unavoidably discover, if we make use of the occasion offer'd and keep the way that we are put into. And thus Man, who by the Bounty of his Creator, enjoys the Faculty of comprehending both his own and other Mens Actions; and of judging whether or no they are agreeable to Human Nature, cannot but take occasion (supposing there are more Men in the World besides himself) to observe and consider how some of those Actions do really thus agree, to the Inclination and to the Condition of Mankind (a).

Altho' to render a Law obligatory, there is a necessity of making it known to the Subject; and altho' to deduce the Law of Nature from the Suggestions of Reason, and to apprehend its Foundation, and its necessary Connexion with the State of Humanity, be not the Gift of every Person; Yet hence it can neither be pretended, that this Law doth not oblige all Men, or that it may not be said to be known by the Light of Reason. For to give a Law a binding Force, a Popular and simple Knowledge is sufficient; nor is an artificial Demonstration and Deduction absolutely requisite to this purpose. And altho' 'tis very probable that the chief Heads of Natural Law were expressly deliver'd by God Almighty to the first Mortals, and were from them communicated to others by Custom and Institution; yet the Knowledge of that Law may nevertheless be stil'd *Natural*, in as much as the necessary Truth and Certainty of it may be drawn from the use of Natural Reason. At the same time, because those Propositions which represent to us the Law of Nature, are insinuated into Mens minds from the Contemplation of the Nature of things; on that account they are justly attributed and referr'd to GOD, the Author of Nature (b).

The Wifest of the Old Heathens acknowledg'd the Authority of Natural Law, and deriv'd it rightly from GOD. Thus *Plutarch* (c) *Ταυτὸν ἔστι τὸ ἐπιταῖσι θεῶν, καὶ τὸ περὶθεταῖσι λόγοις.* *To follow GOD and to obey Reason is the same thing.* But *Tully* hath left the most Noble Testimony for our purpose, as it is cited out of his Books *de Republicâ* by *Laëtantius* (d). *There is indeed (says he) a Law agreeable to Nature, and no other than Right Reason, made known to all Men, constant and perpetual; which calls us to Duty by Commands, and deters us from Sin by Threats; and whose Commands and Threats are neither of them in vain to the Good, tho' they may seem of little force to the Wicked. This Law we are neither allow'd to disannul, nor to diminish; nor is it possible it should be totally revers'd; the Senate or the People, cannot free us from its Authority. Nor do we need any other Explainer or Interpreter of it besides our selves. Nor will it be different at Rome and at Athens, now and hereafter; but will eternally and unchangeably affect all Persons in all Places: GOD Himself appearing the Universal Master, the Universal King. 'Tis He, who is the Inventor, the Expounder, the Enacter of this Law; which whosoever shall refuse to obey, shall fly and loath his own Person, and renounce his Title to Humanity; and shall thus undergo the severest Penalties, tho' he escape every thing else which falls under our common Name and Notion of Punishment.* *Sophocles* speaks very honourably on the same Subject in his first *Oedipus*, Act 3d, p. 187. Ed. *H. Steph.*

————— νόμοι ὑψηλοῦ, &c.

————— The lofty Laws  
Deriv'd from Heaven and High *Olympian Jove*,  
And not the mean Device of Mortal Men.

*Mr. Selden*, in his Discussion of this Point, hath shown (e), that altho' the Gentiles did acknowledge the chief Heads of Natural Law to be sometimes violated thro' the corrupt Manners of Men; and to be (as it were) oppress'd and stifled by wicked Ordinances and Constitutions; yet they were at the same time fully perswaded that their *τὸ αὐτοσχεῖον*, or what was really just and fit to be done, did by order of the Gods perpetually remain the same, and hold the same Force of Obligation. Whence arose that common Opinion amongst them of the Punishment of Wicked Men in another State; when they had been guilty of any monstrous Offence against the Law of Nature. And since they thus believ'd the Gods to be the Avengers of its Violation, we may take it for granted that they thought them too the Authors and Founders of its Authority. On the other hand, such of them as had any Sense or any Virtue, did as fairly suppose, that Good Men exercising Piety never fail'd of the

(a) Add. Dr. Cumberland, c. 1. f. 11. & c. 5. f. 1. (b) Add. Dr. Cumberland, c. 1. f. 10. (c) De Auditione. (d) L. 6. c. 8. (e) De J. N. & G. l. 1. c. 8.

peculiar Countenance and Consideration of Heaven. Thus *Iamblicus* (a) "Ἐν τῷ ἐν ἡμῶν διανοεῖται θεῖ ἀληθές, &c. *We must take this therefore for a certain Truth, that nothing properly evil shall happen to a Good Man, either in this Life or after it. Nor are Affairs and Concerns of such a Person neglected by the Immortal Deities.* And *Euripides* (1), "Εἰς τὰς οἰαῖς εὖ εὖ εὖ, &c. *Good Men do at last obtain what their Virtue hath deserv'd: But Evil Men shall never arrive at any tolerable degree of Happiness.* But Mr. *Selden* farther shews (2) it to have been a constant Opinion amongst the Primitive Christians, that in the Interval betwixt the Creation and the Publication of the Decalogue, those Natural and Universal Laws were given to Mankind, which were afterwards intertied in the Mosaical Constitutions. Hence was drawn that most excellent Observation of St. *Chrysostome* (b), that to the Commandments about the honouring of Parents, about Murder, about Adultery, and about Theft, GOD was therefore pleas'd to add no reason; because those Duties were already well known and understood, as being main Points of the *Law Natural*; whereas to the Ordinance concerning the Sabbath-day, a reason of the Precept was designedly affix'd, upon account of its being positive and arbitrary (c). To conclude, all Legislators have believ'd that their Laws of what kind soever would derive the greatest Strength and Authority from the Succours of Religion: As Appears from their Solemn Custom of ushering in all their Constitutions, with the Worship of the Gods (d).

XXI. It is well worth our while to treat more distinctly and more carefully concerning the *Sanction* of the Law of Nature. And to this purpose, besides what we have formerly deliver'd about the Sanction of Laws in General, we will first of all observe, that the Goods and Evils which happen to Man, may be both divided into three Ranks or Classes. And as for the Goods, some of them proceed, either from the free and liberal Donation of the Creator, or from the voluntary Benevolence of other Men, or from the Industry of the Acquirers, to which Industry they determin'd themselves by their own free Choice. And it is plain, that this first sort are not owing to the Observation of the Laws. Other Goods there are which flow by a Natural Consequence, from some Actions which the Laws command: The Creator having been pleas'd to assign to such and such Performances of the Laws such perpetual and natural Effects, productive

of the Good and Profit of Mankind. And these are those which Dr. *Cumberland* calls *Natural Rewards*. A third kind of Goods proceed from some certain Actions, either the Pleasure of the Legislator, or by the Covenant and Agreement of Men; of which the former are call'd κατ' ἐξουσίαν, *Rewards*, or Arbitrary Returns, the latter more properly *Wages*. In the same manner may Evils be divided. Some of them follow the very Nature and Condition of Men; (if we abstract the first Cause and Original of that Condition;) or they happen without the particular Default of him who suffers them. Which we may, in a sound Sense, call *Fatal Evils*, opposing the Word Fate, not to the Divine Disposal, but to the peculiar Faultiness of the Person on whom these Evils light. Others do, by Natural Consequence and Connexion, proceed from Sins; which are by some Authors term'd *Natural Punishments*. Lastly, others there are which arise from Sins, by the peculiar Determination and Disposal of the Legislator beyond the manner of Natural Effects: In which the Quality, the Manner, the place and time of the Evil depend on the Legislator's free Pleasure. And these are what we would properly call *Punishments*, or (in a looser Sense of the Word) *Arbitrary Punishments*.

Thus much being premis'd, we proceed to remark, that altho' the Omnipotent Creator, might by virtue of his Sovereign Right have requir'd our Obedience, without making any good Fruit proceed thence to our own Advantage: Yet it hath pleas'd his Infinite Goodness, so to order and constitute the Nature of Things and of Mankind, that by a kind of Natural Connexion some Goods should attend the Observance, and some Evils the Transgression of Nature's Laws. Thus a constant Obedience, is follow'd by Serenity and Security of Conscience, join'd with a good and certain Assurance; by a good Frame and a settled Tranquillity of Mind (3); by the Preservation of the Body from many Evils, not fatal: Besides an infinite number of advantages, which may be obtain'd by the mutual Benevolence and Good Offices of other Men (e). On the other hand from the Violation of the same Laws, arise by a Natural Connexion, Disquiet of Conscience, Disturbance and Degeneracy of Mind, Destruction of the Body, and numberless Evils, which may be occasion'd by the withdrawing of other Mens Assistance, or by the Violence of their provok'd Revenge (f).

(a) *Protrep.* c. 13. (1) *Euripid. Ion.* v. 1620, &c. (2) See B. VII. c. 9, 10. (b) *Orat.* 12. ad Pop. *Antioche.* (c) *Add. Selden* *ibid.* c. 9. & l. 7. c. 9, 10. (d) See the Form which introduceth *Zaleucus's* Laws in *Diod. Sic.* l. 2. c. 21. (3) See *Arch-Bp. Tillotson's* 38th Serm. Fol. p. 451, &c. See likewise p. 51. and 74th, &c. (e) *Seneca* (de Irâ l. 2. c. 13.) calls the Unmov'd Tranquillity of a Happy Mind a *Great Reward*. *Idem* *ibid.* *The way to Happiness is plain and easy. For what can be more comfortable to the Mind than Calmness? What more troublesome than Passion? What more at rest than Clemency? What so full of Business as Cruelty? Modesty and Chastity enjoy a perfect Leisure, whilst Lust is ever tir'd with laborious Pursuits. To Conclude, the Possession of every Virtue stands us in little Cost or Trouble, but Vices are all Chargeable to be kept.* *Add. de Irâ,* l. 2. c. 30. & ult. & l. 3. c. 5, 26. See the Story of *Hercules* at the two Ways in *Xenophon. Apomnem.* l. 2. *Prov.* VIII. 19. X. 9. XI. 3, 5, 10, 18, 19, 25. (f) *Marc. Antonin.* l. 9. f. 4. *He that acts unjustly really injures himself by his Wickedness.* 'Tis a Saying of *Tully* ad *Attic.* l. 9. Ep. 12. on a Profligate Wretch, *Ulciscitur illum mores sui, His own Practices will be reveng'd upon him.* See *Prov.* V. 9, 10, 11. VI. 33, 34, 35. XII. 13. XIV. 14. 32, 34. XVII. 13. XIX. 29. XX. 1. XXII. 5. XXIII. 20, 28, &c. *Siras.* XIX. 3. XXXI. 22. &c

Now although these Rewards and these Punishments, are by some imagin'd not to proceed with Certainty enough from Good and Evil Actions; because many Persons in return for Benefits receive only Hatred, Envy, or Injury; whilst others on the contrary do securely enjoy the Fruits of their Wickedness, without Molestation or Punishment; whence we cannot be infallibly assur'd before-hand, that our Good Deeds will be equally repaid by *other Men*; (though the Fruit which arises in *our selves* from such honest Practices is not capable of Hindrance or of Interruption:) yet thus much is beyond dispute, that more Advantages most surely and certainly follow from good and just Proceedings, than we can in reason expect from the opposite Vices (a). And altho' the whole Train of those Goods do not attend on such a conscientious Behaviour, as in the Nature of things they were dispos'd to do; yet we have a fair Probability that many of them will not disappoint us; at least, that we shall obtain a greater share than we could have hop'd for from a Course of Dishonesty and Wickedness. And so by this means we provide much better for our own Security, and have much fairer Grounds to hope that others will, in their turn, be alike ready to promote our Interests and Concerns; than if laying aside all regard to our Neighbours, we directed every thing towards our own private Advantage; and therefore infinitely better than if by the Exercise of Violence or of Deceit, we endeavour'd to make our own Gains and Profits out of the Losses of other Men. By this way of reckoning therefore it appears, that the Value of that Reward which will follow upon a Good Action, doth, all things rightly consider'd, exceed the Gain of the opposite illegal Practice.

We desire it should be well observ'd, that whilst we are here treating about the natural Effects of Good and of Evil Actions, we do not by any means reckon amongst these Effects those kind of Goods which we but now rank'd in the first Class, and which our own Prudence and Industry either cannot obtain, or cannot avoid. Such things both may, and generally do happen alike to Virtuous and to Vicious Men. Thus a wicked Person may by the Gift of Nature possess a vigorous and a healthy Body, while perhaps a Man of Honesty and Piety labours under a weak and crazy Constitution. And thus Death lays hold promiscuously on the Just and on the Vile. But the only Goods we here allude to are such as it is in the Power of Human Reason to provide for us; and which do therefore in some measure depend upon our own Act. Now although some part of those Goods which we intend by the Observance of the Law of Nature to obtain from other Men, has a Dependence

on their Kindness and on their Probity, and so is not absolutely in our own power; yet for as much as in all Probability, they have the same End and Design with our selves, we have at least fair reason to hope for and to expect such Good Usage and Retribution from them, though we cannot give our selves an infallible Assurance of it, before it comes. Scarce any Man hath met with so many Enemies in the World, as not to own himself indebted to some Benefactors. And we see that the Evils which Men procure to one another, have never been able to prevail to utter Ruine and Destruction of Human Race: Which is a plain Evidence, that Good Actions have oftner attain'd their just End and Reward, than they have fail'd and been disappointed of it. On the other side, altho' a Person who neglects or disobeys the Law of Nature, may sometimes by an unaccountable Concourse of External Causes, receive a whole Flood of Goods and Benefits from other Men; yet because in this case those Effects are, with regard to him, merely contingent, and do very seldom fall out in such a manner, we may conclude, that Nature and Reason did not prescribe, much less command, the Means by which he attain'd, only casually, to such an End. Reason, on the contrary, most clearly shews us, that we take a much more probable way to Happiness by acting on a settled Design, and by applying the best Means we can to the gaining of our purpose, than if we should throw aside all Counsel and Forecast, and permit our selves to be driven at random by the blind Guidance of Chance. But this Point is indeed as clear as any thing in Nature, and hath been made out to full Advantage by Dr. Cumberland.

There remains therefore this only Question farther, whether or no besides the Natural Effects of Evil Actions, and besides those which arise from the Sanction of Civil Laws, there are still others in reserve appointed by God's free Pleasure, and to be inflicted by virtue of his Sovereign Prerogative; or whether God hath not added to the Sanction of the Laws of Nature some Arbitrary Punishment: Especially since it is apparent, that the Natural Consequences and Effects of Evil Actions are frequently interrupted, and that the Wickedness of many Men seems to turn to their Gain and Advantage. Now what the Scripture hath declar'd in this Matter, is plain and beyond all Dispute. But waving that Authority, the affirmative Side of the Question may be defended from several Considerations. As from that most ancient and most universal Tradition, concerning a certain Revenging Divinity (1), and the Pains after Death. Of which Opinion we have two fair Instances in the Cases of *Jonas* and of *St. Paul*; (*Jonas* chap. i. v. 7. *Acts* chap. 28. v. 1, &c.) for there being no

(a) See *Prov.* XI. 31. Vid. *Isocrat. de Permutatione*, p. 576. (1) Which was call'd *Nemesis*, and was thought to have the care of punishing the Crimes, which were unpunish'd upon Earth; either thro' Negligence, or thro' want of Power, of this there is a fine Description in *Ammien. Marcellin. B. 14. c. 2.*

natural Connexion and Consequence, either between *Jonas's* Crime and the Tempest, or between the Fact of Murther, and the biting of the Viper, the People who were present at both Accidents, immediately suppos'd that God Almighty did thus extraordinarily interpose his hand to punish some heinous Wickedness (a). Moreover, it being most certain that it is the Divine Pleasure those Laws should be obey'd, and not less manifest, that the natural Effects of them may be (partly at least) eluded; it is highly probable, that God will find some other way of punishing such Offenders: Especially since the Gnawings of Conscience, and the want of Quiet and Security, which constantly attend Evil Men, do not always rise to such an afflicting degree, as to seem a sufficient Plague and Penalty for their Crimes (b). But because whatever Arguments we can alledge *à priori*, will not amount to a Demonstration, but only to a high Probability; and because this Arbitrary Punishment presupposes some positive Determination of the Divine Will, which we can hardly come to a Knowledge of without a particular Revelation; and since our Induction and our Experience are at present imperfect, we can scarce avoid confessing, that to those who see only by the Light of Natural Reason (1), this Controversy must still appear in some measure, dark and obscure.

XXII. As to the *matter* of the Law of Nature, *Grotius* observes (c), that many things are refer'd to this Law not *properly*, but *reductively*, for as much as the Law doth not oppose or forbid them. As those things are term'd Just, not only which are in strict Justice due, but which Justice doth not contradict: (though it would be better to call such things *permitted*, than plainly *just*.) But perhaps this Distinction of *Grotius* might be more conveniently applied to those Constitutions which according to the particular State of Men, the Desire of Peace and Tranquillity hath at any time introduc'd: as likewise to the Actions undertaken in Conformity to such Constitutions. For we shall often hear the Lawyers debating such Cases as these, whether the *Possession of things*, whether *Prescription*, whether the *making of Wills*, and whether *buying and selling*, do belong to the Law of Nature, or not. Which doubts cannot easily be resolv'd, unless we distinguish between those things which the Law of Nature determines, by commanding or forbidding them: and those things which Men have been induc'd to ordain for the necessary Promotion of Society, the Liberty of doing which flows immediately from this Human Ordinance and

Institution: And then we say of these last things, that they belong to the Law of Nature by way of *Reduction*. Thus the Dominion or the Possession of things, doth not immediately spring from Nature, nor can we alledge any direct and express Precept for its Introduction: Yet it may be said in some measure to be enjoind by Natural Law, in as much as when Mankind began to multiply in the World, it was requisite to their peaceable Condition, that the Primitive Communion of Goods should be laid aside. Thus *Prescription* is not plainly commanded by the Law of Nature; yet upon Supposition of things being divided into distinct Proprieties, the Peace of Mankind seems to favour it; lest otherwise the Titles to things should remain always in doubt. Thus, lastly, Nature doth not positively enjoin us to make Wills, or to buy and sell; yet Proprieties being suppos'd as in the former case, it naturally follows, that a Person at his Death shall have the Power of disposing of his own Goods; and that Men by the Intervention of Bargains and Contracts shall be at Liberty to alienate such things as belong to themselves, for the Procurement of those which are in the Possession of others.

*Grotius* farther observes on this Subject (2), that sometimes by abuse, those things are refer'd to the Law of Nature, which Reason indeed shows us to be Honest, and better than their Opposites, though they are not properly matter of Debt and strict Obligation. Of which kind, are many high and uncommon Acts of Liberality, of Mercy and Clemency; as likewise whenever a Man recedes from any part of his Right, not being compell'd by Necessity. These Matters *St. Paul* illustrates in his first Epistle to the *Corinthians*, Chap. VI. v. 12. Chap. VII. v. 38. Chap. X. v. 23. (d).

*Socrates* (3), when a Rascally Fellow had offer'd him an Injury, would not complain of it to the Judge; but reckon'd it (as he said) no more than if an Ass had kick'd him. And *Cato*, as *Seneca* (e) tells us, when he receiv'd a Blow in the Face, was so far from resenting the Affront, and from desiring Satisfaction, that he would not venture so far as to *forgive* it, but denied that any such thing had been done. Thinking it better not to acknowledge the Fact than to prosecute it.

XXIII. There is still one Question behind which requires our Determination. Whether or no there be any such thing as a particular and positive *Law of Nations*, contradistinct to the *Law of Nature*. Learned Men are not come to any good Agreement in this Point. Many assert the *Law of Nature and of Nations* to be the very same thing, differing no other-

(a) Add. *Grot. de Veritate Rel. Chr.* l. 1. f. 19, 20, 21, 22. l. 2. f. 9. (b) Add. *D. Cumberland. C.* 5. f. 25. (1) See *Lock of Human Understanding*, B. 2. c. 21. f. 70. See *Mr. Pascal's Book of Thoughts*, Chap. VII. and *Le Clerk's Latin Pneumatology*, c. 9. f. 2. and f. 9, &c. to the End of that Chapter. (c) *L. i. c. i. f. 10. n. 3.* (2) See *B. i. c. 2. f. 8.* (d) So *Ulpian.* (l. 4. f. 1. *D. de alien. jud. mut. caus.*) *The Prator doth not disapprove of his Proceeding, who chose rather to lose his Right, than to engage in long Suits and Contentions. This Aversion to Strife doth by no means deserve Reproof.* (3) See *Plutarch of the Education of Children*, pag. 19. C. Ed. *Wech.* (e) *De Ira*, l. 2. c. 32, &c. *de Constant. Sapientis*, c. 14.

wife than in external Denomination. Thus *Hobbes* (a) divides *Natural Law*, into the *Natural Law of Men*, and the *Natural Law of States* commonly call'd the *Law of Nations*. He observes, that the *Precepts of both are the same*: But that for as much as *States when they are once instituted, assume the Personal Properties of Men*, hence it comes to pass, that what, speaking of the *Duty of particular Men*, we call the *Law of Nature*, the same we term the *Law of Nations*, when we apply it to whole *States, Nations, or People*. This Opinion we for our part readily subscribe to: Nor do we conceive, that there is any other Voluntary or Positive Law of Nations, properly invested with a true and legal Force, and obliging as the Ordinance of a Superior Power (b). And thus we do not really differ in Judgment from those who are more inclin'd to call that the *Law of Nature* which consists in a Conformity to Rational Nature, and that the *Law of Nations*, which flows from the Consideration of Human Indigence, the Relief of which seems to be the main end and design of Society. For we as well as they, deny that there is any positive Law of Nations proceeding from a Superior. And whatever is deducible from Reflections on the Indigence of Human Nature, we refer immediately to *Natural Law*: only we were unwilling to define and explain this *Natural Law* by a Conformity to Rational Nature; because by this means we should establish Reason for the Rule and Measure of it self; and so this way of demonstrating Nature's Laws would run round in a Circle.

Most of those matters which by the *Civilians* and others are refer'd to the *Law of Nations*, as the ways of acquiring things, the Business of Contracts, &c. do indeed belong either to the *Law of Nature* or to the *Civil Laws* of those Countries where they are observ'd: Many People and States agreeing in such points, which otherwise do not depend on the Universal reason of Mankind. Now it is not proper or fair to constitute these as a peculiar and distinct Species of *Law*; in as much as the Reason why such Constitutions are common to many Nations doth not arise from any mutual Covenant or Obligation, but is wholly to be attributed to the particular Pleasure of the several Legislators, who by accident agreed in these Ordinances, without the least regard to one another. And therefore this kind of Customs and Decrees, may be and frequently are, alter'd by one People, or Kingdom, without advising with their Neighbours.

Nor is *Feldenius's* Distinction to be despis'd, who in his Observations on *Grotius* (c), tells us, that the Roman Lawyers by the *Law of Nations*, understood the Power and Liberty which Strangers and Foreigners were allow'd to transact Matters in the *Roman State*; and by the *Civil Law*, that which was proper to

the Citizens only, all Foreigners being excluded from its Benefit. That on this account *Wills* and *Marriages* were said to be of the *Civil Law*, and *Contracts* or *Bargains*, of the *Law of Nations*, because the former were restrain'd to the Citizens, whereas Strangers were admitted to a Share and Right in the latter.

Many Authors do farther rank under the Title of the *Law of Nations*, several Customs mutually observ'd by tacite Consent, amongst most People pretending to Civility; especially in the Affairs and Transactions of War. For after that the most polish'd parts of the World came to esteem Martial Glory as the greatest of Human Honours, and to think that a Man had no such fair way of showing his Excellency beyond others, as by being able by his Boldness and his Sagacity to destroy many of his Fellows; upon which account there perpetually arose either unnecessary or unjust Contentions; For fear great Captains, if they us'd the full Liberty of a just War, should bring too much Envy on their Power, and expose themselves to general Hatred; many Nations found it convenient to temper the vigorous Fierceness of Hostile Proceedings, by a Shew of Clemency and of Magnanimity. Hence arose the Customs of exempting certain Things and Persons from Martial Violence; the particular manners of hurting Enemies to such degrees, of treating Captives, and the like. *Machiavel* in his *Prince* (d) relates one Practice of this Nature, which I question whether it were Worthy of the Name and the Profession of Soldiers. He says it was first introduc'd by *Alberigo da Como* of *Romagna*, and kept up in the *Italian Wars* of the last Age, chiefly by the Foreign and Mercenary Troops. The opposite Generals endeavour'd with all possible Industry, to rid themselves and their Soldiers of all Trouble and Fear. And their way was, by killing no one in Fight; only taking one another Prisoners, whom they afterwards dismiss'd without Ransom. When they were in Leaguer before a Town, they shot not rudely amongst them in the Night; nor did the Besieged disturb their Camp with the like Incivilities. They made no Intrenchments for their Security whilst encamped; and when Winter came on, never lay at all in the Field. And to behave themselves in this manner was part of their Discipline and Institution. An Agreement something like this *Strabo* (e) tells us of, between the *Eretrians* and the *Chalcidians*, forbidding the use of Missive Weapons against each other. To which we may add the Custom observ'd by the Ancient *Indians*, of letting the Husbandmen remain safe from all Injury and Molestation, even in Civil Wars (f).

But although these Customs seem to include some kind of Obligation arising from tacite

(a) *De Cive*, c. 14, 4, 5. (b) Add. *Boecler*. in *Grot.* l. 1. c. 1. f. 14. & in l. 2. c. 4. f. 9. (c) L. 2. c. 2. f. 20. & c. 8. f. 1. (d) C. 12. (e) L. 10. (f) *Arrian*. in *Indice*.

Consent; yet if one who is engag'd in a Lawful War, shall neglect them, and profess that he will not be bound by such Restraints; provided what is contrary to them may be rightly done according to the Law of Nature; he is guilty of no other Sin, but a sort of Unskillfulness, in not adjusting his Proceedings to the nice Models of those, who reckon War in the number of the Liberal Studies. As a Gladiator is accus'd of Inexpertness, when he wounds his Antagonist otherwise than by the Rules of Art. Whoever therefore wages War in a just Cause, may slight these Formalities at Pleasure, and govern himself purely by the Law of Nature: Unless he thinks it more for his Interest to observe them, as a means to render the Enemies less severe towards himself and his Men. On the other hand, he who prosecutes an unjust Quarrel, if he punctually fulfils these Niceties, is so far in the Right, as to appear wicked with some kind of Temper and Moderation. However these Reasons not being general, cannot constitute any Law of an universal Obligation. Especially since as to any Restraints which depend on tacite Agreement, it seems reasonable that either Party should have the Liberty of absolving themselves from them; by making exprefs Declaration that they will be holden by them no longer, and that they do not expect or require the Observance of them from others. Hence we find many such Practices to be worn out by Time, or overcome by the Prevalence of contrary Custom. Neither have those Men any good reason of Complaint, who censure this Doctrine as a Notion by which the Security, the Interest, and the Safety of Nations are robb'd of their surest Guards and Defence. For the Ensurance of these Advantages and Blessings doth not consist in the Practice of such mutual Favours, but in the due Observance of the Law of Nature; a much more sacred Support; and which whilst they enjoy, they have little need of inferior Methods of Protection. And sure it shows much more Excellency and Worth in any Custom, to derive it from the Law of Nature, than to establish it only on the Consent of different People.

Amongst the chief Heads of that *Voluntary Law of Nations* which *Grotius* maintains, he reckons the Law of Embassies. Now as to this point it is our Opinion, that the Persons of Embassadors are Sacred and Inviolable, even amongst Enemies by the meer Law of Nature; provided they do not come purely as Spies, nor enter any hostile Design against the Person to whom they are sent; although in the ordinary Course of Business, and of Treaties, they prefer their Master's Interest to all others. For in as much as such Persons are necessary for the procuring the preserving, or the strengthening of Peace by Leagues and Covenants; and since the Law of Nature enjoins

us to embrace Peace by all honest ways; it must at the same time be suppos'd to have provided for the Security of those Men, without whose Intervention this Good End cannot be obtain'd (a). To this Right of personal Safety is join'd another of being exempted from the Jurisdiction of the Sovereign to whom they are sent; at least in all Matters relating to their Office. Since otherwise they would not have full Power and Liberty to promote their Master's Interest, with due Application and Vigour, were they oblig'd to give an account of their Management to any Authority, besides that which they represent. Other Privileges commonly attributed to Embassadors, especially to those who reside in Courts, not for the settling or the securing of Peace, but chiefly for the diving into the Secrets and Policies of a State, these depend absolutely on the Indulgence of the Prince who entertains them; and therefore, if he sees convenient, he may deprive them of these Favours without the Breach of any Law, provided he will suffer his own Ministers abroad to be treated in the same manner.

The Right of Burial, which according to *Grotius* seems likewise to make a particular Head of the *Law of Nations*, may be well refer'd to the common Duties of Kindness and Humanity (b). Nor are the other Instances which he offers, of Consequence enough to establish a new Species of Law, since they may with Convenience enough be allowed a Place in the System of the *Law of Nature*. As for those Persons who rank under the *Law of Nations*, the particular Compacts of two or more States, concluded by Leagues and Treaties of Peace, to us their Notion appears very incongruous. For altho' the *Law of Nature* in that part of it concerning the *keeping of Faith*, doth oblige us to stand to such Agreements; yet the Agreements themselves cannot be call'd *Laws*, in any Propriety of Speech or of Sense. Besides they are almost infinite in Number, and commonly are settled only for a Time. Nor do they any more constitute a part of Law in general, than the Covenants and Bargains of particular Subjects with each other, do belong to the Body of the Civil Law of the Kingdom: But they are rather to be esteem'd the Subject and the Concern of *History* (c).

XXIV. Of all the Divisions of *Natural Law*, that seems to us most accurate and most convenient, which considers in the first Place, a *Man's Behaviour towards himself*, and then *towards other Men*. Those Precepts of the *Law of Nature* which bear a regard to other Men, may be again divided into *Absolute* and *Hypothetical* or *Conditional*. The former are such as *oblige* all Men in all States and Conditions, independent from any human Settlement or Institution. The latter presuppose some Publick Forms and Civil Methods of Living to have

(a) Add. *Marfelaer Legat.* l. 2. c. 13. (b) Add. *Ant. Matth. de Crimin. Proleg.* c. 3. f. 5. (c) Add. *Selden de Mari Clauso*, l. 1. c. 2. concerning *Unwritten Laws*, or *Custom*, besides others. See *Baeker. ad Grot.* l. 2. c. 4. f. 5.

been already constituted and receiv'd in the World. Which Distinction *Grotius* hath thus express'd in other Words; *The Law of Nature is concern'd, not only about such things as exist antecedent to Human Will, but likewise about many things which follow upon some Acts of that Will.* 'Whence altho' the *Dominion* or the 'Propriety of things as it now stands is establish'd by the Pleasure of Men, yet such a Settlement being once suppos'd, *Natural Law* informs us that 'tis a Sin to take the Goods of another Man, without the Owners Consent (a). That is, there are many things which as to the Exercise of the Act are Arbitrary, or where it is left to the free Pleasure of Men whether they will perform such an Act or no: But the Act being once perform'd, there follows upon it by virtue of some Precept of the Law of Nature, a Moral Necessity or Obligation; or else the Manner and Circumstances of the Act, are by the same Law adjusted and determin'd. Thus, for Example, altho' the Law of Nature doth not command me to buy of another, yet supposing me to buy at my own Pleasure, it commands me not to seek my own Gain to the Damage of the other Party, nor to cheat him in the Bargain. And many such Precepts of the Law of Nature there are, which cannot take place, or indeed be understood, unless upon Supposition of Distinct Proprieties of things, and of the Estab-

lishment of Civil Authority! Yet it cannot hence be prov'd that even all Positive Laws are part of the Law of Nature, because Nature obliges us to obey the Commands of the Supreme Magistrate, tho' our own Consent gave him his Sovereignty over us. Thus much indeed is certain, that the Violators of Civil Laws do, by breaking their intervening Covenant, mediately sin against the Law of Nature. And yet there still remains a prodigious difference between these Natural Laws which we call *Hypothetical*, and the Positive Laws of Civil Governments: in as much as the reason of the former is drawn from the Condition of Mankind consider'd in general; but the Reason of the latter is taken from the particular Interest of any Nation or State, or from the bare Pleasure of the Legislator. Therefore our Civil Positive Laws, are not so many Precepts of the Natural *Hypothetical* Law, but do only borrow their Force of obliging, in Human Regard, from the Virtue of some such Hypothetical Precept of Nature. Now of those Human Institutions which serve for Foundations of these Hypothetical Precepts, the three chief are *Speech*, the *Dominion* and the *Price* of things, and *Human Sovereignty* or Command. And by this Division we shall hereafter guide our Proceedings, when we arrive at that part of our Design.

(a) Vid. l. 1. f. 3. D. de furtis. l. 42. D. de verb. Signif.

#### CHAP. IV.

### *Of the Duties and Performances of Man towards himself; as well in regard to the Improvement of his Mind, as to the Care of his Body and of his Life.*

ALTHO' this be a Quality common to Man, with other Animals, that he is concern'd for his own Preservation, and is naturally glad to be in as good a Condition as possible; yet that his Care of himself ought to be of a much more refin'd, and of a much nobler Strain, than what we can suppose in Brute Creatures, there is good reason to conclude: Not only because he hath receiv'd more Endowments than they, and such as are more capable of fruitful Culture and of useful Improvement; but farther, because he cannot perform the Duties to which he stands oblig'd, unless he brighten and quicken his Faculties by good Exercise, and make them more vigorous and more ready in the Production of worthy Actions. Besides, the Labour which a Man spends on his own Improvement, is not terminated in himself; but spreads abroad its Fruit to the Benefit of all Mankind; and the better any Person approves himself in the Management of his own Gifts and Abilities, he is justly

esteem'd the more excellent Citizen of the World, and the more Generous Benefactor to his Fellows. Wherefore Man in his Endeavours to fulfil the Laws of Society, to which he is by his Creator directed and designed, hath good reason to imploy his first Pains and Study on himself; since he will be able to discharge his Duty towards others with so much more Ease and Success, the more diligent he hath been in advancing his own Perfection. Whereas he who is unuseful to himself and idle in his proper Concerns, can give other Men but little reason to expect advantage from his Pains.

There is scarce more necessity for our engaging in this Care, than there is Sollicitude and Difficulty in the Prosecution of it. For in the first place, Men are born in an entire Ignorance of things, and their Minds whilst yet tender may be easily so far defiled and tainted with vile Opinions, that it will afterwards be no easy Labour to wash off the Stains. Besides we bring hereditary and inbred Corruptions with

with us into the World, which draw us all, more or less, out of the strait Path of Reason; and unless we bridle and restrain them, pour out a Flood of foul and unworthy Actions, thro' the Course of our whole Lives. And it may perhaps quicken our Industry to consider, that we have but one Time allow'd us to act our Part in, and cannot hope for a second Entrance on the Stage to amend the Faults of our first Performance. For that old Complaint in *Euripides* (a) will ever be as vain and ineffectual as when it was first made: —

\*Οι μοι τι δὴ βεγγίον ἐκ τόνου τίθε, &c.

Me miserable! that Men should be deny'd  
The Gift of springing to a second Youth,  
A Double Age! The Structures which we raise  
If found defective, later Cares reform,  
New modell'd: But our own unhappy Frame  
Stands without Change, and falls without Repair!

O! might we turn our Steps, and tread again  
The Path of Life; what Slips we once had made  
We would correct, and every cheating Maze  
Avoid, where Folly lost our Way before!

Now since Man consists of two Parts, a *Soul* and a *Body*, whereof the former is the great Principle and Spring of Human Actions, the latter supplying the Place of a subordinate Instrument, the Care and Improvement of the first and Noblest Part, may justly challenge the Precedence in our Endeavours.

II. The Culture of the Mind which all Men are oblig'd to undertake, and which is absolutely necessary for the Performance of Human Duty, consists chiefly in these Particulars; that we obtain true Opinions concerning all such things as our Duty bears any reference to, that we set a right Judgment and Price on those Objects which commonly excite our Appetites, and that we temper and regulate our Passions by the Direction of Sound Reason.

III. Amongst the Opinions then which it highly concerns all Men to settle and to embrace, the Chief are those which relate to ALMIGHTY GOD, as the Great Creator and Governour of the Universe. That there is really existing a Supreme Being, from whom all other things derive their Original, and the Principle of their Motion; not as from a dull and senseless Power (as the Weight, for Example, in a Clock), but as from a Cause endu'd with Understanding and with Freedom of Choice. That this Eternal Being exercises

a Sovereignty not only over the whole World, or over Mankind in General, but over every Individual Human Person: Whose Knowledge nothing can escape: Who by Virtue of his Imperial Right, hath enjoin'd Men such certain Duties by *Natural Law*, the Observance of which will meet with his Approbation, the Breach or the Neglect with his Displeasure: And that he will for this purpose, require an exact Account from every Man, of his Proceedings, without Corruption and without Partiality.

Now as the main Parts of Human Duty turn on this Belief, so is it the only Foundation of that sweet Tranquillity and Acquiescence of Mind, which Men inwardly enjoy, and the very Fence and Bulwark of all that Probity which we are to exercise towards our Neighbours; without which no Man can seriously and heartily do a good Action himself, or give sufficient Caution and Security of his Honest Intentions to others (b). And altho' it appears from the Ordinances of the Christian Religion, that GOD is not so far pleas'd with every kind of Worship which Men pay him, as to embrace them with peculiar Favour, and to give them a Title to Eternal Life, which Good Effects do follow only that Institution and Way of Service which he hath reveal'd in a singular manner to the World: Yet a serious Perswasion concerning the Divine Existence and Providence, under whatever particular Apprehensions, or particular Worship, hath however thus much of Force and Efficacy, as to render Men more observant of their Duty (c). To prove this Assertion we need only consider, that there have been of old, and still are Men professing Religions which we must own to be destructive to Salvation, as suppose *Mahometans*, or *Pagans*; who nevertheless by Virtue of their Perswasion of GOD's Providence, have shown no inconsiderable Concern and Care for Honesty and Justice; so as not to be outdone by many Christians, at least as to External Performances. Nay there are not wanting Persons, who from the Experience of long Travels pretend to affirm, that Christianity hath not been able to alter the Common Dispositions of some Nations towards particular Vices; and that 'tis not easy to discover the Truth of that Holy Religion, from the Manners and the Practices of those who profess it. Tho' I should imagine the Reason of that Unhappiness to be chiefly this, because the Christian Doctrine and Worship, being receiv'd by most Men, not upon their own

(a) In *Supplicibus*. (b) *Boetius de Consolat.* Your living under the Eyes of an All-seeing Judge, lays a kind of a necessity upon you to be Good and Virtuous. *Grotius in lib. Sapientia. Cap. 12. v. 1.* How high soever some People talk about Honesty's being desirable merely on its own account; yet so great is the force of these outward visible Things upon our Mind, that without a full Perswasion of the Divine Providence and Retribution, and without some System of Laws to guide Men in the true way of acting, it is impossible but that they should wander into most grievous and fatal Dangers. For, as Human Reason is loose and giddy, when the Passions have overcome the Judgment, and the Manners are suited to the Passions, it easily finds out a Colour and Disguise for Sin, and so long obstinately refuseth to hear till it grows quite deaf. Therefore the Wise Man pronounceth those to be miserably Vain, who are so far from having a careful regard to the Knowledge of GOD and of his Providence, as to let those great Points depend on every Man's Fancy and Choice: Than which nothing can be contriv'd more destructive, I do not say to Good Manners, but to Government and Society. (c) *Lucian. de Imaginib.* Those who are most strict and conscientious in their Duty to GOD, are the most Honest and Regular in their Dealings with Men.

Choice and Judgment, but from the Custom of the State in which they happen to be born, resides rather in their Mouth than in their Heart; whence it comes to pass, that so few are seriously inclin'd to reform their Mind by its Directions. For I doubt not, but that at least the External Acts even of National Vices might be repress'd, would Men but apply themselves in earnest to the leading a Life suitable to their Profession.

IV. As this Perswasion, and whatever else we are able to learn concerning the Worship of GOD, either from Reason or from Revelation, is first of all to be implanted in a rightly Cultivated Mind: So are the Opinions contrary to these Truths most carefully to be barr'd off and excluded. And here we would not only be understood of Atheistical and Epicurean Principles, but of those numerous Notions, which appear to be destructive of true Religion, of Good Manners and of Human Society, which it is in an high manner the Interest of Mankind, to see absolutely rooted up, and banish'd out of the World. Such is that Fancy of the *Stoical Fate*, or the unchangeable Course and Wheel of things and Actions; by which Men are made only the Tools or Engines of their own Operations, it not being in their Power to manage them with any Freedom of Choice, or with any Direction of Counsel. For admitting this Hypothesis, it doth not appear, why the Actions of a Man should be morally *imputed* to him, rather than the Motion of a Clock to the Wheels by which it is perform'd, or what would be the use of Religion, what the Equity of Laws and of Punishments (a). There is an Opinion nearly allied to this which supposes, the Consequences of Causes and of Effects, or the Great Chain of things establish'd by the Creator, to stand by such an Immoveable Decree, that GOD hath left himself no liberty of interposing in particular Cases. Thus all Miracles, all extraordinary Assistances of Heaven, all Effects of Prayers, of Repentance and of Amendment, seem to be entirely cut off at one Stroke. To these we may join that Ancient and widely receiv'd Perswasion, that the Positions of the Stars, laid an indispensable necessity on Human Actions and Events; or that the Hour of Nativity determin'd the whole Proceedings of Life. Which *Manilius*, one of the Assertors of it, thus delivers,

(a) *Seneca Oedip.*

*Fati ista culpa est; nemo fit fato nocens.*

The Fault is Fates; and Fate can fix no Guilt.

Vid. *ibid.* v. 980, &c. *Homer Ili. T.*

————— Ἐγὼ δ' ἔκ ἀϊπὸς εἶμι,  
'Αλλὰ Ζεὺς κ' ἡ μοῖρα κ' ἡ ἐσθρῶνις  
Ἐειρησὺς.

————— *Furit alter amore*  
*Et pontum tranare potest, & vertere Trojam.*  
*Alterius fors est scribendis legibus apta:*  
*Ecce patrem nati perimunt, natosq; parentes,*  
*Mutuaq; armati coeunt in vulnera fratres:*  
*Non nostrum hoc bellum est: coguntur tanta movere,*  
*Inq; suas ferri poenas, lacerandaq; membra.*  
*Hoc quoque fatale est sic ipsum expendere fatum.*

One, mad in Love, to Troy will carry War,  
Or swim the Flood, and view the Torch from far;  
Another is determin'd to the Bar.  
A Son his Father, Father kills the Son  
On mutual Wounds two headlong Brothers run.  
These Combats prove the force of Ruling Powers:  
For they are too unnatural to be ours.

Nay this Opinion's settled by Debate,  
'Tis Fate, that we should thus dispute of Fate.

Mr. Creech.

And this Superstition still bewitcheth a great part of the Eastern World, where no Business of Moment is undertaken, without consulting the Astrologers, *that they may read*, as the Phrase is, *what is written in Heaven*. To which purpose, Father *Bernier* tells a pleasant Story of a Gardener of *Abas King of Persia*, who rooting up some Trees which the King by Direction of his Astrologer, had planted in a *fortunate hour*, and being thereupon rebuked, turning to the Astrologer, *Sure* (says he) *you was out in your Calculation: For those Trees could never have the Benefit of lucky Stars, which were set at Noon, and unfortunately pull'd up at Night*. Another Relation like this he gives us of a certain Slave, a Run-away from *Goa*, who set up in the City *Dehli* for an Expounder of the Stars, and foretold many strange Events with good Confidence to the People: Every now and then looking upon his *Mariner's Compass* and his *Hour-book*, as the Noble Instrument of his Art. When some who had formerly a Knowledge of him, declar'd their Wonder, at his new Profession and Equipment, his Reply was, *A tal Bestias, tal Astrologuo*. For such Beasts, such an Astrologer. But all this kind of Astrology is really nothing else, but a specious way of cheating Ignorant People of their Money, undertaken by some Confident Knaves, who in their talk of future Occurrences are not so much supported by their own Arts, as by the Cre-

*Zeno* (in *Diog. Laert.* 1.7.) retorted this Objection very pleasantly, though he did not refute it: As he was correcting his Slave who had been catch'd in a piece of Thievery, the Fellow in way of Excuse told him, *truly 'twas his Fate to steal; yet, says Zeno, 'twas your Fate too to be beat for it*. *Marcus Antoninus* gives a more serious Judgment on the Point, *The GODS* (says he, l. 2. c. 11.) *have put it in every Man's Power and Choice, to avoid whatever is truly Evil.*

dulity of their Hearers: If things fall out as they boldly guess'd, they presently rise in Honour and Credit with the Multitude; if Matters go otherwise, their Predictions are easily forgot, and so their Mistakes make no noise (a). Now besides the other numerous ill Consequences of such a Superstition, this Mischief follows of Course, that whilst Men are continually gaping at the Stars, they have neither Leisure nor Inclination to guide their Lives by the Rules of sound Reason (b).

Most pernicious likewise is that Conceit, which makes GOD to allow a kind of Market of Sins, so as to let them be bought off with Money or other Presents, or perhaps with some vain Ceremonies and set Forms of Speech, without Amendment of Life. No less absurd is it to imagine, that GOD Almighty is delighted with such Inventions of Men, such Institutions and Ways of Living, as are disagreeable to Human and Civil Society, as it is temper'd by the Dictates of Reason and the Laws of Nature. Such may we reckon the greatest part of the Monastical Orders, which we find in vast Numbers, not only in Christendom, but amongst the Turks and the Heathens. We should also carefully avoid all such unworthy and superstitious Notions, as debase and dishonour the Divine Nature or Worship. Every sensible Man ought to be as *Antoninus* says, θεοσεβής χωρίς δεσποδαιμονίας (c) *Devout without Superstition* (1).

'Tis another wicked Opinion, that the bare Exercise of Piety towards God, is sufficient, without any regard had to Honesty and to those other Duties which are to be practis'd towards our Neighbours: As if the External of Divine Worship, when exactly perform'd, were able to make amends for a Course of Injustice towards other Men: Or as if it were lawful to scrape up Money in our Life-time by all Means and Methods, good or bad, provided at our Death, we leave somewhat to be spent in *Pious Uses* (d). Nor less unreasonable

is the Fancy, that a single Man should be able not only to fulfil his own Duty towards GOD, but to transfer some of his Merits on others, as if one Person's Negligence in his Duty was to be supplied, by the *over* Righteousness of another. Of the same Stamp is that vain Conjecture, that upon account of the Satisfaction and the Merit of *Christ*, we have a less Obligation lying on us to Probity and Sanctity of Manners; and that the Hope of those Blessings furnishes us with a Security of sinning. He who believes that his own Offences shall be forgiven him for the sake of Another's Deserts, can scarce be hinder'd from sinking into the basest Dissoluteness, unless he be at the same time fully perswaded, that there is still an Obligation incumbent on him, to apply all his Endeavours to the Practice of a most Holy Life.

Farther, it is no less pestilent than brutal an Opinion, to pretend that the Wickedness of some Actions is excus'd with GOD upon account of their Dexterity or *Humour*; and that some Sins pass only for Jest in the Cognisance of Heaven. As the old Poets feign'd their Deities to take no notice of the Perjury of Lovers, and to forgive their Thefts and treacherous Intrigues (e). Nay their Madness proceeded so far, that they were not afraid to introduce their Heavenly Powers as the Actors of detestable Villanies; assigning so many Tutelar Gods to have the Care (as it were) and the Guidance of so many particular kinds of Wickedness. Now the Argument which *Fulgentius* (f) draws hence is right and conclusive: *If there were any Deities (lays he, meaning Mercury and Laverna) presiding over Robberies, how could those Actions be criminal before Human Judges, which had Divine Authors and Patrons to defend them* (g)? *Euripides* disputes as well on the same point.

Ἄουκίτ' ἀνθρώπους κακῶς λέγειν δικάιον, &c.

If Human Vices are but Transcripts drawn From Deeds Divine, and Copies set in Heaven,

(a) *Tacitus* (Hist. l. 1.) calls the Pretenders to Astrology, *Genus hominum potentibus infidum, sperantibus fallax, A Pack of Men unfaithful to the Great, and disappointing to All of eager Hopes and Desires.* Add. *Hobbes de Homine*, c. 14. f. 12. *Agathias* l. 1. *I cannot believe that the Cause of Evil is fix'd in the Course of the Stars, and in the Fatal Appointment of Unconceivable Necessity. For if the Power of Fate every where prevails, all free Election of Man's Will is destroy'd; and with it, all Precepts, all Arts, all Discipline, must come to nothing; and those who have led Pious and Vertuous Lives, will be surpris'd of their future Expectation. Nor do I think it allowable to ascribe Mutual Wounds and Slaughter to the Deities.* Vid. *Grot. de Veritate Rel. Christianæ*, l. 4. f. 11. (b) *Helen* says Wisely in *Euripid.*

Χρῶμεν δ' ἀείην μάντης ἢ' ἐμβουλία.

*Statius*, Theb. 2.

Prudence and Good Counsel are the best Prognosticators.

Quid crastina volveret ætas  
Scire nefas homini. Nos pravum ac debile vulgus  
Scrutatur penitus superos: hinc pallor & ira,  
Hinc metus, insidiæq; & nulla modestia voti.

What future Years shall bring to pass  
'Tis Sin to know. We a Weak, Puny Race,  
Examine Heaven and ransack Jove's Decrees,  
Wisely to antedate our Miseries.  
Hence all our Mischiefs spring, our Rage, our Fears,  
Our treach'rous Wiles, and our Immodest Prayers.

(c) L. 6. f. 30. Add. *Bacon*, Essay 17. (1) See *Plutarch's* Treatise of Superstition. Item *Charron of Wisdom*, lib. 2. c. 5. f. 10. (d) Add. *Charron de la Sageffe*. l. 2. c. 5. f. 25, &c. (e) *Tibull.* l. 3.

Perjuria ridet amantem  
Jupiter, & ventos irrita ferre jubet.

Jove laughs to hear Love's Harmless Perjury,  
And bids the Winds go lose it as they fly.

(f) *Mytholog.* l. 1. (g) *Senec. Hypolit.*

Deum esse Amorem turpis & vitio favens,  
Fincit libido; quoq; liberior foret  
Titulum furori Numinis falso addidit.

Love was first Deified by Lust and Vice:  
When Men to gain a Patron to their Sin  
And free pursuit of Pleasure, fix'd the Stamp  
Of Heaven on Hell, a Fury made a God.

Should

Should Men be blam'd who act what they're taught,  
Or those Immortal Guides who teach 'em wrong?

Nor was the poor *Indian* much out in his Inference, who when a *Spaniard* boasted to him, that he was a Christian, a Son of the Great Creator of Heaven and Earth, whose Laws he came there to publish and proclaim, answer'd him to this Effect: *If 'tis by Command of your God, that you thus invade other Men's Dominions, and there spoil, burn, kill, and commit all other Wickedness at pleasure; you may rest assur'd, that we will not on any account believe in such a God, or receive his Ordinances amongst us* (a).

It is wicked likewise to believe, that those Prayers can please G O D, by which a Man desires that others may suffer an undeserved Evil, for the promoting or the occasioning of an Advantage to himself. As suppose if the Inhabitants of a Sea-Coast should pray, that many Shipwracks might happen on their Shore. Nor do I take those solemn Supplications to contain much more Holiness which are perform'd, either upon the engaging in an unjust War, or upon any Success obtain'd in it. Those Persons too must needs lie under a great Mistake, who fancy the Breach of some Precept of Natural Law to be a part of Divine Worship. As they who are for treating in a hostile manner, all such as differ from them in Perswasion; who assert that Religion is to be propagated by the Sword; that no Faith is to be kept with Men of a contrary Profession, no Political Friendship (as they call it) and no Offices of Humanity to be exercis'd towards them, but that they are to be avoided even in common Conversation as Unholy and Unclean; that Violence, Wickedness, Treason, Perfidiousness, Sedition and Rebellion, are not only lawful but commendable, if undertaken on a Religious Account. To conclude, the following Opinions are not of less fatal effect than those which we have already mention'd: That it imports nothing to solid Felicity, whether a Man apply himself to a Virtuous or to a Vicious Life, and that Good Men are entituled to no better State or Condition than the Wicked (b). That the highest Pleasure a Man can expect or obtain, is the present Gratification of his Senses; and that the Soul perishes with the Body. Lastly, that all Law, even that which we call *Natural*, is a meer Human Device, not referable to G O D as the Author of it, nor deriving from him its Force and Sanctity. These therefore, and such like Notions,

are entirely to be rooted up out of Human Minds, in as much as they destroy our Duty to Almighty G O D, and prevent or intercept all Endeavours of conforming our Life and Manners to the Guidance of Good Reason.

V. When this Principal Care is over, the main Concern behind is for a Man accurately to examine his own Nature; and to study to *know himself*. An Enquiry which Antiquity so much valued as the Forerunner of true Wisdom, that *Γνώσις σαυτοῦ* was thought an Inscription worthy to be set in Letters of Gold, and Consecrated in the *Delphian* Temple. On which *Tully* hath given us this Comment. *The Precept of Apollo, says he, in which he enjoins us to know our selves, doth not mean that we should be careful, in knowing our Limbs, our Stature, or our Figure; for our Bodies indeed are not our selves. But when the Oracle says, Know your Self, it says in effect, Know your own Mind and Soul. For the Body is no more than the Soul's Vessel or Receptacle. And no Action is properly done by your self, but what proceeds from your better and Nobler Part* (c). Now from this Knowledge of himself rightly pursu'd, a Man is brought to understand his Condition; and the Office he is to bear in the World: Whilst he apprehends, that he did not exist of himself, but ow'd his Original and Being to a much Sublimer Principle; that he is endow'd with far more noble Faculties, than he sees enjoy'd by the Beasts about him; lastly, that he was not born by himself, nor purely for his own Service, but that he is a part of Human Kind, and is oblig'd to behave himself sociably towards other Men. And from these Fountains may easily be drawn the Compleat Knowledge of Human Duty (d). It belongs likewise to our Understanding our selves, to know our own Power and how far it extends, either in exerting our Actions or in forming our Designs (e): (1). And farther, what is the true Effect and Consequence of every Practice; and what respect and use the things without us, have to our selves and to our Happiness.

VI. From this Knowledge it follows, that a Man must apprehend his Subjection to Almighty God, and the Obligation which lies upon him, according to the Measure of the Gifts he hath receiv'd, both to celebrate the Divine Majesty, and to show himself a sociable Creature in his Transactions with his Fellows. And in as much as God hath bestow'd on him the Light of Understanding, he ought certainly to conclude, that he is not to do every thing at random, and without end or design, but that whatever he undertakes, he should

(a) *Benzo. Hist. Nov. Orb. l. 2. c. 13.* (b) *Cicero de Naturâ Deorum, l. 3. c. 35.* Heaven is certainly not at all concern'd in the Government of Men if it doth not make a Distinction between the Good and the Wicked. (c) *Add. Casaubon ad Pers. Sat. 3. v. 67.* (d) *Vid. Marc. Antonin. l. 10. f. 6. Pers. Sat. 3.*

Quem te Deus esse  
Fussit & humana qua parte locatus es in re.  
Disce.

Study thy self: Learn in what Rank and State,  
The Wise Creator hath ordain'd thy Fate.

(e) See *Socrates* Explication of that Noble Sentence, in *Zenophon Apomnem. l. 4.* *Add. Bacon. Ess. 36.* (1) *Vid. Montaigne's Essays, l. 1. c. 3.*

first weigh the matter in hand, and regulate his Method of proceeding about it (1). And consequently, that he propose an End agreeable to his Nature, and rightly moderate and direct both his own Actions and all other due Means towards the Attainment of that End. And this in such a manner, that he neither proceed in the Application of the Means, before the End is fixt and determin'd; nor settle such an End as he must afterwards want Means to arrive at. Another Inference closely allied to this, is, that since Truth and Right are always Uniform and without Alteration, so he ought always to form the same Judgments of the same things, and when he hath once judg'd truly, to be always constant in his Mind and Resolution. Farther, that his Will and his Appetite do not get the start of Good Judgment, but follow and obey it; never making Resistance to its Decrees (2). For he who observes this Course of proceeding will be sure to act with Prudence, with Constancy and with Moderation. He will make it his chief Aim and Rule, as *Lucan* describes *Cato*,

*Servare modum, finemq; tueri,  
Naturamq; sequi, patriæq; impendere vitam.  
Nec sibi sed toti genitum se credere mundo.*

To keep a *Mean*, to eye the chief Design;  
To follow *Nature*, as a Guide Divine,  
To pay his Country's Ransom with his Blood,  
And private Pleasure quit for publick Good:  
To raise his Soul to Universal Cares,  
And in his Pains give all the World their Shares.

He that acts otherwise, instead of keeping a decent Pace in the Journey of Life, seems to rowl and tumble through the World: His Proceedings are perpetual Contradictions; and 'tis impossible for him to arrive at any Comfortable Condition: Since, as *Sophocles* observes,

*True Wisdom is the Spring of Happiness.*

VII. If a Man thus rightly apprehend and consider his own Strength and Power, he will discover that it is of a *finite* Nature, having certain Limits beyond which it can never extend it self; and therefore, that there are many things in the World which he cannot manage or compass, as many that he cannot hinder or resist. Other matters there are which do not absolutely exceed human Power, but which may be intercepted and prevented by the Opposition of other Causes. And a third kind of things we cannot compass by our bare Strength, nor assisted by Dexterity and Ad-

dress. Applicable to these Reflections is the famous old Distinction of the *Stoicks*, dividing things into τὰ ἐφ' ἡμῶν & τὰ ἔκ ἐφ' ἡμῶν, those *in our Power*, and those *without or beyond it*. What seems to be most under our Command is our own Will, and the Power of that Faculty in exerting Actions proper to our Species of Being. For altho' the Will hath some cross and stubborn Principles adherent to it, which bend and ply it continually from its due *Equilibrium*; yet hath a Man nothing in his whole Nature, more nearly and closely tied to him, nothing which is less capable of being hindred by external Powers, and therefore nothing the Motions of which do more properly belong to his Person, and may accordingly be *Imputed*. Hence it follows, that every Man ought to make it his main Care and Concern, rightly to employ his Force and Abilities, in Conformity to the Rules of Reason: At least to settle a constant Resolution of discharging, as far as in him lies, every thing which seems agreeable to his Duty, and to the Design of his Being. For this is the Test by which we are to rate the Worth of every Person, and to measure his intrinsecal Goodness and Excellency (3) (a).

VIII. As to other matters which lie without us, we are so far to employ our selves about them as they do not surpass our Strength, as they tend to a lawful End, and are worth the Labour which we spend in the pursuit. For things above us, a Wise Man will not lose his Hopes and his Pains upon them; he will reckon it Folly to endeavour with vast Toil the Attainment of such an End, which he knows his own Force together with the Assistances he expects, unable to compass: Or unless he be at least certain that the very Probability of obtaining the End is of more Consequence than any other Effect, which he could without question have produc'd at the same time, and with the same Labour. Other things he will leave to the Direction of Providence, and will compose his Mind as well as he is able, for a peaceful Acquiescence in every Event. He will not vainly disquiet himself on the account of Evils which either have already happen'd, or may hereafter fall out without his Fault: And so he will cut off the greatest part of Human Troubles which are wont to be produc'd, either by vain Hope driving us on ill Designs, or by the more violent Motions of Grief, Anger, or Fear (b).

From these Considerations this farther Consequence may be drawn, that Man as he is guided only by the Light of Reason, ought not to frame to himself, or to aspire after any other Happiness in this World, than such as

(1) Ἰδέον πρῶτ' ἡδὴ χρεαστήρα σου πρῶτ', καὶ πῶτον ὄν φυλάξῃς ὅτι τὸ σεαυτῶ ἄν, καὶ Ἀνθρώπου ἐντυγχάνων. *Epiet. Ench. c. 40.* V *Hierocl. in Carm. Pythag. p. 1.* (2) V. *Tullium de Off. l. 1. c. 29.* (3) V. *Marc. Ant. l. 6. 32.* (a) *Arrian. Epiet. l. 1. c. 1.* What therefore, on the whole matter, are we to do? To improve and to put to the best Use those things which are in our Power, and to deal with other things as their End and Nature require. (b) *Arrian. Epiet. l. 2. c. 7.* What can be better for us than that which hath the Approbation and the Appointment of God Himself. *Liban. Declam. 21.* A good and diligent Man proceeds according to his Judgment, and to the Notions which he hath form'd of things: And although the Event doth not answer the Worthiness of his Design, he is no less Industrious for the future.

arises from the prudent Government of his Faculties, and from those Assurances and Supports, which we are sure the Divine Providence will afford us; in the Universal Administration of Things. From the same Principles we may infer, that as we are not to leave things to meer Hazard and Chance, whilst there is any room for Human Caution and Foresight; so when we have done all that lies in our power, we cannot ensure an Event which doth not depend on our Direction, and of which we have no certain Knowledge till it actually happen. As *Iphicrates* us'd to say 'twas unworthy of a General to say, *I did not think it*; so 'tis below a Wise Man to make the like sorry Reflection. It was a Good Wish of the Poet:

————— *Careat successibus opto*  
*Quisquis ab eventu facta notanda putat.*

————— Never may Successes blest  
The Man, who measures Actions by Success.

Yet this absurd Opinion is so strong and so universal among the *Mahometans*, that they take Good Success to be an Infallible Argument of the Justice of a Cause, and an open Sign of the Approbation of Heaven. Whereas such a Notion is indeed to be rank'd amongst the ridiculous Follies of the lowest and most Ignorant Vulgar. For 'tis evident to any Person of Common Sense, that as *Juvenal* says,

————— *Multi*  
*Committunt eadem diverso crimina fato;*  
*Ille crucem sceleris pretium tulit, hic diadema.*

That Sins alike unlike Rewards have found,  
And whilst *this* Villain's Hang'd, the *other's*  
Crown'd.

Hence likewise we learn, that as it is the part of a Wise Man, not to bound his Sight at the things before him, but to extend his Consideration and his View to things to come, and to drive on his well-form'd Resolution with his whole Strength, without suffering either the Threats of Fear, or the Flatteries of Pleasure to turn him aside: So is it as sure a Mark of a Fool to strive directly against the Stream, and not rather to accommodate his Inclinations to the Events, when they will not conform themselves to his Inclinations (a). Lastly, since Human Foresight is so weak in discovering Future things, and since they are very far from being under our Guidance, tho' they frequently fall out well beyond our Hopes and Expectations; hence it is plain, that we ought neither too securely to trust our present Condition, nor to spend too much Care and Anxiety on what is to come. And for the same Reason, Insolence in Prosperity, and Despair in Adversity, are to be both avoided as equally dangerous and equally absurd (b).

IX. Another necessary part of Human Improvement, is to be able to set a just Price on those things which are the chief in moving our Appetites. Because from the exact Worth and Value of them we are to judge how far we may justly labour to be concern'd about them. Amongst these, that which appears with most Figure and Splendor, and which is most capable of soliciting Elevated and Noble Souls, is the Opinion of Worth and Excellency, the Foundation of Glory and of Praise. Now as to this Concern, we are in such a manner to form and dispose our Mind, as to endeavour as far as possible the procuring and the preserving that kind of *Esteem* which is *simply* so call'd, being the bare good Opinion of good Men: In as much as this *regularly* flows from the Observance of the Law of Nature, and of our Duty; and because the want of it may lay

(a) *Cedere majori virtutis fama secunda est.* Mart.  
'Tis next to Conqu'ring, wisely to submit.

(b) *Ὀμίχλη ἄσκοτος ἐσομένων*, the Dark Mist of Futurities. Tryphiodor. 'T would be easy to illustrate this Doctrine with endless Testimonies of Authors. Take the following for a Specimen. *Arrian. Epictet. l. 2. c. 1.* In things which do not depend upon our Election, let us be bold and venturous, but in things which are capable of Choice and Counsel, let us be timorous and cautious. *Plutarch de Superstitione.* God is the Hope of Courage and Vertue, not the Plea and Excuse of Weakness and Cowardice.

*Juvenal, S. 10.*

*Nullum numen abest si sit prudentia.* ———  
All Heaven stands ready to assist the Wise.

*Horat. Carm. III. 4.*  
*Vis consilii expers mole ruit sua*  
*Vim temperatam Dii quoque promouent*  
*In majus.* ———

Force without Wisdom for its Guide  
Sinks with its own Unweildy Weight,  
But with Delib'rate Art apply'd  
The Gods advance it to a Nobler Height.

*Lucret. l. 3.*  
————— *Petere quod inane est nec datur unquam*  
*Atque in eo semper clarum perferre laborem,*  
*Hoc est adverso nixantem tradere monte*  
*Saxum, quod tamen a summo jam vertice rursus*  
*Volvitur, & plani raptim petit æquora campi.*

For, still to seek, and still in Hopes devour,  
And never to enjoy desired Power,  
What is it but to rowl a weighty Stone  
Against a Hill, which straight will tumble down?  
Almost a Top, it must return again,  
And with swift Force rowl thro' the humble Plain.

*Hor. Ode 3. l. 2.*  
*Æquam momento rebus in arduis*  
*Servare mentem: non secus in bonis*  
*Ab insolenti temperatam*  
*Latitia.*

Learn, Friend, to keep an even State,  
Whatever Scene your Cares employs,  
Amongst the Smiles or Frowns of Fate,  
Nor mean in Grief, nor Insolent in Joys.

Mr. Creech.

Ibid.

ay open an occasion to a Thousand Mischiefs and Inconveniences (1). And if this good Reputation be assaulted by the Lies and Calumnies of Wicked Men, we are to spare no Labour in restoring it to its primitive Purity. But when it is not in our power to overcome Slander, or to stifle the false Conceptions that the World may entertain about us, we are to comfort our Selves with the Testimony of a good Conscience, and with the Assurance that our Integrity is still known to God (a).

As for that *Esteem*, which we usually term *Intensive*, as Honour and Glory, we are so far to pursue it, as it redounds from worthy Actions, agreeable to Reason, and promoting the Good of Human Society; and as far as it opens a wider Field for such Generous Undertakings. But how large a Share soever we obtain of these Favours, and even by Honest Means, good heed is to be taken that our Mind doth not swell with Arrogance and Vain-glory (b). Much more foolish and ridiculous is it to boast of, and to value our selves upon, what is empty and vain, and gives no solid Proof of our Worth. Therefore *Demonastes*

in *Lucian*, when he saw a Fellow priding himself in the Wideness of his Purple, *Hark you, Friend* (says he) *a Sheep us'd to carry this fine Burthen before you, and yet was still but a Sheep.* But when we want Occasions and Opportunities of showing our Worth, and are not able to procure them; we must bear this ill Fortune with Patience, since there is nothing in it that can be charg'd upon our Default (c). On the other hand, it appears to be at the same time Wicked and Foolish, to affect and usurp the external Ensigns of Honour, when the inward Foundations of it are wanting: As it is detestable Madness, to aspire to Fame and to Honours by Evil Arts, and by Deeds repugnant to Reason; and to desire the shining above others, only to be able to insult over them, and to make them obnoxious to our Pleasure. Lastly, since we are not always allow'd the Liberty of building our Fortune as we please, since it must sometimes depend on external Causes; our Mind is to be put into such a temper, as when we have once done our best, to rest satisfied with the Lot that falls to our Share; and to look on those things which we are not able to compass and

Ibid. Od. 10.

*Rebus angustis animosus atque  
Fortis appare, sapienter idem  
Contrahes vento nimium secundo  
Turgida vela.*

L. 2. Ode 29.

*Ille potens sui  
Letusq; deget, cui licet in diem  
Dixisse vixi; cras vel atra  
Nube polum pater occupato,  
Vel sole puro.*

Idem 1. 2. Sat. 9.

*Quis nam igitur liber? sapiens; sibi qui imperiosus,  
Quem neque pauperies, neq; mors neq; vincula terrent.  
Responsare cupidinibus, contemnere honores  
Fortis, & in seipso totus teres atq; rotundus,  
Externi ne quid valeat per laeve morari.*

Juvenal, Sat. 13.

*Dicimus autem,  
Hos quoque felices qui ferre incommoda vita,  
Nec jactare jugum vita didicere magistra.*

Idem Sat. 10.

*Permittes ipsis expendere Numinibus, quid  
Conveniat nobis, rebusq; sit utile nostris.  
Nam pro jucundis aptissima quaeque dabunt Dii;  
Charior est illis homo quam sibi.*

(1) See 2 Cor. VIII. 21. *V. Essais de Morale par Mr. Placete, Vol. 4. Discours 6, & 7.* (a) Add. *Le Grand Philos.* P. 8. p. 420. (b) *Plin. Panegy.* He who hath already arriv'd at the Noblest Pitch of Eminence, hath this only way left of improving his Height, by stooping to the Arts of Humility and Condescension, as secure of his own Greatness.

(c) Hor. Carm. III. 2.

*Virtus repulsae nescia sordidae  
Intaminatis fulget honoribus  
Nec sumit aut ponit secures.  
Arbitrio popularis aerae.*

Claudian. de Consulatu. Mall.

*Ipsa quidem Virtus pretium sibi; solaq; late  
Fortuna securâ nitet, nec facibus ullis  
Erigitur, plausuræ petit clarescere vulgi:  
Nil opis externa cupiens, nil indiga laudis,  
Divitiis animosa suis, immotaq; cunctis  
Casibus, ex alta mortalium despicit arce.*

The more you are oppress'd, bear up the more;  
Weather the Tempest, 'till its Rage be o'er.  
But if too prosperous and too strong a Gale  
Should rather ruffle than just fill your Sail,  
Lessen it, and let it take but so much Wind.  
As is proportion'd to the Course design'd.

Dryd. Miscell. 2. p. 422.

He lives in true Delight,  
And Master of himself appears,  
Who strange alike to Hopes and Fears,  
Can boldly say each Night,  
To Morrow let my Sun his Beams display,  
Or in Clouds hide them; I have liv'd to Day.

Mr. Cowley.

He's Free, who Wisely can himself control,  
And challenge Fate and Death to shock his Soul.  
Brave to resist the Tide of Wild Desire,  
And Proof against Ambition's Cheating Fire.  
All Round and Smooth, that no External Load,  
May fix a Rub, to check him in his Road.

As Happy those, though not so Learn'd, are thought  
Whom Life instructs, who by Experience taught  
For new to come from past Misfortunes, look,  
Nor shake the Yoke, which Galls the more 'tis shook.

Mr. Creech.

Intrust thy Fortune to the Powers above,  
Leave them to manage for thee, and to grant  
What their unerring Wisdom sees thee want;  
In Goodness as in Greatness they excel:  
Oh that we lov'd our selves but half so well!

Mr. Dryden.

On its own Worth true Majesty is rear'd,  
And Vertue is her own Reward;  
With solid Beams and Native Glory Bright,  
She neither Darknes dreads, nor covets Light.  
True to her self, and fix'd to In-born Laws,  
Nor sunk by Spight, nor lifted by Applause.

Mr. Prior.

Vertue the Tribute scorns of Vulgar Eyes,  
And in her self her richest Portion lies.  
With Native Rays she shines, nor owes a Beam  
To Glittering Honour, or to Glossy Fame.  
Unmov'd at Earthly Storms, to Heaven Ally'd,  
From Heaven she looks, and laughs at Mortal Pride.

to obtain, as Matters which do not concern us, and which therefore are not worthy our Grief or our Anger (a).

X. For the better maintaining and preserving himself in the World, a Man hath likewise need of external Goods and Possessions; as it is frequently a part of our Duty to provide them for others. Concerning which it is the Command of Reason and Nature, that we endeavour the Procurement of them, so far as is consistent with our Strength, our Opportunities, and our Honesty. The *Ant* which *Virgil* (1) makes so prudent a Provider

for Old Age, is even in the Divine Writings propos'd amongst the Examples of Harmless Industry (b). But because our Wants are not infinite, but lie in a very little Compass, therefore we must moderate our Desire and our Pursuit of these things, according to the just Occasions of Nature, and the Measure of Sobriety. *Socrates* in *Diogenes Laertius*, when he us'd to see the prodigious Quantity of Goods expos'd to Sale in the publick places, would cry out, *ἄριστον ἐστὶν ἄρῃαν εἶναι ἔχειν*; *What a number of things are there here which I do not want* (c)? We must not then on any account give too loose Reins

(a) *Vid. Valer. Max. l. 7. c. 2. f. 1. Seneca Agamemn.*

*Modicis rebus longius ævum est.  
Felix mediæ quisquis turba  
Sorte quietus,  
Aura stringit littora tuta  
Timidusq; mari credere cymbam,  
Remo terras propiore legit.*

*Idem Herc. Octæ.*

*Male pensantur magna ruinis;  
Felix alius, magnusq; volet;  
Me nulla vocet turba potentem;  
Stringat tenuis littora puppis.  
Nec magna meos aura phaselos  
Jubeat medium & scindere pontum.  
Transit tutas Fortuna sinus,  
Medioq; rates quaris in alto,  
Quarum feriunt suppara nubes.*

Add. *Oedip. v. 882, &c.*

(1) ——— *Inopi metuens Formica senectæ.* *Georg. l. 1. vers. 186.* (b) *Prov. VI. 6. XIII. 7. Euripides Electra.*

————— The Wretch that hopes  
To help his Idle Hands with Idle Prayers,  
And will not work to live, should fairly starve  
By Gods and Men unpitied. —————

(c) *Juvenal Sat. 5.*

*Ventre nihil novi frugalius.* —————  
————— The Belly is a Frugal Guest.

*Idem Sat. 14.*

————— *Mensura tamen quæ  
Sufficiat census, si quis me consulat edam:  
In quantum sitis atq; fames & frigora poscunt.*

If any ask me what would satisfy  
To make Life easie, thus would I reply:  
As much as keeps out Hunger, Thirst and Cold.

*Mr. Dryden, Jun.*

*Apuleius Apolog. I would chuse my Fortune as I would my Coat, rather neat and fit, than too long or too full. In as much as in all things which we apply to the Service of Life, whatever exceeds Conveniency and Moderation, turns more to Burthen than to Use. Unweildly Possessions, like vast and monstrous Rudders, will sooner drown than guide us: They clog with Plenty, and surfeit with Excess.*

*Lucan. l. 4.*

*Discite quam parvo liceat producere vitam,  
Et quantum natura petit.* —————

————— *Satis est populo fluviusq; Ceresq;*

*Lucret. l. 5.*

*Quod si quis vera vitam ratione gubernet,  
Divitiæ grandes homini sunt vivere parce  
Æquo animo.*

*Claudian in Rufin. 1.*

*Vivitur exiguo melius; Natura beatiss  
Omnibus esse dedit si quis cognoverit uti.*

*Horat. Carm. III. 16.*

*Contracta melius parva cupidina  
Vectigalia porrigam,  
Quam si Mygdoniis regnum Halyattici  
Campis continuem: multa petentibus  
Desunt multa, bene est cui Deus obtulit,  
Parca quod satis est manu.*

True Bliss is Frugal, every Brook and Field  
A full Supply for Life and Nature yield.

Would Men but once live up to Reason's Rules,  
They would not scrape and cringe to Wealthy Fools.  
For 'tis the Greatest Wealth to live Content  
With little. —————

*Mr. Creech.*

Life runs the best on little: Nature's Store  
Can make all Happy that will use their Power.

Thus Paraphras'd by *Mr. Cowley.*

A Field of Corn, a Fountain, and a Wood,  
Is all the Wealth by Nature understood.  
The Monarch on whom fertile Nile bestows  
All which that Grateful Earth can bear,  
Deceives himself if he suppose,  
That more than this falls to his Share.  
Whatever an Estate doth beyond this afford,  
Is not a Rent paid to the Lord;  
But is a Tax Illegal and Unjust  
Exacted from it by the Tyrant Lust.  
Much will always wanting be  
To him who much desires. Thrice happy he  
To whom the wise Indulgency of Heaven  
With sparing Hand but just enough has given.

*Idem*

Reins to our desire of getting; much less must we invade the Wealth of others by Injuries and Evil Designs (a). And those things which we have fairly made our selves Masters of, we are to account no otherwise, than as Helps to our Necessities, and Instruments to make us deserve well of Mankind. But the Mind must by no means fix and enslave it self, to possess and to preserve them merely for their own Sake: or to be perpetually employ'd in the endless Labour of increasing them. 'Tis downright Phrensy, as *Juvenal* says,

*Ut locuples moriatis, egenti vivere fato.*

Living, to suffer a low starving Fate,  
In hopes of dying in a Wealthy State.

On the other side, 'tis a very good part of the Character which *Statius* gives of a wise Man,

*Non tibi sepositas infelix strangulat arca  
Droitias, avidiq; animum dispendia torquent*

*Fœneris: expositi census & docta fruendi  
Temperies.*

In stifling Chests your Wealth is not confin'd,  
Nor, lent on Greedy Use, torments your Mind;  
But nobly spreads, on decent Ends employ'd,  
By Moderation, and with *Art enjoy'd* (b).

We are farther to consider, that Nature is not wanting in a plentiful Provision for the Necessities of her Sons (c). That the Riches which we hoard up for future Use, are expos'd in the mean time to a thousand Dangers, and sometimes give us more Trouble in keeping them, than they gave us Labour in getting them (d). Lastly, that whatever we leave heap'd together, at our Death, must fall to an Heir, who may not only be unworthy of the Gift, but may despise and deride the Giver (e). As therefore an Honest Occasion of acquiring Riches is not to be neglected; so the Mind ought to be put into so even a Temper, as not to lose *it self*, if it should happen to lose *them*. *Horace* hath taught us the best way of dealing with Fortune:

*Idem* l. 1. Epist. 10.

*Liceat sub paupere tecto  
Reges, & regum vita præcurrere amicos.*

*Idem* l. 1. Ep. 12.

*Pauper enim non est cui rerum suppetit usus.*

He's never Poor that holds enough for Use.

*Quintil. Declam. 13.* It is Wealth enough to desire no more. *Turpilius in Priscian, The happiest Livers, are the Contented Masters of little Fortunes.*

(a) *Hor. Sat. 1.*

*Denique sit finis querendi, cumq; habeas plus,  
Pauperiem metuas minus; & finire laborem  
Incipias, parto quod ardebas.*

A Cottager may match in true Delights  
Kings, and their more Luxurious Favourites.

*Pauper enim non est cui rerum suppetit usus.*

He's never Poor that holds enough for Use.

Stop then your swelling Riches as they grow;  
And let base Want, with its Retinue, show  
At greater distance a less dreadful Foe.  
Cease your vain Care, let all your Labours cease,  
When your large Wish is crown'd with full Success.

*Eumen. Panegy.* Those who make not Reason the Bounds of their Desires, are never satisfied with any Profuseness of Fortune; and thus Happiness ever slides by them, whilst being full of Hopes, and void of real Enjoyments, they lose the present in gazing after the future. Add. *Charron de la Sageffe, l. 1. c. 21.* (b) *Hippodamus de Felicitate. The Possession of Good Things contributes nothing to Happiness, without the Use.* Add. *Theocrit. Idyll. 16.*

*Horat. Epod. 1.*

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

*Idem Carm. IV. 9.*

*Non possidentem multa vocaveris  
Rekte beatum: rektius occupas  
Nomen beati, qui deorum  
Muneribus sapienter uti*

*---Callet.*

*Idem* l. 1. Epist. 2.

*Semper avarus eget; certum voto pete fuem.  
Quod satis est cui contingit nil amplius optat.*

*Idem* l. 2. Epist. 2.

*Ut ar & ex modico, quantum res poscit acervo  
Tollam: nec metuum quid de me judicet hæres,  
Quod non plura datis invenerit.*

Add. *Gell. l. 10. c. 17.*

(c) *Arrian Epictet. l. 3. c. 24.* No Man is properly an Orphan; we have a Common Father, who is constantly busied in providing for us.

(d) *Horat. Carm. III. 16.*

*Crescentem sequitur cura pecuniam.*

Care in proportion swells with every Bag.

(e) *Bion. Idyll. 5.*

*Ἔς πόσον ἂ δειλοῖ, &c.*

How vainly Wretched do we spend our Years  
In Useless Labour and in Idle Cares?  
The Chase of Wealth unwearied we pursue,  
And lose the Present, for a Future, View.  
But not one thinks how soon his Mortal Line  
Must sadly break, and end his Wild Design.

*Laudo manentem; si celeres quatit  
Pennas resigno quæ dedit, & meâ  
Virtute me involvo; probamq;  
Pauperiem sine dote quæro.*

which a Great and Noble Wit hath thus most happily paraphras'd :

(her ;  
Let her love whom she please, I scorn to woo  
Whilst she stays with me, I'll be Civil to her ;  
But if she offers once to move her Wings,  
I'll fling her back all her vain Gew-gaw things,  
And arm'd with Virtue will more Glorious stand,  
Than if the Bitch still bow'd at my Command.  
I'll marry Honesty, though ne'er so poor,  
Rather than follow such a dull blind Whore (a).

As to Expences, we are to use such a Moderation about them, as most willingly to undertake such as our Duty requires of us, and yet not to squander our Fortune at a venture, without Necessity and without Reason (b). For 'tis equally foolish and absurd, not to apply our Riches to the Ends for which they are given us, and vainly to throw them away on inferior Uses and Designs. The former Vice including numerous Breaches of our Duty; the latter leading the direct way, to Debt, Poverty, Rapine, Deceit, and a Thousand other Enormities and Mischiefs (c).

XI. In Reference to Pleasure and Pain, 'tis not only the Permission but the Advice of Reason, that we avoid as much as possible all unnecessary Trouble and Disquiet; and not only endeavour to keep our selves free from Grief and Disgust, but likewise to entertain our Senses with such Objects as are agreeable and delightful to them (d) (1). But to a singular and exquisite Gratification of Sense, the Mind is by no means to be accustomed; in as much as this kind of Epicurism either weakens and enervates a Man, equally oppressing the Vigour of Body and of Soul, and rendring them both unfit for any serious Business; or steals our Time from better and more necessary Employments; or wasts and consumes our Wealth and our Conveniences of Life; or often, being join'd with some Criminal Practice, draws

after it no other Train, than Trouble, Danger, Damage and Disgrace. As therefore 'tis next degree to Madness, to invite Uneasiness and Torment without Use or Occasion: So is it very Rational to allow our selves a moderate Taste of Lawful and Innocent Pleasures, without suffering them to overwhelm and to drown us. But this is to be fix'd as an inviolable Rule, that no Pleasure must be purchas'd at so dear a rate, as the Neglect or the Transgression of our Duty.

XII. The last Care which lies on us in the improving and well-ordering of our Mind, is with our utmost Diligence to maintain its Sovereignty over its own Motions and Affections; the greatest part of which do not only impair the Health of the Body and the Vigour of the Soul, but cast such a Cloud on the Judgment and Understanding, as to wrest them violently from the ways of Reason and of Duty. So that a *Coldness of the Passions* is, as it were, the Natural Principle of Prudence and Probity amongst Men (e) (2). It may not be amiss to run with some light Remarks thro' the Particulars. *Joy* is in it self a Passion most agreeable to Nature. But strict Care is to be taken, that it do not break out on improper Occasions, as upon the Misfortunes of other Men: And likewise, that it do not drive us on any thing that is vain and trifling, or base and indecent. *Sorrow* is a Canker that wastes alike the Body and the Mind. This therefore is, as much as possible, to be remov'd and expell'd (3); unless so far as the Offices of Humanity oblige us to express our Concern and Pity at the Misfortunes, or at the Deaths of others; and as it is requisite to the Great Business of Repentance. *Love* is a Friendly Motion to Mankind; yet this is so wisely to be manag'd and moderated by Reason, that it does not throw it self away on an Ill Object; that it does not procure base and unworthy Fuel to its Flame; that it does not hinder the Exercise of other Duties, nor degenerate into Disquiet and Disease: That if it settle on a thing subject to Loss, or to Corruption, it stick not so closely to it, as upon the failure of it, to make the Soul unable to recollect and to recover its Force (f). *Hatred*

(a) Add. *Charron de la Sageffe*, l. 1. c. 39. n. 2. f. 9.

(b) *Horat.* l. 2. Epist. 2.

*Distat enim spargas tua prodigus, an neque sumptum  
Invitus facias, neque plura parare labores.*

(c) *Lucan.* l. 1.

*Hinc Usura vorax, avidumq; in tempore fœnus,  
Et concussa fides, & multis utile bellum.*

*Ovid.* Epist. 5.

*Quasq; male emisit nunc male quærit opes.*

What Vice h'as spent by Vice he would repair.

(d) Vid. *Charron de la Sageffe*, l. 2. c. 6. n. 1, 2. (1) Vid. *Mr. Montaigne's Excellent Thoughts upon this subject*, Especially, l. 3. chap. the last. (e) *Quintilian Declam.* 295. *Great Passions are above Laws.* (2) Vid. *Senault's Usage des Passions*. See what is said above, l. 1. c. 4. f. 7. (3) Vid. *Montaigne's Ess.* l. 1. c. 2. *Charron de la Sageffe*, l. 1. c. 33. & l. 3. c. 29. (f) *Sophocles Antigone*. Never let Women rob thee of thy Wits. *Euripid. Hippol. Coron.*

*Ἐνν μετρίαις εἰς ἀνάλας, &c.*

Men should be Mod'rate when they fix their Love,

And ne'er give up their Freedom and their Soul.

The Bands of Passion should be loosely ti'd,

Fit for a Wider or a Closer Knot.

is pernicious as well to the Person who employs it, as to him against whom it is employ'd. This therefore is to be diligently quench'd and stifled, least it betray us to Injuries and Breach of Duty against our Neighbours. And if some Persons do really deserve our Aversion, yet 'twould be still Folly to create, on their account, Uneasiness and Disquiet to our selves. *Envy* is a most deform'd Monster, sometimes producing ill Effects in others, but always in the Envious Person; who like Iron, o'er-run with Rust, not only defiles, but destroys himself continually (a). *Hope*, altho' a Passion more easie and mild than others, yet it is to be guided with such a Temper, that it do not make the Heart sick; nor, by aiming at things either vain and uncertain, or beyond its Strength and Reach, tire it self to no purpose, and become as *Aristotle* terms it, ἐξηραεῖς ἰδὼν τι, a *Waking Dream*: And that we do not fall under *Lucretius's* Censure and Character;

— *Dum abest quod avemus, id exsuperare videtur Cetera; post aliud, cum contigit, illud, avemus; Et sitis aqua tenet vitai semper hianteis, &c.*

— Absent Pleasures seem the best; With wing'd Desire and Hast we those pursue, But those enjoy'd, we straightway call for new. Life, Life we wish still eager to live on, &c.

Mr. Creech.

*Fear*, as it is a dangerous Enemy to Human Minds, so is it a Motion altogether useles, and unserviceable. For that Good Caution which some make to be the Product of it, may arise without its Assistance from a wary Circumspection, and from a Prudence alike untouch'd with Anxiety, or with Consternation. *Anger* is a most Destructive as well as a most Violent Passion; which is to be resisted with our utmost Strength and Endeavour. And whereas some alledge in its Favour, that it excites our Valour, and confirms our Constancy in Dangers; its Effect is indeed directly contrary, for it binds a Man's Spirit and Courage, and drives

him headlong to his Ruine (b). Nearly related to *Anger* is the *Desire of Revenge*, which when it exceeds a moderate Defence of our selves and of our Dependants or Concerns, and a just Assertion of our Rights against the Invaders of them, turns, beyond Dispute, into a *Vice* (c).

XIII. In such Duties then, as we have already reckon'd up, doth that Culture of the Mind chiefly consist, which all are oblig'd to undertake, and in the implanting and enforcing which, those Persons ought to employ especial Care and Concern, who have the Information and Institution of others committed to their Charge. For the want of this Improvement, or the Disposition directly contrary to it, are both repugnant to Human Duty, and lay such a Rub in our way as it is not easy to get over. And therefore whoever is found destitute of such a necessary Perfection, justly falls under common Censure and Reproach.

There is still behind a more peculiar Culture of the Mind, consisting in the various Knowledge of things, and of Arts and Disciplines. This cannot be absolutely necessary to the Discharge of our Duty in General: And therefore every one is to moderate his Pursuit of them, according to his own Capacity, and Occasions, according to the Causes which drive him on such Searches, and the Fruits which he may fairly hope to obtain from them. Now as for those Arts which administer to the Necessities and to the Conveniences of Human Life, no Man can raise a Doubt about their Excellency and Use. But concerning the Study of Letters, many have been so bold as to maintain, that Learning is not only useles, but destructive to Mankind; and that for this Reason we find it to have been forbidden in so many Commonwealths, above the degree of Reading, Writing, and Managing Accompts. Every one knows the common Reproaches that are cast on Scholars: Of their Unfitness for Business, their Weakness of Courage, and of Civil Prudence, their Awkerness in Gesture and in Converse; with a thousand more Reflections of the same Nature, which some Men have thought

(a) *Ovid. Metamorph.*

— *Videt ingratos intabescitq; videndo Successus hominum, carpitq; & carpitur una Suppliciumq; suum est.*

Add. *Bacon's* Ess. 10.

*Horat. l. 1. Ep. 2.*

*Invidia sculi non invener e Tyranni Majus tormentum.*

(b) *Xenophon de re Equestri. Anger is the most Improvident Thing in the World; and seldom acts but what we afterwards repent of. Statius, Theb. 10.*

— *Ne frana animo permitte calenti, Da spatium tenuemq; moram: male cuncta ministrat Impetus.*

*Horat. l. 1. Epist. 2.*

— *Qui non moderabitur iræ Infectum volet esse dolor quod suaserit & mens Dum pœnas odio per vim festinat inulto.*

Pale Envy with pernicious Joys surveighs Others Success; and in Reflection preys Upon her self; her Sin's her Punishment.

Envy's a Torment that no Art can reach, Of Cruelty improv'd. —————

Give not the Reins to Passion in its Course, Let Silence cool, and Leisure break its Force: Fury do's all things ill. —————

The Man of Rage, whose Mind is not his own, Must often grieve, and often wish undone What pass'd when Rashness deaf to Wife Debate, Prompted the speedy Vengeance of his Hate.

*Ira furor brevis est. Anger is a short Phrenzy. Add. Liban. Progymn. Vituper. Iræ. (c) Add. Le Grand. Philosoph. p. 8. c. 12, &c.*

them-

themselves very Eloquent in setting out (a).

Now to come at the Truth of this Question, and to know how to set a just Value on such Attainments, let us first lay this down for an undoubted Principle, that to the acquiring of Wisdom and Prudence, bare Letters are by no means sufficient, without a Native Excellency of Soul. If this Happiness be wanting, we can no more produce Wisdom by Scholastical Institution, than we can procure a rich Harvest of Corn by Ploughing on the Barren Sands. For 'tis one thing to be a Great Reader, and another to be a Prudent Man (b). And *Quintilian's* Judgment is right, when he observes (1), that *Prudence can do more without Learning, than Learning without Prudence*. Therefore that Persons naturally Foolish and Stupid are not turn'd into Great Sages by the Application of Liberal Studies, doth no more detract from the Excellency of Solid Learning, than it doth from the Efficacy of Medicines, that they are not able to recover Dead Men. *To him that hath, shall be given*: And Learning, as *Horace* says, *vim promovet insitam*; and where that *vis insita*, that *Natural Vigour* is wanting, the other Gift is vainly bestow'd,

We may observe farther, that as Learning cannot alter Native Folly, so neither can it reform a Native Disposition to Wickedness and to Impiety; which on the contrary grow more incurable by its Application; drawing thence a Supply of Arms for their open Defence. 'Tis a Remark of *Hobbes* (c), that *without Letters it is impossible for any Man to become either excellently wise, or (unless his Memory be hurt by Disease, or ill Constitution of Organs) excellently foolish* (d).

But the whole Course of those Pursuits which pass under the Name of Learning, is not all of the same Nature, and therefore should not be all rated at the same Price. We may divide Learning then into three kinds, such as is *Useful*, such as is *Elegant* and *Curious*; and lastly, such as is *Vain* and *Insignificant* (2). *Useful* Learning may be again divided into three Classes, *Morality*, *Physick*, and *Mathematicks*. (For *Divinity* stands on its own Bottom, and maintains a separate and a superior Esteem: Tho' if it condescends to enter the common Division of Sciences, it must be placed under this first Head.) *Morality* is concern'd about the Im-

provement of Mens Minds, and the Advancement of a Social Life; *Physick* hath the Health of the Body under its peculiar Care; and *Mathematicks* are of apparent Use and Benefit in the Invention of so many Arts for the Profit and for the Conveniency of Human Life. By that Learning which we term *Elegant* and *Curious*, we understand such as is not indeed of so necessary Use, as to render the Life of Man less sociable or less convenient upon the want of it; and yet is worthy of the Enquiries of Ingenious Persons; because it either leads us deeper into the Discovery of the secret Works of Nature, or shows the singular Excellency of Human Wit and Cunning, or preserves the Memory of Things and Actions, and the Records of Mankind. And such may we reckon the Knowledge of various Tongues, Natural Experiments and Speculations, the more fine and subtle Parts of *Mathematicks*, *History* of all kinds, *Criticism*, (as it preserves Authors correct and entire,) *Poesy*, *Oratory*, and the like. Which are all in themselves excellent, and worthy of Praise, and serve for the Garniture and Ornament of Human Improvement; according to which Measure, both the Practice and the Value of them are to be stated, and determin'd.

*Vain* Learning we call, not only such as is made up of false and erroneous Notions; but likewise all those Inventions of Crafty or of Idle Men, set up to amaze our Minds, and to hinder us from the Pursuits of solid Knowledge. Amongst which, as we must needs reckon many Opinions of the Old Philosophers, so very disagreeable to the apparent Nature of things; so we think it will not be over-severe to join to them the greatest part of that Barbarous Cant, which went under the Name of *School-Learning* in the Ages preceding the Reformation of Religion; and which is still resolutely maintain'd by some Men, either because they know no better, or because they are ashamed to unlearn, what they have made themselves Masters of with such prodigious Labour, or because 'tis the manifest Interest of the *Papal Monarchy* to keep Mens Wits employ'd on Trifles, for fear they should make some very dangerous Discoveries (e). Now the greater Proficiency any Person hath made in solid Knowledge, the more he despises these empty and unprofitable Enquiries.

(a) *Erasmus* (Epist. 12. l. 17.) giving a Character of a Learned Man, adds, *He was skill'd in Common Prudence and Knowledge of Affairs, which is generally wanting to Scholars*. *Procop. Hist. Goth. l. 1. Learning and Virtue are different things; and Good Dispositions are most commonly broken and cov'd by rigorous Institution*. *Theodorick us'd to say, 'twas impossible that they who had been bred up in fear of the Rod, should ever arrive to such a degree of Courage, as to contempt Swords and Spears*. *Plato de Reput. l. 7. No Free Born Subject ought to be Instructed in a Servile Manner*. *Senec. Hippol.*

*Ingenia melius recta se in laudem ferunt,  
Si nobilem animum vegeta libertas alit.*

Great Souls move straightest in the Paths of Praise,  
When left to follow their Free Native Bent.

*Plato Gorg.* When they (the Philosophers) apply themselves to the Management of Publick or of Private Business, they are most contemptibly ridiculous. *Arrian. Epist. l. 1. c. 11.* calls a meer Scholar, an Animal that all the World laughs at. *Add. Montaigne l. 1. c. 24. Charron. l. 1. c. 39. l. 3. c. 14. n. 19, &c.* (b) 'Tis the Saying of an Old Poet, *Learning signifies nothing without a Mind, or Genius*. (1) *Quintilian. Instit. l. 6 c. 6. Plus sine Doctrina Prudentiam, quam sine Prudentia facere Doctrinam, certum est. Vid. Mont. Ess. l. 3. c. 8. Seneca, Epist. 33.* (c) *Leviath. c. 4.* (d) *Add. Bacon, Essay 48.* (2) *Vid. Seneca. Epist. 88.* (e) See *Hobbes Leviath. c. 46, 47. Plutarch (in Alexand.)* has left this Censure of *Aristotle's* *Metaphysics*, that they can afford no real Advantage to the Teacher or the Learner. *Martial. II. Epig. 86.*

*Turpe est difficiles habere nugas,  
Et stultus labor est ineptiarum.*

'Tis shameful Men should needless Knots invent,  
To prove laboriously Impertinent.

Another thing to be consider'd by those who dispute about the Usefulness of Learning is this; that the Faults of bad Institution and of Hot-brain'd Pedants, are not to be charg'd on the Sciences themselves (a). Is it likely, that sound Knowledge and Wisdom should be learnt in such a School as *Agathias* describes under the Philosophaster *Uranius*? *At their Meetings* (says he) *every one talks as he pleases about the sublimest Matters, and Points of Divine Science; and tho' they are perpetually canvassing these Questions, yet they neither persuade others, nor will ever lay aside the Notion they themselves have taken up, but whatever they be, defend them Tooth and Nail, against all Opposers. When the Disputations are over they depart mutually incens'd, and vent their Rage against one another, like quarrelling Gamesters, in the most abusive and foulest Ribaldry. Thus the Contention ends, without the least Profit given, or receiv'd; and those who went to the Engagement very good Friends, come away most violent and most spiteful Enemies* (b) (1).

But supposing things rightly order'd, can any one doubt, whether a Person endow'd with Good Natural Abilities, and instituted in solid Learning, will not discharge the greatest Affairs with more Accuracy and with more Dispatch, than if he depended on the bare Strength of Nature, and neglected other Assistances (c)? But then all those who apply themselves to Study, should be exactly careful, first that they direct their Enquiries to a good End, the Service of Life, or the Improvement and Perfection of their Minds; and not make use of them for idle Amusements, or pleasant Methods of passing away Time. *Aristippus* in

*Diogenes Laertius*, being ask'd what things ingenuous Children should be taught, answer'd, *such as they may use when they come to be Men.* 'Twould not be only shameful, but wicked, if those whose Heads are fill'd with brave Notions and Sentences, should do no more Good than Common Ideots (d). The *Egyptians* call'd their Libraries *Physick-shops for their Soul*, intimating their Use as well as their Excellency (e). And *Arrian's Epictetus* (f) thought he could not give a worse Character of Mens being falsely and insignificantly Learn'd, than to say that they were *Lyons in their Schools, but meer Vermin out of them.*

They are likewise to take heed, that they do not resolve all Science, into bare Authority (2), and Custom of Speech, and an unintelligible Set of Terms; but that they search into the solid Foundations of things, and build their Schemes on evident Reason. As for those things which they cannot yet bring to clear Demonstration, there must be no Stubbornness or Obstinacy in maintaining them; but a former Opinion must be willingly quitted, upon a better and a more certain Information; because 'tis very likely another Man may have more quick and more piercing Parts than our selves; and because every new Day may correct some Mistake in the former. And this teachable Disposition is a most infallible Mark of a Generous Mind (g). Lastly, Care is to be us'd that they do not in such a manner bury themselves amongst their Books, as to neglect other Duties, and render themselves unfit for the Genius of a Civil and Sociable Life (h). For *Pedantry* of Mind is a Vice not peculiar to Scholars, but runs in some measure thro' the whole

(a) Vid. *Charron* l. 3. c. 14. n. 21, &c. (b) The Master is describ'd very agreeable to his Scholars, *Bearing above the rest only by Impudence, and Volubility of Tongue, he appear'd the first Fool of the Herd, and conquer'd those that knew nothing, by knowing just as much.* The like Form of Disputation is ridicul'd by *Lucian in his accusato* & in *Charron.* (1) Vid. *Mont. Ess.* l. 3. c. 8. (c) *Plutarch de Educat. The Man of Contemplation, is of no use unless he act: And the Man of Action cannot but mistake and miscarry, without the Assistance of Study and Contemplation.* *Salust. Jugurth.* The more Reason have we to wonder at the Perverseness of those, who suffer their Parts and Genius, the Best and the Noblest Advantage of a Mortal Nature, to rust in Idleness, and to grow dull and barren through want of Culture. *Ælian V. A. l. 7. c. 15.* When the *Mittylenians* were Masters of the Sea they impos'd this Penalty on their Revolted Allies, that they should not teach Children Letters or Musick: Thinking is the most grievous Punishment that could be inflicted, to live in utter Ignorance of the Liberal Arts. *Add. Cic. Off. l. 1.* where he speaks of the Study and Search of Truth. (d) *I hate Men* (says *Old Pacuvius*, in *Gell. l. 53. c. 8.*) that are Philosophers in Opinion, and Drones in Business. *Isocrates Encom. Helen.* The Sophists ought to have instructed their Scholars, in things which are of Use in Common Life, and to have exercis'd them in the skilful Management of Civil Affairs; taking this for a certain Truth, that a competent Knowledge of Profitable Points, is highly preferable, to the most exquisite Attainments in unnecessary Speculations, and that it is much better to excel others a little in Great and Important things, than to go far beyond them in small Matters, especially in such, as contribute nothing to the Assistance of Life. *Lucian in Conviv.* 'Tis to no purpose to be WISER unless we are BETTER. (e) *Diodor. Sic. l. 1. c. 49.* (f) *L. 4. c. 5.* (2) *Horat. l. 1. Epist. l. 1. vers. 14.* *Nullius addictus jurare in verba Magistri.* Vid. *Cicero, de Nat. Deorum, l. 1. c. 5.* *Seneca, de Vita beata, c. 1.*

(g) *Sophocl. Antigone.*

True Wisdom is not Stiff or Positive,  
Nor thinks it a Disgrace to be Inform'd.

*Plin. N. H. l. 3. Proem.* 'Tis not to be look'd upon as a Wonder, that Mortal Creatures should be incapable of knowing all things. *Idem. l. 11. c. 3.* By my frequent Contemplations on Nature, I have been instructed never to call any thing incredible that she performs. *Diog. Laert. l. 10.* In Natural Enquiries we are not to proceed according to strict Method and Rules, but according as the various Appearances offer themselves to our Observation, and incline our Judgment. *Cic. de N. Deor. l. 1.* The Authority of those who pretend to teach, often proves a hindrance to those who desire to learn. For by this means they neglect to apply their own Judgment, and to take every thing for fix'd and certain, which they hear deliver'd by those whom they admire. *Quint. Instic. l. 3. c. 1.* They love the Path which they first trod in, whatever it be. And you will find it a most difficult Task to make Persons change such Opinions as they imbib'd when they were Children; because every one rather wishes to have his Trouble over, than to continue it, to have learnt formerly, than to be a Learner now. *Idem. l. 7. c. ult.* No Body is willing to see a Thing lessen'd in which he once appear'd Great. Yet as *Plato* observes (*de Repub. l. 5.*) 'Tis very unjust to be angry with the Truth. And all farther Study would be in vain, if it were unlawful to improve the Discoveries of those that went before us. (h) *Lucian Conviv.* A Learned Institution leads aside from Right and Plain Reasoning, those who keep their Eyes and their Thoughts continually fix'd upon their Books.

World, and infects Men of all Orders, Professions and Conditions.

XIV. But altho' the principal and the most laborious part of Human Improvement is concern'd about the Mind, we must not in the mean time neglect the Body; since the Mind makes use of its supports, and can never rise to any great Achievement, if this inferior be ill affected. We are oblig'd therefore, as much as in us lies, to secure a *Sound Body* for our *Sound Mind* to lodge in (1); and rather to harden our Limbs and Constitution by long Endurance of Labour, than to soften or break their Strength by Effeminacy and Idleness (a). *Pyrrhus* is said to have made this only request to the Gods in his daily Devotions, *ὑμῖνεν, to be well in health*, judging this Blessing to contain under it all Degrees of Happiness. Care is likewise to be taken, that our Bodily Force and Vigour be not weaken'd by Intemperance in Meat or Drink, or by unseasonable and unnecessary Labours, or any other way. Upon this account *Gluttony, Drunkenness, Immoderate Use of Women*, and the like Excesses are to avoided (b). 'Tis a famous Saying of *Democritus* in *Plutarch* (c), *if the Body should bring an Action of Damage against the Soul, the Soul would be sure to be Cast*. Tho' to this it might be replied, that the Mistakes of the Mind in Reference to Food, and Pleasure and other things, which concern the Preservation of the Body, do all proceed from its yielding to the Corporeal Appetites and Affections, contrary to the Admonitions of Reason: So that the Mind is never of it self the Cause of bringing the Body into a worse Condition, than ordinary. And therefore to *Democritus's* Saying on one side, we will oppose the no less renown'd Sentence of *Theophrastus* on the other; *The Soul* (says he) *pays large Rent to the Body for its dwelling*.

XV. Our Life is given us by our Great Creator, as a kind of Course or Race, in which we might exercise our Strength and Abilities by the Direction of Reason: And therefore it is not to be measur'd by so many times drawing Breath, but by a constant Succession of Good Actions. Every one is therefore to take Care, that he be not *επιτόσιον ἀχθῶ ἀρξενς* (2), *an useless Burden to the Earth*; unprofitable to himself, and troublesome to others; born only to increase the Number of Mankind, and to devour the Provisions of Nature; and that he do not live only for the sake of his Palate (d). Farther, since Human Industry commonly exercises it self one of these two ways, either in procuring things necessary for the Preservation of Life, or in discharging the Offices of a Social and a Civil Condition; which admit of great Variety, and do not all suit alike with all Mens Capacities and Abilities (3); it is manifest that every Man ought with early Care to chuse out and undertake such a Course of Life as is Honest, Profitable, and Comporting with his Parts and Strength. In which Choice (4), Men are usually determin'd, either by Impulse and Inclination of Genius and Fancy, or by some peculiar Aptness of Body or Mind, or by Condition and Quality of Birth, or by the Goods of Fortune, or by the Authority of Parents, and sometimes by the Command of the Civil State, or lastly by the Invitations of Opportunity, or by the Compulsion of Necessity (e). Hence it appears, that not only those Persons do live in a State repugnant to sound Reason, who maintain themselves by Robbery or Villanies; but those too, who withdraw themselves unnecessarily from the common Duties and Offices of Life: Such are many of the Modern Hermits and Monks, as well as some of the An-

(1) To this end it may be useful to read that incomparable Book, *Medicina Mentis & Corporis*, by Mr. *Tchernhausen*.

(a) Vid. *Diodor. Sic. l. 1. c. 45.* (b) *Juvenal, Sat. 11.*

————— *Buccæ*  
*Noscenda est mensura tua* —————

Add *Socrates's* Arguments against Incontinence, in *Xenophon. Apomn. l. 1.*

Fools only make Attempts beyond their Skill;  
A Wife Man's Power's the Limit of his Will.

Mr. *Congreve:*

(c) *De Sanitate tuenda.* Add. *Bacon. Ess. 30.* (2) *Homer, Il. Σ.* (d) *Cicero. de Nat. Deor. l. 2.* *He that doth not shew himself in Action, seems to me to have lost his very Being.* *Ovid. de Pont. l. 1. El. 6.*

————— *Mors nobis tempus habetur iners.*

————— To be Idle's to be Dead.

*Sil. Ital. l. 3.*

*Quantum etenim distant a morte silentia vita?*  
A silent Life is an untimely Grave.

*Theocrit. Idyll. 14.*

————— *Ποτεῖν π δεῖ οἷς γένυ χλωρόν.*

————— Business should be plid whilst Age is Green.

Add *Gell. l. 19. c. 10.* (3) Vid. *Essais de Morale, Vol. III. p. 44, 202.* (4) Vid. Mr. *Ostervald's* Causes of Corruption, Engl. Ed. p. 227, &c. (e) *Isocrates* (in *Areopagit.*) gives us this Account of the Old Athenians. Under so great an Inequality of Fortunes, they could not prescribe to all the same common Exercises; and therefore they put them in different Ways according to their Circumstances and Condition. The meaner sort they engag'd in Agriculture and in Trading; well knowing both, that Idleness was the Cause of Poverty, and Poverty a Temptation to Injury and Mischiefs. So that by removing this Fountain of Vice, they thought they should prevent the Evils which us'd to flow from it. As for the more Wealthy, them they compell'd to apply their Minds to Horsemanship, Feats of Body, Hunting, and Philosophy: Apprehending that such Employments and Amusements, must needs have this good Effect, to make some excel in Virtue, and to keep others from being Notorious in Vice. It was an Ordinance amongst the Egyptians and Indians, that every Man should follow his Father's Trade. *Diodor. Sic. l. 1. c. 74. & l. 12. c. 41.* The reason of which Institution is given by *Isocrates* in *Laud. Busir:* The like Custom was receiv'd amongst the Peruvians, under their Ancient *Yncas*; the Nobility alone being allow'd to improve themselves by the Study of Letters. *De la Vega. l. 4. c. 19.* 'Tis a True Observation of *Xenophon, Cyropæd. l. 2.* Those Persons arrive at the greatest Height and Perfection in particular Attainments, who have given themselves wholly to some single Pursuit, avoiding Multiplicity of Business and of Enquiry. As he says well in another Place, (1. 8) 'Tis impossible that a Man who professeth many Arts together, should excel in a'l.

cient Philosophers. But those who chiefly fall under this Censure, are the Sturdy and Able *Vagrants*, who abuse the Divine Name into a Trade of getting Money, and make GOD, as it were, their Tributary. The Wickedness of these Varlets is the greater, if they voluntarily maim or distort any of their Limbs, so as to render themselves incapable of doing the World any Service, tho' they should afterwards desire it. 'Tis a Custom very remarkable amongst the *Chinese*, that no Person of sound Strength is permitted to beg, altho' he be *blind*; such unfortunate Wretches being employ'd in turning Mills, from which Service they earn their Subsistence (a).

Again, since Time runs on with such swift Steps, since Death surprizes Men so often when they least expect it, and is always beyond their Power to avoid; thence it follows, that 'tis our Duty to make an early Use of Life, not to begin too long a Thread of Actions, not to lay too vast a Train of Designs (b) (1). We ought likewise to have the Accompts of our Life all ways drawn up in a Readiness, and to harden our Minds betimes against the Terrour of *Dying*; that without a trembling Reluctancy, without repining at our Creator's Pleasure, we may resign, when he demands it, what he lent us of his Free Bounty, under no Terms of keeping (c).

XVI. How passionately every Man loves his own Life, and how heartily he studies the Security and Preservation of it, is evident beyond Dispute. But it will admit of a Debate whether the bare Natural Instinct which he enjoys in common with Beasts, inclines him to these Desires; or whether he is not engag'd in them by some Superior Command of the Law of Nature. For, in as much as no one can, in a legal Sense, stand *oblig'd* to himself, such a Law seems to be of no Force or Significancy which is terminated in my self, which I can dispense with when I please, and by the Breach of which I do no one an Injury. Besides, it looks

like a needless thing to establish a Law about this Point, since the anxious Tenderness of Self-Love would before-hand drive us so forcibly on the Care of our own Safety, as to render it almost impossible for us to act otherwise (d). If then, a Man were born only for himself, we confess it would be convenient that he should be left entirely to his own Disposal, and be allow'd to do whatever he pleas'd with himself. But since by the Universal Consent of all Wise Men it is acknowledg'd, that the Almighty Creator made Man to serve him, and to set forth his Glory in a more illustrious manner, by improving the Good things committed to his Trust; and since *Society*, for which Man is sent into the World, cannot be well exercis'd and maintain'd, unless every one, as much as in him lies, takes care of his own Preservation; (the Safety of the whole Society of Mankind, being a thing unintelligible, if the Safety of each Particular Member were an indifferent Point,) it manifestly appears, that a Man by throwing aside all Care of his own Life, though he cannot properly be said to *injure* himself, yet is highly injurious both to Almighty God, and to the General Body of Mankind (e).

It was not rightly infer'd in the Argument we just now mention'd, that the Law of Nature did not concern it self with this matter, because Instinct did before drive us on the like good Resolution. We should rather imagine, that the Force of Instinct was super-added (as an able Second) to the Dictate of Reason; as if this Help alone could scarce make a Tie strong enough to keep Mankind together. For indeed, if we reflect on the Troubles and Miseries that constantly wait on Human Life, and do so far outweigh that little and mean Portion of Pleasure (2), which through a perpetual Repetition grows every day more flat and languid, so that we must needs loath it in every Enjoyment; and if we consider farther, how many Men have their

(a) *Mart. Hist. Sin.* l. 1. c. 34. (b) *Martial*, l. 1. Epigr. 16. (1) *Ars longa, Vita brevis*. Hippocrat. *Non est crede mihi sapientis dicere vivam: Sera nimis vita est crastina: vive hodie.*

*Horat.* l. 1. Epist. 4. *Inter spem curamq; timores inter Et iras, Omnem crede diem tibi diluxisse supremum: Grata superveniet, quæ non sperabitur hora.*

*Sil. Ital.* l. 3. *Brevitasque vetat mutabilis hora Prolatare diem.*

*Horat.* Carm. l. 4. *Vita summa brevis spem nos vetat inchoare longam.* The Shortness of our Mortal Line Forbids a longer Thread in our Design.

(c) *Virtus futile nomen, Ni decus adfuerit patiendo, ubi tempora lethi Proxima sint.*

*Plin.* N. H. l. 7. c. 40. *One Day passeth Judgment on another, and the last on all.* *Arrian Epist.* l. 1. c. 1. *When my Time is come, I will be prepar'd immediately to leave the World. After what manner? Why, like a Person who is restoring what was lent him.* *Add. M. Antonin.* l. 12. f. 12. & *Bacon*, Ess. 2. (d) *Senec. de Brev. Vitæ.* 'Tis needless to drive us, whether we are going of our own accord. No one wants an Exhortation to be perswaded to love himself, since he drew in that Principle with his first Breath. (e) *Comp. Ant. Matth. de Crim. Prolegom.* c. 3. f. 4. (2) *Mr. Bayle* has over and over prov'd in his *Hist. and Crit. Dictionary*, (as may be found in its Index) *The Miseries of Life are more and greater than its Comforts.*

Days prolong'd only to make them capable of more Misfortunes and Evils; who is there almost, who would not rid himself of the Burthen of Life, as soon as possible, if Instinct did not render it so light and so sweet; or unless so much Bitterness or so much Terrour were join'd to our Notion of Death? And yet who is there almost who would not break through the bare Opposition of Instinct, had not the Command of our Creator secur'd us with a much stronger Bar and Restraint (a)? 'Nature, says *Quintilian*, hath invented this 'chief Devise for the Preservation of Man- 'kind, to make us die unwillingly, thus en- 'abling us to bear so vast a Load of Misfor- 'tunes as falls to our Share, with some Patience 'and Quiet. And *Socrates* in *Xenophon* (b) declares it to be *σοφὸν ἀναγκαστὴν τὴν φύσιν, the Artifice of a Wise Workman, or Builder*, 'to have 'implanted in Men a Desire of producing Off- 'spring; in Woman a Desire of Nursing and 'Breeding them up; and in all, when brought 'up, a vast Desire of Living, and as great a 'Fear of Death. And this last Motive is the main security of every Man, from the Violence of others. For how easy were it to Kill, were it not so hard to Die? Hence he presently becomes Master of other Men's Lives, who hath once arriv'd at the Contempt of his own. And the regard that others have to their own Safety, is the best Defence of Mine (c).

XVII. 'Tis a Question of more Difficulty, whether at all, or how far a Man hath Power over his own Life, either to expose it to extreme Danger, or to consume it by slow means and degrees, or lastly, to end it in a sudden and a violent manner (1). Many of the Ancients allow'd a Man an absolute Right in these Points, and thought he might either voluntarily offer his Life as a Pledge for another's, or devote it freely, without any such Design of preserving the Life of his Friend; or whenever he grew weary of living, might prevent the Tardiness of Nature and Fate. *Pliny* (d) calls the Ability to kill ones self the most excellent Convenience, in the midst of so many Torments of Life. Whom we can by no means excuse from flat Impiety, for daring

to think so abjectly of the greatest Gift of Heaven. It is our Business to examine what seems most agreeable, in this Case, to the Law of Nature. And here we take it first of all to be true beyond dispute, that since Men both can and ought to apply their Pains to the Help and Service of another; and since some certain kinds of Labour, and an overstraining Earnestness in any, may so affect the Strength and Vigour of a Man, as to make Old Age and Death come on much sooner, than if he had pass'd his Days in Softness, and in easy Pursuits; any one may without Fault, voluntarily contract his Life in some Degree, upon account of obliging Mankind more signally, by some extraordinary Services and Benefits. For since we do not only live to our selves, but to God, and to Human society; if either the Glory of our Creator, or the Safety and Good of the General Community require the spending of our Lives, we ought willingly to lay them out on such excellent Uses (e). *Pompey* the Great, in a time of Famine at Rome, when the Officer who had the Care of transporting the Corn, as well as all his other Friends intreated him not to venture to Sea in so stormy a Season, nobly answer'd them, that I should go 'tis necessary, but not that I should live. And *Achilles* in *Homer*, when his Fate was put to his Choice, prefer'd a hasty Death in the Glorious Adventures of War, to the longest Period of Age, to be pass'd idly and ingloriously at home.

XVIII. Farther, in as much as it frequently happens, that the Lives of many Men cannot be preserv'd, unless others expose themselves on their Behalf, to a probable Danger of losing their own; this makes it evident, that the lawful Governour may lay an Injunction on any Man in such cases, not to decline the Danger upon Pain of the severest Punishment. And on this Principle is founded the Obligation of Souldiers, which we shall enlarge upon in its proper place. 'Tis a Noble Saying of *Socrates* in *Plato's Apology*; In whatever Station a Man is fixt either by his own Choice, as judging it the best, or by the Command of his Superior, in that he ought resolutely to continue,

(a) *Quint.* Declam. 4. What Satisfaction, O wretched Mortals, can it prove, to keep the Soul for so many Years, or, if Nature allow'd it, for infinite Ages, in the unpleasant and wearisome restraint of the Body? If we diligently weigh and examine all our Joys, all the Pleasures, which in this universal Scene of the World, either attract our Sight or flatter our Use, we shall find the whole Life of Man to be no more than a single Day. They must be low and abject Minds which are not tired with this poor Circulation of Actions. So that he who by Application to honest Arts is able to understand what is the Perfection of Goodness and true Happiness, will think no Death untimely: and those who refer the Design of our being chiefly to the Mind and Soul, must every Day be surfeited of Life: Ye expect I should now give an account how many things there are in this short Stage, which we ought to avoid and decline; that I should set our Fears and our Calamities against our Joy and our Success. Let us then weigh those dear Comforts for which we weary the Gods with vain Petitions, and on the account of which we complain of the Shortness of Life. And what are they, but Vanity, Greediness, Luxury and Lust? And shall not we be ashamed for the Sake of such Scandalous Privileges, to bear Weakness, Grief, and tedious Distempers; and even to court their stay, when we have an Opportunity of throwing them off and escaping? (b) *Xenophon.* Apomn. l. 1. (c) *Add.* Charron, l. 2. c. 11. n. 8. (1) See *Montaigne's* Ess. l. 2. c. 3. (d) *N. H.* l. 2. c. 7.

(e) *Statius* Theb. X.

*Felix, qui tanta lucem mercede relinquit.*

Happy, who at a Price so Noble sold  
A fleeting Life!

*Horat.* Carm. III. 2.  
Dulce & decorum est pro patria mori.  
Mors & fugacem persequitur virum,  
Nec parcat in bellis juvenem  
Poplitibus, timidoq; tergo.

How Sweet, how Glorious is the parting Breath  
With which our injur'd Country's Peace we buy?  
In vain the Coward flies: whilst swifter Death  
Hangs on his Back, nor spares the quivering Thigh.  
and

and to undergo any Danger that may assault him there; reckoning neither Death nor any other Evil so Grievous, as Cowardice and Infamy.

Nor doth it seem at all repugnant either to Natural Reason, or to the Holy Scriptures, (which command us to lay down our Lives for our Brethren) that, without any such rigid Injunction of a Superior, a Man should voluntarily expose himself to a Probability of losing his Life for others; provided he hath good hopes of thus procuring their Safety, and that they are worthy of so dear a Ransom: For it would be filly and senseless, that a Man should venture his own Life for another whom 'tis impossible to preserve; and that a Person of Worth and Excellence should sacrifice himself for the Security of an Insignificant paltry Fellow (a). We conceive it then to be Lawful, that a Man may either give himself, as a Surety for another, especially for an Innocent and a Worthy Person, or as a Hostage for the Safety of many, in the Case of Treaties; upon pain of suffering Death, if either the accus'd Person doth not appear, or the Treaty be not observ'd. Though the other Party to whom he stands bound on either of these Accounts, cannot fairly put him to Death upon such Failure; as we shall elsewhere make out. But that those vain Customs of Men's devoting themselves out of Fool-hardiness and Ostentation (such as we observ'd to be in use amongst the *Japonese*,) are contrary to the Law of Nature, we do not in the least doubt. For there can be no Virtue in an Action where there's no Reason. Nor do we pretend to maintain, that the Law of Nature obliges a Man to prefer the Lives of others to his own; especially supposing the Cases and Circumstances to be equal. For besides that the common Inclination of Mankind is an Argument to the contrary, we might alledge the Testimony of Witnesses beyond all Exception, allowing a Man to be always dearest to himself,

and Charity still to begin at home (b).

XIX. It remains that we examine, whether or no a Man, at his own free Pleasure, either when he grows weary of Life, or on the account of avoiding some terrible impending Evil, or some ignominious and certain Death, may hasten his own Fate, as a Remedy to his present or to his future Misfortunes (i). On this point we have a famous Saying of Plato (c) frequently mention'd with Honour and Commendation by Christian Writers. *ὡς ἐν νυκτερῶν ἰσμεν οἱ ἄνθρωποι, καὶ εἰ δὲ ἴδῃ ἑαυτὸν ἐκ ταύτης λύειν, εἰ δ' ἀποσιδῶσθαι.* We are plac'd, as it were, upon the Guard, in Life; and a Man must not rid himself of this Charge, or basely desert his Post. Which Lactantius hath express'd more fully in his *Divine Institutions* (d); As (says he) we did not come into the World upon our own Pleasure or Choice, so neither must we quit our Station otherwise than by the Command of him who gave it us; who put us into this Tenement of the Body, with Orders to dwell here, till he should please to remove us. It is worth while to hear how Plato (e) describes the Self-Murderer, whom he hath condemn'd to a disgraceful Burial. He that kills himself, preventing by Violence the Stroke of Fate, being forc'd to his End, neither by the Sentence of the Judges, nor by any unavoidable Chance, nor on the account of defending his Modesty in extreme Danger; but thus unjustly condemning and executing himself, out of Cowardice and Unmanliness of Spirit. Aristotle hath well seconded his Master. To die (says he (f)) either to get rid of Poverty or of Love, or of any other Trouble or Hardship, is so far from being an Act of Courage, that it rather argues the meanest degree of Fear. For 'tis Weakness to fly and to avoid those things which are hard and painful to be undergone (g). Grotius (h) hath observ'd, that Persons Guilty of Self-Murder were excluded from decent Honours of Burial, both amongst the Gentiles and the Jews (i). But amongst

(a) Grotius ad Jonath. C. 1. v. 12. If one Man does well in offering to die for the Preservation of many (as Phocion told Demosthenes) how much more is he in Justice oblig'd to this, who apprehends himself to be the Cause of the common Danger?

(b) See 2 Corinth. VIII. 17, 14. L. 14. Prin. D. præscript. verb. 1. 6. C. de servit. 1. 2. f. 9. D. de aqua plu. arc. Nor can any Argument for the contrary be drawn from 1. 5. f. 4. D. Commodati. 1. 1. f. 28. D. de Sancto Silan. Add. Traët. de Principiis Justi & Decori, p. 12, &c. (i) Vid. Lipsii Epist. Cent. 2. Ep. 22. Dr. Doune's *Blasphém.* Ess. de Morale, Vol. 1. p. 50. (c) In Phædo. (d) Div. Instit. 1. 3. c. 18. (e) De LL. 1. 9. (f) Ethic. 1. 3. c. H. N.

(g) Senec. *Pheniss.*

Non est Virtus  
Timere vitam; sed malis ingentibus  
Obstare, nec se vertere ac retrodare.

Martial, L. 11. Epig. 57.  
Rebus in angustiis facile est contemnere vitam  
Fortiter ille facit qui miser esse potest.

Virgil assigns a Place in Hell to Self-murderers.

Qui sibi letum  
Insontes peperere manus, lucemq; perosæ  
Projecerunt animas.

Valour, is not to be afraid of Life,  
But bravely to resist impending Woes,  
And never to submit or to retire.

Cowards in Misery may court their Fate;  
He's Brave, that dare persist Unfortunate.

They  
Who prodigally throw their Souls away.  
Fools who repining at their wretched State  
And loathing Anxious Life, suborn'd their Fate.

Mr. Dryden.

Procop. Hist. Goth. 1. 4. To throw away our Life when there can be no Advantage, is precipitate Madness: And though such a Blind Fierceness hath some vain Shadow of Courage, yet it will always pass for Folly, in the Judgment of wise Men. Ammian. Marcellin. 1. 25. c. 4. If we consider right, it is just the same Fearfulness and Cowardice, to desire Death when we ought not, and to refuse it on a proper occasion. Add. Roger de Bramin. p. 2. c. 19. Nicol. Trigant. de Regno China, 1. 1. c. 9. Charvon. 1. 2. c. 11. n. 18. (h) L. 2. c. 19. f. 5. (i) Aristotle observes (Ethic. 1. 5. c. 15.) that those who are guilty of their own Deaths, are more properly Injurious to the Commonwealth than to themselves; and that therefore they deserve the Ignominy commonly inflicted on their Reliques.

the latter one Case is commonly excepted, and allow'd as a just Reason for killing ones self; and that is when a Man finds he shall otherwise be made a Repröach to God, and to Religion. For acknowledging the Power over our Lives not to be in our own hands but in God's, they took it for granted, that nothing but the Will of God, either *manifest* or *presumptive*, could excuse the Design of anticipating our Fate. As Instances of this excepted Case they alledge the Examples, of *Sampson*, who chose to die by his own Strength, when he found the True Religion expos'd to Scorn in his Person and Misfortunes. And of *Saul*, who fell on his own Sword, lest he should have been derided and insulted over by God's and his Enemies; and lest, if he should have yielded himself Prisoner, the Slavery of his Country and Kingdom should inevitably follow. For the *Jews* are of Opinion that *Saul* recover'd his Wisdom and Honour, as to the last Act of his Life; in as much as after the Ghost of *Samuel* had foretold his Death in the Battle, yet he refus'd not to engage for his Country and for the Law of his God; whence he merited eternal Praise, even by the Testimony of *David*; who likewise commended so highly the Piety of those Men, who honour'd their Princes Reliques with a decent Burial.

Some extend this Exception and Allowance to many other Cases which bear a Resemblance to the former. And the Foundation they build upon is this, that as no Man can be properly bound or oblig'd to himself, so no Man can do an Injury to himself, when he takes away his own Life. As for a Man's being engag'd by the *Law of Nature* to preserve himself, they say the Reason of this is, because he is constituted and appointed by God for the maintenance of *Human Society*, which he must not by any means forsake, like an idle Soldier, who runs away from the Post assign'd him in Battle; And that therefore my Obligation to save my own Life, is not a *Debt* to my self, but to God, and to the Community of Mankind. So that if that Respect to God and to Mankind be taken off and be remov'd, the Care of my Life is recommended to me only by *Sensitive Instinct*, which not rising to the Force of a Law, an Action repugnant to it cannot be accounted sinful. On these Considerations, they think the Case of those Persons deserves a favourable Judgment, and at least a kind Pity rather than a rigorous Censure, who lay violent Hands upon themselves, when they see that they shall otherwise infallibly suffer a Death of Torture and Ignominy from their

Enemies; since it cannot be for the Interest of the Publick, that they must needs die in so infamous a manner: Or else, when they see such an Injury likely to be offer'd to them, as if they undergo, they shall be ever after scorn'd and derided by the rest of Mankind. Of the former sort, are those, who seeing themselves condemn'd to Death, either by Cruel Enemies abroad, or Bloody Tyrants at home, have wilfully prevented the Stroke; either to avoid the Tortures and the Shame of a Publick Execution, or to procure some Benefit to their Friends or Families by this Expedient. Thus *Tacitus* (a), giving an account of some of the *Accus'd Persons* under *Tiberius*, who made themselves away, observes, that *the Fear of the Executioner, rendred these Acts very frequent. And that whereas such as suffer'd Death in Publick, were denied the Privilege of Burial, and had their Goods confiscated; those who died by their own hands, were decently interr'd, and their Last Wills stood good with full effect; these Indulgences serving as a Reward for their Haste.* And here by the way we may remark, that *Martial's* Censure doth not always hold good,

— *Furor est, ne mori, mori;*

— 'Tis mad to die for fear of Death;

For, as *Æschines* (b) hath well distinguish'd, *To die is not so terrible, as to bear the Infamy that attends some kinds of Deaths.*

The other sort of Persons whose Death we observ'd to be so favourably interpreted by some Casuists, are those Women and Beautiful Boys, who have kill'd themselves to avoid the Violation of their Chastity (c). And in their Behalf, they urge this plausible Excuse, that being assaulted with such a Danger as they could not otherwise unless by Miracle escape, they might well conclude that their Almighty Sovereign and General, now gave them a Dismission, and that they might well presume on the Consent and Leave of Mankind, to whom they were already lost: It being no ones Interest, that they should not anticipate their Death for so little a time, to avoid the feeling of such Tortures and Abuses as might perhaps tempt them to yield to a more grievous Sin: And in as much as it seem'd unreasonable to condemn Generous Souls to such a Necessity, as that they must wait for the Sword of Villains, who would inhanche the Bitterness of Death, by their foul and ignominious Usage (d).

But to leave this particular Point without venturing at a Determination; thus much we take to be evident, that those who voluntarily

(a) Ann. VI. (b) Orat. de fals. Legat. (c) Vid. Paul Diac. l. 15. & Euseb. H. E. l. 8. c. 24, 27. (d) Cicero Tusc. Qu. I. Cato left the World rejoicing that he had met with an Opportunity of Dying. For that Divine Power which dwells in us, forbids us to depart without his Leave. But when Heaven presents a fair Occasion, as formerly to Socrates, now to Cato, and often to other Persons, I dare engage, that a truly wise Man, will quit with Joy this Vale of Darkness, to enter into Happiness and Light. And yet such an one will not violently break the Chains of his Prison; for this the Laws forbid him; but he will go out quietly and fairly, when God is pleas'd to give him his Enlargement; as if his Release from the Restraint were sign'd by the Proper Magistrate and Power. Comp. l. 3. f. 6. D. de bonis eorum qui ante sententiam. l. 45. f. D. de jure fisci. Add. Quintilian. Declam. 4. Ant. Matthe: de Crim. ad. l. 48. tit. 5. c. 1. f. 9. Græt. ad Judic. c. 16. v. 30. put

put an end to their own Lives, either as tired out with the many Troubles which commonly attend our Mortal Condition; or from an *Abhorrence* of Indignities and Evils, which yet would not render them disgraceful Members of *Human Society*; or through Fear of such Pains and Torments as by resolutely enduring, they might have become useful Examples to others; cannot be well clear'd of the Charge of *Sinning* against the *Law of Nature*. Sir *Thomas Moor* seems to be of another Opinion in his *Utopia*, but his Reasons do not prevail with us to alter our Judgment.

But those are on all accounts to be exempted from the Crime of Self-Murder, who lay violent Hands on themselves, under any Disease robbing them of the Use of Reason. Many Persons likewise who have ran into Voluntary Destruction, upon an exceeding Fright and Consternation, have on that account been excus'd by Moderate and Candid Judges (a).

It ought to be observ'd farther on this Head, that it makes no difference whether a Man kill himself, or force others to dispatch him (b). For he who at such a time, or on such occasion, ought not to die, is by no means excus'd, if he makes use of another Man's hands to procure his Death; since what a Man doth by another, he is suppos'd in Law to have done himself, and must therefore bear the Guilt or *Imputation* of the Fact (1): Altho' the Person who lends his hands to such a Service, may likewise bring himself in for a Share in the Fault. For this Reason we don't admire the Reflection which *Florus* (c) makes on the Deaths of *Brutus* and *Cassius*; who (says he) doth not wonder, that these *Wise and Great Persons* did not employ their own hands in their concluding Strokes? Perhaps it was part of their Perswasion, that they ought not to defile themselves by such Attempts, but that in delivering their most Holy and most Pious Souls from the Confinement of their Bodies, they should make use of their own Judgment, in the Intention, and

of other Men's Wickedness in the Execution. For if it were unlawful for them at that time to end their Lives, it was indifferent whether they fell by their own or by others Violence. But if it were lawful, how can any Wickedness or Guilt be imputed to the Servants who assisted them? Though the Historian might in some measure be excus'd, if the same Custom were practis'd in his Country, which *Aschines* mentions amongst the *Grecians*, that if a Person Murder'd himself, the hand that perform'd the Deed, was buried apart from the rest of the Body (d).

To conclude, since we deny that a Man hath absolute Power over his own Life, it is plain that we cannot approve of those Laws, which in some Countries either command or permit People to make themselves away. Such a Law *Diodorus Siculus* (e) reports to have been in force amongst the Inhabitants of the Island *Ceylan*, ordaining, that the People should live only to such a Number of Years, which being run out, they eat a certain Herb that put them into their long Sleep, and dispatch'd them without the least Sense of Pain (f). And thus too amongst the *Creans*, all Persons above Sixty Years old were oblig'd by the Laws to poyson themselves, to supply Food for the rest (g). Tho' *Alian* gives this better Reason for the Practice, that having arriv'd at such an Age they were conscious to themselves, that they were no longer able to promote their Country's Interest by their Service; growing now towards *Stupidity and Dotage* (h). *Procopius* (i) relates a Custom of the *Heruli*, by which those who were weaken'd and disabled either by Disease or Age, voluntarily sent themselves out of the World: The Wives hanging themselves at the Tombs of their Husbands, if they lost them in this manner. *Alian* (k) reports somewhat to the same purpose of the *Sardi*, and the *Bebricci*, and *Strabo* (l), and *Herodotus* (m) of the *Massagetae*, who may be consulted at Leisure.

(a) *Q. Curtius*, l. 4. c. 16. When Fear hath once got Possession of the Mind, Men grow desperate, and dread nothing but that first Object of Terror. *Lucan*. l. 3.

*Mille modos inter lethi mors una timori est  
Qua capere mori.*

*Mors timore appetita*, Death desired thro' Fear, is a Phrase with *Sueton*. Add. l. 14. f. 3. *D. quod metus causa*, & *Montaigne*. Ess. l. 1. c. 17. (b) Thus *Deianira* speaks in *Seneca* (*Aerc. Oet.*)

*Dextera sternar tua  
Sed mente nostra.*

Amongst a Thousand ways of Death, they fear  
That only which in part they feel.

— Yours shall be the Hand of Fate,  
— And mine the Will.

(1) *David* was Guilty of the Death of *Uriah*, tho' he got it effected by the Hands of the *Ammonites*. So were *Pilate* and the *Pharisees* Guilty of that of our Saviour, tho' they did not themselves fasten Him to the Cross, but order'd the Soldiers to do it.

(c) L. 4. 7. (d) *Orat. contra Ctesiphont*. (e) L. 2. c. 57. (f) Add. l. 3. c. 33. (g) *Strabo*, l. 10. *Heraclid. de Polit.* Vid. H. l. 3. c. 37. (h) Add. *Valer. Max.* l. 2. c. 6. f. 7, 8. (i) *Hist. Oetb.* l. 2. (k) L. 2. c. 4. (l) L. 2. (m) *Glio in fin.*

## C H A P. V.

## Of Self-Defence.

**T**O *Self-Preservation*, which not only the tenderest Passion, but the exactest Reason recommends to Mankind, belongs *Self-Defence*, or the warding off such Evils or Mischiefs as tend to our hurt, when offer'd by other Men. This Defence of our selves may be undertaken two ways, either without *hurting* him, who designs the Mischief against us; or else by *hurting* or *destroying* him. As to the former Expedient, no sensible Man can question, but that it is altogether lawful, and blameless. But concerning the latter, many have entertain'd a Scruple; in as much as by putting it in Practice we hurt or destroy a Man like our selves, with whom we are oblig'd to live in a *Social* manner, and whose Death seems to be as great a Loss to Mankind, as our own. And besides, because a *forcible* Repulse of an Aggressor, may cause more Disturbances and Outrages in human Society, than if we should either decline the Mischief by Flight, or patiently yield our Body to it, when an escape is impossible. Yet that the Defence of our selves may not only be undertaken the first of these ways, but when that proves ineffectual, even with the Hurt of the Assailant, we are inform'd as well by the Judgment of Reason, as by the concurring Testimony of the Learned and Unlearned World. 'Tis true Man was created for the maintaining of Peace with his Fellows, and all the Laws of Nature which bear a regard to other Men, do primarily tend towards the Constitution and the Preservation of this Universal Safety and Quiet. Yet Nature is not backward in giving us an Indulgence to fly even to *Force*, when we cannot by other means secure our selves from Injuries and Assaults. For the Obligation to the Exercise of the Laws of Nature and the Offices of Peace, is *mutual*, and binds all Men alike; neither hath Nature given any Person such a distinct Privilege, as that he may break these Laws at his Pleasure, towards *others*, and the others be still oblig'd to maintain the Peace towards *him*. But the Duty being *Mutual*, the Peace ought to be *mutually* observ'd. And therefore when another, contrary to the Laws of Peace

attempts such things against me, as tend to my Destruction, it would be the highest Impudence in him to require me at the same time to hold his Person as Sacred and Inviolable: That is, to forego my own Safety, for the sake of letting him practice his Malice with Impunity (a). But since in his Behaviour towards me he shows himself *unsociable*, and so renders himself unfit to receive from me the Duties of Peace, all my Care and Concern ought to be how to effect my own Deliverance from his hands; which if I cannot accomplish without his *Hurt*, he may impute the Mischief to his own Wickedness, which put me under this Necessity (b). For otherwise, all the Goods which we enjoy either by the Gift of Nature, or by the Procurement of our own Industry, would have been granted us in vain, if it were unlawful for us to oppose those in a *forcible* manner, who unjustly invade them. And *honest* Men would be expos'd a ready Prey to *Villains*, if they were never allow'd to make use of Violence in resisting their Attacks. So that upon the whole, to banish *Self-defence* though pursued by *Force*, would be so far from promoting the Peace, that it would rather contribute to the Ruine and Destruction of Mankind. Nor is it to be imagin'd that the *Law of Nature*, which was instituted for a Man's Security in the World, should favour so absurd a Peace, as must necessarily cause his present Destruction, and would in fine, produce any Thing sooner than a *sociable* Life (c).

II. But now, whether a *Violent Self-defence*, and such as is join'd with the Hurt or the Slaughter of the Assailant be an obliging and a necessary Duty, (as we have already shown it to be a lawful, and an allow'd Practice,) is a Question not so easy to be determin'd. In stating which Point we do not speak of Soldiers, or of the Guards hired by Travellers, who whilst they defend themselves with the Slaughter of the Enemies or the Robbers, at the same time protect and deliver their Country, or the Men who have put themselves under their Care. But we confine our selves to

(a) Herodian. l. 4. c. 5. *In Extream Danger, not only Necessity but Reputation obligeth us rather to avenge an Injury, than sustain it. Since should we fall by such a Mischief, at the same time that we were pitied as Unfortunate, we should be reproach'd as Cowards.*

(b) Hor. II. Sat. l. v. 44.

*Nec quisquam noceat cupido mihi pacis: at ille  
Qui me commovit, (melius non tangere, clamo;)   
Flebit.*

Hurt not a Peaceful Man: but if you try  
His Patience far, (you had best keep off, I cry;)   
You may repent your Boldness. ———

(c) Add. Græc. l. 1. c. 2. & 6. 3. f. 3. To whom we may apply that Saying of Seneca (Phœnix)

*Vitam tibi ipsi si negas, multis negas.*

By chusing Death your self, you chuse for All.

the Case of those who are excited to make such Defence by their own Particular Danger (a). Now there are some who will have this *Defence* to be so strict a *Command*, that it cannot be taken off even by *Civil Constitutions*; and consequently that he who suffers himself to be kill'd, when he might have violently resisted, ought to be look'd upon as guilty of *Self-Murder* (b). Which is something like the Custom in *Sparta*, where the *Ephori* punish'd a Man, for having suffer'd many Persons to injure him (c).

The Author of the Treatise *De Principiis Justi & Decori*, declares in Favour of this Opinion: and the Argument he proceeds on is to this purpose (d), 'That since amongst other things contributing to the Preservation of Man, Nature hath given us all a quick Sense of Pain, a Desire of Revenge, together with hands for the hurting others, or the defending our selves; we may hence infer, that these Gifts not being bestow'd on us in vain, it is the Pleasure of God that we should employ them in procuring our own Safety. And that therefore not to use my hands against an Assailant, tho' to the Procurement of his Death, would be the same thing as voluntarily to cut them off. Though indeed he afterwards (e) confesses, that this Law of Self-Preservation is not of so strict necessity, but that there may sometimes happen such Cases, as shall either dispense with a Man's Obedience to it, or leave him free to do as he pleases.

For our parts, we think it ought principally to be consider'd, whether it much concern the Interest of many that the Person Invaded should survive, or whether he seem only to live for himself. In the former Case we conceive that there lies an *Obligation* on a Man to secure his own Life by any possible Means. But in the latter Case we take it to be a thing of *Permission* or Allowance only, not of *Command* to defend One-self by the Death of the Aggressor, especially if his Life would have been of great Service and Profit to many People; and if we may probably conjecture, that by dying in such an Attempt, he incurs the Danger of Eternal Damnation. For tho' the Greatness of a surprizing Terrour will scarce suffer one exactly to weigh the Merits of Persons; and tho' such a Danger as a Man voluntarily throws himself into, and may at his Pleasure get rid of, ought to find little Re-

gard or Consideration from others, especially from him who is the Subject of his Fury, and at whose Cost he is thus extravagant (f); Yet that an Act from which so great Evils would be brought upon another (as there would sometimes from this Violent Defence,) should be reckon'd a matter of strict Duty, and the Omission of it a Sin, we see little Reason to allow. Especially, since the Old Maxim might be so well applied to this Case, *that any Man may renounce his own Privilege, provided he do not thereby injure a third Person*: Which *Quintilian* (g) hath thus express'd and illustrated, *This, says he, is the Nature of all Benefits, that they do not impose a necessity, but grant a Power. Whatever Expedient you invent, to procure the Honour or Safety of another, loses the Name of a Privilege, if you compel him to make use of it. Run over all the Institutions and all the Rights of Mankind, and you shall never observe that the Law is so fondly solicitous for our Good, as to extort that from us, by which it intends only to do us a Favour.*

III. But in order to more exact Judgment of *Self-defence*, and to know by what Rule it should be moderated, and how far it may rightly proceed: first of all we should examine, whether the Defendant live in a *State of Nature*, or of *Civil Society*; since the bounds of this Practice are much narrower in the latter than in the former Condition. Which difference not being observ'd by many Authors, hath been the Occasion of their delivering such things in General concerning *Unblameable Self-defence*, as will hold true only under one particular State. But now if we first distinctly explain what Right we have to such a Practice in a *State of Nature*, it will appear with great Ease and Evidence, how far and on what grounds this Liberty is stinted, in Persons living together under a Civil Government.

It is then a good Rule of Prudence, that a wise Man ought to try all other Expedients before he proceed to Arms, or Violence. For in as much as all Combat and forcible Contention is of uncertain issue, it would be adviseable first to make Experiment of safer Remedies and Redresses, e'er we enter the Lists, and come to a formal Engagement (h) (1). Thus if I can cut off the Invader's Access to me, I am a Fool if I unnecessarily meet him hand to hand. And if I can defend my self with a Wall or a Gate, 'tis absurd in me to expose my Breast to my Foe (i). Farther, Wisdom advises us to

(a) *Plutarch* in *Phocion*. When he was censur'd by some for letting *Nicanor* enjoy his Liberty, he answer'd, that he did not distrust the Man, nor apprehend any Danger from him: But if things should happen otherwise, he should be glad to let the World see, how much more willing he was to receive an Injury, than to offer one. This, if he look'd no farther than his own Person, was spoke with Honesty as well as with Bravery. But if a Man by such an Act of Generosity endangers the Safety of the State, especially being himself in a Publick Trust, I question if he does not violate that greater and more Sacred Law, his Obligation to his Country. (b) *Vid.* *Ziegler* ad *Grot.* l. 1. c. 3. s. 3. (c) *Plutarch* *Lacon.* Institut. (d) P. 33. (e) P. 118.

(f) *Isocrates* adverf. *Callimach.* Is it not ridiculous and absurd, that he should petition you for Mercy in such a Danger, as purely depended on his own Will; which he freely run into at first, and from which he has still means of being deliver'd. *Liban.* Declam. 23. He who unless he had offer'd one Injury, had not suffer'd another, is equally the Cause of both. (g) *Declam.* 7.

(h) *Liban.* Declam. 1. It is a more Worthy and more Manly way of proceeding, not to run presently to Arms and Violence, but to try first if our Right may not be recover'd by fair means. (i) *Omnia prius experiri verbis, quam Armis Sapienter docet.* *Ter.* *Eunuch.* Act. IV. s. VII. v. 19. (i) *Terent.* *Eunuch.* *Tw quod cavere possis Stultum admittere est.* 'Tis extreme folly to meet a Danger that you may avoid.

Put up a small Injury, if we can with Convenience, and so rather to recede in some degree from our *Right*, than by an unseasonable Defence, to expose our selves to a greater Danger: Especially if that Thing or Concern of ours, upon which the Attempt is made, may be easily made amends for, or repair'd (a). Thus a Man who hath a Debt owing him from another, suppose to the Value of Ten Pounds, would act more wisely in my Judgment, if he made up the Business by any kind of Composition, than if he engag'd in a troublesome Suit, where the Lawyers Fees might exceed the main Sum which he endeavours to recover (b).

At the same time it may be observ'd, that the injur'd Party doth not owe this Patience and Moderation, to the Person from whom he receiv'd the Damage; who as far as lay in his Power, hath broke off all Duties of Humanity and Commerce with him; but to his own Security and Quiet. And therefore if a Man provok'd by Anger or Pain should happen to exceed these bounds, he does no Injury to the Provoker, but can only be said to have acted imprudently, or without sufficient Temper and Discretion.

But when by the Application of these moderate Expedients, I cannot secure my self from the impending Danger, I am then to oppose Force with Force, and am compell'd to enter

the Combat. During which, if the Injurious Party continue to push on his Malicious Designs against me, and do not declare his Sorrow and Repentance for his Fault, and his Willingness to renew the Peace, I am at liberty to kill him. And altho' he do not directly attack my Life, as suppose he only attempts to load me with a great number of Blows, or to maim me by the loss of some Member not *Vital*, or to rob me of my Goods; yet since he hath once broke the Peace with me, and since he gives me no Caution or Security, that he will not from these lesser Injuries proceed to much greater, I may even in these Cases make use of *Extremities* for my own Deliverance. For at the same Instant, as a Man professes himself my Enemy (which he doth whilst he injures me, without shew of Repentance) he gives me (as far as 'tis in his Power to give it,) an *Infinite Liberty* of proceeding against him (c). Some indeed there are who do not approve of this Liberty of *resisting in infinitum*; For (say they) *there can be no Natural Right of Defence and of Resistance against Injuries, but such as is consistent with that Order, which is the chief End and Design of a Social Life. Therefore in resisting by Natural Right, this Exception is always understood, unless the Social Order be infring'd by my present resisting, to which Order Nature hath the first and*

(a) *Plautus Amphitr. Act. 2. f. 2. Baccha bacchanti, &c.*

Oppose a Raving Gypsie in her Fit,  
She'll get more Fury, and you'll get more Blows.  
Be Gentle, and her Consecrated Wand  
May then excuse you with a single Stroke.

*Martial, Epig. 64. l. 6.*

*Sed miserere tui, rabido nec perditus ore  
Fumantem nasum vivvi tentaveris urfi.*

(b) *Martial, l. 7. Epig. 64.*

*Ab miser & demens! viginti litigat annis  
Quisquam cui vinci, Gargiliane, licet?*

Have Pity on your self; and, though you're Stout  
As Mastiff Breed, don't take a Bear by th' Snout.

Would any Wretch prolong his Suit, a Score  
Of Doubtful Terms, that might be Cast before?

*Theocrit. Idyll. 23.*

Ὀλίγω τοι εἶσι κακῶ μέγα πόνος ἀναστρεῖν.

'Tis wise to close  
A Great Contention with a little Loss.

*Pindar, Olymp. Od. 10.*

'Tis hard to end a Quarrel with the Great.

*And Isthm. Od. 4.*

War is as blind as Chance: The Doubtful Day  
Oft cheats the Fighters, e'er it end the Fray.

It was very Wise Conduct that which *Isocrates* reports of himself, (*de Permut.*) *These, says he, were the Arts I made use of; never to offer any Damage or Trespass: And, in case I receiv'd any Injury from others, not to make my self my own Redresser; but to refer the Controversy to the Decision of Friends.* *Lucian. Eunuch.* This is highly ridiculous, that Men who pretend to Philosophy, should engage in Suits and Quarrels; whereas they ought to compose in a Friendly manner their Differences of the greatest Consequence. *Add. l. 4. f. 1. D. de alienat. jud. mut.* That which *Polybius* (in Excerpt. *Pieresc.*) applies to the *Achaëans*, proves a Truth in many other Cases *εἰ μὲν παχέως ἀπολόμαθα ἐκ ἀν' ἐσώδημων.* Unless we had been quickly lost, we had never been sav'd. *Seneca, de Irâ, l. 2. c. 14.* Reason often prescribes Patience, when Anger calls for Revenge: And when we might have escap'd smaller Evils we sink our selves into Greater. Some upon the Resentment of one Affronting Word, have been cast into Banishment: They have incur'd the severest Troubles, by not being able to digest a slight Injury; and been made arrant Slaves, by their disdaining a petit Incroachment on their Liberty. See *Stobæus Serm. XIX.* To this may be applied the Interpretation of *Mat. V. 17.* offer'd by *Grotius, l. 1. c. 1. f. 8.* Though others will have that Saying to relate to Men who are under Oppression, and who cannot obtain Justice. (*Comp. Lamentar. III. 28, 29, 30.*) Whereas in a well-order'd Common-wealth every one is oblig'd to apply himself for redress of Injuries to the Judge; (*Levitic. V. 1.*) not for the sake of Revenge; (*Levitic. XIX. 17, 18.*) but with a good Design of defending the Laws and Justice of his Country, and to hinder Wicked Men from reaping any Gain or any Pleasure from their Crimes. *Lysias, Orat. contra Theomnest.* I take it to be a Sign of a most Litigious and a most Ungenerous Temper, to sue a Man for an Affronting Word. It was a Law amongst the *Cyrenians*, that the *Ephori* should bring the Litigious Citizens before the Court of Justice, and impose a Fine on them, with the Addition of a Disgrace. *Arrian, Epictet. l. 1. c. 28.* Suppose I stand as deaf as a Stone when I am abus'd; what Advantage can the Slanderer reap from his Calumny? *Seneca de Irâ.* To despise Injuries is a Mark of a Great and Generous Mind. 'Tis one of the most grating ways of being reveng'd upon a Man, by seeming not to think him Worthy our Revenge. He is truly Brave and Noble, who like some Princely Beast, can bear the puny Dogs barking about him, with Scorn and Security. (c) *Antiphon, Orat. XI.* The first Aggressors in an In-

chiefsel

chiefest regard. And if this Caution were not interpos'd, upon our failing to maintain that necessary and Natural Order, we should render Society it self unsociable (a). But we do by no means assert, that this Infinite Liberty of resisting is to be actually made use of in all Cases; because several intervening Considerations may prevail with the Injur'd Party not to proceed to Extremities: But only that the Injurious Person cannot complain of hard measure, tho' he be repell'd with the utmost Violence and Severity. The Life of Men would be then indeed most properly rendred *Insociable*, if, in a Natural State, any bounds were set to the Liberty of Resistance. For what an Age of Torments should I undergo, if another Man were allow'd perpetually to lay me on only with moderate Blows, whose Malice I could not otherwise stop, or repel, than by compassing his Death? Or if a Neighbour were continually to infest me with Incurfions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For since the chief Aim of Human Sociableness, is the Safety of every Person, we ought not to fancy in it any such Laws, as would make every Good and Modest Man of necessity miserable, as often as any Wicked Varlet should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men, on so destructive a bottom as a necessity of enduring Wrongs. Wherefore he is to be reckon'd a Foolish and Base Traytor to his own Safety, who whilst an Enemy persists in the Exercise of Hostility, vainly spares his Life, and chuses rather to Perish than to Destroy. For the Law of Nature obliges me thus far only to be mild and merciful towards my Enemy, as that if he shall express a Sorrow for what is past, and an Inclination to desist from farther Injury, shall make Retribution for my present Damage, and give Security for his not offending hereafter, I may entirely spare and pardon him, and, renewing the Peace, may perform all friendly Offices towards him, as he shall towards me (b). For *meer Revenge*, which proposes no Aim but the Grief or the Destruction of him who hath hurt us, is detested and discarded by Nature, as falling under the Vice of Cruelty. Whence it follows, that the Remembrance of Enmities and Contentions ought as soon as possible to be defac'd out of our Minds. On this account, as we find the Story in *Tully* (c), the *Thebans* were accus'd in the

General Diet or Council of Greece, for setting up a Brazen Trophy of their Victory over the *Lacedemonians*; in as much as it did not become one Grecian State to fix an Eternal Monument of their Quarrel with another. For it seems, the Custom was to raise their Trophies only of Wood, to prevent their long and reproachful Continuance (d).

But farther, Persons in a Natural State may not only repel a present Danger that threatens them, but having got rid of that Fear, may pursue their Success against the Assailant, till such time as, upon sufficient Caution given, they shall think themselves secure of him for the future. Concerning which Caution, this is to be observ'd; if a Man having injur'd me, shall presently after, repenting of what he had done, desire my Pardon, and offer Reparation of the Damage, I am then oblig'd to be reconcil'd to him, and cannot fairly demand any farther Security than his Faith and Promise. For his voluntary Repentance and Application to me for Pardon, are a sufficient Argument of his firm Resolution to offer me no Wrong for the future. But he who must be brought to Repentance by main force, and who then only thinks of begging Pardon when his Strength fails him in Prosecuting his Violences; such an one is not safely to be trusted on his bare Promise: And therefore in order to our farther Security, we must either cut off from him all Power of doing Mischief, or we must lay some such Bond or Confinement on him as shall hinder him from appearing ever after formidable to us: In as much as his Malice having been once express'd, and never rightly purg'd or amended, hath rendred him a just Object of our perpetual Suspicion.

IV. But that which is a lawful Practice in Men, living under a Natural Liberty, who are to work out their Safety by their own Strength, and according to their own Judgment, can by no means be indulg'd in the Members of Civil States; and especially in regard to their dealings with their Fellow-Subjects. For against these who live under the same Government and Laws (either perpetually, or only for the time being) they ought to be so moderate in the Use of this Violent Self-defence, as then only to betake themselves to it, when the Time and Place will not admit of any Application to the Magistrate for his Assistance in repressing such an Injury, as puts either their Life, or something as valuable as their Life, or some Good which

(a) Vid. *Bæcler. ad Gror. l. 1. c. 4. f. 2.* (b) It is a Rule of *Hesiod's* (*Oper. & Dier. l. 2.*)

Ἡ γῆν' ἐς φιλόπυρα, δίκην δ' ἐδέλυσται. πύρα γαίην,  
Δεξάσθῃ.

But if the Injurious Friend the Wrong repair,  
And beg a Readmission to thy Care;  
Reject him not. —————

(c) *De Invent. l. 2.* (d) *Add. Flor. l. 3. c. 2. in fin. Senec. Herc. Fur.*

*Si æterna semper odia mortales agant,  
Nec ceptus unquam cedat ex animo furor,  
Sed arma felix teneat, infelix parat;  
Nihil relinquent bella.* —————

————— Should Men maintain Immortal Hate,  
Nor quell the Fury rising in their Breast.  
But still the Fortunate their Dreaded Arms  
Shake, and th' Unfortunate new Force prepare,  
To try another Field; the General War  
Would clear the World, and drive a Common Spoil.

can never be repair'd, into present and manifest Danger. And even in such a Case we are, by our own Strength only, to rid our selves of the present Mischief, leaving both the Punishment, and the Caution for future Good Behaviour, entirely to the Magistrate's Determination. Cicero (a) tells us, that *nothing is so contrary to Rights and Laws, as the using Force in a well order'd Commonwealth*: But then 'tis his own Observation in another Place (b), that *these Laws are silent, when Arms appear bent against us; and do not command us to wait for their Help and Protection, when we should most certainly suffer an unjust Violence, before we could procure a just Redress*.

By these Rules and Foundations which we have laid, may be decided most of those Disputes, which are usually bandied in Authors, concerning the Measure and the Moderation of *Unblameable Self-defence*.

V. Some Men have rais'd a Doubt, whether supposing a Person assaults me by Mistake, without any evil design against me, and intending to employ his Force against another, I may in such a Case kill him in my own Defence. For the clearing of which Point Grotius (c) lays down this Principle to proceed upon, that the Right of *Defence* doth *primarily* and *absolutely* arise, from that favour of Nature, by which she hath recommended every Man most strongly to himself, whence no one can refuse to apply all his Endeavours for the Procurement of his own Safety; and not from the Injustice, or the Sin of the Aggressor. It will therefore be sufficient to render my Defence Innocent, if the Assailant have no Right to invade or to destroy me; and I lie under no Obligation of taking Death at his hands without Reluctancy or Resistance. Farther, since in the Case propos'd the Love of our own Persons and Lives must needs gain an easy Conquest over all other Considerations, it is impossible but that a Man who finds himself expos'd to equal Danger with another, must, if he follow Nature, give his own Deliverance the Preference in his Regard: And since such a Danger as we are speaking of is brought on me without my deserving it, my Fact is for that reason the less Odious, if I turn the Mischief on the Author. All this being taken for granted, 'twill be very easy to decide all those Particulars and Cases which may happen about the Point in hand. As suppose a Madman, or a Person walking in his Sleep and affrighted with some terrible Dream, should make an Attempt upon my Life; in as much as he hath no Right of assaulting me, and I have good Reason to prize my self above all things, it doth by no means appear why I should prefer his Safety to my own. But here it must necessarily be suppos'd, that I could not decline the threatned Danger any other way: Which is not so scrupulously observ'd, when

a Man attacks me upon a Grudge, or upon a manifest ill Design. The same Decision will hold, in case a Soldier, fighting with Good Intentions, assaults me whom he mistakes for one of his Enemies. For if even an Enemy had a Right of resisting him, there's no reason why I, who am in no such State of Opposition, should patiently run upon his Sword: But he ought to impute it to his own Folly and Heedlessness, that he thus drives a Friend on the Necessity of an hostile Act; since he ought to have known against whom his Force was to be employ'd. The same is to be said, when a private Man lying in wait for one with whom he hath a particular Quarrel, sets upon me instead of him by mistake. For why should I upon account of the Aggressor's Blunder, be brought under a harder Condition than that other Man, whom perhaps he had some reason to hate? Such an Assailant is indeed by the *Cornelian Law of Rome* guilty of Murther. For tho' there was an Error in the Person, yet there was no Error in the Design; but the Will and the Attempt of committing Murther were both manifestly declar'd (d).

VI. To render the Defence of our selves entirely Innocent, it is commonly thought a necessary Condition, that, as to the time, the Danger be just upon us, or as it were in the very *Point* of seizing us: And that no Suspicion or Fear, whilst yet uncertain, is sufficient to justify our assaulting another. But this Assertion too will prove very unaccurate, unless we relieve it with our Distinction between a *Natural* and a *Civil State*. For as in neither Case the *Point* of Danger, which these Men speak of, can be understood without some Latitude, so is it most certain that Persons plac'd under a *Natural Liberty* are allow'd a longer Space in making their Defence by Violence, than those who live under the Protection and the Assistance of a Government.

In as much as *Nature* obliges us to maintain Peace with others, it may and ought to be *presum'd*, that every one will fulfil this Obligation, unless he give manifest Evidence of contrary Designs, and unless it be apparent that he quits his Obedience to sound Reason, which advis'd him to this Duty. But considering how prone the greatest part of Mankind are to violate this Precept of Reason, whoever hath a true Concern for his own Safety, will fortifie himself betimes by all innocent Methods of Defence; as suppose by shutting up the Avenues against such as are plotting any hostile Design; by providing Arms and all other Necessaries for offensive or defensive Force; by entering into Confederacies and Alliances; by keeping a watchful Eye upon the Motions and Attempts of others; and the like. Thus we justly esteem it Wisdom in a Commonwealth, to think of War during the full En-

(a) De LL. l. 3. (b) Pro Milone. (c) L. 2. c. 1. f. 3. Add. Gell. l. 4. c. 14. Quintil. Declam. 13. 'Twas on this account we receiv'd Laws and Magistrates from Institution of our Ancestors; that no Man might be the Redresser of his own Grievances: And lest if Private Revenge should pursue every Crime, there should be a constant Succession of Injuries, and all Parties prove alike Guilty. (d) Add. l. 18. f. 3. D. de Injuriis & Grot. in Sparf. Flor. ad l. 14. D. ad L. Cornel. de Sicar.

joyment of Peace. And altho' Innocency will always find a strong Guard and Support in the Divine Providence, yet is it most senseless Vanity for that Man to expect Miracles from Heaven for his Deliverance, who lies still in a drowsy Idleness, and neglects all Care of his own Affairs. And even in Civil States, where our Goods are in some measure secur'd against Thieves and Ravagers, by the Severity of Penal Sanctions, he would be reckon'd a very ill Husband, who should forbear to secure his Doors in the Night, or to lock up his Closets and his Chests. To this purpose we are inform'd, that the Old Romans us'd to seal their meanest Utensils and Household Goods with their Rings, to secure them from pilfering Slaves; over whom, at the same time, they had the free Power of Life and Death (a).

But now, tho' my providing thus far for my Security can be injurious to no one, yet before I can actually assault another under colour of my own Defence, I must have Tokens and Arguments amounting to a Moral Certainty, that he entertains a Grudge against me, and hath a full design of doing me a Mischief, so that unless I prevent him, I shall immediately feel his Stroke. Amongst these Signs and Tokens, giving me a Right to make a violent Assault on another Man, I must by no means reckon his bare Superiority to me in Strength and Power; especially if that Happiness deriv'd its Increase from harmless Industry, or from the Bounty of Providence, without the Oppression of others. For 'twould be inhuman Malice to envy another, and to endeavour to take from him a Blessing which he came so fairly by. 'Tis a very gross Knack of Philosophizing that some Men have got, when they tell us by way of Advice, *He that is able to hurt you, undoubtedly is willing; and therefore, without farther Warning, down with him, as you love your own Safety.* This kind of Doctrine is manifestly destructive of all Sociable Commerce amongst Men; and the Authors commonly cited in Defence of it, either are such whose Character prevents their Authority, or else in the Passages alledg'd from them, they speak only of Precaution of our dealing with those Wretches, who have given us sufficient Tokens of their Resolution to hurt us (b). And whereas some Men bring Examples instead of Arguments for so base a Practice, this is to make another's Sin the Rule and Standard of my acting (c). Yet because any Man may abuse his Strength to ill Purposes, therefore, as we said before, we ought to fence against Danger by timely, and by harmless, Methods.

Nay, altho' such a Mighty Neighbour, hath

shown himself to have the Will of hurting as well as the Power, he doth not yet give me directly a just Cause of setting upon him, because he doth not yet express this ill Will towards me in particular. For it is not sufficient Proof that a Man designs to hurt me, because he hath already hurt others; in as much as he might be provok'd to his attempt on them by some particular Reasons, which he doth not find against me. An Injury then done to another gives me no Licence of falling on the Aggressor, whilst I am tied to both Parties only by the Common Band of Humanity. But I may happen to be united by a more peculiar Obligation to the Injur'd Person; as if upon his Desire, I have promis'd and engag'd to assist him. For it is very agreeable to *Social Nature*, that a Man who hath himself receiv'd no Wrong, should yet join Forces on Covenant with another, to help him to drive off an unjust Assault, as being allied to him by those General Ties which hold together all Mankind. Because, supposing the two Parties to be otherwise indifferent to me, yet it is a standing Rule, that an Injury *receiv'd* ought to incline me to Favour, and an Injury *offer'd*, to Hatred and Aversion (d). But farther, if on good and probable Grounds I suspect that this *powerful* Aggressor when he hath dispatch'd his first Prey, will turn his Force upon me, and use his former Conquest for the Instrument of another; I may then more readily assist the distress'd Party, because his Preservation is likely to ensure my own Safety. As a wise Man will lend his best Help towards quenching a Fire in his Neighbour's House, when his own is the next in Danger.

More than this; if it appear by clear Tokens that a Man is at present under a real Design of hurting us, tho' he doth not yet proceed to the open Execution of it, supposing us to live in a *Natural State*, we may immediately enter on our own Defence by Violent Methods, and, prevent the Foe; provided that either upon a friendly Admonition he is not likely to be driven from his Hostile Intentions, or that the giving such an Admonition would prove of ill Consequence to our Affairs. For no Man is oblig'd to expect patiently the Insult of another, that he may thereby build the Justice of his Violence on the absolute Necessity of his Defence. And therefore, in this Case, he is to be accounted the *Aggressor* who made the first Motion towards hurting his Neighbour, or who conceiv'd the first design of Mischief, and was preparing to accomplish it, tho' the other Party using greater Expedition, may have surpriz'd and oppress'd him before he could bring his Plot to Perfection. For it

(a) Vid. *Tabir.* A. II. 1. (b) And as for that Saying of Cicero (*Epist. Fam.* XI. 28.) *Even Slaves have been always allow'd this Liberty to fear according to their own Judgment, not another's;* we may oppose to it the sharp return of *Vibius Crispus* (in *Quintil.* 1. 8. c. 5.) *Who ever gave you Permission to fear so unreasonably? Nay, Cicero himself hath sufficiently overthrow'd this Opinion, Who (says he) ever made such an Ordinance as this, or to whom can this be granted without the manifest Danger of the whole Community, that a Man may lawfully kill him, by whom he shall pretend to fear being hereafter kill'd?* *Orat. pro Tull.* in *Quintil.* 1. 5. c. 13. (c) Add. *Alberic. Gentil. de Jure Belli*, l. 1. c. 14. (d) For that of *Exodus* II. 14. only holds in a Civil State.

is not absolutely necessary to the Notion and Business of Defence, that a Man receive the first Stroke, or that he only ward off or elude the Blows that are aim'd at him; but he too shall be interpreted to act by way of *Self-Defence*; who, taking his Foe tardy, hath prevented the Mischief that was hatching against him (a).

VII. But we must by no means allow an equal Liberty to the Members of *Civil States*. For here, if the Adversary be a Foreigner, we may resist and repel him any way at the instant, when he comes violently upon us: But we cannot (without the Sovereign's Command) either assault him whilst his Mischief is only in Machination, or revenge our selves upon him after he hath perform'd the Injury against us: lest we should by this rash and unwarrantable Proceeding involve our Country in an unnecessary and unseasonable War. And a much greater Degree of Caution must be us'd in our Dealings with our Fellow Subjects. For though I understand that such an one is now coming to do me a Mischief, or that he threatned me desperately in publick, this will on no account bear me out in assaulting him; but I am to inform against him before the common Magistrate, who is to require Security for his Good Behaviour. But if the Magistrate refuse to interpose, I may then consult my own Safety by what means I can with the same Freedom, as if I were plac'd under a *Natural State* and Condition. Those Moralists are widely mistaken, who, as *Grotius* (b) says, maintain, 'That I may lawfully kill, not only the Man who offers me present Violence, but him too whom I shall have discover'd to plot and conspire against me; as by Poyson, by false Accusation, false Witness, the Procurement of an unjust Sentence, or the like. Nor is the Absurdity at all lessen'd by that Restriction which they add, *if either the Danger cannot otherwise be avoided, or if we are not sufficiently assur'd that it cannot.* Because such a Delay of Time as is here suppos'd how short soever, may put us on many good Ways of Redress and Relief; besides the Variety of Accidents which may perhaps work our Deliverance. It is manifest, that these Authors suppose a *Civil State*, because in that only we can conceive such things as unjust Judgments, Accusations, Witnesses, &c. For the Suppression of which Injuries, if we permit the Subjects to inflict Death, what occasion have we for Magistrates or for Laws? No Man is in danger of being condemn'd, if he can prove the Accuser guilty of Calumny and Forgery. Yet, if being unable to make this out, he assaults his Life, 'twill be hard to excuse him from the

Legal Censure and Penalty of Murther. But when a Man is already actually set upon, and reduc'd to such Streights, that he hath not Power or Opportunity to implore the Assistance of the Magistrate, or of his Neighbours, he may then make use of Extremities in repelling the Assailant: Yet the Reason and Ground of his proceeding to such Violence, must not be that he may thus revenge himself for the Injury offer'd; but only because he could not otherwise secure his Life from the imminent Danger. And therefore supposing that Danger to be more easily driven off, he cannot lawfully pursue the Aggressor, so as to strike or harm him in his Flight (c).

VIII. It appears then from these Considerations, that under Civil Governments the *time* of making an *unblamable Self-defence*, is set within very narrow Bounds, and indeed reduc'd almost to a *Point* or Instant, yet such as admits some small Latitude, and in which a slight Excess will escape the Magistrate's Censure. And therefore altho' an Understanding Judge will be best able to settle the Innocency of any Defence, from the Circumstances of the particular Facts: Yet we think it may be asserted in General, that the exact time when a Man may fairly destroy another in his own Defence, begins at the instant, when the Aggressor shewing plainly his design upon my Life, and being furnish'd with Strength and Weapons for the Execution, is already got into a Place whence he may perform his Mischief; Allowance being only made me for just so much *Space* as is necessarily requir'd for me to attack him in before he attacks me. For Example, if a Man is making towards me with a naked Sword, and with full Signification of his Intention to stab me, and I at the same time have a Gun in my hand, I may fairly discharge it at him whilst he is at a distance, and cannot yet reach me with his Weapon, because should he get too near me, my Arms would be of no use. And the same holds more strongly in Relation to Bows and Instruments of that Nature, which signifie nothing at all, unless we give them full room and space to exert their Force in. Again, suppose a Man approach me with full Design upon my Life, and is only arm'd with Pistols or the like, whilst I am furnish'd with a longer *Piece*, I am not oblig'd to wait till he comes within Pistol-shot, but may prevent him with my Arms before he can use his own. For this is what the Laws call *to meet a danger in time, which is esteem'd much better, than to revenge it after it hath taken effect* (d). The Continuance of this *Time* for *Innocent Defence* is so long as till the Aggressor

(a) Demosthenes Philip. 3. *He who is preparing and contriving Wiles for my Destruction, is most certainly engag'd in a Hostile State with me, though he has not yet attack'd me with his Darts or his Spears.* Thucyd. 1. 6. *We ought, not only to chastise the open Actions of our Enemies, but to prevent by due Punishments, their secret Counsels and Designs: For they will be before-hand with us, if we neglect to be so with them.* Procop. de Bel. Persic. 1. 2. c. 3. *Those break the Peace, not who first take Arms, but who are discover'd in any Plot against their Neighbours and Friends. For whoever attempts and designs Mischief, hath really committed the Crime, tho' his Endeavours prove unsuccessful.* Phil. Jud. de Leg. Special. *We do not only reckon them our Enemies, who assault us with Fleets or Armies, but them too who by Sea or Land make Preparations against us.* Add. Alberic. Gentil. advoc. Hispan. 1. 1. c. 9. *Leges Wisigoth. 1. 9. tit. 4. c. 6.* (b) L. 2. c. 1.

(c) Vid. 1. 3. f. 9. *D. de vi & vi armata?*

(d) L. 1. C. quando liceat unicuique.

either is repuls'd, or hath retreated of his own accord, whether repenting of the mischievous design in the very moment that he was performing it, or else because he sees he is like to lose his Aim; as suppose his Sword is broke, or his Piece hath mis'd Fire, or shot beside us; so that at present he can hurt us no farther, and we have an opportunity of retiring into a place of Safety. For the *Revenge* for past Injury, and the *Caution* for future Security, belong to the Care of the Magistrate, whom we are to address on those Accounts (a). Whoever, enjoying the Protection of a Civil Government, shall kill another beyond these Bounds and Conditions, under the Notion of *Self-defence*, cannot be acquitted as entirely Guiltless. Whence we may perceive how unreasonable the Assertion of Old *Baldus* is, when he declares, *if a Man chance to say to me, I'll kill you where-ever I find you from hence forward, I may without incurring any Penalty; take his Life by way of Prevention, either in the midst of his Threats, or whenever I can do it with most Convenience.* For tho' I be not oblig'd to wait till he perform his Threats, yet in a Commonwealth I ought to pursue other ways of Safety than by killing him: Even when it appears from the former Course of his Life, that that he is not backward in making good such bold Resolutions; which condition is by some Authors added to mitigate *Baldus's* Opinion.

IX. As to the common Determination, that this killing a Man in our own Defence is then only Innocent, *when we cannot possibly escape the Danger by other means*; this is not to be interpreted in too strict a Sense, but admits of a reasonable Latitude upon account of that Perturbation of Mind which arises from so surprising and so imminent a Mischief. For it is scarce possible that a Man under so terrible Apprehension should be so exact in considering and discovering all ways of escape, as he who being set out of danger can sedately deliberate on the Case. Hence, as it is meer Rashness for me to come out of a safe Hold to him who challenges me, so if another assault me in an open place, I am not strictly oblig'd to betake myself to flight, unless there be near at hand a Place of most secure Refuge, nor am I always bound to draw back from the Onset. Because I then turn my defenceless parts to the Danger, and there is great hazard of tripping or falling; and besides, when I have once quitted my Posture of Guard, 'tis not very easy to recover myself. Neither doth it render my Defence blameable, if I chose to run the Hazard of such Accidents rather than omit such Business, which was either a part of my Duty, or which however I had a Liberty of acting. As suppose, whilst I am going to any publick Place, about my Affairs, I kill a Man that sets upon me in the way, I am not the less Innocent, because if I had staid at home the thing had not happen'd. For the

publick Security would be ill guarded, and our Liberty would stand us in little stead, if we might not make use of it in opposing those sudden Violences which others offer us, out of pure Malice and wicked Design.

There is no need of proving *Balsaron's* Distinction (b) to be ridiculous; *A Man* (says he) *who kills another in his own Defence, is free from all Guilt, if the other Person had first given him a Mortal Wound, or the like Mischief; but if the Hurt that was first offer'd him be slight and curable, the Slaughter of the Aggressor is then unjust, and he must answer for the Fact.*

Much more pleasant is their Nicety, who make it a Question, *Whether an Equality of Weapons be necessary to the rendering a Defence Innocent.* As if the Aggressors were so Generous, as constantly to give Notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have Leisure to furnish themselves in like manner for the Combat. Or as if in these Rencounters we were to act on our Defence by the strict Rules of the Common Sword Plays and Tryals of Skill, where the Champions and their Weapons are nicely match'd and measur'd for our better Diversion.

But it must be observ'd on this Head, that the Plea of *Self-defence* shall not excuse or indemnify him, who being challeng'd to meet in the way of *Duel*, doth by so appearing put himself into such a Condition, that he must either kill or be kill'd. For in the Estimation of such a Fact, the Danger will not be consider'd, since the Laws forbid him to meet it; and therefore he will not only be guilty of *Manslaughter*, but will stand obnoxious to those other Penalties which are particularly ordain'd against the Custom of Duelling.

X. There is one Enquiry commonly made farther on this Point, and that is whether it be lawful for a Man to kill another, who comes upon him not with a Design to take away his Life, but only to *Maim* him; provided the Danger cannot be otherwise avoided. And here as to a *Natural State* we may safely hold the Affirmative Side of the Question. For Nature hath inspir'd us with so tender a Care to preserve our Bodies whole and entire, that we cannot but make use of all Ways and Methods for that purpose; and the Loss of one Member, especially if it be of the most noble kind, is reckon'd almost equal to the Loss of Life itself. Besides Death is frequently the Consequence of such Barbarous Treatment; and I have no Security but that the Villain will proceed to greater Mischief. Lastly, as we have heretofore hinted, such an Attempt declares a Man my open Enemy, and consequently gives me a Licence *in infinitum*, of acting against him.

Nor do the Laws even in Civil Governments seem to engage the Subjects to such hard Conditions, as that they must rather suffer them-

(a) Vid. l. 45. f. 4. D. ad L. Aquilians. \* Mention'd by *Sichard ad C. Cod.* (b) Ad Epist. Basil. ad Amphilocho. Can. 43.

elves to be *maim'd*, than use Extremities in repelling the Assailant: For since such a Degree of Patience surpasses the Ordinary Strength and Constancy of Mankind, 'twould look very rigid to require it, only in favour of a Malicious Rogue. But when such an Injury is once actually receiv'd, the Prosecution of the Malefactor is to be left entirely to the Magistrate.

XI. The Defence of *Chastity* is in almost all Nations esteem'd equal to the Defence of Life, and doth in the same manner excuse the Slaughter of those who attempt it. The reason of this Favour is grounded on the Natural Consideration that the *Honour* of Women is their chief Treasure and Ornament; together with the respect had to the Weakness of the Fair Sex, which 'twas convenient should be guarded by all possible means from Violence and Abuse (a). Even in Civil States, as the Legislators might very reasonably appoint Capital Punishments for Offences of this kind, so they might farther give a Liberty to all Honest Women, to use *Extremities* in their own Defence, upon Danger of losing what 'tis impossible for them to recover, and for which no Reparation can be made them (1). Amongst the *Jews*, as Mr. *Selden* (b) tells us, a Man was allow'd to kill another, not only in his own Defence, but in the Defence of a third Person if unjustly assaulted, whether with regard to Life, or to Chastity of either kind (c). And thus the Sentence of *C. Marius* was highly applauded amongst the *Romans*, when he not only absolv'd, but crown'd the Soldier who had kill'd his Nephew a *Tribune*, or Colonel in the Army, for solliciting him to an Unnatural Debauch (d). *St. Augustine* (e) hath a Saying, that *the Holiness, or Purity of the Body is never lost, whilst the Purity of the Mind remains, tho' the Body suffer Violence* (f). But it follows no more from hence, that forcible Ravishers are not to be repell'd with Extremities, than that because a Good Man is translated by Temporary Death to Eternal Happiness, therefore he ought not to defend himself with Violence against a Villain who attempts his Life.

'Tis observable what *Lysias* (g) reports, that the *Attick* Laws decreed a severer Punishment against him who *perswaded* a Woman into an Unchast Compliance, than against him who compell'd her by meer Force. The Reason we find subjoin'd, *because* (says he) *Man who commits a Violent Rape is suppos'd to be hated*

by whom he abuses. Whereas those who by Flattery and Insinuations tempt Women to their Desires, do by this means gain a greater Interest and Authority with them than their own Husbands, and consequently have the whole Family in their Power and Disposal: besides the Inconvenience of confounding the Childrens Birth, and hindring all Distinction between those who came lawfully, and those who came unlawfully into the World (h).

XII. 'Tis another famous Question, whether the Danger of receiving a *Box of the Ear*, or some such ignominious tho' slight Injury, will excuse the killing of a Man in our own Defence. And *Grotius's* Decision (i) makes it *not to be repugnant to Expletive Justice*. The Sense of which Expression is this, that since Expletive Justice is equally violated by denying one that which he had a *perfect Right* to possess, or by bringing somewhat on him which he had likewise a *perfect Right* not to suffer, when a Person is kill'd for offering an Injury of this Nature, there can be no Complaint made that a Breach of *Expletive Justice* hath been committed upon him. For he who first makes an Attempt of any Mischief against another, retains no Right why the other should not proceed to Extremities in returning it; or, (what comes to the same thing) gives the other an *Infinite Right* of opposing him; tho' other Considerations may frequently hinder the injur'd Party from a full and rigorous use of this Right. Nor will it signify any thing to object, that in such Returns that *Equality* is neglected, which Justice commonly requires. For that *Equality* is chiefly concern'd with the Exchanges of things, and the distribution of common Goods. But Evils, which by way of War are mutually offer'd, cannot be exactly reduc'd to any such measure, nor is it necessary they should. As for *Grotius's* Remark, that *the Degree of hurting in War should be stated according to the manner of Restitution and Reparation in Civil Damages*, there is good Reason for this Limitation to it, *as nearly as we can*: And then that Moderation doth not arise from any Right inherent in the Enemy, but from the Generosity and Courage of the Victor. *Grotius* adds, that *Charity doth not of it self require our patiently suffering such an Affront, in favour of the Person who offer'd it; tho' the Doctrine of the Gospel doth indeed forbid the Repulse of such Attempts by violent means*.

For our parts, we have already shown, that in a *Natural State*, a Man cannot be requir'd to bear even a slight Injury, (especially if it be

(a) *Quintilian*. Declam. 349. *You have drawn a Virgin into as great an Injury, as War it self could have offer'd.*

(1) The greatest Damage and Affront a Woman suffers in this case is, that she is brought under a Necessity of bringing forth of her own Blood the Off-spring of her greatest Enemy. Mr. *Barbeyrac* in hunc locum.

(b) L. 4. c. 3. (c) *Lex Wisigoth*. l. 3. tit. 3. c. 6. *Constitut. Sicul.* l. 1. tit. 22. (d) *Plutarch*. *Mario*. *Plato* de LL. l. 9. *He that hath debauch'd a Young Person of either Sex, shall be lawfully kill'd, not only by the abused Party, but by the Father, Brothers, or Children.* (e) *De Civitate Dei*, l. 1. c. 18. (f) *Add. Gratian*. *Caus.* 32. qu. 5. c. 1, 2, 3, 4. *Plautus Amphitry*. *Haut promeruit quamobrem vitio verteres; mea vi subacta est facere.* You can't lay to her Charge, what she did upon my Compulsion. *Seneca*. *Hypolit*.

*Meus Impudicam facere non casus solet.*

Not on Chance, but on the Will  
Unchastity depends.

(g) *Orat.* 1. (h) *Liban*. *Declam.* 2. *It is a much greater Wickedness to tempt and entice a Maid to be consenting to her own Abuse, than to injure her by meer force.* (i) L. 2. c. 1. f. 10.

continued) without endeavouring even by the utmost Violence, to keep it off. And we read that the most Holy King *David*, for an Affront put upon his Ambassadors, rais'd a War, to almost the utter Ruine of a Nation (a).

But 'tis very doubtful, whether in Members of a *Civil State*, the same violent Procedure is excusable. It is indeed in common Judgment a most high Affront to receive a *Box on the Ear*, and the Reason of this Opinion amongst many of us *Europeans*, seems to be, because we treat our Servants in this manner, and other Inferiours plac'd under our Discipline. And hence 'tis a Custom in some Places, when Persons are first allow'd the Use of Arms, or come out of their Apprenticeship, and the like, to give them a *Box on the Ear* in formal manner, to put them in mind of their former Condition, and to let them understand, that they are above such Treatment for the future. Therefore to offer such an Affront, highly disgraces the Sufferer, and supposes him to be unworthy of bearing Arms, or of being reckon'd amongst Free and Grown Men. But here we must observe, that such a Blow never appears ignominious and disgraceful, but when it is given before the other Party prepares for Resistance: For thus Slaves and Children are beat without the Liberty of Opposition. Therefore those who fall by mutual Consent to Fifty-Cuffs, and deal freely with each others Face and Head, can on neither side complain of an Injury of this affronting Nature. Nor is it easy to conceive how a Man that bears Arms, and is preparing to use them for his Defence, can be capable of receiving a Blow under the same Notion and Aggravation of Contempt. Beside 'tis a great Mistake, to fancy that a Man's Honour is *really* impair'd by such a Trifle; for Honour would be a most fragile and a most precarious Good, if 'twere in the Power of every saucy Fellow to diminish and to infringe it. And as for the Contempt which is shown in such an Action, this may be either quite taken off, or however easily repair'd by the Magistrate, by setting a heavy Fine on the Offender, and by enjoining him farther to perform in Publick some Marks of Honour and Respect to the Person whom he hath injur'd. Nor is the Vulgar Notion of any Weight, which fancies the Courage of Men, and especially of Soldiers, to be indamag'd in its Character by the receiving these kinds of Affronts; and that therefore their Credit must be vindicated by Sword and Duel. For that Man shows sufficient Testimonies of his Courage, who bravely maintains and discharges the Office assign'd him by the State. And there are much more noble and more shining Occasions of exercising Valour, than, contrary to the Laws of Reason and of our Country, to pursue an immoderate Passion, or to engage in the Hazard of an unnecessary and

unprofitable Combat. Yet if, as it commonly falls out, upon the offering of such an Injury, Swords are immediately drawn, and the Man who thus began the Fray happens to be kill'd, or desperately wounded; 'tis reasonable that the other *Party* should have his Penalty mitigated, upon account of the high Provocation. But 'tis an intolerable Paradox which some maintain, that a Man may fairly kill another not only to avoid an Affront of this kind, but for the Recovery of his Honour after the Affront has been actually given, and the Party who offer'd it is fled.

We may add to these Observations, that tho' the Rate and Estimation of things is not to be determin'd by the Multitude, but by the Judgement of Wise Men, yet if in any State the Receipt of some particular Injury is attended with extraordinary Scandal and Disgrace, there ought to be a most severe Punishment ordain'd against Delinquents in this Point; in as much as all Men have not Philosophy enough to put up these provoking Indignities; and because it would be inconsistent with the Characters and Stations which some Men are to maintain in the Commonwealth, should they be expos'd to the Contempt and Derision of the meanest Subjects. The Magistrate then hath little Reason to be angry, if neglecting or refusing to give redress in Complaints on this Score, a Man asserts his own Honour by what means he can, tho' only in regard to the Opinion of the Vulgar, since the same Opinion would otherwise load him with so much Reproach. Therefore those Governours who would effectually suppress all Duels and Private Combats, ought to enact the most grievous Penalties against those who shall offer such a Blow or other Affront, as is reckon'd ignominious in the Opinion of the particular Country. For the course and manner of Civil Life will not bear that refin'd Philosophy of *Grotius*; since Honour is no more than an Opinion of Excellence, and the Sufferer of such an Injury shows himself excellently Patient, his Honour is rather increas'd than impair'd (b).

XIII. From what hath been said it may likewise be understood, whether in cases of Assault, a Man is oblig'd, if he can conveniently, to betake himself to flight, so as that the Slaughter of the Assailant is never justifiable under a Possibility of running from him. Now here it is plain, that in a State of Nature, the Aggressor hath no *Right*, by which the other Party is bound to decline his Violence in this manner rather than oppose it. And the Reason why a Man (under this Natural Condition) sometimes chuses rather to fly than fight, is not out of any favour to him who sets upon him, but because he thinks it most convenient for his own Affairs (c). Distinct Nations and Kingdoms are set, we know, in this *Natural State* towards each other: And who will ever main-

(a) 2 Sam. X. 4, &c. (b) Vid. *Acti* XVI. 37. (c) — Πόδες ὅπλα λαγῶν, says *Oppian*. Hares have their Armour in their Feet.

tain, that when one King unjustly invades the Realm of another, the injur'd Prince is oblig'd to save himself if possible by flying; for fear he should kill some of his Enemies by making Resistance?

But under Civil Governments, we are to fly, if we can with Convenience, rather than take away the Assailant's Life. Nor can such a flight be at all Base or Unworthy of a Man at Arms; in as much as it is not undertaken out of Cowardice or Neglect of Duty; and because Reason can never think this a fit occasion of exerting my Valour, when I only kill a Fellow-Subject without any necessity, from whom the Magistrate could have sufficiently secur'd me. We added this Restriction, *if we can with Convenience*, because (as hath been already hinted in part) we are not always oblig'd to retreat and to turn our Backs, since we thus expose our selves to a greater danger of Wounds and Mischiefs, as well as to the additional one of Falling; and since a Man who hath once betaken himself to his Heels, if he meet with a Stop, or if the Aggressor happen to overtake him, cannot easily recover himself into a Posture of Defence. Therefore in case there be not a place of safe Refuge near at hand, he doth not transgress the bounds of *Innocent Self-defence*, who opposes an Assailant Breast to Breast, rather than he will lay himself open to his Violence, by running off on a Disadvantage.

Lastly, *Grotius* hath done well to censure those Authors, who allow that *we may lawfully kill a Man who hath said any such thing of us, as we think will injure our Repute and Character with good Men*. For, if the Man hath spoken false, have we not many more convenient ways of wiping off the Calumny? And if he hath said nothing but Truth, must we study the Concealment of one Sin by the Commission of another? How much better is *Plato's Law*, *If a Man kill a Slave who hath not injur'd him, only out of fear he should discover some base Action, or on the like account; he shall undergo the same Penalty as if he had murder'd a Free Subject or Citizen?*

XIV. All this seems plainly enough deducible from Reason. But many raise a Scruple about these Doctrines, in regard to the peculiar Temper and Genius of Christianity, asserting that altho' it be indeed lawful to kill a Man who unjustly attempts our Life, yet 'tis an Action more Praise-worthy to lose our own Life in such a case, than to take his. Because he thus dying in the Commission of a Mortal Sin, incurs the Danger of Damnation: And that it is not consistent with Justice to rid our selves of a less Evil, by bringing a greater on another Man. Now, though the Solution of this Difficulty doth not properly fall under

our Business; yet, we think the Maintainers of this high Notion would do well to consider, that in the Consternation of Danger, and in the Heat of Fighting, a Man hath little leisure for a nice Reflection on such Reasons; in as much as all his Thoughts and Faculties are taken up with consulting how to save him from present Death. Again, the Person who is thus assaulted is not always so well prepar'd as not to need some farther time for composing his Mind and Conscience, and for *making up his Bundles* before he takes his long Journey, as *Varro* speaks. Besides it doth not appear very probable, that I ought in this case to be more solicitous for the Soul of the other Man, than he himself is: And therefore if he neglecting this great Concern invade my Life, ought I to pay so precious and irrecoverable a Ransom, for rescuing him from one Danger of incurring so sad a State (a)? For it is very doubtful whether, if I should now spare him to my own Ruine, he would not, for all my Charity, still deserve and still meet with the same terrible Sentence. 'Tis a Maxim vulgarly known, that no regard is to be had to such a Danger as a Man throws himself into by his own Default, and from which he may deliver himself if he pleases. Now in the case before us, provided he draw off or forbear to treat me in this injurious manner, the Danger to which he exposes his Soul, ceases as to the present matter. And doth not this Opinion allow greater Favour and Indulgence to Wickedness, than to Goodness, whilst it makes the former, as it were, Sacred and Inviolable? For according to such Rules, the most holy and vertuous Men would be always oblig'd to yield their Throats to Villains and Murderers, lest, by resisting, they should send them immediately on their Road to Hell (b). That Saying of our Saviour, in which he commands us to love our Neighbour as our selves (c), seems not so fitly to be interpreted of the Degree of Love, as of the Truth and Sincerity; in as much as no Man dissembles or counterfeits a Passion towards himself. And that Phrase, *As thy self*, looks like a Proverbial Speech, importing a sincere and hearty Kindness (c). But should we take the Expression in the highest Sense, it would scarce follow, that supposing the Love of our selves and of our Neighbour not capable (in some Instance) of being answer'd both together, the former ought to yield to the latter (d). Nor are the Proofs which we find sometimes alledg'd from *Exodus XXIII. 4, 5.* and *Deuteronomy XXII. 4.* sufficient to evince, that the Love of our Neighbour ought to take place before our own real Advantage. For it cannot thence be gather'd, that we are first to help our Neigh-

(a) *Plin.* 1. 2. *Epist.* 10. *You are very Improvident, if you expect that from others, which you will not do.* (b) *Comp. Grot.* 1. 1. c. 2. f. 8. & c. 3. f. 3. (c) *Matt.* 22. 39. (d) *Vid.* 1 *Sam.* XVIII. 1, 3. (d) *Vid.* 2 *Corinth.* VIII. 13. *Cicero Tusc. Qu.* 1. 3. c. 29. *Thus much indeed is Brave, and Right, and True, who ought to be most dear to us, as well as our selves. But to love them better, is absurd and impossible. 'T would be ridiculous for me to wish, that my Friend and I should each of us prefer the others Person and Interest to his own; because such a Change of Hearts could not but be follow'd with a Confusion of all Offices of Life.*

bour's Beast out of the Ditch, if our own be in the same Condition; or that we are oblig'd to give such an Assistance, when the Business we must neglect for that good Office, is of more Consequence, than the thing we thus endeavour to save or rescue for another. And besides all this, it may very fairly be question'd, whether a Person who assaults us in a violent manner, ought to keep the Title of a *Neighbour*, as the Word seems to be meant in our Saviour's Command (a).

*Lactantius* (b) hath censur'd *Tully* for describing a *Good Man* to be one *that doth Good to as many as possible, and that hurts no Body unless provok'd*. O what a most excellent and a most true Sentence (says the Father,) hath he spoil'd by the Addition of two Words! For what occasion had he to say unless Provok'd? If a *Good Man* may thus hurt another when he is provok'd, the very offering that hurt, will make him lose his Character and Name: It not being less Evil to return an Injury, than at first to give it. For whence arise all the Contentions and the Combats which we behold amongst Men, unless from this Miscarriage, that Impatience opposing Wickedness occasions so many Tempests in the World? Whereas, if in opposing the same Wickedness we would make use of Patience, than which there is no truer Vertue, and none more worthy of Human Nature, we should as effectually extinguish the ill Design, as if we were pouring Water upon Fire. But indeed, as the Impatience of the Injur'd Party is frequently the occasion of unnecessary Combats, which might with Convenience have been avoided; so on the other hand, Patience is not always infallible in the Cure of Malice and Villany. Nor doth the Vertue, which under that Name is so highly recommended to Christians, equally oblige us to the putting up all Injuries promiscuously, without Difference and Distinction (1). He that defends himself in a Lawful manner, doth not act directly for the Hurt of another, but for his own preservation: And he who repels a Wrong is not Injurious, but he who offers it. 'Tis one thing to exercise an unblameable Defence, and another thing to prosecute an unmerciful Revenge. The latter may be as great a Sin as the first Offer of an Injury, but the former can never fall under so hard a Censure.

But farther, those who maintain that in Cases of this Nature it is more commendable to be kill'd, than to kill, add this Exception, *Unless the Party assailed be a more useful Person than the Assailant*. As if it were always possible for me under the Apprehension of so imminent Danger, to weigh my Abilities nicely

with those of the other Man, and to determine whether the World would have more occasion for his Service than for mine. This is beyond Dispute, that he on whom the Safety of many depends, and whose Office or Duty it is to keep off Violence from others, ought not to resign his own Life for the sparing an unjust Invader; tho' he should be of so mild a Disposition as with *Piso* in *Tacitus* (c) *to think it as great a Misery to kill another as to die himself*. And the Reason is evident, because by throwing himself away, he betray'd the Safety of so many other Persons. This is the Case of those who accompany Travellers by way of Guards; as likewise of Princes, of Generals, and other Commanders, whose Deaths are usually attended with so wide a Ruine, and to whom we may apply that Saying of *Lucan*;

*Cum tot in hac anima populorum vita, salusq;  
Pendeat, & tantus caput hoc sibi fecerit orbis,  
Sevitia est voluisse mori.*——

Since one Dear Life ensures and guards us all,  
And with the World's great Head, the World  
must fall,

'Twere Cruelty to court your Fate (d).

But it cannot be hence inferr'd, that supposing a Man to have the Lives of none or of very few depending on him, such an one may not fairly kill an Assailant, who is perhaps of more Service to the Publick, or in whose Life the Interest of more Persons are concern'd. For at this rate, a Man who is either Unmarried or without Children, must in no case kill an Invader, who hath a Family, for fear his Wife and Children should be left desolate and in want. But if the Affection and Concern for these Relations could not hinder the Injurious Party from attempting his Villany, what Reason hath the other Person to give his own Life for the Prevention of their Misfortune and Trouble?

*Plato* in his System of Laws (e) hath been very nice and exact on this Point. *If the Life of a Son* (says he) *be attempted by his Parents, did ever any Law allow him in such a Case to kill those who gave him Being, although in his own Defence? So far from this, that he is oblig'd and commanded to suffer all Extremities rather than to engage in so unnatural a Deed. But if upon account of a Tumult or Sedition, or the like occasion, a Brother kills his Brother, to preserve himself from his Violence and Assault, he shall be equally guiltless as if he had slaughter'd an Enemy*. As for the Addi-

(a) See *Luke* X. 29, &c. where by the Term of *Neighbour*, we are to understand every Man who hath need of our Help, and whom we have Opportunity of benefiting. (b) *Institut.* 1. 6. c. 18. (1) The contrary rather may be infer'd from our Saviour's words *Mat.* V. 39. where he only forbids Resistance or Revenge in case of small Injuries, such as a Smite on the Cheek, &c. not that he has enjoin'd us Patience without Redress or Self-defence when assaulted with greater Injuries, as Murder, Maiming, &c. (c) *Hist.* 1. 29. (d) And that of *Alexander's* Friends in *Qu. Curtius*, 1. 9. c. 6. *What God can secure to us a long Enjoyment of this Light, this Bulwark of Macedon; when you so often with a kind of Greediness expose your Persons to certain Danger; not reflecting how many Thousand of Lives you hazard in ons.* (e) *De LL.* 1. 9.

tional Clause, *If a Slave in his own Defence kill a Free Man, he shall be obnoxious to the same Penalties as a Parricide*, this was not the Fault of the Law-giver, but of the Age.

XV. From what hath been observ'd on this Head it appears, that a Slaughter committed within the just Bounds of Self-Defence, doth not taint the Author with any real Blemish or Guilt, and consequently doth not render him obnoxious to any Punishment: and that it is not to be rank'd amongst those Actions, which, tho' they are in themselves sinful, yet Human Laws favour with Impunity, upon account of the violent and almost unavoidable Transports of Passion: As when they allow the Husband to kill the Adulterer (a). If therefore in any Places some Penalty or Expiation hath been enjoin'd the Actors of just Slaughter, it either belong'd not to the Case of *Innocent Defence*, or it was introduc'd without any true ground or reason: or lastly, it might be applied for the making Men understand how heinous a Crime it was to kill unjustly, when the killing even upon a just account stood in need of some Satisfaction. *Philo the Jew*, in his *Life of Moses*, tells us, *he commanded the Priest to perform a solemn Purgation, on those who return'd fresh from the Slaughter of their Enemies; because though the Laws did by no means forbid such Attempts, yet he who kills a Man tho' by Compulsion, and in repelling an Injury, seems to contract some Stain, upon account of the near Relation which Mankind bear to one another, being all deriv'd originally from the same Head. And this therefore was the reason of the Ceremony, to take off the very Appearance and Shadow of Guilt.* As for the Benefit of the *Asylums* or Places of Refuge and Sanctuary, a Man who preserv'd his own Life by the Death of an Assailant, seems to have had no occasion for these Reliefs; but only he who had been the Author of another's Death by an involuntary Stroke, yet such as upon exact Care and Diligence he might have forborn and avoided. That Place in the first of the *Chronicles*, Chap. XXIX. ver. 3. doth not belong to the Case of *Self-defence*; and the Building of a Temple seems to have been forbidden *David*, not so much because he had gather'd any Pollution by his Slaughters in War, as because he who had acquir'd sufficient Honour to himself by Martial Atchievements, ought not to have robb'd his Son of such an occasion of growing Glorious by the Works of Peace. The Scholiast on the *Orestes* of *Euripides* informs us,

that 'twas an ancient Custom amongst the *Grecians*, for those who kill'd any one upon a just Reason, immediately to show their Weapons to the *Sun* for a Token of their Innocence; as desiring him to be Witness of the Fact, who, in their Opinion, *over-look'd and over-heard all things*. And besides this Formality, they applied some Means of Expiation, and were oblig'd to undergo one Year's Banishment (b). And we learn farther from *Demosthenes*, and from the Scholiast on *Aristophanes*, that at *Athens* when a Man had kill'd another, and pleaded to have done it justly, the Cause was tried in a peculiar Court, call'd the *Delphinian*, with Allusion to the Oracle of *Apollo* at *Delphi*. Amongst the *Ethiopians*, whoever had slain a Man involuntarily, quitted his Country till such time as the *Gymnosophists* had purg'd him by their Ceremonies (c). And we find *Aeneas* in *Virgil* declaring in Reference to the Holy Reliques,

*Me bello tanto digressum & caede recenti  
Attrectare nefas; donec me flumine vivo  
Abluero.*

In me 'tis impious Holy things to bear,  
Red as I am with Slaughter, new from War:  
Till in some living Stream I cleanse the Guilt.  
Mr. Dryden.

In the 18<sup>th</sup> Canon of the Council of *Nantes* held under *Formosus*, we have this nice Injunction; *If a Man by accident, and unwillingly hath been Author of another's Death, let him repent forty days with Bread and Water; when this Course is over, let him for two Years be separated from the Congregation of the Faithful, and let him neither communicate nor offer. After the Space of two Years, let him offer with the Congregation, but not communicate. At the end of the five Years, let him be receiv'd to full Communion, but let his Abstinence from Meats continue at the Discretion of the Priest.* Yet neither doth this Canon touch the Case of Defence, nor can it well be vindicated from too much Rigour. Thus too what we meet with in the Laws of the *Lombards* (d), seems not capable of being extended to the Business in hand, or if it be, may deservedly fall under the Censure of unreasonable Severity. *De Mornay* (e) tells us, that 'tis religiously observ'd by the Judges in *France*, scarce ever to absolve Persons in Causes of this Nature, without enjoining them at the same time to bestow

(a) Of which see l. 20. l. 22. l. 24. l. 32. D. ad L. Jul. de Adulter. & *Lysias* Orat. 1. pro caede *Eratosthen*. where he shews, that by the *Attick* Constitutions it was allowable to kill (if catch'd in the Fact) the Abuser not only of a Wife, but of a Concubine; and, as *Demosthenes* extends it, of a Mother, a Sister, or a Daughter. And the Reason he gives is this; *Because whatsoever Persons we fight for against our Enemies, to rescue them from Injury or Affront, for the sake of the same Persons the Law permits us to kill even Friends, if they offer them any unjust Violence. For since Enemies and Friends are to be judg'd and distinguish'd by their Actions, those that practice Hostility, we may prosecute in an Hostile manner.* Amongst the *Persians* he that kills the Adulterer and the Adulterers at the same time, is presented with a new Garment as a Reward of his Service to the State. Add. *Olear. Fin. Persic.* l. 5. c. 22. *Val. Max.* l. 9. c. 1. f. 13. *Ant. Matthæ. de Crimin.* ad l. 48. D. tit. 3. c. 3. f. 13, &c. *Advers.* 820. (b) Which Banishment is likewise mention'd by *Plato* de LL. l. 9. Vid. l. 16. f. 8. D. de *Pænis* & *Groti* in *Hor. Sparf.* ad loc. (c) Vid. *Philost.* de Vit. *Appollon.* l. 6. (d) L. 1. tit. 9. l. 19. & capit. *Carol.* l. 4. tit. 27. & lib. 7. tit. 295. (e) Ad. l. 3. D. de *Just. & Jure.*

peculiar Largeſſes upon the Poor, and ſometimes to be at the Charges of Chriſtian Sacrifices or Propitiations for the Soul of the Party kill'd. And tho' the latter part of this Cuſtom ſmells too much of Superſtition; yet every good Man hath reaſon to be deeply afflicted and concern'd, when he is put under the Neceſſity of depriving Another of Life, by any ſuch unfortunate Means.

XVI. Indeed, the Defence of Life, of Limbs, and of Chaſtity, as of Irreparable Goods, admits ſo large a Degree of Favour, as to ſtand exempted from one of the Poſitive Divine Laws, and to be conſtrued as no Breach of the Sabbath (a): For thoſe who maintain'd the contrary Opinion are not without reaſon ſcouted by *Plutarch* and *Agatharchis*, as *Joſephus* obſerves in his *Antiquities* (b). And therefore 'tis ſtrange that the ſame Author in his firſt Book againſt *Appion*, ſhould celebrate as worthy of all Commendation that Act of the *Jews* which we read of in the Hiſtory of the *Maccabees*, whiſt reſuſing to make Reſiſtance on the Sabbath Day, they prefer'd this Command of God, to their own Lives, and to the Liberty of their Country: Unleſs he is to be underſtood as rather praizing the Good Intention, than the Deed it ſelf.

But in Reference to the Defence of things or Goods, which as they may be reſtor'd or compensated, ſo they ſeem not all of them abſolutely neceſſary to Man's Happineſs, it will bear a Diſpute whether theſe may be preſerv'd and ſecur'd by the Uſe of Extremities (c). The Judgment and the Cuſtom of all Nations is manifeſt in this Point, whiſt they allow Men to fight for their Goods and Poſſeſſions even to the Slaughtering of thoſe who wrongfully invade them. It is plain likewiſe, that moſt War is engag'd in, not for the ſake of deſtroying Men's Lives, but of winning their Lands or their Wealth. And it would be reckon'd a very pleaſant Humour in an Enemy, if to hinder himſelf from being oppos'd by violent means, he ſhould make Profeſſion, that he came not to kill but to rob. Thus much therefore is certain, that he who is kill'd in the Attempt of plundering or of waſting another Man's Goods, hath no Injury done him: Though in other reſpects, thoſe Goods do not bear an equal Proportion to the Life of a Man. For in a *Natural State*, he who offers any kind of Injury with a malicious Intent, immediately becomes an Enemy; and then he can have no Right inherent in himſelf to forbid the uſe of the utmoſt Extre-

mities againſt him. And ſince another hath no more Right to invade my Poſſeſſions than to aſſault my Life, I have certainly an equal Licence and Power to defend them both. Beſides, ſince Life cannot be preſerv'd without a Competency of Goods, he that goes about to rob me of theſe, doth by Conſequence endeavour to deprive me of that. And indeed, it is clearly evident, that the Security and Peace of Society and of Mankind could very hardly ſubſiſt, if a Liberty were not granted to repel by the moſt violent Courſe, thoſe who come to pillage our Goods, for which Men have commonly a very hearty Love and Concern.

Thoſe who have tormented themſelves in maintaining the more rigid ſide of the Queſtion, build chiefly on two Suppoſitions; firſt, that a juſt Punishment ought always to be ſo equal to the Crime, that the guilty Perſon be not depriv'd of a greater Good than what he attempted to hurt or to deſtroy in another. The Falſeneſs of which, we ſhall elſewhere make out. Secondly, that the Hurts which we offer to an unjuſt Invader in Defence of our ſelves and of our Poſſeſſions, are Punishments in a proper Senſe, and conſequently ought to be ſtated by the Rules of Vindicative Juſtice. But this Hypotheſis is no truer than the former. For all Punishment proceeds from a Superiour againſt a Subject by Virtue of his Sovereign Right; and the degree of it is meaſur'd with reſpect to the Publick Good. But Defence is a thing of more ancient date than any Civil command, and chiefly takes place amongſt thoſe, neither of whom are ſubject to the other; and is moderated with regard to our own Safety, and to the Neceſſity of Self-preſervation. Indeed amongſt thoſe who live under the ſame Civil Government, the Liberty of *Natural Defence* is very much reſtrain'd. Becauſe the inward Tranquility of a State could not ſubſiſt, if the Subjects were to return Hoſtilities to each other, for every Injury or Affront. The Members then of a Community may ſo far only make uſe of Violent Defence, as it is not taken off or forbidden by the Genius of Civil Society, or by the Laws of the State. And the Laws of moſt Places, tho' they allow one Subject to repel another who invades him, by offering a greater Evil, than the Invader deſign'd againſt him (d); yet according to the regular Courſe of Proceeding, they would not have private Perſons apply Extremities, in oppoſing ſuch Injuries as are levell'd only againſt things that may be re-

(a) Vid. 1 *Maccab.* 1. 32, &c. *Joſephus. Antiq.* 1. 12. c. 8. (b) *L.* 12. c. 1. *Add. Grot. ad 1 Maccab.* 11. 37.

(c) Eſpecially ſince many are very ready to approve of what *Taxilles* ſaid to *Alexander* in *Plutarch*, *What occaſion is there, Alexander, that you and I muſt needs quarrel and fight; ſince you neither came to rob us of our Water nor of our Food, which are the only two things that Men in their Wits think worth contending for.*

*Euripid. Supplic.*

Τὸ τοῦ μόνου βερονίε, &c.

For, Life alone's th' Irreparable Loſs;  
Breaches of Fortune have an eaſy Cure.

(d) Such was the *Athenian Law* mention'd by *Demosthenes* (adverſ. *Aristocrat.*) ordaining, that he who kill'd another in defence of Goods, which this other Perſon was taking or carrying off by Violence, ſhould not be chargeable with any Guilt.

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stor'd or repair'd. In as much as such Reparation or Restitution may easily be procur'd by the help of Government; whereas when there is no Government to interpose, Men cannot be forc'd to make Requitals, but by War. There is no need then of being so solicitous with *Grotius* (a) to make up the Inequality between the thing invaded and the Life of the Invader, by our Favour to the Defendant, and our Hatred and Rigour against the Guilty Party. Unless we join with *Bœcler* in his Explanation of the Place, and say no more than this, that since in a Cause or Action of this kind, it is generally very difficult to determine what was done within and what beyond the due Bounds, it is not repugnant to Nature, that we turn our Favour on the side of the Person who suffer'd or was likely to suffer, the Damage, and our Hatred upon the Plunderer or Thief; that is, when the Case is doubtful we may fairly pardon in the former the Death of the latter. In Civil States therefore it is sufficient, that a Man do not exceed the Limits of Defence, appointed by the Laws of his Country. And yet if he should transgress these Measures, he doth no Injury to the Invader, but only is guilty of a Breach of Civil Law. But it may be ask'd farther, whether it is not at least a Sin against Charity, to kill one who comes to plunder us of a Reparable Good. In answer to which, it is our Judgment, that Charity towards one who professes Hostility against us, takes place only so long as we have probable hopes of bringing him by this means to Repentance and to Peace. But when these Hopes appear fruitless, he that spares his Enemy, betrays himself. Or if at any time my Reason persuades me, that a thing of little and despicable Value is not to be defended with the same Eagerness and Violence, I forbear, in this case,

not for the sake of the Robber or Invader, but partly because I would not give my self so much Trouble about a matter of so slight Concern, and partly because I would not seem Narrow-spirited and Covetous, by resenting to so desperate a height, so inconsiderable a Damage.

XVII. It may be proper for us on the present occasion, to reflect on that most noble Lawgiving Licence to kill a Night-Robber, but not one that comes in the Day-time; which we read in *Exodus XXII. 2.* and which hath been so often imitated in the *Grecian* and the *Roman* Constitution (b). Now the Reason of such Distinction we take to be this, that in the Day we may easily seize the Thief and recover our Goods; whereas in the Night, he may slip from the House undiscover'd; it being difficult to know him in the dark; or if one Person should chance to have a Knowledge of him, yet this will not convict him, unless, which cannot be done without great Trouble, more Witnesses are call'd out of their Beds. But in this Opinion, there is one thing which startles most Men, and puts them to some Loss and Difficulty; for they are apt to argue thus, since the Laws which make this Allowance do not decree a Capital Punishment against Robbers, it looks like an Absurdity, that private Persons should be indulg'd with a Licence of proceeding farther in these Cases, than the Sovereign Power thinks proper for it self to do. In answer to which it may be observ'd, that all those Laws concerning the Punishment of Thieves, do suppose the things stolen to be restor'd or compensated, upon the Apprehension of the Felon. And in order to this, they judg'd the giving of two-fold, or sometimes of four-fold to be sufficient; according to the different Customs of particular

(a) L. 2. c. 1. f. 11. (b) Thus the Law of Solon recited by *Demosthenes*, (contra *Timocrat.*) If any one, in the Day-time, steal above Fifty Drachmæ, all Persons are empower'd to bring him before the Court of the Eleven. But if he steal in the Night, whatever the Value be, it shall be allowable, either to bring him before the Judges, or to pursue, and wound, or kill him. For which, *Ulpian* the Rhetorician, gives this Reason, In the Day we may call for Assistance, which in the Night cannot so well be had. So *Plato* de LL. 1. 9. He that kills a Thief entering his House in the Night shall be blameless. The same we find in the *Roman* Twelve Tables. Though as to this, *Caius* (1. 4. f. 1. D. ad L. Aquil.) affirms, that the Roman Law doth indeed permit a Man to kill the Night-Thief; but then it obligeth him to give Notice of it by crying out. The latter part of which Assertion, *Jac. Godefredus* (ad LL. 6. Tali) observes to be a Specimen of *Tribonian's* Mild Disposition, in as much as that there was no such Clause originally in the XII. Tables appears from *Cicero* Orat. pro *Milon*. The XII. Tables, says *Cicero*, allow the killing of the Night-Thief by any Means possible, but the Day-Thief only if he defend himself with his Weapon. *M. Senec.* 1. 10. Controv. ult. The Law which permits the killing of the Night-Thief any way possible, doth not speak of him as condemned, but as surpriz'd in the Fact. *Gell.* 1. 11. c. ult. when he reports that *Draco* made Theft Capital, and *Solon* only Double Restitution; adds, that the *Roman* *Decemviri* took the middle way between the Severity of the former, and the Mildness of the latter; then only permitting a Thief, taken in the Act, to be kill'd, if either the thing happen'd in the Night; or if, being the Day-time, he defended himself with his Arms against the Discoverer. As for the Sign of Crying out, the XII. Tables requir'd it only in the Case of the Day-Thief when he fought in his own Defence. *Si luci furtum faxint, si se relo defensint, quiritato, endoq; plorato: Post deinde si casti esint, se fraude esto.* *Comp.* 1. 3. S. D. ad L. Aquil. where the Term *æque* is mollified by *Tribonian*. Yet it is not improbable, that in Course of time, and upon the Authority of Wise Men, that ancient Law was plainly mitigated, as *Cujacius* allows, 1. 14. *Observ.* 15. This appears from *Ulpian*, 1. 5. ad *Edict.* whose Words are fully recited in the Comparison of the Jewish and Roman Laws, first publish'd by *Peter Pitheus*. Which are main'd as we have them in 1. 5. D. ad L. Aquil. (Add. 1. 9. D. ad L. *Cornel. de Sicar.*) The reason of which Alteration perhaps might be, that it was a Practice sometimes with Villains to rush out of their Houses and murder Persons, and then pretend that they found them in the Act of Thievery. As likewise, because Houses which are strongly built, and stand thick together, cannot easily be robb'd without the Master's Negligence; or at least cannot afford Rogues so frequent Opportunities. *Comp. Justin.* 1. 2. c. 2. f. 9. Whence *Cujacius* conjectures, that the said Law as by 1. 1. C. quando hic unicuique, was abrogated in Towns and Cities, and only allow'd to hold good in the Country. Though indeed this Order which he cites, doth not speak of Thieves who make their Attempts in Privacy and Silence; but of violent Robbers and open Assailants; as appears from the Reason subjoin'd, that they may meet the Death which they threatened, and incur that which they design'd against others. *Sextus Calicius* in *Gell.* 1. 20. c. 1. explains this Law of the XII. Tables falsely, when he makes it relate to the insidious Violence of Nightly Murderers.

Commonwealths. But it doth not hence follow, that therefore the same Laws in Cases where Reparation was not to be had, could not furnish the Subject with some larger Power taken out of the Stock of Natural Liberty. For the Law-givers of Kingdoms and Republicks have not always thought it necessary, in ordaining Penalties for Offences, to take their Standard from what in a State of Nature the Right of War allow'd to be done. Thus there are some States in the World where Adultery is not a Capital Crime; And yet the Husbands are Indemnified if they kill the Adulterers, upon surprizing them in the Act. Now supposing Men to be plac'd in a *Natural Liberty*, the Performance, or the very Offer of an Injury to their Bed, is plainly a sufficient Cause of War, and how far the Licence of War extends every one is sensible. And yet these Laws would not stretch the Punishment of Adultery when once actually committed, to such Violence as might be allowable in a *War* undertaken upon that Score. But for their Indulgence to private Persons of farther and severer Methods, we may borrow this very good Reason from Dr. *Cumberland* (a), that in as much as Offences of this kind escaping the Cognizance of the Civil Magistrate do frequently pass unpunish'd, therefore whensoever their Circumstances make them capable of receiving Punishment, it hath been thought proper to allow the most rigorous and extreme; that the Boldness of wicked Men, as much as it increases by Common Impunity, so much it may be lessen'd and kept under by the Fear of meeting sometimes with so grievous and so terrible a return. That Clause in the *Roman Law* giving Authority to kill a Day-Thief *si telose defenderit, If he defends himself with his Weapon*, plainly intimates that I am hereby permitted to kill him, tho' barely for the Preservation of my Goods, and not then only when he at first assaults me with his Weapon, but when upon my endeavouring to recover my things from him, he employs it against me for his own Security.

XVIII. And therefore it is clear, that they are in the Wrong who make the Reason of the foresaid Law to be only this, lest if the Robber escap'd in the Night, the Crime should pass unpunish'd. As to *Grotius's* (b) Discussion of this Point, there are many things in it to which we cannot subscribe. He makes the Laws we have been speaking of to be founded on this Bottom, that the *Legislators hereby intimated, no Man ought to be kill'd, directly for the sake of our Goods*. Which is more than we can discover in those Laws which treat of such Thieves as creep into Houses with Design to carry things privily away. 'Tis true in the

Case of the Nightly Thief, it may happen that whilst I endeavour to save my *Goods*, my Life too may be in danger. And then the Slaughter of the Thief is permitted me upon a double account. Nor here will it be an Objection against my Innocence, that I seem to throw my self into this danger, by attempting to retain or to recover my Matters. For I am then engag'd in a lawful and almost a necessary Act; from which no effect that arises without my Fault, can be *imputed* to me. But were it not lawful to kill another purely on the account of Goods, how can we utterly clear him from all Guilt, who for the Preservation of those Concerns, casts himself deliberately into such a Condition as makes it necessary for him either to kill, or to be kill'd? As we do not allow him the Plea of *Self-defence*, who kills a Man in a Duel voluntarily undertaken.

The other Reason which *Grotius* assigns for the *Hebrew Law* seems not of sufficient Strength and Solidity. *In as much* (says he) *as by Night Witnesses of the Fact are difficult to be procur'd, therefore more easy Credit is given to him who shall affirm (1) that he kill'd the Thief in defence of his own Life; as having found him with an Instrument that might have done hurt*. For granting that the Hebrew Word in the Text cited by him signifies an *Instrument of Digging or Stabbing*, yet if the Intent of the Law had been as he makes it, 'twould have been much plainer to have said, *if he be found with a Weapon*. Nor indeed is it, after all, a good Consequence to say, that because the Thief was found arm'd with a Weapon, therefore he came certainly to assault the Life of the Person who kill'd him. No more doth it follow, that because by the Law of the XII. Tables the Day-Thief could not be kill'd unless he defended himself with his Weapon, therefore there lies a fair Presumption against the Nightly Thief that he actually made use of his Weapon in the same manner. For that Law gave Commission to kill the Nightly Thief without Conditions and by any means possible. In after Ages indeed, this farther Clause was added to it, *si parcere ei sine periculo suo non potuit, dum rem servare conatur* (c), *if whilst he endeavours to save his Goods he cannot spare this Robber's Life without manifest Danger*. But before this Addition it cannot be prov'd, that a Person stood Guilty of *Homicide*, who had kill'd a Nightly Thief, tho' there were Witnesses to prove that the Party Slain never brought him into danger of his Life. The Example of a Maid Ravish'd in the Field, which *Grotius* here alledges, is nothing at all to his Purpose. For in that Case, the Law expressly commands us to *presume* that Violence was offer'd her: But in the Matter we are now concern'd about, we cannot disco-

(a) L. 5. f. 26. (b) L. 2. c. 1. f. 12. (1) If the Affirmation, or Word of every particular stood for a legal Evidence in this case, this great Inconvenience would follow, that any malicious Person (tho' his Credit be no better than his Temper) might, with Impunity destroy his Neighbour, if he would but give his Word his Neighbour first assaulted him. (c) In l. 9. D. ad L. Cornel. de Sicar.

ver that any *Presumption* of Mortal Danger is made or suppos'd by the Laws. As indeed it is not the Business of these purloining Rascals to Fight, but to Run. Yet after all we are ready to confess, that a Man who in defence of his Goods, only lays hold on the Night-Robber, (if he can with Safety and Convenience) and carries him before the Magistrate, acts much more generously than if he had unnecessarily depriv'd him of Life (a).

XIX. The last Point usually disputed on this Subject is, whether the Party who first gave and begun an Injury, may fairly resist the other Man when he endeavours to return or to revenge it. Many here take the Affirmative side, upon this Reason, that whilst Men undertake to right themselves by their own Pleasure and their own Force, they are very seldom very exact in

proportioning the Punishment to the Crime. But we conceive the Question ought to be determin'd with more Caution, and with more Distinction. The Law of Nature, then, commands, that he who has injur'd another should offer him Satisfaction: And at the same time it obliges the other Party to pardon the Offender, when he intreats him with Signs of Penitence, offering reparation for past Damages, and Security for his Future Good Behaviour (b). He therefore that refuses to make Satisfaction, and hereupon *resists* the Person demanding it, manifestly heaps one Injury upon another. But when a Man refuses to accept fair Satisfaction when offer'd him, and resolves to prosecute his Revenge by open Arms, in this case he practices *unjust Force*, and consequently it can be no fault to make Resistance against him (c).

(a) Add. *Groenewegen de Leg. abrogatis*, ad. L. *Aquil.* where he observes that the Dutch Laws do not require the Sign of *Crying out* in the dispatching of a Night-Thief. *Comp. Leg. Wisigoth.* l. 7. tit. 2. cap. 16. *Leg. Burgundion.* addit. l. tit. 16. c. 1. 2. *Leg. Frisorum*, Tit. 5. *Constitut. Sicul.* Tit. 13. Capital. Carol. & *Ludovic.* l. 6. c. 19.

(b) *Quintilian* Declam. 5. There's nothing more honourable than the Conclusion of a Quarrel. But whilst the Parties are hot with secret Desires of Mischief, 'tis in vain to pretend an outward Reconciliation. *M. Antoninus* (l. 1. f. 7.) rejoiceth in this Happiness of his own Temper, that he was easily placable, and willing to be reconciled to those, who had given him any Cause of Offence; so soon as they desired it. Add. & l. 9. f. 8. & *Senec.* de Ira, l. 2. c. 34. l. 3. c. 26, 27. 42. Amongst the *Chinese*, who prefer Moral Philosophy to all other Parts of Knowledge, there is scarce any one so Cruel, as to desire to revenge an Injury with the Death of him that offer'd it: And they reckon it a true Mark of a Brave and Wise, and Worthy Man, to put up the Hurts and Affronts he receives, without any Inclination to harm the Author. *Neuhof.* Descript. *Chin.* c. 1. (c) *Comp. Liv.* l. 9. & *Grot.* l. 2. c. 1. f. 18. & *Baeler* ad loc. See the Story of the Private Combat in *Davila.* l. 15. p. 1027.

## CHAP. VI.

### Of the Right and Privilege of Necessity.

THE Case of Necessity is a thing in every Body's Mouth, and the Force of it generally acknowledg'd in the World. Hence we commonly say, that it *bath no Law*, that 'tis a *suppos'd* or *presumptive* Exception to all Human Ordinances and Constitutions; and that therefore it gives a Right of doing many things, otherwise forbidden (a). Now whence this Force or Power arises, and how far it extends, we ought with the more Accuracy to examine; because some Casuists seem to allow it none or very little Efficacy as to the Morality of Human Actions. But before we proceed to this Enquiry, we may observe in general, that *Tully* in his Second Book of *Invention*, makes a two-fold *Necessity*, the one *simple* and *absolute*, which can by no possible means, be resisted, alter'd, or abated; and the other *Conditional* or *Respective*. This again he divides into three kinds, with regard either to *Honesty* (b), to *Safety*, or to *Convenience*. Of which, he says the first is by many degrees the highest, the second of next Moment and Consideration, and the third very much inferior, and not able to stand in Competition with the rest. He pro-

ceeds to give it for a Rule, that altho' *Honesty* be better than *Safety*, yet in some Cases we may give the Preference to the latter; when what we take from *Honesty* in the consulting our present *Safety* may be recover'd and made up by our future *Vertue* and *Integrity*: When this cannot be done, *Honesty* is absolutely to be prefer'd and embrac'd. Others chuse to say, that when the *Necessity of Safety* is prefer'd to the *Necessity of Honesty*, such a Fact cannot be defended in a direct way, and by any Prescription of Right, but leans wholly on the Excuse which we allow to Human Infirmity, and on the Indulgence of our Mercy and Pity. But that *Necessity of Convenience* is still much weaker, and weighs very little either in the Defence or the Excuse of Actions; unless when the Cause comes before such a Judge, as hath more regard to his own partial Inclination, than to the Suggestions of Wisdom and to the Demands of Right.

Now our Business on this Subject lies chiefly in examining and stating the *Necessity of Safety*, and in considering what force it hath to exempt any Action from the Obligation of

(a) *M. Senec.* l. 4. Controv. 27. *Necessity is the Great Patronage and Shelter of Human Infelicity.* *Callimach.* Hymn. in Del. *Necessity's a Mighty Goddess.* ——— Add. *Orat. Lentul.* in *Liv.* l. 9. c. 4. (b) To which belongs that Saying of *Pliny*, l. 1. *Epist.* 12. *The Best and Highest Reason passeth for Necessity with Wise Men.*

Common Laws. That is, whether we may not sometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own fault) cast into such Straights, that we cannot otherwise secure our own Preservation. And here it is apparent, that the *Favour*, the *Right*, the *Leave*, or whatever it is that in such Cases we attribute to *Necessity*, doth spring from this single Principle, that it is impossible for a Man not to apply his utmost Endeavour towards preserving himself; and that therefore we cannot easily conceive or suppose, such an Obligation upon him, as ought to outweigh the Desire of his own Safety.

II. No Good and Pious Man can question, but that GOD ALMIGHTY who is the absolute Master of our Lives, and whose free Bounty gave us the precarious Enjoyment of them, may impose on us so severe a Law, that we ought rather to die, than to recede the least degree from it. Of which kind the *Jews* took their Law against eating Swine's Flesh to be; as we find in the History of the *Maccabees*. And their Judgment was then indeed right; because as the Case stood with them, to eat that sort of Flesh was look'd on as an open Denial of the True Religion. Whereas, were they under no such hard Circumstances, it was no Sin for a Man to keep himself from starving by feeding on this forbidden Meat, when no other could be procur'd. Sometimes too by the Authority of a Civil Sovereign, Men may receive so strict and rigorous Commands, that they must rather part with their Lives, than omit the Duty enjoin'd them. But the Obligation of *Positive Laws* is not always presum'd to be so harsh and severe. For in as much as the Authors of these, or of any other Rules and Constitutions in the World chiefly design'd by them to promote the Safety or Convenience of Mankind, we may suppose them, generally speaking, to have had before their Eyes the weak Condition of Human Nature; and to have reflected on the Impossibility which every Man lies under, not to avoid, and to drive off, all things that aim at his Destruction. Upon this account then, most Laws, especially those which we call *Positive*, are judg'd to except the *Cases of Necessity*; that is, not to *oblige*, when the Observance of them must be attended with some Evil, destructive of our Nature, or exceeding the ordinary Patience and Constancy of Human Minds: Unless when this very *Case* is included plainly in the Injunction, either by express mention, or because the Nature of the Business cuts off all Exception and Reserve. Hence it is clear that no such Power ought to be attributed to *Necessity*, as that it should give us the Privilege of directly violating a Law, or of committing a Sin; but we only presume from the favourable Intention of Legislators, and from the Consideration of the Nature of Man, that the *Case of Necessity* is not comprehended

under the General Terms of a Law. An Instance of this our Saviour himself hath been pleas'd to give us, in *David's* eating the *Shewbread* (a), intimating, that the Matter and the Reason of the Law which forbid that Action in general, could not be suppos'd to have any such rigorous design, as that a Man ought rather to die with Hunger, than to touch the Consecrated Food (b).

It is plain then, that as to *Positive Laws* this Privilege of *Necessity*, is admitted and allow'd: But 'tis a Point much more difficult to determine whether the same Favour can take place in the Laws of Nature; That is, whether in *Necessary Cases* we may fairly omit what is *Naturally* commanded, or perform what is *Naturally* forbidden. As for the first Question, it appears from the Nature of *Affirmative* Precepts, that whenever they oblige a Man to the actual exerting of such a Performance as is enjoin'd, they at the same time suppose him to have Opportunity, Subject and Power of acting: But now we may fairly judge these Conditions to be wanting, when I cannot do a thing without the Loss of my Life. Since to throw off the Love and the Care of our selves, is justly rank'd amongst impossible Attempts; or however amongst such as surpass the common Strength of Mens Souls. Therefore, unless it either be expressly and particularly provided by the Law, or deducible from the Quality of the Business to be undertaken, that I must rather lay down my Life, than omit the Duty, all affirmative Edicts of Nature may be understood to except the Case of extreme Necessity: Especially when a Man hath not fallen under such a Necessity thro' his own Neglect and Default. Thus I am not bound to furnish an hungry Person with Bread, when I want it for my own Sustainance (c); Or to help a Man that is drowning, when I cannot save him without losing my self. *Seneca's* Resolution is good in both Cases, *I will give* (says he (d)) *to those that are in need; but so as not to put my self in the same needy Condition: I will succour those who are ready to perish; but so as not to expose my self to certain Ruine.*

As for the *Negative* Precepts, or the Prohibitions of Natural Laws, this in the first place is most certain, that no *Necessity* can make it allowable for us to undertake an Action directly dishonouring Almighty GOD; as suppose, to blaspheme or to deny him, and renounce his Worship and Service, tho' for the avoiding of present Death. For in as much as GOD is able to inflict on a Man a much more grievous Evil than *Natural Death* can be imagin'd to be; our Reason doth with good Probability assure us, that he will requite us with a much more noble Happiness when we part with our Lives for his Sake: On the other hand it would be absurd as well as impious to sin against the Divine Honour for the escaping of a lesser

(a) See *Mat.* XII. 4. Add. *Casaubon* Exercitat. ad *Baron.* i. n. 9. (b) *Pallad.* de R. R. l. i. c. 6. *Necessitas Feriis* *causet*, Necessity keeps no Holy-Day. (c) See *1. 1. Corinth.* VIII. 13. (d) *De Benef.* l. 2. c. 15.

Evil, than what he incurs by such an Offence (a). Yet the unhappy Case of those who yield to the Force and Violence of Tortures, is not altogether unworthy of our Pity.

Concerning those Laws which contain the Mutual Duties of Men, it may be first observ'd, that some of these Natural Precepts do presuppose some Human Deed or Institution; which, as may be gather'd from its End and Purport, not extending to the Case of extreme Necessity; the same Exception may be fairly understood in the Law. And then we may remark farther, that a Man cannot be said by his own Act *immediately* to have violated a Law, unless the Act can be rightly *imputed* to him. Now an Act may proceed from a Man two ways, either as he is the *Principal*, or as he is the *Instrumental Cause of it*. And this *Instrumental Cause* is again of two kinds, either as it exercises no Motion but what is impress'd on it by the *Principal Cause*, and against its own Natural Inclination, if it have any; or, as it applies it self upon its own proper and internal Impulse to such a Performance, tho' the Influence and the Direction of the first Cause do likewise assist in the Operation. If then a Man be according to this latter way *Instrumental* in an Act, the Act may not only be *imputed* to the *Principal Cause*, but also to him, as his true and proper Work. But if he be *Instrumental* or Concurrent only in the former manner, the Act shall not be *imputed* to him, but only to the *Principal Agent*. What farther Conditions are requisite to this Case shall hereafter be more largely explain'd.

III. Thus much being premis'd, we may go on to discuss the particular Cases, and Questions usually disputed on this Head. In reference then to a Man's self, tho' otherwise he hath no such Right and Power over his Members as to destroy, to distort, or to maim them at his Pleasure; yet it shall be lawful for him to cut off a Limb, that is either possess'd by an Incurable Gangrene, or that is rendred useles by a Wound; in the former Case, to keep the whole Body from perishing, or the sound Parts from being infected, and in the latter, that the Use of the other Members be not hindred by the Clog of an unserviceable and cumbersome Appendage. Whether the extremest Necessity doth farther give a Man any Right over his own Life, that is, whether for the escaping a Death of Ignominy or of Torture, he may lay hold on more gentle Means of leaving the World, we have enquir'd and stated in the preceding Chapter. We may proceed therefore to examine what Right Ne-

cessity can give us over others. To feed on Man's Flesh in the desperate Extremity of Famine, when no other Sustainance can be procur'd, is a lamentable indeed, but not a sinful Expedient. But as for those Instances, when in Distress and Want of all Provisions, Men have been kill'd to preserve their Fellows, either by Compulsion and against their Consent, or else by the Determination of Lot, the Decision of them is a Point of some Difficulty and Uncertainty. In as much as whatever the Law against Murther suggests on one side, the Sharpness of Hunger pleads as loud on the other, and the Belly that Advocate without Ears: Especially considering that unless this *unhappy Means* was made use of, the whole Company must have inevitably perish'd (b) (1). To this purpose we have a Story of Seven *English men*, who being toss'd in the Main Ocean without Meat or Drink, kill'd one of their Number, on whom the Lot fell, and who had the Courage not to be dissatisfied, affwaging in some measure with his Body, their intolerable and almost famish'd Condition: Whom when they at last came to Shore, the Judges absolv'd of the Crime of Murther. Ziegler upon *Grotius* (c), giving this Relation, is of Opinion, that *the Men were all guilty of a great Sin, for conspiring against the Life of one in the Company, and (if it should so happen) every one against his own; thus regarding Bodily Peril, more than the Danger of their Souls. That no one ought to have set so little a Value on his Life, as to lose it for satisfying the Hunger of the rest: And that the rest ought not to have been so cruel to their Fellow, in Compliment to their own Stomachs.* But to this it might be answer'd, that 'tis too harsh and rigorous a Censure, to say that those Men *conspire against the Life of another*, who agree to take the Chance of dying one of them, for preserving the Lives of all the rest (d). And consequently they could put their Souls into no Danger by this Unfortunate Resolution. Nor is the Charge of *undervaluing their Lives* any better grounded; since he only can fall under this Imputation who throws himself away without Necessity. Nor, in the third Place, doth there lie any Objection of Cruelty, when the Person dying for the Safety of his Companions, receives the Instrument of Death with less Grief and Reluctancy than the others apply it. There is another Case worth examining; suppose in a Shipwreck more Men leap into the little Boat than it is able to carry, and the Boat belongs to no one by a more peculiar Right than to the rest; whether they may not fairly draw Lots who shall be cast over-board; and whether if any one refuse thus

(a) *Carpyllid.* in Antholog.

Ἡ εἰς δικαιοῦς  
Ἄνδρῶν εὐσεβῆς ἀπὸ λαοῦ χρεῖται.

(b) *Homer Odyss.* 8. Οὐ γὰρ π σοχεῖν, &c.

(1) This is one of those Cases in which a Man ought to dye rather than commit the Fact, it being directly contrary to the Laws both of God and Nature.

(d) See *Jenah*, l. 7, &c

Good Men, whatever Scenes of Fate they see,  
Shall ne'er be Losers by their Piety.

The Belly, like a Bold Petitioner,  
Breaks rudely in, and forceth you to hear.

(c) *Ad Gros.* l. 2. c. 1. from *Nich. Tulpius Observat. Medicin.*

to take his chance, he may not be thrown out without farther Deliberation, as one that seeks the Destruction of the whole Company. But these Cases being such as very rarely fall out, we chuse at present to suspend our Positive Judgment concerning them.

IV. This may more frequently happen, that two Persons being under imminent Danger of their Lives, both must unavoidably perish, unless one of them for his own Deliverance, hastens, by some Act the Fate of the other, which would however have soon arriv'd. Or, that upon Necessity we may bring on another indirectly the Danger of Death, or of some grievous Hurt; not designing to harm him, but only to exercise such an Act, as may probably prove mischievous to him; at the same time desiring any other way to get rid of our Necessity and Streights, and endeavouring as far as lies in our Power to make the Damage fall light on the suffering Party. Now this kind of Hurt, as we judge it not to cause any Sin in the Giver, so we think the Receiver ought to look on it as purely an Accidental Evil, upon account of which he has no reason to be angry at the Author. Let us consider an Instance or two of both Cases. If I, being a skilful Swimmer, fall into deep Waters with another utterly ignorant of that Art, and he, as the usual way is, clings fast about me, who am not able to drag out both Burthens; who will blame me for using all my Strength to get rid of him, and so to prevent my own Death, tho' perhaps I could, with hard shift, have held him some few Minutes above Water? So in a Wreck, if I have taken Possession of a Plank which will not hold two, and another, swimming towards me, shall endeavour to throw himself upon it, to the Destruction of us both; there seems to be no reason why I should not apply the utmost Violence in keeping him off. And thus likewise if two Men are pursued hard by an Enemy bringing Death in his hand, if both cannot be saved, one of them may, for his own Security, either by breaking down a Bridge, or shutting a Gate after him, leave the other in imminent Danger of being kill'd.

This kind of Necessity often happens in War; where 'tis a Rule, that at any time some few are to be left in Distress, for securing the Main Body (a). Yet *Darius* in *Quintus Curtius* (b), when things were not brought to desperate Extremity, bravely refus'd to break down the Bridge of the River *Lycus* which he had pass'd with some part of an Army in a Retreat; making this Generous Declaration, *that he had rather give a Passage to those that pursu'd, than take it from those that fled.*

An Instance of the other Case which we mention'd in General, may be this: Suppose a Person of more Strength than my self, follows me close with Intention to kill me, and I meet one in a narrow Passage thro' which I must take my Flight, if upon my Request he will not get out of the way, or if he has not time or room to stand off, I may throw him down and run over him, tho' the Fall in Probability will be very grievous and hurtful to him: Unless he be such an one, as, by Virtue of some peculiar *Obligation*, I am bound at any time to serve voluntarily with my own Danger. And if the Person who thus stops my Flight be not able to look to himself upon my calling to him, as suppose a Lame Man or a Child, I shall certainly deserve Excuse, if I attempt to leap over him (either being on Horse-back or a-foot) rather than fall into my Enemies hands by my Delay. As for that other Example, which some give, it plainly appears not to be without *Fault*. The Case is this, *a Captain flying from a Battle, and being closely follow'd by the Enemy, one of his Men happening to be got just before him in the Crowd, he runs him thro', to get off with the more Expedition.* Now here the Captain was strong enough to have made his way only by pushing down the Fellow that stop'd him, and therefore ought not to have us'd so violent Means. Yet if in getting by him, he had undesignedly hurt him with his Arms, the Mischance would have been very pardonable. But in case a Man either out of a Frolicksome, or a Cruel and Barbarous Humour, stops me on purpose, and refuses to make room for me to escape, I may presently use him as an Ene-

(a) *Arrian. de Expedit. Alexand. l. 6. It was necessary to set aside the Care of single Persons, in Prosecution of the Common Safety.* *Virgil. Æn. IX.*

*PANDARUS ut fuso germanum corpore cernit,  
Et quo sit fortuna loco, qui casus agat res;  
Portam vi multa converso cardine torquet,  
Obnixis latis humeris: multosq; suorum,  
Manibus exclusos, duro in certamine linquit.*

When *Pandarus* beheld his Brother kill'd,  
The Town with Fear and wild Confusion fill'd.  
He turns the Hinges of the heavy Gate,  
With both his hands, & adds his Shoulders to the Weight.  
Some happier Friends within the Walls inclosed;  
The rest shut out to certain Death expos'd.

And again, l. XI. after the Defeat of the Latin Horse,

*Pars claudere portas,  
Nec Sociis aperire viam, nec manibus audent  
Accipere orantes.*

Then in a Fright, the Folding Gates they close,  
But leave their Friends excluded with their Foes.

*Mr. Dryden.*

*Mr. Dryden.*

*Comp. Livy, l. 26. 15. Where the Thurini made a wicked and treacherous use of this Pretence. Florus (l. 2. c. 18.) says of the Numantines, At length they entred into a Resolution of Flight: But this their Wives prevented, by cutting in pieces the Harness of their Horses; committing a Base Cruelty through an Extremity of Love. Tacitus (Ann. 14.) censures it as the Effect of ill Conduct or of Treachery, that when the Romans were besieg'd in *Camolodunum*, non motis senibus & feminis juvenus sola restiterit; the Young and Able Men did not throw out the Women, and Persons useless through Age, and so clearing the Place, make it more capable of Defence. (Add. Livy, l. 5. c. 40.) On the contrary he tells us in the same Story, that *Suetonius* resolv'd to hazard the Loss of one Town, for the Security of the whole Province; And therefore he would not be mov'd by the Cries and Intreaties of those who begg'd him to stay and protect them: But giving the Sign for Marching, he receiv'd all into his Troops that were willing and able to follow him; and as for those whom either the Weakness of their Sex, or the Burthen of their Age hindered from stirring, they were left to the Mercy of the Barbarians. (b) L. 4. c. 16.*

my, and thrust him down by any means I can, how much soever he is like to suffer by the Bruise (a). To conclude this Point, as the declining Death any way, admits of much Favour and Excuse, so if the Danger offer'd be no more than a Maiming or a Grievous Wound, and we fly from it with the Hurt of those that chance to stop us, the Fact will bear much the same Apology or Defence. For he who offers such a Violence, may be resisted as much as if he directly attempted to murder us; and when we are compell'd to consult our Safety by Flight, the Consternation we must needs lie under, vindicates our Innocence, as to any sudden and unfortunate Accident, that we chance to trespass in.

V. Let us enquire in the next place, whether the Necessity of preserving our Life, can give us any *Right* over other Men's Goods; so as to make it allowable for us to seize on them for our Relief, either secretly or by open Force against the Owner's Consent. For the more clear and solid Determination of which Point, we think it necessary to hint in short on the Causes upon which Distinct *Proprieties* were first introduc'd in the World; designing to examine them more at large in their proper place (1). Now the main Reasons on which *Proprieties* are founded, we take to be these two, that the Feuds and Quarrels might be appeas'd which arose in the *Primitive Communion* of things, and that Men might be put under a kind of Necessity of being Industrious, every one being to get his maintenance by his own Application and Labour. This Division therefore of Goods was not made, that every Person should sit idly brooding over the Share of Wealth he had got, without assisting or serving his Fellows (2); but that any one might dispose of his things how he pleas'd, and if he thought fit to communicate them to others, he might at least be thus furnish'd with an Opportunity of laying Obligations on the rest of Mankind. Hence when *Proprieties* were once establish'd, Men obtain'd a Power, not only of Exercising Commerce to their mutual Advantage and Gain, but likewise of dispensing more largely in the Works of Humanity and Beneficence; whence their Diligence had procur'd them a greater Share of Goods than others: Whereas before, when all things lay in common, Men could lend one another no Assistance but what was supplied by their Corporal Ability, and could be Charitable of nothing but of their *Strength* (b). Farther, such is the Force of *Propriety*, that the *Proprietor* hath a Right of delivering his Goods with his own hands; even such as he is oblig'd to give to others. Whence it follows, that when one Man has any thing owing from another, he is not presently to

seize on it at a venture, but ought to apply himself to the Owner, desiring to receive it from his Disposal. Yet in case the other Party refuse thus to make good his Obligation; the Power and Privilege of *Propriety* doth not reach so far as that the things may not be taken away without the Owner's Consent, either by the Authority of the Magistrate in *Civil Communities*, or in a *State of Nature*, by Violence and Hostile Force. And though in regard to bare *Natural Right*, for a Man to relieve another in Extremity with his Goods, for which he himself hath not so much Occasion, be a Duty obliging only *Imperfectly*, and not in the manner of a *Debt*, since it arises wholly from the Vertue of *Humanity*; Yet there seems to be no Reason why by the additional Force of a *Civil Ordinance*, it may not be turn'd into a strict and perfect Obligation. And this *Seldens* observes to have been done among the *Jews*: Who, upon a Man's refusing to give such Alms as was proper for him, could force him to it by an *Action* at Law. 'Tis no Wonder therefore, that they should forbid their Poor on any account to seize on the Goods of others, enjoining them to take only what Private Persons, or the Publick Officers or Stewards of *Alms* should give them on their Petition. Whence the stealing of what was another's, though upon extreme Necessity, pass'd in that State for Theft or Rapine. But now supposing under another Government the like good Provision is not made for Persons in Want, supposing likewise that the covetous Temper of Men of Substance cannot be prevail'd on to give Relief, and that the Needy Creature is not able, either by his Work or Service, or by making Sale of any thing that he possesses, to assist his present Necessity, must he therefore perish with Famine? Or can any Human Institution bind me with such a force, that in case another Man neglects his Duty towards me, I must rather die, than recede a little from the ordinary and the regular way of Acting? We conceive therefore that such a Person doth not contract the Guilt of Theft, who happening, not through his own Fault, to be in extreme want, either of necessary Food, or of Cloaths to preserve him from the Violence of Weather, and cannot obtain them from the voluntary Gift of the Rich, either by urgent Intreaties, or by offering somewhat equivalent in Price, or by engaging to *work it out*, shall either forcibly or privily relieve himself out of their Abundance; especially if he do it with full Intention to pay the Value of them, whenever his better Fortune gives him Ability. Some Men deny that such a Case of *Necessity*, as we speak of, can possibly happen. But what if a Man should wander in a Foreign Land, Unknown, Friend-

(a) Comp. *Lactant. Institut. l. 5. c. 17.* which some have vainly oppos'd to the Opinion here deliver'd.

(1) *Lib. 4. c. 4.*

(2) *Aut quis Divitiis soli incumbere reperitis,*

*Nec partem possidere suis, &c. Virg. Æn. VI. 610, 611.*

(b) See *Ephes. IV. 28.*

less and in Want, spoil'd of all he had by Shipwreck or by Robbers, or having lost by some Casualty whatever he was worth in his own Country; should none be found willing either to relieve his Distress, or to hire his Service, and should they rather (as it commonly happens,) seeing him in a Good Garb, suspect him to beg without Reason, must the Poor Creature starve in this miserable Condition? It may be objected indeed, that in *Proverbs* VI. 30, 31. he is call'd a Thief, and pronounced obnoxious to the Penalty of Theft, who steals only to satisfy his Hunger. But whoever closely views and considers that Text will find, that the Thief there censur'd is neither in such extreme *Necessity*, as we are now supposing, nor seems to have fallen into his needy Condition merely by ill Fortune without his own Idleness or Default. For the Context implies, that he had a House and Goods, sufficient to make Seven-fold Restitution; which he might have either sold or pawn'd; a Chapman or Creditor being easily to be met with in times of Plenty and of Peace. For we have no Grounds to think that the Fact there mention'd is suppos'd to be committed, either in the time of War, or upon account of the extraordinary Price of Provisions. Besides, this Thief was faulty on another Account: For if he had not wherewithal to maintain himself, the Laws oblig'd him to sell himself for a Slave (a).

VI. *Grotius* (b) proposes another way of solving the Difficulty under our present Debate. He says, that the first Introducers of distinct *Proprieties*, must be understood to have done it with this Exception and Limitation, that the Right of this Propriety excluding others from the Use of every Man's proper Goods ought then to expire and to give place, when another cannot possibly without making use of them, be sustain'd or preserv'd: And consequently, that in such a Case of *Necessity*, a thing possess'd in *peculiar*, when another Man's Life cannot be sav'd without it, is turn'd again into *Common*. Or, what amounts to the same Purpose, that when Men Originally instituted separate *Proprieties*, they agreed by Mutual Covenant, to forbear using the particular Goods of each other, any farther than the Owner should give leave: Yet so as to make it allowable in extreme *Necessity*, for a Man to seize on any thing absolutely requisite for his Preservation, as if it still lay in its primitive Indifference and Community. For since in *Written Laws*, that Interpretation is to be follow'd which recedes the least from *Natural Equity*, he presumes

this will hold more strongly in regard to *Customs*, which obtain only by Tacit Agreement. And surely it must be in the highest Degree *Equitable*, that a Man be permitted to save his Life, by using any thing at hand, when all other Means fail him.

But this Exposition lies open to several Exceptions and Difficulties. For if *Necessity* gives a Man a Right of seizing on the Goods of others as if they lay in common, what hinders but that, if he have sufficient Strength, he may take them from the Owners, when they themselves are at the same time pinch'd with the like *Necessity*? Yet this *Grotius* doth by no means allow. Again, *Grotius* requires *Restitution* to be made in these Cases: But I am oblig'd to no such Duty, when I take a thing by Virtue of my *Right*. Besides he forgot to mention how different the Case is, when a Man falls under such *Necessity* by his own Sloth or Negligence, and when it comes on him without his Fault. Which Distinction being omitted, a Right seems to be given to idle Knaves whose Vices have brought them into Want, to seize forcibly for their own Use the Fruits of other Men's honest Labours; and so continuing their Poverty and their Laziness together, to put a *Necessity* on Industrious Persons, of feeding such useless Bellies for Nothing. But all wise Men, as they allow such as are innocently Miserable to deserve Assistance and Relief; so they advise us to pack off Mendicant Drones and Lubbers, with the old Answer that the Ant gave the Grasshopper in the Fable (c). Since then it is lawful for every Proprietor to distinguish between such as are Indigent out of Misfortune, and such as are reduc'd to the same Condition by their own Demerit and Neglect; 'tis plain, that he has such a Right over his own Goods, as shall in some measure prevail even against a Person in extreme *Necessity*: So far at least as that he shall have the Privilege of judging, whether the Man be an Object worthy of his Relief or not; that it may be in his Power to oblige and win a necessitous Person by his seasonable Succours: For nothing raises the Value of a Kindness so much as its being done for the Removal of an extreme Distress. But all this Merit and Obligation is cut off, when we give another, only what he might otherwise, as his own Right and Due, violently take from us.

We think therefore, that this Point of Dispute will be more clearly determin'd by the Principles and the Method which we have laid down: That is, by saying in short, that the Wealthy Person is bound to relieve him

(a) See *Levit.* XXV. 39. *Selden.* l. 6. c. 7. Nothing can be drawn to the contrary from *Prov.* XXX. 7. Other Authors give this Example of Extreme *Necessity*. *A Man being in an unknown Country, is attack'd by an unjust Assailant, and cannot otherwise save himself than by speedy Flight. He finds ready at hand, a Horse belonging to some Person of the Country, but which he sees no means of restoring, as well because he is Ignorant of the Owner, as because he may be oblig'd to ride far to escape the Danger.* (b) *L.* 2. c. 2. f. 6. (c) And thus in *Plutarch*, (Apothegm.) when a Captain of Coasting Robbers, made an Inroad into the Territories of *Lacedemon*, and being taken, urg'd in his own Defence, "That he was neither able of himself to pay his Companions, nor could prevail with those that had Money, to supply him; and therefore he ventur'd to take it by Force. *Cleomenes* call'd this Proceeding *ὀνίπμ@ ἢ πικρῆλα*, *A very Compendious Wickedness.* Add. *Pandulf.* *Collenut.* rer. *Neapolit.* l. 5. p. 373.

who *Innocently* wants, by an *Imperfect Obligation*; to the performing of which though regularly no Man ought to be compell'd by Violence, yet the force of *extreme Necessity* is so great, as to make these things recoverable by the same means as those which are truly and rightfully *due*: That is, by making Complaint to the Magistrate, or when the Urgency of the Distress cannot allow time for such an Expedient, then by seizing what is ready at hand, either in a secret or in an open manner. Now the chief reason why we affirm those things which proceed purely from the Virtue of *Humanity* to be owing only by an *Imperfect Right*, is that Men may be allow'd both an occasion of showing their voluntary Propension to the Discharge of their Duty, and likewise of endearing others to them by their voluntary Benefits. But now if a Man should despise these Considerations, must a poor necessitous Creature be famish'd, because he cannot prevail on the Unmerciful Miser? Certainly such an inflexible Churl ought rather to be depriv'd of his Gift and of his Merit together; since he had not Heart enough to venture on an Act of common Humanity.

From what has been hitherto offer'd, it is easy to gather the Reasonableness of those Exceptions which *Grotius* subjoins to his and our main Assertion. For since nothing but inevitable Necessity can justify the taking by force what is owing only upon an *Imperfect Obligation*, in the first place it is clear, that all fairer Courses are first to be tried, as complaining to the Magistrate, begging and intreating, promising Restitution if we are ever able, or offering to discharge the Debt by equivalent Labour and Service. Secondly, this Licence can by no means take place, when the Owner of the thing which we want, lies under as great a *Necessity* as we our selves: On the contrary, we suppose the Owner to *abound*. This Caution or Exception may be extended farther, and we may say, that a distress'd Person cannot fairly take a thing from the Owner without his Consent, if it be only manifest that upon the Loss of that thing the Owner will hereafter fall into the like indigent Condition. For in these Cases, 'tis fit *Charity should begin at home*. That Rule of Civil Law which *Grotius* applies to the present Business, that *when the Considerations on both sides are equal, the Case of the present Occupant, is to be preferred*; doth not seem so exactly to hit the Purpose. For that Maxim only imports, that Judgment ought to be given for the *Possessor*, whilst the *Claimant's* Title and his are alike disputable. But in the Matter before us, the Possessor's Right and Title are granted, and the only Question is, whether I am oblig'd by the bare Law of Humanity, to perish myself for the sake of preserving another: which

is a Paradox that no Man will pretend to maintain. The other Sentence which *Grotius* applies, out of *Curtius* (a), is much more proper and more agreeable to the Point; *Melior est causa suum non tradentis, quam poscentis alienum*. He who refuses to deliver what is his own, has a fairer Cause than he who demands what is another Man's.

Thirdly, we lay it down as an indispensable Condition, that Restitution is to be made if possible; especially, if the thing taken were of great Value, and such as the Owner could not well part with without some Consideration. But if the thing were small and inconsiderable, and the Loss so light that the Owner's Fortune could not feel it, 'twill be sufficient when opportunity serves, to show that we should not have been wanting in Gratitude, if his Greediness would have given us leave to be obliged to him. As for *Grotius's* requiring Restitution, it seems not to suit with his Hypothesis. For if upon a Case of Necessity the Right of *Primitive Communion* returns, so as to give a Man a just Title to the Goods of others, then Restitution can on no account be desir'd or demanded. But since this is necessarily to be made, it appears that the Right of the Owner doth not expire thro' the Necessity of the Petitioner; but that he ought voluntarily to have given Relief, either *gratis*, or upon Receipt of the Price of the thing or any other Compensation. Which Duty when he neglects to perform, then indeed the Necessity of the Distress'd Person gives him a right of taking the thing by Force, but still with the same *Burthen*, or under the same Condition which the Owner might have impos'd on him; that is, either to refund the Value hereafter, or at least to make a grateful Acknowledgment of the Benefit.

VII. If we look on other Authors, we shall find them much divided about this difficult Point. The fourth Chapter of the fifth Book of the *Decretals* (b), enjoining *Penance* to Thieves who steal out of Necessity, is by the *Gloss* expounded of little and indifferent Necessity, not of such as is Extreme and Insupportable. *Covarruvias* (c) delivers his Opinion almost to the same purpose as *Grotius*. The Reason (says he) why a Man in extreme Necessity may without incurring the Guilt of Theft or Rapine, forcibly take Goods of others for his present Relief; is, because this Condition renders all things Common. For it is the Ordinance and Institution of Nature it self, that Inferior things should be design'd and directed to serve the Necessities of Men. Wherefore the Division of Goods afterwards introduc'd into the World, doth not derogate from that Precept of Natural Reason, which suggests that the extreme Wants of Mankind may be in any manner remov'd by the use of Temporal Possessions (d). *Peregrinus* (e), arguing on the same side, alledges,

(a) L. 7. c. 1. (b) Cap. si quis X. de furtis. (c) P. 2. f. 1. n. 3. (d) There is alledg'd a Passage of St. Ambrose from Gratian, Decret. c. Sicut. hi. dist. 47. It is the Bread of the Hungry which you detain: It is the Raiment of the Naked which you lock up. (e) Ad Tit. Cod. de furtis, l. 3.

that in this Case a Man is compell'd to the Action by a Force which he can't resist; and then, that the Owner's Consent may be *presum'd* on, because Humanity obliges him to succour those who are in Distress. Besides, he observes, that the Necessitous Person doth not properly take the Goods which were another Man's, but which lay in common: And yet that he is bound, when he has obtain'd Deliverance from his Want, to make fair Restitution. *Anton. Matthæus* (a) is of Opinion, that a Distinction should be made in this case between the *Crime* and the *Punishment*; the *Crime* of Theft, he says, is not taken off even by extreme *Penury*, but he would have the *Punishment* either wholly remitted, or considerably mitigated and abated. Now that the *Crime* of Theft is committed even under these Circumstances he endeavours to prove from the Definition of *Theft* in the Civil Law, which he makes to reach this Action. *Theft*, the Emperour *Justinian* tells us, is a *fraudulent seizing on the Goods of others, for the sake of making a Gain of them*. But we may fairly plead (in Opposition to *Matthæus*,) that neither of these Imputations can fall on the Fact which we defend. For how can this be term'd a *fraudulent seizing on another Man's Goods*, when both the Owner lay under an imperfect Obligation of giving the thing desir'd, and the other Person had a *Right*, by Virtue of his present Condition to possess himself of it, by the most convenient means he could? Nor can he well be said to take a thing of another Man's for the sake of making a Gain of it, who designs it purely for the Relief of his extreme Distress, with full Wishes and Resolutions to restore or to repay it as soon as possible. That part of his Argument is meer Bravado, where he tells us, that no Violence can compel a Wife and a Good Man to defile himself wilfully with any uncomely Action: And that in these Cases, every one should, as *Tully* (b) advises, *rather patiently endure his own Inconvenience, than trespass on the Conveniencies of others*. Now besides that, 'tis an easy matter to talk Philosophically, whilst we do not ourselves feel the *Hardship* any farther than in Speculation (c); the Fact under Debate can, according to our way of determining it, include no other Turpitude or Indecency than such as Persons of Breeding and Quality are guilty of, when the Severity of Famine compels them to feed on the basest and most filthy Meats. And then the Rule about Conveniencies and Inconveniencies is beside the Question, which only supposes some little Matter to be taken from a wealthy Person, who doth not feel the Loss, to keep another from perishing by the Extremities of Hunger or of Weather. The same Author observes on the *Lex Rhodia de jactu*, that tho' for the Publick Benefit, in

a time of Scarcity, every Man is oblig'd to bring what Corn he has by him into the Common Market, yet People are not hereupon empower'd to carry off what they please, because they are in want, and others abound; but the whole Business is to be left to the Care and to the Directions of the Magistrate. But must the Poor therefore be content to starve, when the Magistrates neglect to make due Provision for their Sustenance?

As to what some urge, that there doth not appear any *Dispensation of the Law in this matter*, 'tis an Objection that may be easily spar'd. For sufficient Reasons have been given why we may well presume, that the Law which forbids *Theft* is not to be extended to the present Case.

VIII. Lastly, the Danger or *Necessity* of our own Goods, seems to allow us the Privilege of destroying or of invading those which belong to other Men. Yet with these Proviso's, that the Danger did not happen thro' our Fault; that we cannot find a more convenient way of removing it; that we do not ruine a more valuable Thing of our Neighbour's, for saving one of our own, inferiour in Price and Consideration; that, in case the other thing had not been lost but for our sake, we pay the Price of it; and lastly, that if what belong'd to our Neighbour must have otherwise been destroy'd together with ours, if we had not preserv'd the latter by making away with the former, that then we consent to bear a part in the *Damage*. On this Foundation is grounded the Equity of the *Rhodian Law de jactu*, by which it was provided, that *if for the lightening of a Ship the Men were compell'd to throw any Goods overboard, the Loss should be made up by general Contribution, since it happen'd upon account of the general Safety* (d). Thus too if my Vessel be driven upon the Cables, or the Nets belonging to another, I have Liberty to cut them in Pieces, if I cannot otherwise get clear. And if my own Neglect did not bring me into that Trouble, I am to answer but for half the Cost. Thus in a Fire, I may pull down my Neighbour's House for the Security of mine; if I am willing to make good all that he suffers by the Mischiefe. For tho' in one of the *Roman Constitutions* (e), it is determin'd, that in Case the Fire had Actually reach'd to the House that was pull'd down, the Person who procur'd it, shall not be Responsible; yet the common Opinion inclines more to Equity (f), which asserts, that upon such Demolishment of one House for the Security of many, the Damage shall be repair'd by those Neighbouring Inhabitants, who thus escap'd the Danger; though the House which they in this manner ruine, hath not been touch'd by the Flames. For it would be indeed unreasonably hard,

(a) Ad l. 47. D. tit. 1. f. 7. (b) *Offic.* 1. 3. (c) Vid. *Oppian. Halieut.* 1. 3. v. 197. (d) Vid. *tot. titul.* together with the Commentators on that, and on the Naval Laws. (e) L. 7. f. 4. D. *quod vi aut clam*, (f) *Add.* 1. 49. f. 1. D. *ad L. Aquil.*

that when I have sav'd my own Concerns by destroying those of another Man, the whole Loss should be thrown upon him, whilst the whole Advantage lights on me. From the same Rules and Principles the *Roman* Lawyers deduce most of their Doctrine concerning that kind of *Damage* which they call *Damnum Infectum* (1). Thus, for Example, if my next Neighbour has a Ruinous House, very likely to tumble to the Prejudice of my Effects, he shall be oblig'd to give me Security for answering all Damages that I sustain; and if he refuse this Condition, upon applying myself to the *Prætor*, I obtain an *Edict* empowering me to enter the Ruinous Place. On the same account they assert, that in case a Man has a Field surrounded in such a manner on all sides, by the Lands of others, that he cannot get to it without seemingly committing a *Trespas*; the Borderers shall be compell'd by the Judge, to grant him *Passage*, at least upon the offering of a reasonable Consideration.

*Grotius* (a) makes this farther Deduction from the Doctrines we have been now laying down, that it is lawful for him who wages a *Just War*, to possess himself of a Place seated in a Country that is at Peace with him; if there be certain (and not only imaginary) Danger, that the Enemy will otherwise surprize it, and from thence annoy him with irreparable Mischief: Provided he take nothing but what is necessary to his own Security, as the bare *Custody* of the Place, leaving both the Jurisdiction and the Profits to the right Owner; and fully purposing to restore the *Custody* too, so soon as the Necessity that brought him thither shall cease. To these Conditions it should be added, that the Lord of the Place is first to have frequent notice given him, and to be desir'd that he would himself secure and defend the Place, upon a Promise

from the other Prince to defray the Charges; or that he would demolish and render it untenable, if he thinks that the most proper Method. And another equitable Caution is, that in case the new Possessor has expended any Sum in raising *Works* and Fortifications, the proper *Lord* is not oblig'd to refund, unless he intended to have built the same Defences himself; in as much as the other did not make it his Aim purely to improve the Place, but chiefly to secure his own Territories. *Bæcler* in his Notes on this Passage of *Grotius* well observes, that it is apparent from the usage of all Ages and of all Nations, that no one thinks himself oblig'd to allow another thus to seize on any Fort or Place of his, if he be able to hinder his Attempt. And that therefore if the other do actually take Possession, the Fact is such as may admit of easy Pardon, but not such as can be fairly and strictly defended on the Grounds of *Natural Law*. To which purpose we may consider farther, that 'tis very probable the Enemy may hence entertain a Suspicion, that the Lord of the Place is in secret Confederacy against him; and so the whole Burthen of the War may be easily devolv'd on the third Party. And tho' the Enemy be well satisfied that the Place was seiz'd without the Leave or Concurrence of the Lord, yet if he resolve and endeavour to dispossess those who hold it, the Innocent Prince cannot but feel some part of the Calamities of Arms; which if he keeps off by any Means, he cannot justly fall under Reprehension. And thus too in a lesser Case, it can never be advisable for a Man to admit more *Strangers* into his House, than he can conveniently get rid of when he pleases: Since otherwise he is under a Necessity of being at their Disposal; and must perhaps be content to walk out of Doors, and to leave all to his New Masters.

(1) *De Damno Infecto*, Vid. *Digest.* XXXIX. tit. II.

(a) L. 2. c. 2. f. 10.

O F T H E

# LAW of NATURE

A N D

# NATIONS.

B O O K III.

C H A P. I.

*That no Man is to be Injur'd; and that if any Damage be done,  
Reparation is to be made.*

**W**HAT Duties the Law of Nature enjoins a Man to Exercise towards himself; and what Indulgence, what License or Favour it allows him in the Preservation of his own Person or Goods, we have hitherto endeavour'd to explain (1). We may now pass on to those other Natural Precepts which contain the Duties we are to practise towards other Men. These we have formerly divided into *Absolute*, and *Hypothetical* or *Conditional*. In the Series of *absolute* Duties, or such as oblige all Men antecedently to any Human Institution, this seems with Justice to challenge the first and noblest Place, *that no Man hurt another; and that in Case of any hurt or Damage done by him, he fail not to make Reparation*. For this Duty is not only the widest of all in its extent comprehending *all Men*, on the bare account of their being *Men*; but it is at the same time the most easie of all to be perform'd, consisting for the most part purely in a negative Abstinence from Acting; except that its Assistance is sometimes necessary in restraining the Lusts and Passions, when they fight and struggle against Reason, amongst which *Rebellious Desires*, that boundless Regard which we sometimes show to our own private Advantage, seems to be the Principal, and the Ring-leader. Besides, it is the most necessary of Human Duties, in as much as a Life of

Society cannot possibly be maintain'd without it. For suppose a Man to do me no good, and not so much as to transact with me in the Common Offices of Life, yet provided he do me no harm, I can live with him under some tolerable Comfort and Quiet. And indeed this is all we desire from the greatest part of Mankind; a mutual Intercourse of good Turns lying only between a few. But what possibility is there of my living at Peace with him who hurts and injures me; since Nature has implanted in every Man's Breast so tender a concern for himself, and for what he possesses, that he cannot but apply all means to resist and repel him, who in either respect attempts to wrong him (a)? Now as the strength of this Precept is a Guard and a Fence to those things which we receive from the immediate hand of Nature, as our Life, our Bodies, our Members, our Chastity, our Reputation and our Liberty; engaging Men to keep them Sacred and Inviolable. So must it be supposed to spread it self thro' all those Compacts or Institutions, by which the Propriety of any thing is made over to us; since without it they could obtain no Force or Effect. Whatever therefore we can on any good Title call our own, Men are by this Precept forbidden to take away, to endamage or to impair, or any way to withdraw it from our use, in Whole or in Part. The same Duty is virtually contain'd in many Affirmative Commands, which

(1) B. II. C. 3. (a) *Seneca* of Anger. B. II. C. 31. It is a Sin to injure ones Country; and therefore to injure a Fellow Subject, in as much as he is a Member of our Country. The Parts ought to be held Sacred, if the Whole deserve our Veneration. And hence likewise, the Person of every Man ought to be inviolable, because every Man is our Fellow-Citizen in the great and Universal Society. What a Distraction would arise, should the Hand practise Mischief against the Feet, or the Eyes prove Treacherous to the Hands? As all the Members conspire in an exact Union and Agreement, because the safety of each in particular is the Interest of the whole Body; so particular Men ought to spare each other, because we are all born for Society. And no Society can remain secure, without a firm Love and Concord amongst the Members of which it is Composed.

enjoining some one positive Practice, remove and restrain the contrary Enormities. How plainly the necessity of this Law insinuates itself into the Minds of all Men, let *Seneca's* Observation inform us. *Ask a Common Rogue* (says he) *whether he had not rather obtain by honest Means, what he now gets by Theft and Villany: He who makes it his Gain to assault and pillage all he meets, would be more willing to find the Money by Chance, than to take it by Violence. There is no one who would not be better pleas'd to enjoy the Fruits of his Wickedness, without the Practice of it* (a). *Tully* says excellently to the same purpose, that for a Man to rob and injure another to promote his own Advantage, is more against Nature, than Death or Poverty, or Pain (b).

II. Farther, it follows from this Precept, that in Case a Man be hurt or injur'd by another, in any respect, the Person who stands justly charg'd as Author of the wrong, ought as far as it lies in his power to make Reparation. For otherwise it would have been a vain Command not to harm another, if the Party who actually suffers such a Harm, must be content to put it up without farther notice, and leave the Offender to enjoy in Peace the Fruit of his Injury, never obliging him to refund or to restore. Were not Restitution made a necessary Duty, neither would wicked Men ever abstain from wronging others; nor would those who have been injured, find it an easy task to compose their Mind in such a manner, as to maintain Peace with the other Party, so long as they have obtain'd no Recompence or Consideration for their Sufferings.

III. The word *Damage* which seems properly to refer only to Goods and Possessions, we here use in an extended Sense, so as to make it take in likewise all manner of Harm that may be offer'd to a Man's Body, his Chastity, or his good Name. In this Latitude, then, it implies all Hurt, Spoil or Diminution of whatsoever is already actually our own; all Interception of what by a perfect and absolute Right, we ought to receive whether such Right be the Original Gift of Nature, or whether it be allow'd us by Human Institution and Law. And lastly, all Omission or Denial of any Duty, or Performance, which others by a perfect Obligation, stand bound to pay us (c), we say by a *perfect Obligation*; because if the *Obligation* in the other Party be only *Imperfect*, and we consequently have only an *Imperfect Right*, the withholding of any such Due, cannot really be esteem'd a Damage. For since all Performances of this kind, ought to proceed from the voluntary Motion of some vertuous Principle in the Giver, and since I have no Power or License to ex-

act the Payment of them by force, it would by no means be convenient that I should think myself Damaged, in not receiving such things as I could not otherwise expect, than in the way of free Gift and Benefit. And as I cannot reckon those things amongst my own which I have only a *Fitness* or *Capacity* to possess, so I have no reason to complain of injurious Practice, if they happen to be kept from me. *Aristotle* says elegantly to this purpose, *he who out of a narrowness of Spirit, refuses to assist another with his Wealth, doth not hereby increase it.* And since he has not more, the Person whom he thus sends away unreliev'd, has not less. On the same Principle is founded the Argument which *Cicero* makes use of in his Defence of *Plancius*, that altho' the other Gentleman *Lateranensis*, might perhaps be the more worthy Competitor, yet it was in the Power of the People to pass him by, and to chuse *Plancius* into the Office of *Edile*, in as much as neither of the Candidates had a *Perfect Right* to that Honour. *It is a Privilege*, says he, *belonging to the very Condition and Constitution of free States, that they be able by their Votes, to give to a Person, or to take from him what they will.* Yet in the same place, the Orator distinguisheth between what the People could do, and what they ought to do; the Term *ought* implying that *less perfect Obligation*, by which we stand engaged to the Exercise of every Vertue. But here *Grotius* well advises us to take heed, of Confounding Points which belong not to the same Head. For the People in a Commonwealth, who are obliged to confer Honours on the most deserving, only by the Rules of State Prudence, yet in Case they intrust any Person with this their power of chusing Officers, if he prefer those who are less worthy, the others who are pass by, cannot bring an Action of Injury or Damage against the Elector. Yet the People, by whose Deputation he acted, have a Right of calling him to an Account for his Proceedings, and may require *Reparation* for any Damage which the Commonwealth hath sustain'd by his unworthy Choice. And thus to a *Citizen* indued with Arts and Abilities sufficient for the discharge of an Office, tho' in Reference to obtaining it, he has no Right which will hold good against the State; yet he has an equal Right with others to sue for it; in which Right if any Person by Force or Fraud shall prejudice or obstruct him, he may demand Satisfaction; tho' not to the full value of the Office desired, yet to the value of his uncertain Expectation. And now we are settling the Notion of *Damage*, we are farther to remark, that it affects not only the thing it self, which being either our Possession or our Due, is hurt; destroy'd or intercepted, but likewise the

(a) *Sen. de Benef.* l. 4. c. 17. (b) *De Offic.* l. 3. (c) Remarkable to this purpose, is *Quintilian's* Thirteenth Declamation, where it is proved at large, 'That the Man was guilty of a Trespass, who by poisoning the Flowers in his own Garden, had caused the Death of his Neighbours Bees. The main Argument runs thus, that since Bees are naturally wild and wandering Creatures, and cannot by any means be confin'd to a certain place of feeding; therefore wheresoever a Person hath a Right to keep them, there is at the same time an Obligation laid on all the Neighbourhood to let them ramble without hurt or hindrance. *Ad. l. 17. s. 11. 49. D. ad L. Aquil.*

Fruits or Profits accruing from the thing, whether they have been already received (tho' then indeed they may be valued as particular Goods or Things) or whether they are yet only in Hope and Prospect, if the Owner had a Right of receiving them (a), provided still a Deduction be made of the Expences, he would have been put to in securing and gathering in such Fruits, lest he enrich himself at the Charge of the other Party. Now the *value* of Fruits in Expectation, rises and falls according as the time of receiving them, is more or less distant, and consequently the Issue more or less uncertain. Thus the losing a Field of Corn, in the *Blade*, will not be rated so high, as if it had been destroy'd in the *Ear*. Some Consideration too is allowed for what we call *Civil Fruits*. Thus he who sets on Fire another Man's House (b), is not only bound to rebuild it, but likewise to make good the Rent, which they would in the mean time have brought to the Owner. *Philo Judæus* (c) informs us, that in his Nation, when a Man had any way damaged his Neighbour, and done Penance for the Fact, he was obliged, besides paying to the full Value, to add one fifth Part more, as a Comfort to the Person who had sustain'd the wrong.

Lastly, it is a clear Point, that all Evils or Mischiefs following by a Natural Consequence from any *Damage* given, ought to be adjudg'd Parts of it (d). *Strabo* (e) relates of King *Ariartbes* of *Cappadocia*, that having stop't up the little Passages, by which the River *Melas* emptied it self into the *Euphrates*, that so covering the greatest Part of the Neighbouring Plain, he might divert himself with the Childish play of making little *Islands*; at length the Damms all giving way on a sudden, the Flood pour'd it self so violently upon *Euphrates*, as not only to make it carry off part of the *Cappadocians* Country, and some of their Houses, but to cause great Wast and Mischief in the Lands of their Neighbours, the *Galatians*: whereupon the matter being refer'd to the Arbitration of the *Romans*, they condemn'd the King in Damages of thirty Talents (f).

IV. In stating who are to be esteem'd Authors of *Damage*, it will be necessary to recollect from our first Book, *Chap. 5.* how many ways the Act of one Man may be imputed to another. A Person then may damnifie his Neighbour, not only immediately by himself, but likewise by the Ministry of others. And farther, a *Damage* immediately done by one Man, may be chargeable upon another, (who is consequently obliged to make reparation,) in as much as he contributed somewhat to the Action, either by doing what he ought not, or by omitting what he ought to have done (1). He may stand guilty of this Charge in three ways and

degrees; for he may either be the Principal Cause, or he may be equally concern'd with the Actor; or lastly, he may be only an Accessory, and an Inferior Cause. Of all which Cases this may in general be observ'd, that the Persons thus Chargeable are bound to *Restitution*, according as they were either the real Cause of the Damages, or contributed to it in whole, or in Part. For it often happens, that Persons may concur less principally to the Fact of another Man, by some Omission or Commission, and yet that he would most certainly have done the same Damage, whether they had thus concur'd or no; so as to render their Concurrence altogether superfluous. Now here tho' they are justly punishable for the Will and the Endeavour, yet since no part of the present *Damage* flow'd from them, they cannot be required to make *Restitution*. Some indeed are for bringing off all Accessories at a venture; because say they, if these had not lent their Counsel or Assistance, there would not have been wanting others to help forward with the Mischief, and consequently the Damage had been done without their means. But this Argument is of no Weight, 'tis sufficient to make them Guilty, if their Aid had any real Efficacy in producing the Trespas; and had those other Persons join'd their Hands to the Business, they too would have been proportionably responsible. This Rule then may be fix'd as an Universal Standard, to know who are bound to make Reparation, and who are not; that when any one did not give real Assistance in the Act of Damage, nor by any antecedent Motion or Default, caus'd it to be undertaken, nor came in for any Part of the Advantage, such a Person tho' by giving any the least occasion to an ill Action he contracts a Sin, yet shall not be obliged to Restitution. And hence 'tis easy to conclude on the other side who shall be oblig'd. Those who insult over their afflicted Neighbours, and rejoyce in their Calamities, brought on them by wicked and injurious Men, are sinful no doubt in an heinous Manner (g); and yet it would be absurd to affirm, that they are bound to repair such Damages as they delight to see. The same must be said of those who defend, excuse, or praise, a Trespas already committed, provided they do not hereby hinder the Duty of Restitution, as likewise of those who either with Success to such a Fact before it is committed, or entertain a silent Joy and Satisfaction, during the performance. There is no ground to build a contrary Opinion on the passage of *Cicero* (h), which some would make use of to that purpose. *What difference is there, says he, between him who persuades a Man to an ill Action, and him who afterwards approves of it? Or what signifies it whether I*

(a) *Vid. l. 62. f. 1. D. de rei vindic.* (b) *Vid. l. 5. C. de rei vindic. Add. l. 22. f. 1. 23. princ. D. ad L. Aquiliam.*  
 (c) *De Victimis.* (d) See *Exod. XXII. 6. l. 27. f. 8. l. 30. f. 3. D. ad L. Aquil. M. Seneca, l. 5. excerpt. Controvers. 5.*  
 (e) *L. 22.* (f) *Liban. Progym. Το παρὶχον τὸ ἀφορμὴν ἢ τῶν ἀκαλεθόντων κομιζέσθαι τὸν λόγον.* That which gave the Occasion is esteem'd the Cause of all Accidents that follow. *Add. l. 7. D. ad L. Aquil. Lex Wisigothorum. l. 8. Tit. 2. c. 1, 2, 3. & tit. 3. c. 3.* (1) *Nemo damnum facit* (says the Roman Lawyers,) *nisi qui id fecit, quod facere jus non habet.* *Digest. Lib. L. Tit. 17.* (g) See *Psalms CXXXVII. v. 7.* (h) *Philip. II.*

would have a thing done, or whether I rejoyce when it is done? For the Orator employs this Sentence, not to express his serious Mind, but to refute an impertinent Objection. And had it been spoken never so gravely, it could not be strain'd so high, as to assert the Necessity of Reparation in these Cases. And therefore *Ammianus Marcellinus* (a) seems not very properly to apply this saying of *Tully* to the business of *Probus, Præfectus Prætorio*, to the Emperour *Valentinian*, who, as he relates, did indeed never command any of his Clients or Servants to undertake an unlawful Action; yet if he found them to have committed any Crime, he protected and defended them in spite of Justice it self, without ever enquiring into the Fact, and without the least regard to Honesty or Truth. For here the Dependance on so great a Patron, added Strength and Boldness to their Enormities; and his Protection interposing, hindred them from making good the Damages they had been guilty of. As to the point of Counselling or Advising, this is most certain, that he who suggests to another the way and manner of committing a Trespass, is bound to Reparation. Whereas the same Obligation doth not seem to lie on those who either perswade a Man in general Terms to apply himself to an ill Course, as to Theft or Robbery, for instance, or joyn their Approbation and Consent to his Resolution, when already fixt and settled; as is often the Case with timorous Counsellors, or base Flatterers of Princes (b). Lastly, concerning those who concur to an injurious Action, by omitting somewhat which they ought to have perform'd, this may be observ'd, that their Omission doth then only bind them to repair the Damage, when it is of a Duty, to which they stood engaged by a perfect Obligation; not if the thing was only a matter of Charity and Humanity. For, since what is owing to me in this imperfect Manner I cannot yet account my own, neither if it be intercepted can I go about to recover it, whatever *Ziegler* in his Observations on *Grotius* (c), alleges to the contrary.

V. Where therefore many Persons have concurr'd to one Act of Damage, in making Reparation, this Order shall be observ'd; those shall be in the first place chargeable, who set forwards the Mischief, either by their Commands, or by some other powerful Means, amounting almost to a necessary Influence. And the immediate Actor of the Crime, or he who was thus forced to lend his Hands for its Performance, shall in these Cases be esteem'd only as the Instrument (1). Where any one appears to have engag'd himself in the Enterprize, without being driven on it by Necessity, he shall be first Obnoxious, and then the Rest who contributed their Assistance. Yet so, that if the former of these Parties con-

cern'd shall have made good the Damage, the others shall be then clear, as to Reparation, tho' not as to Punishment. But what if an Act proceeds from many Persons, who are all Authors or Causes of it in the very same Degree; shall each Party be responsible for the whole, or only for an equal Share of the Damage? *Grotius* (d) pronounces in this Case, that each Person is to answer for all, if the whole Fact proceeded from each, tho' not from each alone. Which Rule is somewhat obscure, unless we illustrate it by an Instance. Here are three Men, then, who at the same time, tho' perhaps in different Parts, all set Fire to an House. This Fact of burning the House, seems to have proceeded from each Man entire, and in whole, although not from each alone; in as much as the same Mischief would have follow'd, had one only applied the Fire. But suppose several Persons join in beating, or cudgelling a Man, one of whom perhaps gives him a Wound in the Head, another breaks his Arm, and a third strikes out his Eye; here each Person shall not answer for the whole Hurt, but only for that part of it, which he himself effected. Though in Case one of them escape, it is usual to condemn the rest, who are taken in the whole, especially when it appears, that they combined together to execute the Mischief. We may still set this Matter in a clearer light, by distinguishing between divisible and indivisible Acts. The latter which we are now concern'd with, are such in which many Persons concur, but in such a manner that the whole Act would have follow'd from the Endeavours of one only; and therefore cannot conveniently be divided in Shares amongst them all; of this kind are the firing of Houses, the breaking down of Banks and Damms, or the like. For the same Damage would have ensued, had one only of the many Parties set his Hand to the Exploit; so that it is impossible to define and settle what part of the Fire or of the Flood proceeded from each in particular. When many join in an Act of this Nature, each Person shall be thus far Responsible for the whole; that in Case they are all apprehended, they shall contribute equally to the Reparation, but if upon the Escape of the rest, one only be taken, he shall then be charg'd with the entire Summ. After the same manner, if some of the Persons apprehended, prove Insolvent, the whole Burthen shall be laid on those who have more Substance and Ability. In this too the Reparation of Damage, differs from the Exaction of Punishment, that in the former, if full Payment or Restitution be made by one of the Parties concern'd, the rest are cleared and excus'd; since it is not consistent with Equity, that the same Damage should be twice made good, (though by way of Punishment, this is frequently practis'd.)

(a) L. 27. (b) Compare *Ant. Matthæus de Crimin. Proleg. c. 1. f. 7. 89.* (c) L. 2. c. 17. f. 9.  
 (1) *Is damnatum dat qui jubet dare: ejus vero nulla culpa est cui parere necesse sit.* Digest. lib. 50. tit. 17.  
 (d) *Ibid. f. 11.*

But on the other hand, in penal Cases, nothing is more usual, than that every particular Accomplice in a Crime, be made to suffer all that the Law inflicts (a).

VI. Now whenever we hurt or endamage another, we do it either out of full Purpose and premeditated Guilt, or by a fault of Negligence only, and not of Design; (and this Negligence, as it is more or less Gross and Supine, is more or less Culpable). Or lastly, we may do it by *meer Chance*, so that the Injury cannot rightly be imputed to us (b). Among some People, those Damages are not only imputed to a Man which are committed with his Assistance or Concurrence, but those likewise which are caused by his Servants or Cattle, without his positive Influence. It is beyond doubt, that he who offers Damage to another out of an *evil Design*, is bound to make Reparation, and that to the full Value of the Wrong, and of all the Consequences flowing from it. But those likewise stand responsible, who commit an Act of Trespas, tho' not designedly, yet by such a piece of Neglect as they might easily have avoided. For it is no inconsiderable part of Social Duty, to manage our conversation with such Caution and Prudence that it do not become terrible or pernicious to others; and Men under some Circumstances and Relations, are obliged to more exact and watchful Diligence (c). Indeed the slightest Default in this Point, is sufficient to impose a Necessity of *Reparation*; unless under one of these Exceptions, either that the Nature of the Business was such as disdain'd a Care more nice and scrupulous, or that the Party who receives the Wrong, is no less in fault, than he who gives it; or lastly, that some Perturbation of Mind in the Person, or some extraordinary Circumstances in the Affair, leaves no room for accurate and considerate Circumspection; as suppose a Souldier in the heat of an Engagement should hurt his next Man with his Arms, whilst he brandishes and employs them against the Enemy. To this purpose the Story in *Ælian* (d) is remarkable; a Young Man travelling towards *Delphi*, as he defended his Companion from the Robbers, happen'd to kill him by an unlucky Turn of his Weapon; and upon Application to the Oracle, receiv'd his Pardon in this comfortable Answer.

Ἐξήκοντα ἢ ἑπταῖον ἀμύμων. ἢ σ' ἐμάμεν  
 Αἶμα, πέλεις ὃ χρεός καθαρώτερον ἢ πῶρον ἦδα.

Striving to *save* your hapless Friend you've slain; His Blood may *purifie*, but ne'er can Stain (e).

But in Cases of pure Chance, where the hurtful Action is not mix'd with any Fault of ours, it is evident we are not oblig'd to Reparation. For when I have done nothing that can be fairly laid to my Charge, there seems to be no Reason why the Misfortune, and the Damage of a Harm which I unwillingly caus'd, should rather fall on me, than on the Person who receiv'd it (f). Yet if a Person of Wealth hurt a Poor Man, though meerly by Chance, it will become him by some Act of Liberality, to support and comfort the Sufferer. As for those *Actions* which lie against us for any Trespas or Hurt committed by our Cattle or Slaves and the like, *Grotius* is of Opinion, that they owe their Rise to Civil and Positive Laws; in as much as the Master or Owner being Innocent of the Fact, is not by any Natural Obligation made responsible for it. Yet others hold that *Actions* of this kind, are most agreeable to Natural Equity, although they are not precisely suggested by the Law of Nature. It is one of *Plato's* (g) Constitutions, 'If a Man or Woman being a Servant, shall injure the Goods of another Person, either by an unskillful, or by an immoderate use of them, the Person who receives the Wrong, not being himself the Cause of it, the Master shall either make him Satisfaction for the Damage sustain'd, or shall deliver the offending Servant into his Power and Pleasure. And the same way of proceeding is observable in the old Roman Story of *Evander*, delivering up his Servant *Cacus* to *Hercules*, who had convicted him of stealing his Cattle. But why the Owner of a Beast should rather suffer Damage, than he who upon provoking a Creature not Violent by Nature, has without the Owner's fault receiv'd a Hurt, the Reason seems to be this, that the Settlement of *Proprieties* does not impair or prejudice this Antecedent Natural Precept of Reparation. And therefore, since supposing Things to lie in their primitive Community, in Case I had been hurt by a Beast, I had the power of requiring, or satisfying my self upon the Beast, by any means I thought fit; this Power or Liberty of proceeding, is not suppos'd to be taken from me by the Introduction of distinct *Proprieties*. And in as much as the Owner of such a Beast makes a *Gain* of him,

(a) Such a Case we have in *Quintilian Institut.* l. 7. c. 6. Two Thieves had stolen together Ten Thousand *Sesterces*, they were sued in Court, and Forty Thousand demanded of each Man, according to the Law enacting, that every Thief shall pay *Four-fold*. They petition that each may pay no more than Twenty Thousand. Here the Judgment ought to goe against the Thieves, in as much as by the Roman Laws, these *Actions* of Restitution are reckon'd under the Head of Punishments, s. ult. de Oblig. qua ex delict. nasc. l. 7. f. 5. l. 8. D. de Jurisdictione. l. 6. m. D. arborum furtim Casarum: l. 34. D. de injuriis. Add. l. 11. f. 2, 4. D. ad L. Aquil. l. 5, 1. f. 2. ibid. l. 15. f. 2. D. quod vi aut clam. l. 2. f. 9. D. de furtis. *Hofstman. illust. Quest.* 33. (b) *Lyfias Orat.* XXX.

Ὅτι οὐδὲν ἐστὶν ἐκείνων δυσόχουα γίγνηται.

No Misfortune happens to any Man by his Good Will.

See *Exod.* XXI. 28, &c. 33, &c. & *Grot. ibid.* (c) *Vid.* l. 6. f. 7. l. 14. D. de Offic. Presidis. l. 27. f. 9. in fin. f. 29, 34, 35. l. 27, 29. f. 2, 3, 4. ad L. Aquil. *Deuteron.* XXII. 8. (d) *Vnr. Arist.* l. 3. c. 44. (e) *Add. Epictet Enchir.* l. 39. & *Simplex. in eum circa fin.* 8. L. 44. l. 52. f. 4. D. ad L. Aquil. & ibi *Incorp.* (f) *Add.* l. 5. f. 2. l. 7. f. 3. ad L. Aquil. (g) *De Leg.* l. 11.

and I suffer'd *Loss* by him, the Reparation of Damage taking place in Equity and common Favour before the Procurement of Profit, it hence appears, that I can rightly demand of the Owner, either to make good the *Loss* sustain'd; or in Case such a Charge would rise higher than the Value of the Beast, then to deliver him up as a Criminal, to be destroy'd. The same Rule holds much stronger in the Case of a *Slave*, since he is by Nature made liable to answer for any Damage he shall give. But now, since he has no Goods of his own to repay or requite the *Loss*, and since his very Body is his Master's, it follows in Equity, that the Master either repair the Wrong, or give him up to the Sufferer. Especially since without this Provision, a Slave would be empower'd to act what Hurt and Mischief he pleas'd; whilst neither he (who is Possessor of nothing, nor indeed of himself,) nor his Master could be oblig'd to Restitution. Nor, should the Master by the severest Course of Blows, or of Imprisonment punish the Offender, would this be any real Satisfaction to the injured Party (*a*).

Much more then is it clear beyond the least Doubt or Dispute, that the Owner stands responsible for those Damages which his Beasts commit, either by his own Fault or Instigation, or by their natural and accustom'd Violence, and the common Force of their peculiar Instinct. For the Owner ought either not to keep such Creatures, or carefully to restrain them from doing Mischief.

Of Reparation in general, we have this farther to observe, that when the Hurt or Wrong is done by an Evil and Criminal Act, there to make good the Damage, is not sufficient to take off the Punishment (*b*). Though the voluntary Offer of Requitall, as a Sign of Penitence and Sorrow, frequently lessens the Severity of farther Prosecution (*c*).

It is time now to illustrate this Doctrine by such Instances and Examples as *Grotius* (chiefly) will supply us with.

VII. An *unjust Slayer* is obliged to defray the Charge of Physicians and Chyrurgions, and to give to those Persons whom the Deceas'd was by full and perfect Duty bound to maintain, as Parents, Wife and Children, (not to any whom he kept out of Charity and Pity;)

so much as the hope of their Maintenance shall be fairly valued at; Regard being had to the Age (*i*), both of the Deceas'd, and of themselves (*d*). As to *Ziegler's* Opinion on this place of *Grotius*, that some Consideration is to be allow'd for the Gain which the Deceas'd might have acquired, had he lived longer, which consequently would have made their Portions the larger; we think it will scarce hold good. In as much as all Advantage of this kind being yet uncertain, cannot be reckon'd amongst our Possessions; and since future time lies equally open to *Loss* as to Gain; and lastly, since it cannot clearly be made out, how much the Deceas'd would have spent of any such Gain, had he been suffer'd to live and to procure it.

Now he is an *unjust Slayer* that kills a Man, who had a Right not to be kill'd by him, and who therefore by the Act that caus'd his Death was truly *injur'd*. And this Right appears to belong to every individual Person, since Nature by a general Command, binds all Men to live like Sociable Creatures, and to abstain from mutual Hurt. Which Right a Man may, as far as in him lies, renounce; at least so as to make it fair and just for him to be hurt by such or such particular Persons; and this may be done either *Tacitly* or *expressly*. He *Tacitly* disclaims this Right, who in a violent manner sets upon another without just Cause. For since the other has Right of repelling the Violence by any means he can, the Assailant is to accuse himself only for any harm he suffers in the Repulse of his own unlawful Force. The same Right is *expressly* renounced by him who enters into *War* with another upon mutual Appointment and Consent. For 'tis a Law of War, that every one have fair Liberty to use his full Endeavour for the Defeat and Suppression of his Enemy (*e*). And though in such War, the prevailing Person may perhaps Sin against Charity, yet the Violation of Charity only, will not oblige him to repair the *Loss* he has thus occasion'd.

The Life of a Free-man does not admit of any Rate or Valuation; and had it any, there is no Person to whom the Debt should be paid. For his Life does not properly belong to his near Relations, it is only their *Interest* that he should live; and therefore the Value of

(a) *Vid. Interp. Jur. Roman. ad Tit. si quadrupes pauperiem, & ad L. Aquiliam, & de damno infecto.* (b) *Vid. l. 48. D. de Furtis.* (c) See *Luc. XIX. v. 8.* 'Tis remarkable, what *Glycus* tells us, in his Annals of *Michael the Paphlagonian*. But the Emperour *Michael*, says he, 'Did not forbear all his Life time to lament his Villany towards *Romanus*, and endeavour'd by building *Monasteries*, by Charity to the Poor, and other good Works to appease the Anger of Heaven. And this Method might have prov'd Beneficial to him, had he laid down the Empire (for the sake of which the Fact had been committed,) and throwing off the Adulterers, bewail'd his Sin in a private Condition. But he neglecting such Means of Repentance, and still using *Zoa* as his Wife, still holding fast the Imperial Dignity, and only making a shew of doing good at the Publick Charge, thinking thus to obtain his Pardon, betray'd an Impious Opinion of God Almighty, as if he would suffer us to buy our own Forgiveness at the *Loss* of other Men. *Valer. Max. l. 2. c. 8. f. 4.* So much difference there is, whether you really add any thing to another, or whether you only restore what you had taken from him, as there is between the beginning of a Benefit, and the End of an Injury. (i) See Mr. *Placotte's* Treatise of Restitution, l. 3. c. 4. (d) The way of reckoning the Maintenance, we learn from, *L. 68. D. ad L. Falcidiam.* (e) To this Purpose we have a Story in *Plutarch's Laconian Apothegms*; the Two Boys, one of them with a Sickle, gave the other a Mortal Wound; when the Companions of the wounded Boy, who had hasten'd to part the Fray, promis'd him to revenge his Death on his Murderer; by no means, says he; this would be to act unjustly; for what he hath done to me is no more than I had done to him, had I been strong enough to have prevented him. *Add. l. 4. c. 7. f. 4. l. 52. f. 1. D. ad L. Aquil.*

that Interest or Advantage being paid to them, they can demand no such farther Recompence as the full worth of his Life. The Case is otherwise with a Slave or Vassal, who being entirely the Propriety of his Master, and falling under Exchange and Commerce, in the manner of other Goods, has really a Price set upon him, which if he be wrongfully kill'd, the Master has a Right to demand. If it seem hard and somewhat like Inhumanity to rate our Slave, thus in the same manner as we would our Beast, it may be answer'd, that we do not make this *Valuation* of his Person, but only of the Work and Service which he would have done us.

Those in like manner stand bound to *Reparation*, who kill another out of *Wantonness*, which is esteem'd equal to deliberate Mischief (a). And those also who commit the same Mortal Violence, through their own unweariness and neglect. Examples of which Case we find set down in the *Institutions* (b). As if a Souldier practising with his Arms in another place, than what is set apart for those Exercises, shall slay a Man who was casually passing by; or if one who is not a Souldier shall happen to do the same; though in the place ordain'd for the Publick Training of Military Men. But if a Souldier in the same Place of common Duty shall undesignedly take away a Man's Life, he shall stand excused; for he was performing his proper Business, and the other Party was in fault for throwing himself into the Danger (c). If a Feller of Wood shall with the Limb of a Tree which he is cutting down kill a Servant passing by in the High Road, or in a Way near a Town; without having first cried out to give warning. But in Case he did thus cry out, and the Servant neglected to save himself upon timely notice, the Feller shall not be charged with his Death. No more shall he if the same Misfortune happen'd at a distance from the High way, or in the middle of a Field, although he did not give the usual sign of crying out; because there the Stranger had no Right of passing, and consequently ventured at his own Peril (d).

If a Physician destroy his Patient, either by plain Neglect and Dejection, or by Administering through Ignorance, improper and dangerous Medicines (e).

If a Muletier, through Weakness or Unskilfulness, shall have suffer'd his Mules to run over any Person; provided he undertook this Business of driving at his own choice, or made it his Profession, not if he was press'd and compell'd to the Service, protesting at the same time, his want of Art or of Strength (f).

In the *Alcoran* (g), he who shall ignorantly

kill a Musulman, is enjoy'd to make good to his Relations the Damage they sustain'd by his Death; and to redeem one Person of his own Religion from Slavery.

It seems probable that those likewise were obliged to some such Method of Reparation, who by the favour of the *Jewish Law*, enjoy'd the Privilege and Protection of the *Afylums*, or City of Refuge (h). Since in the Case there specified, of a Man's killing his Neighbour by the fall of the *Head* of his Ax from the *Helve*, the Man is not entirely blameless, in as much as he ought to have strengthen'd his Instrument better, for the Prevention of such a sad Mischance. But how it came to be allow'd, that the *Revenger of Blood* (i) should dispatch such an *Innocent Slayer*, if taken without the Bounds of his Sanctuary, which seems not altogether consistent with a Regular State of Government, we have this only reason to assign, that God was pleas'd to grant some little Instances of Indulgence to the Cruel and Implacable *Genius* of that People (j).

VIII. He that has maimed a Man, shall be obliged to pay the Charges of the Cure, and to make up what he now gains less than before, by his Labour or Calling (k). On this Head the *Jewish Constitutions* are very worthy of Remark, as we find them deliver'd in *Constantine l' Empereur* (l). He that hurts his Neighbour is responsible on five Accounts; for the *Damage*, for the *Pain*, for the *Cure*, for the *Cessation of Work*, and for the *Affront* or Disgrace. The *Damage* they compute in this Method. If for example, he has beat out the others Eye, or cut off his Hand, or broke his Leg, they then consider the suffering Party as if he were a Slave to be sold in the Market, and so reckon how much he would have yielded in Sale before the Hurt, and how far his Price is now fallen. For they judg'd there would be no certain way of settling these Rates and Accounts, should they in this Case distinguish between the different Qualities and Conditions of Men, since the Professions of Life, and the States of Persons admitting so endless a Variety, the Sufferer would be always throwing in some new Reason to enhance the Damage, and aggravate the Hurt, and consequently to enlarge his Demands of Compensation. They thought it convenient therefore to set all Men, with regard to this Business, in the one general Condition of Slaves, the just value of whom was discoverable beyond dispute. So that if the Maim'd Person, suppos'd to be a Slave, would before the hurt have brought fifty *Sheckles*, and could be sold afterwards for no more than thirty, the Maimer was enjoy'd to pay him twenty *Sheckles*.

(a) *Vid.* l. 4. f. 1. *D. ad L. Cornel. de Sicar.* & 6. *Godofred.* l. 10. *D. ad L. Aquil. Digest.* l. 48. tit. 8. (b) *De L. Aquil.* f. 7. &c. (c) *Add.* l. 9. f. 4. *D. ad l. Aquil.* & *Antiphon. Orat.* VII. (d) *L.* 31. *D. ad L. Aquil. Add. Leg. Burgundion.* Tit. 25. (e) *Vid.* *Plin.* l. 29. c. 1. *Leg. Wisogothor.* l. XI. Tit. 1. c. 6. (f) *Add.* l. 5. f. 3. l. 7. f. 2. 5. 6. 8. l. 8. l. 9. *princip.* l. 31. l. 52. f. 2. *D. ad L. Aquil.* & *confer cum c.* 8, 9. *Seqq.* X. *de Homicid.* (g) In the Chapter of *Wivus*. (h) *Numb.* XXXV. & *Deuteron.* XIX. (i) The Revenger of Blood was the next akin to the party Slain. See Mr. *Le Clerc's* Notes. (j) Compare *Tacitus German.* c. 21. *Homer. Odysse,* O. 7. 272. (k) *Confer.* l. 13. *princ. D. ad l. Aquil.* l. 7. *D. de his qui dejecti, vel. Esud.* (l) In *Babakama.* c. 8. f. 1.

As to the Point of *Pain*, if a Man for instance, had *burnt* another, although in the Nails, where no Blister follows, they consider'd how much a Person of that State and Fortune would have taken to suffer voluntarily such a pain. For one may find a Wealthy or a Nice and delicate Person, who would not be hired at any rate to endure a Slight and moderate Smart; and at the same time one may light on a Poor and hardy Labourer, who would be content to undergoe some sharp Degree of Torture, for the earning of a Penny. Farther, in rateing the Pain, they proceed thus; they suppose, for Instance, that a Person of that Condition was condemn'd to have his Hand cut off, and then they consider'd how much he would give to lose his Hand, rather by some easy consuming Application, than by the violent stroke of a Sword; and so much the Party from whom the Hurt was receiv'd, was bound to give him on account of the *Pain* (a).

Concerning the *Cure*, they observ'd these Rules. If after the Cure perform'd, any Sores or Tumours arose, in Case it appear'd that the former Wound was the real occasion of them, the Person who gave it stood farther bound to pay for his second Cure, if they proceeded from any other Cause, he was not responsible. As often as the Wound being imperfectly heal'd broke out again, he was still charged with the Expences, but not after it had been once brought to a perfect cure. It might be added, that his Obligation continued only in Case the Wound thus broke out of *it self*; not if the thing happen'd thro' the fault of the Patient, or thro' the Unskilfulness of the Chirurgeon.

In rateing the allowance to be made the Sufferer for the *Cessation of his Work*, they consider'd him as a *Keeper of Cucumers*. The *Jewish* Doctors thus enlarge on the Point; they suppose him already to have receiv'd Satisfaction for the Defect or Damage sustain'd in his Body, and likewise for the Pain he has endured. And therefore supposing him, (for Instance) to have lost the use of a Hand or a Foot, they do not now consider what Gain he would have made, had those Limbs remain'd entire; but because he hath been already paid for the disabled Part, they only compute what Damage he suffers, during his Sickness in respect of such Work, as he could have perform'd, though maim'd in Body, if well in Health. And they think he may fairly demand so much for every day of his Sickness, as his daily Wages had been for watching a Cucumber Garden. But because it is a different thing, whether a Man loses a Hand or a Foot; whether only lying sometime sick of his Wound, he afterwards recovers without prejudice, or whether he is actually depriv'd of a Limb, *Maimonides* proposes a nicer and more exact way of rateing

the *Cessation of Work*, according to particular Cases. If the Sufferer shall not be Maim'd, but only cast into a Sickness, and confined to his Bed, or if the affected Limb only swell for a time, and afterwards regain its soundness and use, the other Party shall allow him daily for the loss of his Work, according to the usual Wages or Hire receiv'd by Men of the same Calling. But if he is maim'd in a Limb, or has lost a Hand, Satisfaction being already made him for that loss, or what they call *Damage* being before discharg'd, as to the bare *Cessation of his Work*, they then consider him as a Keeper of Cucumers, and computing the Pay, generally allowed for this Work, order him so much for every day of his Illness. In like manner, if he has lost a Leg, they consider him as a Sentinel or Watchman at a City Gate; if an Eye, they suppose him to work at turning a Mill; and so agreeably of all other Hurts and Mischiefs.

Lastly, in rateing the Affront or *Disgrace*, they consider the Condition and Degree of both Parties. Since an Affront is much more provoking from a mean and vile Person, than from one of Quality or Power; and since the same piece of disrespect may be light and inconsiderable to one of vulgar Condition, and yet be heinous and intolerable, if offer'd to a Man of Honour. And here we may by the by observe the Distinction added, concerning the *Place* or the Scene of the Action, which sometimes very much varies this Point. Thus if a Man sliding down from the Roof of a House, shall hurt one that passes by, and at the same time affront him, for Instance, by making the Dirt fall on him, he shall be responsible for the *Damage* or *Mischief*, not for the *Ignominy*. Thus much we have gather'd from the *Jewish* Laws; and on the same Head the Reader may consult the *Roman*; particularly, *l. ult. D. de his qui effuderint vel dejec* &c. l. 3. *D. Siquadrupes*. Where we must take notice, that when 'tis said *Scars* and *Deformity* are not capable of being prized or rated, the Rule will hold good only in the Case of Freemen. For since the debauch'd Manners of that Nation, set a higher Price than ordinary on handsome Slaves, they might consequently claim a pecuniary Satisfaction from those who should rob a Slave of this Advantage, by a Wound in the Face, or any Injury of that kind. So the disfiguring the Face of a Virgin or unmarried Woman, whose Beauty sometimes is the best part of their Fortune, may be reckon'd amongst Hurts, requiring Compensation. And indeed Deformity if very remarkable, is in general a sad Unhappiness, rendring us disagreeable to others, and exposing us to the Contempt and Derision of Proud and of Satyrical Men. Yet Scars receiv'd in War, pass for marks of Honour and Valour by the common Vote of Mankind (b).

(a) *Conf. l. 5. princ. & l. 1. D. de injuriis*. Where since there is this difference made between *Verberatio* and *Pulsatio*, that the former is *with*, and the latter *without Pain*, it seems to follow that even *Pain* may fall under Valuation.

(b) See the Example of *M. Servilius* in *Livy*, l. 45. c. 39. *Add. Senec. de Benefic. l. 5. c. 24. l. 13. Princ. D. ad L. Aquil.*

As to the Compensation after an Act of *Maiming*, this is farther observable, that in such Cases the Limb it self is not properly rated or valued, it being a thing really incapable of a pecuniary Price; but the design of these Proceedings is only to repair the Damage sustain'd by the loss, or by the disuse of such a Part, with regard to the difference of Times, of Persons, and of Abilities; and whilst the Judge is settling these Points, 'tis necessary he should speak of the Members themselves (a).

IX. The next Instance produced by *Grotius* of the Adulterer and the Adulterers, who he says are bound not only to save the Husband harmless, as to the Maintenance of the spurious Issue, but likewise to make good to the Legitimate Children any Damage which they shall sustain, in Case so false a Sharer should be admitted with them into the Inheritance; falls under that kind of *Damage*, which Men are said to cause only *Indirectly*, and *by Consequence*. For as to the *direct* Crime of Adultery, that does by no means belong to *Pecuniary Damage*. On this Point *Ziegler* observes that *Grotius* is indeed in the right, when he asserts, that the Husband ought to be secured from the Burthen of keeping the Adulterous Off-spring: But that it will bear a Dispute, whether Restitution should be made to the Legitimate Children for what they suffer by such a Partner in the Inheritance. For he says the Question here is concern'd only about the Mothers Estate, to which the Adulterous Children cannot be admitted, but by the Ordinance and Prescription of Law. And therefore when the Law of any Nation does thus actually allow them to share in the Maternal Inheritance with the Legitimate; the Damage here given proceeds from the Law it self, and not from the Adulterers. To which might be added, that the Adulterers are not obliged to such Reparation for this farther Reason, That Children have not a *perfect Right* to the Goods of their Living Parents; and no Necessity of Reparation can arise but from the Breach of a *perfect Right*. Thus a Parent cannot be said properly to *injure* the Children by passing to a second Marriage, though their Hopes of Inheritance may sink considerably by such a Proceeding. But the Truth is, the Instance alledged by *Grotius*, abstracts both from the Provisions made by Civil Laws, about the Succession of Adulterous Children, to the Goods of their Parents, and also from the Penalties decreed against the Adulterers, If convicted; and 'tis but reason to affirm with him, that the Adulterers tho' unconvicted or undiscover'd, do really owe such Reparation, both to the Husband and to the Legitimate Children. For by the End and Design of the Matrimonial

Covenant, the Children had a perfect Right, that no one should thrust new Co-heirs amongst them, besides the lawful Husband of their Mother. And by the same Covenant the Husband had a Right of refusing to maintain, not only out of his own proper and separate Goods, but likewise out of his Wife's Dowry, the base Progeny of his polluted Bed (1).

X. If a Man has either by Force or Fraud defiled a Virgin, he is oblig'd to pay her so much as she appears to be damnified in her hopes of Marriage, by the Loss of her Honour. For pure Virginitie is a very valuable Possession, and as it were the common Portion which Nature gives her Daughters (b). And therefore he who robs a Maid against her Will of this Treasure, ought so largely to refund to her, that the Improvement of her Fortune may hide the Blemish of her Body. Though indeed the true way of proceeding is, that he marry her himself; unless hinder'd by the Disparity of their Condition, or some other extraordinary Circumstances (c). But she who by a lustful Compliance, voluntarily parts with her Chastity, is to thank her self for the Loss. Yet commonly speaking, the Man in these Cases is presum'd to be more faulty than the Woman. He who shall entice a Virgin to prostitute her self on the promise of Marriage, should be bound to make good that Engagement. Nor will the Objection hold here, that Covenants about base or dishonest things are invalid. For since the Law of Nature requires no Interval betwixt the Covenant and the Completion of Matrimony (d), (all such distance being introduc'd by Civil Customs and Constitutions) (e), with regard to that Law, we can scarce call this a *base Condition*, 'You shall be my Wife provided you consent, that I shall immediately use you as such. Or if there be any thing which seems foul in so overhasty a Match, it is not judg'd sufficient to invalidate the Contract; because Marriage is, in this Case, the more *favourable* side.

XI. A Thief or Robber is bound to restore the thing taken away, with its natural Increase or Improvement (2); and to make good, not only the Damage Actually ensuing to the Owner, but likewise the surceasing of his Gains; and this, although he be compell'd to suffer the just *Punishment* of his Crime. For 'tis the injur'd Party who demands Reparation, and it is the Commonwealth which requires Punishment for the Publick Good; and the Judge can by no means reckon this as a Satisfaction to the private Person, so as to make him lose his Goods without Remedy and Restitution. Therefore 'tis an absurd way of proceeding in some States, where the Magistrate claims the Goods found on the Robber, and commands

(a) *Baeler. ad Grot. l. 2. c. 1. f. 6.* (b) *Apuleius in Apolog.* A beautiful Maid, though in the Condition of Poverty, hath a sufficient Portion, she brings her Husband, Sweetness of Spirit and Disposition, fair Charms and honest Purity. And indeed Virginitie alone is commonly, and ought to be esteemed by the other Sex, a full and just Recommendation. (1) See *Placcete* upon Restitution, l. 3. c. 12, 13. where he has handled this very Case at large. (c) See *Exod. XXII. 16, 17. Deuterom. XXII. 28, 29.* (d) See *Tobit. VII. 10, 18.* (e) *Vid. Gratian Gausf. 27. Quest. 2. Cap. 39.* (2) *Vid. l. 4. c. 7. f. 3.*

the true Owner of them to content himself with seeing the Villain brought to publick Justice (a). Nor is it more agreeable to the Law of Nature, that the Charges of Punishing the Thief should be laid on the Person he has rob'd, since the inflicting due Penalties, belongs entirely to the Government to effect, which if more Expences are requir'd, than the Estate of the Criminal amounts to, the Remainder is to be made up by the Publick; especially since at other times the Treasury gains so considerably by Forfeits and Confiscations. For Instance, if a State engage in a War, upon account of some private Members who have been injured, all are obliged to contribute to the Charges, as well as those whose Defence is particularly undertaken. The Case is otherwise, if the Judge puts it to the injured Parties choice, whether he had rather recover his Goods, or see the Thief executed; for here if he prefer the latter Condition, he can lay no claim to farther Satisfaction. Though the Judge cannot fairly propose such Terms, since the Punishment of Malefactors ought not to depend on the Pleasure or Humour of private Men, but on the Publick Advantage of the State.

If the thing stolen be spent and embezzl'd, *Grotius* will have it to be paid for according to a middle Valuation; not to the full worth,

nor yet considerably less. Which Direction *Ziegler* does not without reason dislike. For what Title has the Thief in this Case to Favour? If I can demand the full and highest Price when to oblige a Person, I sell a thing otherwise not *Vendible*, why should I here make any Abatement to the Thief, who seizes my Goods against my Will? and is my Chapman only upon Compulsion (b)? And in this Case too Reparation is due from the Thief or from his Heirs, (yet not beyond the Value of the Inheritance,) although he has suffer'd the Corporal Penalty of his Crime. For it does by no means look like Injustice or Cruelty, that the Offender after he has thus satisfied the Law, either by Death or other bodily *Pain*, should likewise recompense the Person he has endamaged. The trite Objection of *Mors omnia solvit* (c), *Death pays all*, has no manner of Force in the present Business. Death indeed discharges personal Performances, but not proper *Debts*, which cleave as it were to the Goods and Possessions, and follow them to any new Master. And such is this Debt for Damage given.

The other Species of *Hurt* are more easy to be settled and decided; and some of them will hereafter be particularly insisted upon in their proper place (d).

(a) *Vid. Caroli V. Ord. Crim. Art. 218. Add. l. 3. f. 12. De de Peculio. l. 56. f. 1. D. de furtis. l. 7. princ. D. de incendio ruina.* (b) *Add. l. 9. D. de in litem jurando. l. 2. princ. D. ad L. Aquil. verb. quanti id in eo anno plurimi fuit. l. 8. f. 1. ult. D. de Condit. furtin.* (c) *Ex Novell. 22. c. 20.* (d) As for the Trespasses done by Beasts, which the Roman Lawyers term *Pauperies*, consult their Observations, *ad Tit. D. si Quadrupes.*

## CHAP. II.

### *That all Men are to be accounted by Nature Equal.*

BESIDES that Affection which every Man maintains for his own Life and Body, and Possessions, by which he cannot but resist and repel whatever threatens Destruction to those dear Concerns; we may discover likewise deeply rooted in his mind, a most tender *Esteem* and *Value* for himself; which if any one endeavour to impair, he is seldom less, (and sometimes much more,) incens'd, than if a Mischief had been offer'd to his Person, or to his Estate. This Passion, though it may be heighten'd and improv'd by various external Causes, yet seems to lay its first Foundations in the very Constitution of Human Nature. The word MAN is thought to carry somewhat of *Dignity* in its sound; and we commonly make use of this, as the last and the most prevailing Argument against a rude Insulter, *I am not a Beast, a Dog, but I am a Man as well as your self* (a). Since then Human Nature agrees

equally to all Persons, and since no one can live a sociable Life with another, who does not own and respect him as a *Man*; it follows as a Command of the Law of Nature, *that every Man esteem and treat another as one who is Naturally his Equal, or who is a Man as well as he.*

II. For the better understanding this *Equality* amongst Men, we may observe, that *Hobbes* (b) restrains it to a parity of Strength, and of other Human Abilities which attend a ripe and perfect Age; and would from hence infer, that all Men have good Cause, naturally to fear each other. For he indeed can strike no Terrour into me whose power reaches not far enough to hurt me. But now amongst Men, he who is inferior to another in bodily strength, may either by Treacherous Contrivance, or by Art and Dexterity, take away the Life of the stoutest Mortal (c).

(a) *Statius, Thebaid. 12.*

— *Hominum inelyte Theseus,  
Sanguis erant omnes eademq; in Sydera, eosdem  
Sortitus animarum, alimentaq; vestra creati.*

Brave *Theseus*, they were *Men* like all before,  
And Human Souls in Human Frames they bore,  
With *You* to take their Parts in Earthly Feasts,  
With you to climb one Heaven, and sit Immortal Guests.

(b) *De Cive, c. 1. f. 3.* (c) *Seneca de Ira, l. 1. c. 4.* There is no Man so contemptibly weak, who may not hope some way or other to wreck his Revenge on the bravest Person breathing. We are all strong enough to do Mischief. Since

Since therefore the greatest of Natural Evils, which can proceed from Human Power is Death, which any grown Person is able to bring upon another; since those may be term'd *Equal*, who can do equal Mischiefs to each other, and since to kill is equally (because in the highest degree) to Mischieve, it follows hence that Men are by Nature equal (a). When he subjoins that *the present Inequality has been introduced by Civil Law*, he seems to me very much to have forgotten himself. For he had been speaking before of the natural Equality of Men's Strength, to which it is a great Impropriety to oppose the Unequalness, arising from Politick Institutions, which does not affect or regard the Strength of Men, but their State and Condition; does not make one Man stouter than another, but greater in Quality and Honour. Nor has the same Author much better Success, when he pretends (b) to discover in *the Faculties of the Mind, a greater Equality than that of Strength*. He says indeed, that *all Prudence is but Experience, which Nature in equal time equally bestows on all Men, in those things they equally apply their Minds unto*. But do not we see one Man piercing more deeply than another into the Consequences of things (1), applying more dextrously what he observes, and distinguishing with more Perspicacity, the likeness or unlikeness of Cases and Circumstances? And hence it frequently comes to pass, that of Two Men who have been employ'd an equal Time in the same Business; one shall grow Eminent for Management and Address, whilst the other's Natural Heaviness shall be little amended, by so long a Course and Experience of Affairs. Nor does the great Disparity of Men's Prudence arise only from their own false and over-weening Conceit of their Particular Worth; every one thinking himself to have a higher Degree of Wisdom than the Vulgar; that is, than all except a few, whom by Fame, or for concurring with himself, he is wont to approve and admire. For this Disparity appears, not only when a Man compares himself with others, but when he compares others amongst themselves, and is not concern'd as to his own Interest, which side carries the Advantage. Nor do we always favour and commend him, who conspires with our own Thoughts and Designs; but whom the fair contrivance and the good Success of his Project, entitles to our Approbation. And although such is the Natural Temper of Man, so greedy of Esteem and Applause, that every one Disdains to be upbraided with Ignorance or Folly, and is exceed-

ingly incens'd against those who boast of much larger Talents, much higher Attainments than his Neighbours, yet it does not follow hence, that no one allows another to be wiser than himself. For what if we fancy Two Men falling together into the same Danger, one of whom by his dexterous Management comes cleanly off, whilst the other is basely hamper'd, and escapes not without considerable Hurt or Prejudice, will not the latter here acknowledge his Fellow to have had a better Head-piece than himself? This is indeed, a part of that Freedom which Men equally enjoy, that a wiser Person shall have no right to challenge the Government of one more simple, unless with his Consent; especially if the latter professes himself to be contented with his own little Sagacity, and not desirous of the Controul, and the Direction of others.

But although the Consideration of *equal* Strength is thus far serviceable to our present purpose, that it may restrain one Man from rashly insulting over another, in as much as all Contention with an Equal is of dubious Issue, and because it is extreme Folly to desire the hurting another by undergoing our selves the same Proportion of Mischiefs: Yet the Equality which we are now treating of, is of a different Species, and the inviolable Observation of it, is in the highest Degree Conducibile to the common Benefit and Interest of Mankind. And here, as in all other things, may we justly admire the wise Contrivance of Nature, that whilst she distributes amongst Men the Goods of the Body and of the Mind, by unequal Parcels and Measures, she introduces this general *Equality*, to form an agreeable Harmony amongst all the other Varieties and Disproportions. For as in well order'd Commonwealths, one Subject may exceed another in Riches or in Honour, but all are equal Sharers in the Common *Liberty*; so under this Regulation of Nature, how much soever a Man may surpass his Neighbours, as to Bodily or Intellectual Endowments, he is still obliged to pay all Natural Duties, as readily and as fully as he expects to receive them; nor do those Advantages give him the least Power or Privilege to oppress his Fellows. Nor on the other side, does the bare unkindness of Nature or of Fortune, set a Man in a worse Condition than others, as to the Enjoyment of Common Rights. But whatever one Man requires or expects from others, the same may others (all Circumstances being alike) demand from him; and the same Judgment one decrees against another, he is obliged in like Case to submit to himself (c).

(a) It is the Argument of *Pallas* in *Virgil's Æn.* 10.

— *Totidem nobis animæq; manusq;*

Our Hands are equal, and our Lives the same.

(b) *Leviathan*, c. 13.

(1) See the Earl of *Clarendon's* Survey of the *Leviathan*. *Lowde* on the Nature of Man, cap. 5. (c) As *Phædrus* says, l. 1. Fab. 27. *Sua quisque exempla debet æquo animo pati*. Every one ought to bear it patiently, when his Example is turn'd upon Himself. *Diodor. Sic.* l. 13. c. 30. 'Tis but just that a Man should himself submit to that Law, which he hath prescribed to others. *Quintilian Declam.* 3. We must needs think that every one when he passeth Judgment on Matters, approves of that which he himself would have done in the like Case. *Add. Cumberland de Leg. Nat.* c. 2. f. 7. *Senec. Epist.* 30. Equality is the first part of Justice. *Enripides Phœniss.*

'Tis best my Son to keep Equality;  
The Mighty Band which Friends unites to Friends,

And States to States, and links confederate Wars.

On this Account we can by no means admit of Cicero's Rule which he lays down in his third Book of *Offices*; *Lex ipsa naturæ, &c.* *The Law of Nature it self, which preserves and holds together the common Profit of Mankind, does decree, that things necessary for Life and Sustenance, may be transfer'd from an idle and uselefs Person, to a Man of Wisdom, Goodness, and Valour, who should be suffer'd to perish, would exceedingly prejudice the Publick by his Death.* Much more unworthy of Approbation is that saying of the *American*, recorded by *Montaigne* (a), who coming to *Roan* in the Reign of *Charles IX.* and being ask'd what he observ'd that was singular in *France*, answer'd that amongst other things, he could not but wonder to see some Persons abounding in all manner of Plenty, and others oppress'd with the most grievous Want, begging at their Doors, and not rather chusing to invade and pillage them for their own support. For as those who excel in the Goods of the Mind, of the Body, or of Fortune, ought not to treat Men of lower Condition with Haughtiness and Insolence, so neither ought these to envy or to rifle their Superiors.

And this Equality we may call an *Equality of Right*, the Principle from which it springs is this, that the Obligation to a social Life equally binds all Men, in as much as it is the inseparable Companion of Human Nature, consider'd simply as *such*. Where we may observe farther, that between Obligations enjoy'd by a Superior, and those which arise from Mutual Compact, there seems to be this difference, that the latter immediately cease to bind a Man, when the other Party hath broken the Agreement; whereas the former may still engage us to some Performances towards a Person who is wanting in a mutual return of Duty. And the reason of this is, because the Author and Imposer of the Obligation is able to make up to us some other way, what we lose by being more just than our Neighbours. But our Obligation to the practice of Natural Duty and Right, although imposed by the supreme Lawgiver, does thus far agree with Obligations of common Bargains and Covenants, that so soon as one Person recedes from it, he can no longer require the same Offices from another; and besides, the other Party does hence acquire a Right of compelling him by force to make Satisfaction. Though the *Genius* of Civil Society makes it necessary to abridge and allay this Liberty ad-

hering to a State of Nature, for the support and maintenance of Government and of Peace.

III. Other Reasons there are Popular and Plausible, which might give us no little Assistance in discovering, and in illustrating this Equality. Amongst which this is not the least considerable, that we all derive our being from one Stock, from the same common Father of Human Race. On this Consideration *Boetius* Checks the pride of the insulting Nobility.

*Quid genus & proavos strepitis?  
Si primordia vestra,  
Autoremq; Deum spectas,  
Nullus degener extat  
Ni vitis pejora fovens,  
Proprium deserat ortum.*

Fondly our High Descent we boast;  
If whence at first our Breath we drew,  
The common springs of Life we view,  
The airy Notion soon is lost.

Th' Almighty made us Equal All:  
But he that slavishly complies  
To do the Drudgery of Vice,  
Disowns his High Original.

Mr. Itchiner.

Farther, that our Bodies are all composed of the same Matter, frail and brittle, liable to be destroy'd by a thousand Accidents of Mischiefe. We all owe our Existence to the same Method of Propagation, we are all by the same Degrees fashion'd and compacted in the Womb of our Mother; and the Noblest Mortal in his Entrance on the Stage of Life, is not distinguish'd by any difference of Pomp or of Passage, from the lowest of Mankind (b). Our Growth and Nourishment is perform'd alike, and the gross remainder of our Food are carried into the same *Common Shore*. Lastly, our Life hastens to the same General Mark, Death observes no Ceremony, but knocks as loud at the Barriers of the Court, as at the Door of the Cottage (c), and after Death, our Bodies are resolv'd into the same Dust and Corruption (d). Besides, wise Men are ever pressing it upon our Consideration, that we are alike obnoxious to the sports of Fortune, to the endless variety of Dangers and Mischances; or rather, that the Divine Disposer of all things, ensures no Man in his present State, or in the Possession of unshaken Felicity: but according to the

(a) B. 1. C. 30. (b) See *Wisdom VII. 5.* (c) — *Mors æquo pulsat pede pauperum tabernas — Regumque turres.*  
Θανάτω πάντες ἐφειλόμεθα.

*Huc post emeritam mortalia secula vitam,  
Deveniunt ubi nulla manent discrimina fati,  
Nullus honos, vanaq; exutum nomina regem,  
Proturbat plebeius egens.* —

The World owes us all to Death. (d) *Claudian in Ruffin. l. 2.*

Hither as to the Grand retiring Room,  
From Earths wide Stage, the Mortal Actors come,  
And here partake an undistinguish'd Doom.  
Aside their Honours with their Robes they throw;  
The Herald and his Trade are lost below.  
The King deposed, forgets the Dust he made;  
And the rude Peasant crowds the Royal Shade.

*Phocylides, Πάντες ἴσοι νέκυες*, the Dead are all upon a Level. *Lucian Ἴσοσημία γὰρ ἐν ἅδῃ καὶ δημοσι ἀπαντες*. The Grave admits no difference in Title or Degree. *Cicero de Leg. l. 2.* It is most agreeable to Nature, that Death should take off all Distinction of Fortune. *Statius, Theb. X.* — *Titulique in mare latentis.*

— Titles hid in Dust. *Add. Sirach. X. 9. &c.*

Secret Counfels of his Providence, difpofes of different Men by different Changes and Removes (\*). Our Christian Profeflion fuggelts many Motives to the fame purpofe; as that God does not efteem Men according to their Nobility, their Power, or their Wealth, but according to their fincere Piety and Goodnefs. And that at the laft great Day of Judgment, of the Diftribution of Rewards and Punifhments in another Life, no regard will be had to thofe who fwell in Port and Figure, beyond their Neighbours of this World.

IV. This Equality being admitted, there flow from it feveral Precepts, the Obfervation of which bears a very great force in the maintaining of Peace and Friendfhip amongft Men. And this in the firft place is moft manifelt, that he who would ufe the Affiftance of others in promoting his own Advantage, ought as freely to be at their fervice, when they want his help on the like Occafions. *One good turn requires another*, is the common Proverb. For he muft certainly efteem others *unequal* to himfelf, who constantly demands their Aid, and as constantly denies his own. And whoever is of this infolent Temper, cannot but highly difpleafe and provoke thofe about him, and foon give occafion to a breach of the Common Peace. It was a Manly and a gallant Reproof which *Caractacus* gavè the Romans, *Num fi vos omnibus imperitare vultis fequitur ut omnes fervitutem accipiant? Because you defire to be Mafters of all Men, does it follow that all Men muft defire to be your Slaves (a)?* (1) And indeed, it as much implies a Contradiction to determine differently in my own Cafe, and anothers, when they are exactly Parallel, as to make contrary Judgments on things really the fame. Since then, every Man is well acquainted with his own Nature, and as well at leaft 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 fame Right of his Neighbour, is guilty of a Contradiction in the plaineft Matter: an Argument of a Mind unfound in no ordinary Degree. For no good reafon can be given, why what I efteem juft for my felf, I fhould reckon unjuft for another in the fame Circumftances. Thofe therefore are moft properly fociable Creatures, who grant the fame Privileges to others, which they defire fhould be allow'd themfelves (b); and thofe on the other Hand, are moft unfit for Society, who imagining themfelves a Degree above Vulgar Mortals, would have a particular Commiffion to do whatever they pleafe; they give themfelves a free Pardon for all things, and vouchfate not to others the leaft Indulgence; they demand the Principal Share of common Honours, and of common Goods; though their Right and Title is not diftinguifh'd by any peculiar Excellence or Advantage. For as in raifing an Edifice, a Stone which by reafon of its rough and angular Figure, robs others of more room than it fills it felf, and upon account of its exceeding Hardnefs, cannot conveniently be cut into Regularity, and fo hinders the whole Frame of Building from clofing together, is thrown afide by the Workman, as unfit for all ufe and Service; fo thofe *πλεονέκται*, thofe greedy Churls, whofe rough and favage Temper inclines them to heap Superfluties on themfelves, and to deprive others of meer Neceffaries, and whofe violence of Paflions makes them incapable of being reclaim'd, are indeed the great Impediments of Society, and the Plagues of Mankind. Hence it is a Command of Natures Law, that *no Man who has not obtain'd a particular and efpecial Right, fhall arrogate to himfelf a larger fhare than his Fellows; but fhall admit others to an Enjoyment of equal Privileges with himfelf* (c). Therefore the Commiffioner in *Livy* (d), who came to treat with the common People in Sedition, was guilty of Infolence, when he told them, *Satis*

(\*). — *Valet ima fummis Mutare, & infiguem attenuat Deus.*

*Obscura promens.* Hor. 1. 1. Od. 34. GOD can quite change the Conditions of Affairs, and the Stations of Men.  
*Idem.* 1. 2. Od. 13. *Quod quisque vitet nunquam homini Satis, Cautum est in horas.* No Man is provided againft the Accidents of the next Hour. *Mamil.* lib. 3.

— *Tanta est rerum discordia in ævo,  
Et Subtefta malis bona funt, lacrymæq; fequuntur,  
Vota, nec in cunctis fervat fortuna tenorem,  
Ufque adeo permixta fluit, nec permanet unquam,  
Amifitq; fidem variando cuncta per omnes.*

— Hence there fprings  
That various Difcord which is feen in things:  
In one continued fream no Fortune flows,  
Joy mixes Grief and Pleafure's urg'd by Woes:  
Inconfancy in every part appears,  
Which Wifdom never trusts, but Folly fears.

Mr. Creech.

A moft noble ftain we have to the fame purpofe in *Seneca's Thyeftes*. *Ille qui donat diadema fronti, &c.*  
*Arrian* (in *Epi&et.*) tells a Story of a poor Shoemaker, whom his Mafter *Epaphroditus* fold off as a Slave of little ufe. In fome time the Man got the Honour of Working at his Trade for the Emperour; and then 'twas pleafant to fee how *Epaphroditus* made his Court to him. (a) *La&ant. Inftit.* 1. 3. c. 22. That cannot be done wifely, which were it done by all, would be Unprofitable or Evil. (1) *Tacit. Annal.* 1. 12. c. 37.

(b) *Qui ne tuberibus propriis offendat amicum  
Postulat, ignofcat verrucis illius: æquum est  
Peccatis veniam pofcentem reddere rurfus.*

Hor. 1. Sat. 3.

He that would have his Botches not offend,  
Muft wink at puny Pimples in his Friend,  
Indulgence fhould be Mutual; they that want  
The largeft Pardon, fhould the largeft grant.

(c) Thus the Tribune of the Commons fpeaks in *Dionyfius Harlicarnaffeus*, with regard to the unwritten Laws of Nature, O ye Senators, we demand that the People may thus far enjoy the fame Rights with you. We grant that thofe of your Number who excel in Vertue and in Fortune, ought to poffefs the chief Offices and Honours of the State: But this Privilege we preſume may be fairly Challeng'd by every Member of a Commonwealth, to be fecured from Injuries, and to obtain Juftice againft thofe who offer them. *La&ant. Div. Inftit.* 1. 3. c. 21. He that would bring Men to an Equality, muft take off all the vain humour of Arrogance and Pride; and fhew thofe who well with Power and Grandeur, that they are indeed on the Level with their moft needy Vaffals. *Æd. Sen. de Irâ,* f. 2. c. 28. (d) Book III. Chap. 53.

*Superq;*

*superq; humilis est, qui aequo jure in civitate vivit, nec inferendo injuriam, nec patiendo. He is humble enough, and indeed too humble in a State, who is content to live upon equal Terms and Rights, neither doing an Injury nor taking one.* As if it were a hard Case, that the Privilege of Nobility should not be strong enough to dispense with that Fundamental Law of Equity, *Do as thou wouldst be done by* (a)! On this Principle is built that gallant Compliment of *Pliny* to the Emperour *Trajan*, *Unum ille se ex nobis, & hoc magis excellit atque eminent quod unum ex nobis se putat: nec minus hominem se quam hominibus praeesse meminit.* He thinks himself one of us, and 'tis this makes him more our Superiour, that he passes in his own Judgment for our Equal; and remembers himself to be no less a Man than the meanest Subject whom he governs. For that excellent Prince when he accepted the Supreme Command, had promised that private Men should find him such an Emperour, as he himself desir'd to find, whilst a private Man. *Galba* in *Tacitus* (b), gives *Piso* an admirable piece of Advice to the same purpose. *Utilissimus idem ac brevissimus bonarum malarumq; rerum delectus est cogitare, quid aut volueris sub alio principe aut nolueris. The best and the shortest Rule to obtain the true Art of good Government, is to consider what you would your self approve, and what you would condemn in another Prince; and accordingly to practice the former, and to avoid the latter.* And *Seneca* (c), joins in the same wise Direction; this (says he) is the Sum of my Advice, shew such behaviour towards an Inferior, as you would have a Superior shew towards you (d).

V. The same Equality teaches a Man how to carry himself, in Case he be appointed Arbitrator of any Right betwixt others, namely, that he treat them as equals, and give no Favour or Indulgence to one above the rest, except such as he can claim by Virtue of some peculiar Right. For he that by a partial preference of one Person to another, violates the Rule of Natural Equality, is at the same time guilty of an Injury, and of an Affront, by denying a Man what is his just Due, and by detracting from that Worthiness, which Nature gives him in common with his Fellow (e). It follows as a Corollary from this Doctrine, that if the thing which is to be distributed amongst

in any, admit not of a Division, the Persons who have an equal Right to it, use it in Common, and without Stint, if the Quantity of the thing will allow it; if not, that they then use it in a certain and limited manner, and with Proportion to their Number. For it is not possible to find out any other way of observing an Equality in these Cases. But if the thing can neither be divided, nor possess'd in Common, then the use of it shall either be taken by turns (f), or if this Course too fail of Success, and if likewise one of the Contenders cannot give the others an equivalent to secure to himself the whole Enjoyment of the thing desired, then one shall carry it from the rest, by the fair Decision of a Lot; which is the most proper Remedy that can be applied to all Differences of this kind, in as much as it takes away the Notion of Contempt by setting all the Parties on a Level, and if it does not favour a Man, yet does not in the least disgrace him (g). *Hobbes* (h) has divided Lots into two sorts, *Arbitrary* and *Natural*. The former is such as the Competitors agree upon, engaging to stand to the Event, whilst they cannot by any Art govern or foresee it; and therefore this kind of Lot with regard to Men, depends entirely on meer Chance and Fortune. *Natural Lot*, he says, is either *first Seisure*, by which a thing which can neither be enjoy'd in common nor divided, passes to him, who shall first lay hands on it with a design to keep it; or *Primogeniture*, by virtue of such Paternal Goods as can neither be divided nor possess'd in the common by many Children, are adjudg'd to the Firstborn. Yet if we accurately consider things, there will appear to be no proper Lot but what we may call *Arbitrary*. For 'tis not easy to assign a reason why such an Event as a Man cannot procure by his own Industry, should give him a Right which should hold good against his Equals, unless this Right was assign'd or adjudg'd to this particular Event, by the *Arbitrary* Appointment, and Institution of Men. Thus a thing which no one has a particular Right to claim, belongs to the first Seiser; because when distinct Proprieties were introduced, there seems to have pass'd this tacit Agreement amongst Men, that those things which were not peculiarly assign'd to any Owner, and yet could not without a prejudice

(a) See the Arrogant manner of the Satisfaction given by the Duke of *Joinvills* to *Marescote*, in *Gramond. Hist. Gal.* l. 8. (b) *Hist.* l. 16. (c) *Epist.* 47. (d) Hence appears the intolerable Insolence of that Saying in *Lucan.* l. 5.

— Nunquam sic cura Deorum

Se premit ut vestrae morti vestrae; Saluti,  
Fata vacent; procerum motus haec cuncta sequuntur,  
Humanum paucis vivit genus.

— Heaven thinks not on the Vulgar Herd,  
Their Deaths to hasten, or their Lives to guard;  
Fortune disdains to Court so mean a Care,  
Nor less than *Cesar* is a Mark for Her.  
The Fate of Subjects on their Lords must turn,  
And little Mortals for the Great are born.

This my Lord *Bacon* calls a *Gigantean Temper of Mind*, possessing those Grand Disturbers of the World, who seem to aim at nothing less than to render all Men happy or miserable, according as they appear their Friends or Foes; and as it were to make all Nature bear their own Image; which is properly fighting against Heaven. *De augment. Scient.* l. 7. c. 2. (e) *Livy.* l. 34. c. 4. *Quod alii liceat, tibi non licere aliquid naturalis aut pudoris aut indignationis habet.* That what is lawful for another, should not be lawful for you, creates a natural Shame, or a natural Indignation. (f) *Curtius.* l. 7. c. 6. In this hot Contention between the two Parties of Horse and Foot, for the Honour of carrying their Prince, *Alexander* finding it would be difficult for him to make the choice, and that he could not satisfy one Order without disgusting the other, commanded they should bear his Litter by turns. (g) *Proverb.* XVIII. 18. (h) *De Civ.* c. 3. f. 15, &c. *Leviath.* Engl. Pag. 78.

to Mankind be always left in common, should be the Right of the first Possessor. And thus too the Right of *Primogeniture*, owes its original to Human Constitution and Compact. For otherwise, why should the younger Brothers born of the same Parents, be placed in a worse Condition than the Eldest, barely upon account of an Accident or Circumstance, which it was not in their power to hinder (a)? Now the reason why these two Claims by *Primogeniture*, and *first Seizure*, are sometimes, tho' improperly call'd *Lots*, is this, because they cannot be foreseen or directed by any power of Human Industry, and because it reflects no real Disgrace on a Man to lose the Preference, for want of these Advantages.

VI. This Rule of *Equality* is likewise transfere'd by *Pride*, when a Man for no Reason, or without sufficient Reason, prefers himself to others, bearing a lofty Carriage towards them, as base Underlings, unworthy of his Consideration or Regard. How vastly distant this Temper is from the Vertue of Generosity and true Greatness of Mind, *Des Cartes* has most elegantly shewn in his *Treatise of the Passions*. 'He lays it down as a Principle, 'that it is one of the chief Parts of Wisdom 'to know how and on what Accounts every 'one ought to esteem or disesteem himself; 'and then he makes out, that the only just 'Cause of esteeming our selves, arises from 'the lawful use of our Power of *free Choice*, 'and from the Command and Authority which 'we exercise over our Wills; since besides the 'Actions which depend on that Faculty, there 'is nothing in us that can properly merit 'Praise or Dispraise. Hence he concludes, the 'true Notion of Generosity which Prompts a 'Man to value himself as highly as in Reason 'he ought, to consist in this, that he acknowledge nothing to be truly *his own* but this 'free Disposition of his Will, that he be sensible he cannot purchase Blame or Commendation, otherwise than by the ill or the good use of this Power, and that at the same time 'he feel within himself a full Purpose and Resolution of using it well. He proceeds to observe, that those who have such a true Sense of themselves are easily inclin'd to think, that every Man judges of his own Worth in the same manner, since there is nothing in this Notion which hath any Dependence on external Things or Persons. That for this Reason they never despise others, but are ready to excuse their Faults, as proceeding rather from Mistake, than Design. That as they think themselves not much Inferior to those who exceed them in Wealth, Honour, Beauty, Wit, or Learning, knowing that these Advantages ought not to come into the Account; so when they find themselves possess'd of the like Goods, they do not fancy

' they are much Superior to those who want ' them. Hence, *he says*, there is discoverable ' in the most generous Spirits an honest Humility; a Vertue consisting in the Reflection ' which we make on the Infirmity of our Nature, ' and upon the Miscarriages which we either ' have formerly been guilty of, or may be hereafter, these being no less than we see committed by others; whence it comes to pass, ' that we prefer not our selves to any Person ' living, wisely considering that all Men have ' the same Faculty of Free-will, and may all ' employ it to as good use. He remarks farther, ' that those who entertain a good Opinion of ' themselves for any other Cause, are not endued with real Generosity, but puffed up ' with empty Pride, which as it is always ' vicious, so it is aggravated the more, the more ' unjust the Cause is on which the Self-Conceit ' is founded. And the most unjust Cause of ' Pride, is the being proud without Cause; ' that is when a Man being conscious to himself, that he has no real Merit which should ' entitle him to Esteem, imagines Glory to ' belong to every one that pleases to usurp it, ' and that the greater Share a Man claims of ' it, the greater he really enjoys. A Vice so extremely absurd, that 'tis scarce credible any ' should prostitute themselves to such a Baseness, were there not a Pack of idle Flatterers ' in the World, who by their false Praises, ' swell Men of heavy Parts, into this most stupid ' Degree of Folly (b).

Nor does a Man's Advancement to Honour or Power, give him any just Reason to be Proud; On which Point *Menelaus* in *Euripides* (c), thus admirably expostulates with *Agamemnon*.

οἶσθ' ἢ πρὸς ἑσέδ' αἴχην Δαναΐδαις, &c.

You know when with Ambitious Aim you  
(strove,  
To lead the *Greeks* to *Troy*, and rule the War,  
How meek you look'd, how low you stoop'd  
(to reach  
The meanest Hand; your Hospitable Gate,  
Free of Access, let in the Vulgar Tide;  
You, as in order thro' the Ranks you pass,  
With Courteous Arts of Popular Address,  
Saluted, Man by Man, the gapeing Crowd,  
And forc'd your Honours on unwilling Clowns:  
That low Compliance might advance your  
(Pride,  
And in the common Market purchase Praise.  
But Master of your Wish, and voted Chief  
Of our united Force, lofty you grew  
In Manners as in Place; your Doors were barr'd,  
Your Friends (once Friends, but now intruding  
Slaves)  
Drove back with Scorn; your self, like some  
(Rich Gem,

(a) Therefore *Aristotle* says, Brothers are equal, except they differ in Age, *Ethick.* 2. c. 12. (b) *Pindar.* *Olymp.* 9. ἢ κωνάδαι πρὸς καὶ ἐν μανίῳ ὑποθέσει. To boast unreasonably is the Character of Madmen.  
(c) *Iphigen. in Aul.*

Deeply encas'd, and veil'd from Vulgar View.  
 But a good Man, if Wealth or Dignity  
 Exalt his State, should keep his Soul unmov'd  
 From Vertue's Centre, and elude the Charms  
 Of swelling Infolence; should freely smile  
 On Friends beneath, and serve them with more  
 (Will  
 When his improv'd Condition gives more Power.

*Lucian* (a) has left an excellent Observation to the same purpose; *No Man*, says he, *will envy one advanced to Eminence and Grandeur, if he see him bear his Fortune with Moderation.*

VII. A much heavier Breach of this *Equality* is it, for a Man to shew his Contempt of others, by outward and open Signs; whether by Actions or Words, by a Look or a Laugh, or any such Affront; one kind of which is often express'd by troubling another with a Ridiculous or a Disagreeable Present (b). Which Sin is to be reputed so much the more Heinous as it gives the highest Provocation imaginable, and inflames the Sufferer with the greatest violence of Anger and Revenge. For we find many Persons who will expose their own Life to present Danger, and much more break the Peace with others, rather than put up such a grateing Indignity. In as much as every Act of this Nature is a Wound to a Man's Glory or Reputation, of which Goods we are more proud, and more tenderly sensible than of any thing else we possess, and in the safe and flourishing State of which, almost the whole Pleasure of our Mind consists (1).

VIII. From what has been offer'd on this Head, it is easy to discover the Absurdity of that Opinion, derived from the Ancient Greeks, of some Men's being Slaves by Nature. Which if taken in the same Crudeness of Sense as it bears in the Expression, is directly repugnant to that *Natural Equality*, which we have been endeavouring to establish (c). Thus much indeed is most evident, that some Men are endued with such a Happiness of Wit and Parts, as enables them not only to provide for themselves and their own Affairs, but to direct and govern others. And that some again are so extremely Stupid and Heavy, as to be unfit to govern themselves, so that they either do Mischief or do nothing, unless others guide and compel them. And farther, that these last being commonly furnish'd by Nature, with strong and hardy Bodies, are capable of bringing many notable Advantages to others by their Labour and Service. Now when these have the Fortune to live in Subjection to a

wise Director they are without doubt fix'd in such a State of Life, as is most agreeable to their *Genius* and Capacity. If therefore these Two Parties of Men voluntarily consent to the Establishing of some common Government amongst them, it is consonant to Nature, that the former be invest'd with the power of *Commanding*, and the latter with the Necessity of *Obeying*, by which Method the Interests of both will be best promoted and secured. And in this Sense we may without Danger admit of *Aristotle's* Aphorism, laid down in his first Book of *Politicks*, Τὸ αὐτὸ δουλεύειν τῷ Στιβαίῳ καὶ σοφῷ, &c. which according to *Heinsius* his Paraphrase, runs to this purpose; *Nothing is more suitable to Nature, than that those who excel in Understanding and Prudence, and are able to judge of things at a Distance, should rule and controul those who are less happy in these Advantages; on the other hand, those whose Bodily Strength and Vigour, enables them to put the Commands of wiser Men in Execution, are by Nature framed and design'd for Subjection and Obedience. From this Constitution of things, the Sovereign and the Slave receive equal Advantage, the Benefits and the Conveniencies are alike on both sides* (d). Yet it would be the greatest Absurdity imaginable to believe, that Nature actually invests the Wise with the Sovereignty over the Weak and Imprudent, or with a Right of forcing them to submit and obey against their Wills. For no Sovereignty can be actually establish'd, unless some Human Deed or Covenant precede. Nor does a Natural fitness for Government presently make a Man Governour over another, who is as Naturally adapted for Subjection; nor, supposing a thing to be profitable for another, is it therefore lawful for me to force it upon him against his Inclination. For all Men enjoy a *Natural Liberty* in the same Measure and Degree, which before they suffer to be impair'd or diminish'd; there must intervene either their own *Consent*; Express, Tacite, or Interpretative, or some Fact of theirs, by which others may obtain a Right of Abridging them of their Liberty by Force, in case they will not part with it by a Voluntary Submission. 'Twas therefore well urged by *Quintilian's* Declaimer (e). *What hath Nature produced amongst all her Works which she hath not set in a State of Freedom? I forbear to speak of Slaves, whom the hard Chance of War hath deliver'd up as a Prey to the Conquerours, though they were born by the same Laws, by the same Necessity, by the same Accidents contributing to their Original. They draw Breath out of the same free and common Air; and 'twas not*

(a) *De Imaginibus.* (b) *Add. l. 5. f. 1. D. qui satis dare cogantur, Matt. V. 22.* (1) See to this Purpose Mr. *Bruyere's* Characters, Ch. Of Man. (c) And therefore *Strabo*, l. 1. speaking of those who advised *Alexander* to treat all *Grecians* as Friends, and all *Barbarians* as Enemies, wisely observes, that the Distinction ought rather to have been founded in the Goodness, and Badness of the Persons; many *Grecians* being wicked and cruel, many *Barbarians* virtuous and obliging. (d) *Apuleius* in *Philosoph.* delivers the same Opinion. It is most agreeable, says he, that a Man who is neither by Nature nor Industry, prepared for a Right way of living, should not govern but be govern'd; should be a Servant not a Master; should upon account of his own Weakness and Incapacity be under the Controul of others; should sustain the Part of *Obeying*, not of *Commanding.* (e) *Declam. 13.*

the Decree of Nature which gave them Masters, but the Unkindness of Fortune. 'Tis a Maxim of Ulpian, that all Men by a Natural Right are born free (1); which Freedom Grotius interprets, 'To be such as is only a Privation of Servitude, not a Contradiction to it; that is, it provides, a Man shall not be by Nature a Slave, but it gives him no Right that he shall not become a Slave afterwards; for no Man is in such a Sense Free, as that it shall be impossible for him to lose his Liberty. The same Truth may be thus explain'd in other words; since Nature hath produc'd all Men Equal, and since Servitude cannot be conceiv'd without Inequality, (for Servitude necessarily brings in a Distinction of Superior and Inferior: whereas in the Notion of Liberty, it is not Requisite that we should have an Inferior, but 'tis sufficient that we are Subject to no Superior;) it follows that all Men Naturally, and Antecedently to any Human Deed, are conceiv'd to be Free. But Natural Ability, or the Possession of such Qualities as are Requisite for any State, do not immediately set a Man in that State. Every one who hath Capacity enough to rule a People, or to command an Army, is not without more adoe a King or a General. Nor can such an accomplish'd Man as Horace's Lollius presently challenge to himself the Consular Fasces; tho' he fully answer that fine Character,

— Est animus tibi  
Rerumq; prudens, & secundis  
Temporibus dubiisq; rectus.  
Vindex avaræ fraudis & abstinens  
Ducentis ad se cuncta pecuniæ;  
Consulq; non unius anni, &c. L. 4. Od. 9.

A Soul with Sage Experience fraught,  
Whose generous Worth and steadfast Thought,  
Nor Frowns of Adverse Fate could grieve,  
Nor smiling Happiness deceive.  
A Mortal Enemy to Knaves,  
And Gold that makes them: Gold enslaves  
The wicked World, but owns its Charms  
A Match too weak for Vertues Arms.  
Not Consul of a single Year, &c.

And what Plutarch reports of Pelopidas, that he held the Supream Command longer than the Laws allow'd of, least his Successors thro' Idleness or Mismanagement, should prejudice the Affairs of the State, must be look'd on as an Instance, not of any standing Right, but of an extraordinary Indulgence (a).

And here too we have an Opportunity of interpreting that saying of Albutius in Seneca (b), which is commonly cited on this Subject. By Nature a Man is neither Bond nor Free; 'twas Fortune that afterwards introduc'd these Names. That is, so long as all Men were

Equal, they could not be distinguish'd in our Mind by such a State as is opposite to their Natural State of Equality. But afterwards, when those who lost or quitted that Natural State, got the Appellation of Bondmen, in like manner those who retain'd it did now entirely engross the Title of Free. The Thing may be explain'd by this familiar Instance in a like Case; so long as there are no Military Men in a State, the Subjects all keep the same common Name and Condition; but when part of the Subjects are list'd into armed Troops, the Distinction of the Souldiery and the Country immediately arises. And according to this Explication may we admit of that Notion, which Aristotle (c) cites and rejects, that Bondage and Freedom owe their Original to Law. For were not Servitude introduced by human Compacts and Constitutions, such a Difference would be unintelligible, all Men being placed by Nature in the same equal State; as the Emperor speaks in the Institutions (d), whereas before all Men enjoy'd the same general Name, the Law of Nations brought in three kinds of Men, Liberti, Servi, and Libertini; Men that are born Free, Men that are Slaves, Men that being at first Slaves have obtain'd their Freedom. Or it may be enough to justify that Saying, which Aristotle dislikes, to give it this Sense, the Rights of Liberty and Servitude, as they are consider'd in Men living under settled Governments, are defined by Civil Laws.

Many other Considerations there are of sufficient Strength, to overthrow that vain and gross Opinion of Slaves by Nature. For there is scarce any Man so dull and stupid, but he fancies it will be more proper and convenient for him to live according to his own Inclinations, than to submit himself to the Command, and to the Pleasure of another. This Natural Desire appears more evidently in whole Nations, none of which are ever so low-spirited as to prefer a Foreign Governour to a Prince of their own Country and Race. Lastly, since Nature does not actually constitute any Superiority or Government, and since those Natural Slaves whom Aristotle speaks so much of, are commonly Men of strong Hands and able Bodies, there would be a hard Scuffle betwixt them and their wiser Neighbours for the Mastery; in which Contention the latter Party with all their Sagacity, could not promise themselves any infallible Success. Aristotle's Argument borrow'd from the Poets, deserves likewise to be thrown out as most Arrogant and Unreasonable. Therefore, says he (e), the Poets tell us, 'tis just the Greeks should rule the Barbarians, as if to be a Barbarian, and to be a Slave were naturally the same thing (f). For according to this Doctrine, if we had a Mind to destroy any Nation differing

(1) Utpote cum jure naturali omnes liberi nascerentur, &c. Digest. 1. 1. de Justitia & Jure. (a) Add. Cornel. Nep. in Epaminond. & Liv. 1. 26. c. 2. (b) III. Controvers. 21. (c) Polit. 1. 1. c. 3. (d) Lib. 1. tit. 5. f. 1. (e) Polit. 1. c. 1. (f) Euripid. Iphig. in Aulid, Βαρβαρων δ' Ἕλληνας, &c.

'Tis fit Barbarians own the Grecian Sway,  
And not that Greece should serve a barbarous Lord.

Wise Nature made the Law; 'twas Nature form'd  
Them to obey, and us to be obey'd.

from us in Customs and Manners, it were only to Brand them with the reproachful Name of *Barbarians*, and then to invade them without farther Colour or Excuse. It is manifest, that this absurd Notion of the *Grecians* arose chiefly from hence, that they were wholly inclin'd to a Democratical Government: whereas their Mighty Neighbours the *Persians* were constant Maintainers of a Monarchy, whom for this and other Reasons they mortally hated beyond all Bounds of Justice or Humanity. On this account *Isocrates* (a) calls the *Persians* οἱ ἐχθροὶ τοῦ ἑλληνισμοῦ, *Enemies by Nature to the Greeks*, 'And says that in the general Councils or Assemblies, before any Business was transacted, a Solemn Curse was denounc'd against those who should desire Peace or Friendship with the *Persians*; and that at the Great Feast of the *Mysteries*, the Publick *Heralds* forbid all of that Nation, as Murderers, to be present at the Holy Ceremony.

As for *Aristotle's* whole Discourse on this Subject, we shall put a more Respectful and a more Favourable Construction on his words, if we say that by making two kinds of Servitude, Natural and Legal, he means the former to be when a Man of more Strength than Wit, serves another, whose Parts and *Genius* dispose him for Command; in which Case both enjoy a Condition most agreeable to their Nature and their Necessities. And that the Legal Servitude which he speaks of, is when a Person of good Endowments and Abilities of Mind, is thro' the Meanness of his Birth, or the Hardness of his Fortune, compell'd either by his own Fear, or by publick Constitutions to serve a Master Inferior to himself in those Accomplishments of Mind; and whenever this happens, 'tis scarce possible but that the Vassal should hate his Lord; whereas on the other hand, these Relations produce a firm Love and a kind of Friendship, when each Party bears that Character which is most suitable to his Disposition and to his Power. But still this must be fixt as a most undoubted Principle, that the bare force of such a *Natural Aptitude*, does neither give the one a Right of imposing a Condition of Servitude, nor oblige the other to receive it.

IX. It will be proper to add somewhat in short, concerning the other kind of *Equality*, which differs from the former, in that it is rather a Consequent, than an Ingredient of the State of Nature; we may call it an *Equality of Power*, or of *Liberty*, by which all Men are reckon'd *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. This *Equality* is taken away when Men enter into a *Civil State*, where whilst one or more are invest'd with the Power of Commanding,

and all the rest enjoyn'd the Duty of Obeying, there arises the greatest Inequality imaginable between the Sovereign and the Subject. But since there still appears some Inequality, even between the Fellow Subjects, not only with regard to Honour and Esteem (b), but likewise as to the Power which one obtains over another; we may observe that part of this Inequality proceeds from the *State of Fathers of Families*, who being the chief Rulers before the Institution of Publick Governments, brought into such Governments the Power which they before held over their Wives, their Children, and their Servants (1). So that this Inequality being more Ancient than the Erection of *Civil States*, can by no means owe its Original to them; nor do they give this Power to the *Fathers of Families*, but leave it in their Hands as they found it; tho' in some Places it is thought convenient very much to abridge, and to restrain it. If any further Inequality, as to Power, be discoverable amongst Fellow-Subjects, it is plain the Fountain and the Occasion of it must be the supream Civil Authority. For those whom we suppose to have pass'd into a Publick *State*, did at their Entrance on it, make over to their Common *Sovereign*, so much of the Power which they before possess'd, as was necessary to support this new Constitution. And therefore in case any Person had before this Change transferr'd to another, any Right over himself, that Right would either cease and be extinct in the present Regulation, or it must submit to the Pleasure and Disposal of the Superior Authority. But after a Man hath once join'd himself as a Member to any Civil Community, he cannot on any Account give another such Power over himself, as shall hold Valid against the Right, acquired by the Chief Ruler; since this would be to admit two Independent Masters, whom 'tis impossible to serve both at once. Whatever Inequality therefore amongst Fellow-Subjects commences, after the Settlement of the Civil State, must take its Rise, either from the Publick Administration, on account of which the Sovereign conveys by Delegacy, to some of the Subjects, a Command over others; or from some certain Privilege, granted by the same Supream Governing Power. But Disparity of Riches does not of it self, cause any Inequality amongst Fellow-Subjects; only as great Wealth affords Men matter of actual Hurt or Benefit to others, on which Score the Poorer sort are wont to seek the Favour of the Rich, by the most submissive Methods of Address, either to obtain Advantage, or to secure themselves from Injury (c). But there is nothing in this *Civil Inequality*, any ways Repugnant to those Precepts, which we have before deduced from a *Natural Equality*.

(a) *Panegy. & Panathenaeic.* (b) Of which see Book the VIII<sup>th</sup>, Chap. 4. (1) See the First Chapter of the Author's Introduction to the History of Europe. (c) Compare *Luc. Antist. Constant. de jure Ecclesiast.* tit. 3.

## C H A P. III.

*Of the Mutual Duties of Humanity.*

IT is but a poor thing not to have hurt another, or not to have robb'd him of his just Esteem (1): this Negative Kindness to a Man will barely hinder him from having any fair Reason to hate, but can give him little Encouragement to love, us. To knit Men's Minds more strongly together, it is necessary to add to this Forbearance of mutual Evil, the real Practice of mutual Good. The Debt which I owe upon Account of my being a sociable Creature I have not yet Discharg'd, whilst I have not estrang'd a Man's Affection from me by any Mischievous or Distastful Deed; but I ought farther to promote his actual Profit and Benefit, that I may shew it is a Pleasure to me to see others Partners of my Nature, and Sharers with me in the World which we possess. The near Relation which Men Naturally bear one to another, is lost, unless it be cherish'd and kept up by a constant Commerce of kind Offices betwixt them (a). It was a noble Saying of Plato (b). *Ἐκείσδε ἡμῶν ἐκ αὐτῶ μόνον γέγενεν, ἀλλὰ τῆς ἀρέσσεως ἡμῶν τὸ μὲν πῆ πατεῖς μείξεται, τὸ δὲ π οἱ ζυνήσαντες τὸ δὲ οἱ λοιποὶ φίλοι.* Which Passage Tully has thus borrow'd and enlarg'd upon in his Offices. *Non nobis solum nati sumus, &c. We are not born for our selves alone; our Country, our Parents, and our Friends have all a Share, and an Interest in our Being.* 'Tis a Maxim with the Stoicks, that as the Earth and all the Productions of it were created for the Use of Men, so Men themselves were, for the sake of Men, brought into the World, that they might Assist, and Benefit each other. In this we ought to follow the Guidance of Nature, to bring common Goods together, and freely lay them in Common, and by an Intercourse of giving and receiving kind Offices, by Art, Industry, and by

*all our Faculties, to cement the Society of Mankind (c).*

How much more ugly and deform'd a Sin will it then be, for a Man to rejoyce in the Afflictions and Calamities of others, especially of Innocent Persons; or on the other side to grieve and repine at the Prosperity of his Neighbours?

II. Now we may promote the good of other Men, either *Indefinitely* or *Definitely*, and this either so as to part with somewhat of our own or not. A Man *Indefinitely* advances the Common Benefit, when he so polishes and prepares his Mind or his Body, as to render them useful to the Publick; particularly if by Sagacity of Parts and Judgment, he discover such *Inventions*, as may serve the Necessities or the Conveniencies of Human Life. *Columella* (d) observes with great Wisdom, 'That it would be 'a thing of the highest Value, and Advantage 'in the World, if every one were sensible of 'his own Ignorance, and always desirous to 'learn what he knew himself at present to be 'defective in.

Hence it appears, that those Persons are guilty of a Sin against Nature's Law, who neglect to exercise themselves in some honest Art or Employment, but living unprofitable to themselves, and troublesome to others, use their Soul only for Salt, to keep their Body from stinking.

— *Numerus tantum & fruges consumere nati; Born only to increase the number of Mankind, and to help to rid, and devour the superfluous Fruits of Nature.* For the rooting such useless Animals out of their State, the *Egyptians* had a Decree, obliging all Men to give in their Names to the Magistrates, and withal to intimate by what Calling or Profession every one

(1) *Quantulum est ei non nocere, cui debeas prodesse.* Seneca, Epist. 95. (a) Seneca, Epist. 95. What a poor thing is it not to hurt him whom you ought to benefit. (b) Epist. 9. ad Archib. (c) *Idem* Off. 3. *magis est secundum naturam* &c. It is more agreeable to Nature, for a Man to undertake all sorts of Labour and Trouble, for the Service and Conservation (if it were possible) of the whole World, than to live in Solitude, not only free from Cares, but in the midst of the greatest Pleasures. Add. *Last. Div. Instit.* l. 6. c. 10, 11. *Phil. Jud. quod Deus est immutab.* Those Wretches are worthy of the utmost Detestation, who regard only their private Interest, and neglect the Common Good of Mankind; as if they were born for themselves alone, and not for an Innumerable Society, for their Parents, their Wife, their Children, and in general for all the World. *Heliodorus Æthiop.* 11. acquaints us that it was one of the *Maxims* amongst the *Gymnosophists*, never to neglect a Soul, when once entred into a Human Body, should it fall into Danger or Distress. *Liban. Declam.* 19. When I do but speak the word Man, I imply Mercy, Courtesy and Kindness. Add. *Philosf. de Vit. Apol.* l. 5. c. 1. *Marc. Anton.* l. 3. f. 4. The good Person considers, that whatever partakes of Reason is of Kin unto him; and that to care for all Men, generally is agreeable to the Nature of a Man. *Idem* l. 4. f. 3. Men are born for the sake of each other. Add. *id.* l. 4. f. 4. *Seneca* Epist. 95. We are all Members of a great Body. Nature produced us under a Mutual Relation, from the same Principles, and for the same Designs. This inspired us with a Love one for another. She taught us the Lessons of Equity and Justice; it is upon account of her Constitutions, that we ought to esteem it a greater Unhappiness to do Hurt than to receive it: it is by her Orders that our Hands move so readily to the Assistance of our injur'd Neighbour. Let that good old Verse be ever in your Mind and in your Mouth.

*Homo sum, humani nihil a me alienum puto.*

I am a Man, and I esteem nothing a Stranger to me, which is of Kin to Humanity. Let us lay our Natural Powers in Common. Human Society is built like an Arch of Stones, which is by this means only supported and upheld from Ruine, that each part hinders the fall of the other. Add *Bacon's Ess.* 13. (d) *De re russic.* l. 11. c. 1.

got his Lively-hood. He that brought in a false Account, or practis'd an unlawful way of Gain, was punish'd with Death (a). In the same Rank we may justly place those, who having a sufficient Fortune left them by their Ancestors, think their own Industry would be unnecessary trouble, since they have gain'd so fair a Subsistence by the Industry of others; and accordingly sacrifice their Time and Thoughts to Sottishness and Sloth. Nor does *Virgil* without good Reason assign a Station in Hell, to those useles and unmerciful Wretches.

— *Qui divitiis soli incubuere paratis,  
Nec partem posuere suis* (b).

— Who to *Lucre* sold,  
Sit brooding on unprofitable Gold;  
And dare not give, and ev'n refuse to lend  
To their poor Kindred, or a wanting Friend.

Mr. Dryden.

It was a Law amongst the *Milesians*, that he who had spent his Father's Estate, should be denied the Benefit of his Father's Sepulchre (c). Such an extravagant *spend-thrift*, *Mamilius* describes,

*Ille patri, natifq; reus, quas ceperit ipse  
Non legabit opes, censumq; immerget in ipso.  
Tanta fames animumq; cibi tam dira cupido  
Corripit, ut capiat semet, nec compleat unquam,  
Inque epulas funus revocet, pretiumq; Sepulchri.*  
(d).

— Who minds himself alone,  
He wrongs his Father, and he cheats his Son:  
His Race in vain with Expectation wait,  
For in himself he buries his Estate.  
So vast his Gluttony, his Lust so wild,  
That he devours himself, yet is not fill'd;  
And whilst his Appetite proceeds to crave,  
He eats his Funeral, and he spends his Grave.

Mr. Creech.

The *Apostle* amongst the Reasons, obliging a Man to labour, sets down this as no inconsiderable one, "ἵνα ἔχη μετὰ δόξου τῷ χρεῖαν ἔχοντι, that he may have to give to him that needeth (e). And *Horace* could ask the covetous Man,

*Cur eget indignus quisquam, te divite?*

Why should any one undeservedly reduced to Poverty, continue to want whilst you abound?

Such great Churls are like Swine, good for nothing till they are dead. The old *Greek Epigram* rallies them very pleasantly, and represents them very justly.

Πλεῖστον φασὶ σε πάντες, ἐγὼ δὲ σε φημι πίνεσθαι,  
Χρήσις γὰρ πλεῖστον μάρτυς, Ἀπυλλόφρανης.  
Ἄν μελέχης αὐτῶν σὺ, σὰ γέννησαι ἂν ἢ φυλάτῃς  
Κληρονομοῖς, ἀπὸ νῦν γέννησαι ἀλλότεια.

Others may think you Rich, l'le say you're poor;  
None e'er enjoy'd but he who us'd his Store.  
Use it, and 'tis your own; but if you spare  
Till Death, you're only Steward for your Heir.

In my Opinion we ought not to judge more favourably of those useles Burthens to the Earth, who under the pretence of Religion, study only the Improvement of a fat Carcass, and in a lubberly Laziness, consume the Fruits of other Mens honest Labour. *Zozimus* the Historian, though in other Things as Profane as *Paganism* could make him, yet has pass'd a Censure Just enough, on some of these *Monastick Brethren*; they abstain (says he) (f) from lawful Wedlock, and fill City and Country with numerous swarms of Men, useful neither for War, nor for any other service of the Commonwealth. Yet they have pursued their Designs with so much Success, from those times to the present Age, that they have engross'd to themselves the greatest part of the Lands and Estates, and under Colour of Communicating all things with the Poor, have almost reduc'd all others to Poverty. To these we may add such begging Strollers, as they tell us are found amongst the *Chinese*, who fight with their Heads like Rams, till you part them with some piece of Bounty; or such as threaten to lay violent Hands on themselves, unless you give them what their Laziness craves (g). *Valerius Maximus* justly commends the Custom of the old *Massilians*, who as he reports the matter, 'Used to shut up their Gates against all such who made the Plea of Religion a Cloak, and Shelter for Idleness; thinking it highly worth their Care to remove by all the Methods of Discouragement, such a false and dronelike Superstition.

On the other Hand, those worthy Persons have been ever celebrated with the highest Praises, whose happy Parts and Study have invented new Arts, and Advantages of living; and then have not kept the Benefit of them to themselves, but communicated them freely to all Mankind. For as *Horace* observes,

*Paulum sepultæ distat inertie  
Celata virtus* L. 4. Od. 9.

Conceal'd Vertue or Worth, has little Advantage above the dullest Idleness.

*Virgil* has wisely placed in his *Elysian Paradise*.

*Inventas*—qui vitam excolere per artes,  
Quiq; sui memores alios fecere merendo (h).

*Æn.* 6.

Those who by Arts invented, Life improved,  
Or by deserving made themselves remember'd.

Sir William Temple.

(a) *Diodor. Sic.* l. 1. c. 77. *Ælian. Var. Hist.* l. 4. c. 1. mentions such a Law amongst the *Sardians*. (b) *Æn.* 6. (c) *Diog. Laert. in. Democrit.* (d) *Lib.* 4. (e) *Ephes.* IV. 28. (f) *L.* 6. 5. (g) Of whom see *Neuhof. in Legat.* (h) Those who instructed, and adorned Life by the invention of Arts. He means those Philosophers that advanced any useful Improvement in the World. *Servius ad loc.*

Thus *Antiquity* advanced many to Divine Honours, who had rendered Human Life more Commodious, by being the Authors of useful Discoveries, or of wise and wholesome Institutions (a). Hence the *Retirement* of great Men, whilst they are capable of serving their Country in Publick Employments, is an Humility, not altogether commendable. And therefore it was too high a strain of Philosophy in *Similis*, Chief Minister to the Emperour *Adrian*, when quitting all his Honours and Offices, and spending his last seven Years in the Country, he left this Sentence for his *Epitaph*. *Here lyes Similis, whose Life was to many Years long, but he lived only Seven.*

By these and the like Methods then may we promote the Good of others Indefinitely, and in General; or without proposing to serve particularly such or such a Person, but by laying as it were our Benefits in Common, and offering them to the Publick Use. But some on this Point will have the Curiosity to enquire, whether supposing a Man to find such a famous Secret, as what they call the *Philosopher's Stone*, the Art of changing with little trouble, the meanest Materials into the Richest Metals; whether I say, he ought to Communicate so rich a Discovery. And if any ask so nice a Question, we may venture to resolve it in the Negative, since were it possible to bring this grand Invention into ordinary Practice, Trade would be ruin'd, Inheritances and all kind of Riches would lose the good Force and Authority which they now bear in the World; and the whole Method and decent Orders of Life, would be changed into endless Tumults and Confusion.

III. We may be said to serve or benefit others, more *definitely* and expressly, when we confer on particular Persons, any thing that may be useful and profitable to them. And this we may often perform, not only without our own Loss and Prejudice, but likewise without giving our selves any Labour or Trouble. To deny, or to grudge another a Kindness of this easy Nature, is justly censured as most detestable Malice and Inhumanity. For such a *Power* by which we may oblige others, and not injure our selves, unless it be on due Occasion, put into Action and Effect, appears to be *Vain*, and only turns to the Reproach of him that has it. Hence it is usual to compare such unreasonable Churls to the Dog in the Fable, who refused that Provender to the Oxe's Hunger, which was so improper to satisfy his own. Therefore when we dispense this kind of Benefits, we regard only *Man* in general or

the Common Nature which we all enjoy. Thus *Aristotle*, when some reproved him for bestowing an Alms on a Vicious Person, wisely answer'd, *ὃ δὲ πρόπον, ἀλλὰ τὸ ἀνθρώπων ἡλέησα* (b). *I did not relieve the Manners, but the Man; or as some report it, ἐκ ἀνθρώπων, ἀλλὰ τῷ ἀνθρώπῳ. Not the Man, but Humanity.*

Thus supposing me to be unwilling to keep a thing any longer; either because I am overstock'd, or because the Possession of it is some way troublesome, how barbarous would it look in me, not rather to leave it safe and entire, that it might prove Serviceable to others, than to imbezil and destroy it. The Case indeed is otherwise in War, where we ruine what we cannot keep, lest the Enemy should employ it to our Prejudice.

In like manner we are to allow freely to others, those things which they call *res innocuæ utilitatis*, things of *Innocent Profit*, or of *Harmless Use*. Let us hear *Tully* settling this Point. *As to those things, says he, which Men ought to hold in Common, we may apply to many Cases, the Instructions which Ennius gives us in one Instance.*

*Ut Homo qui erranti comiter monstrat viam,  
Quasi lumen de suo lumine accendat, facit:  
Nihilominus ipsi luceat cum illi accenderit.*

To set a wandering Traveller in's way,  
Is but to light one Candle with another:  
Yet put not out your own; let that no less  
Shine clear, and not be Loser by its Bounty.

*From this one Example, we may sufficiently apprehend, that whatsoever we can part with to another, without any Damage to our selves, this it is our Duty to give, though to a Stranger. Of which kind are these cheap and common Benefits, to afford Water from a River, Fire from Fire, good Counsel (c) to a Man that is in doubt or distress. All these things are profitable to the Receiver, without any loss or trouble to the Giver. Wherefore we ought both to use them our selves, and likewise to exhibit them to the Common Good. But in regard, that particular Persons have not much to give, whereas the number of those that want it is almost Infinite, in exercising this Duty of Common Bounty, we must have a respect to Ennius's wise Caution, NIHILOMINUS IPSI LUCEAT; that is, we must keep enough to have the Means of being Liberal to our own Relations and Dependants (d).*

Of these Favours, then none is to be debar'd, unless such an one, as by his Abominable Villany, has rendred himself detestable to Mankind, and unworthy the Common Privileges

(a) Vid. *Diodor. Sic. l. 1. c. 13, 14, 15, &c. 43.* *Cicero de Fin. l. 3.* Nature incites, and drives us on to do good to as many as possible; especially by furnishing them with the Rules and Precepts of Wisdom. *Add. Alin. N. H. l. 25. c. 1. Seneca Epist. 6.* The chief Joy that I now take in Learning is, that I may hereafter teach; nor would any Discovery be pleasant to me, however excellent or useful, were I to know it only for my self. If Wisdom were offer'd to me upon this Condition, that I should keep it close, and never vent it abroad, I would reject the Proposal. *Sophocles Oedip. Tyrant.* To help his Fellows as far as he is able, is the noblest Employment of a Man. (b) *Diog. Laert. l. 5.* (c) *Plato (in Theagen.)* calls *Advice* ἱερόν τι, an holy Thing. (d) *Idem. Off. 3.* Amongst the Athenians, a Publick Curse was denounc'd against him, who should refuse to set a Man in the right way.

of his Nature. Thus *Plutarch* (a) reports of those false Accusers, who took away *Socrates*'s Life, 'That the *Athenians* thinking them 'the vilest Men that lived, express'd so high a 'Degree of Hatred and Aversion to them, that 'they would neither lend them Fire, nor so 'much as answer them when they spoke, nor 'bath themselves in the same Water which they 'had used, but would order their Servant to 'pour it away as Polluted and Defiled, till impatient of a State of Constant Reproach, the 'Wretches became their own Executioners. In the same City, when Men were condemn'd for some Heinous Crimes, it was held unlawful to let them *light fire*, to be in their Company at an Entertainment, or at any part of Religious Worship (b).

When *Seneca* says, *who will call it a Courtesy or Benefit, to give a piece of broken Bread, an Alms of small Money not worth keeping, or the favour of lighting a Fire*; he does by no means deny the Obligation that lies on all Men, freely to dispense their Kindnesses; he only shews how impudent and how base it would be for a Man to value himself on such petit Bounty, and to expect a return like some mighty Benefactor. For although these inconsiderable Offices prove sometimes of great Value and Consequence to the Receiver, yet the Cheapness of them in respect of the Giver, be they never so luckily timed, hinders them from being placed to Account (c).

IV. For the farther Illustration of these Offices of Humanity, *Plutarch* will do us good Service whilst he discourses so admirably on those old *Roman* Customs of leaving something always upon the Table, and of never putting out their Lamps. These Practices (says he) (d) serv'd us Lessons of Humanity. For neither is it lawful for us when we have satisfied our own Hunger, to throw away the residue of our Provision, nor to stop up, or any way to conceal a Spring, when we have drank enough of the Water our selves; nor to remove the Marks and Directions of sailing and journeying, after they have serv'd our own Occasions. But all these things are to be left behind us, that they may afterwards prove useful to other Men. In like manner, it is a very unbecoming Niggardliness to put out a Candle, when we have made what use of it we intended; but we ought to leave it, that those who come after us may have the Benefit of its Light. Nay, were it possible to be effected,

we ought to lend others our Sight, and our Hearing, and even our Wisdom and Courage, to employ for their Service, whilst going to our Repose, we for sometime lose the use of them our selves (e).

*Prometheus*, in *Lucian*, chargeth the Gods with Envy, and Narrowness of Spirit, that they should resent so highly his Action of Communicating Fire to Mankind. 'Since this could 'not be the less for being made Publick, nor 'be it self extinguish'd by lending its Light to 'others.

To the same Head belongs the use of running Water, for the ordinary Occasions of Life. For though Rivers may be the Property of whole States, or of private Persons, yet Humanity enjoyns us to allow the Privilege of drinking, or of drawing for other Uses to any one, not actually engag'd in Hostility against us. We think the Point is settled with more Clearness this way, than if we should say with *Grotius*, that the River, as a River, is the peculiar Right of such a People, but as running Water it remains in Common. For it seems less agreeable to call the same thing in different Respects, Proper and Common, than to affirm that the use of a thing ought by the Laws of Humanity to lye freely open to all, though the thing it self may be really a Propriety, or Peculiar Now to impute this as a Loan, which would otherwise be lost, and will be immediately repair'd by the Springs, would look most ridiculously Sordid (f). Thus *Latona* argues with the *Lycian Clowns* in *Ovid Metam.* VI.

(rum est.

*Quid prohibetis aquas? usus communis aqua.  
Nec solem proprium natura nec aera fecit;  
Nec tenues undas: ad publica munera veni.*

What Rudeness Water for my use denies,  
Whose endless store the Common World  
(supplies?

Nor Light nor Air did Heaven create for one;  
Nor gentle Streams: I crave a Publick Boon.

But though the use of Water is Common, yet the Possession of them may, no doubt be turn'd into a Propriety. On this Account we find the *Israelites* offering to pay for what Water they or their Cattle should drink, in passing through the Country of *Edom* (g). However, if the Waters are in great plenty, what the Current throws out at random, we

(a) *De Invid. & Odio.* (b) *Vid. Orat. Dinarch. Contra Aristogit. Add. Sophocl. Oedip. Tyr. v. 44, &c. Euripid. Orest. v. 46, & 513.* (c) *Terence. Andr.* 'Tis by no means the part of a generous Man, to require us to acknowledge that as an Obligation, which indeed is none. *Hor. l. 1. Epist. 7.* ——— *Quo more pyris vesci Calaber jubet hospes,*

*Vescere Jodes*

*Jam satis est. At tu quantumvis tolle. Benigne  
Non inuisa feret pueris manuscula parvis.*

*Tam teneor dono quam si dimittar onustus.*

*Ut libet hac porcis hodie comedenda relinques.*

(d) *Quest. Sympos. L. VII. Q. 4.* (e) *Idem. Quest. Rom.* Or doth this Custom teach us, that we ought not to lose any of those things which we have in Plenty, as Fire, Water, or other Necessaries; but when we have serv'd our own Occasions, to leave them for the use of others.

*Mercury* of all the Gods resents it most,

It is one of *Pythagoras*'s Aphorisms in *Diog. Laert.* Not to cut down nor to hurt a Tree capable of bearing Fruit.

(f) *Plautus Trucul.*

*Destituro qui aquam derivat sibi nisi,*

*Derivetur tamen omnis ea aqua aequat in mars.*

*Ovid. Quis vetet adposito lumen de lumine sumi;*

*Atque carum vastas in mare servet aquas.*

(g) *Numbers XX. 19.* compared with *2 Chron. XXXII. 3.* See likewise *Genes. XXVI. 20, 21, 22.*

ought freely to afford to all; so far as our Indulgence brings no Trouble or Inconvenience on our selves.

We see then, that Duties of this kind do originally belong to the Law of Nature; yet 'tis not unusual to have many of them farther confirm'd and enjoy'd by Civil Constitutions. It may not be improper to set down an Instance or two. *Solon's Law* about Wells we find thus recorded by *Plutarch*. *Because the Country hath but few Rivers, Lakes, or large Springs, and most use Wells, which have been dug, he made a Law, that where there was a Publick Well within four Furlongs, all should draw at that; but when it was farther off, they should search after a private Well. And if upon digging ten Fathom deep they could find no Water, that then they should fetch from their Neighbours to the Quantity of about ten Gallons every day. For he thought it prudent to make Provision against Want; not to encourage Idleness.* 'The same Author tells us, that *Plato* in his Laws, permits none to borrow Water from their Neighbours, but such as having first dug in their own Ground as deep as the Clay, could find no Spring. *For he would have those only come in for a Share with others, who could not provide for themselves.* And the *Spartan* Legislator *Lycurgus*, allows a Person in Necessity to make use of the Servant, the Beast, and even the Food of another Man (a).

V. Amongst the same Duties of Humanity, *Grotius*, L. 2. C. 2. 'Reckons the granting free Passage through any Lands, Rivers, or parts of the Sea, which have fallen under our Propriety, if any have just Occasion to desire it; as suppose when any People expelled out of their own Country, are going to find a new Seat; or when they desire to trade and correspond with a Nation, which we divide from them; or when they are marching to recover what is their own in a just War; or when, being at a Distance from home, they are hastening to the Defence of their Country, at present under some extraordinary Danger or Distress. But we ought to allow this Point a fuller Discussion. Thus much then is clear beyond all Doubt, that in case the Request be made by a small Number of Men unarm'd, and willing to live at their

own Charge, Passage is to be granted them, provided they ask it upon an honest and necessary Account. But the Case of great Armies is not so easily to be decided; since the admitting of them may create just Fears and Suspicions in us, not only on their own Account, but in respect of the People, whither they are bound. *Grotius* maintains, that notwithstanding any such Fear, their Petition is to be complied with for this Reason; 'Cause in that grand Division of things, by which the Primitive Community was abolished, and distinct Proprieties introduced, all may be suppos'd to have reserv'd to themselves, so far the use of each other's Possessions, as should prove serviceable to their Wants, and not injurious to the Owner; and that therefore when any stand in need of such a Use, they have a Right to demand it. If any dislike this Argument, a plainer Reason may be thus offer'd, that the Law of Humanity obliges every Man to allow another the harmless use of his Goods or Possessions; which upon urgent Necessity, may be challeng'd in a forcible manner, in as much as the Denial of it is presum'd to spring, either from Groundless Diffidence, or from wicked Perverseness of Mind. Yet in such Cases, Leave is first to be ask'd fairly and peaceably, and Violence must not force a Passage whilst it is yet uncertain, whether the Lord of the Place grounds his Refusal on any just Reason, or acts only out of a Barbarous and Inhospitable Temper. When *Cimon* with his Troops broke through the Territories of the *Corinthians*, without giving Notice to the State, they gave him that handsome Reproof, *κὶ γὰρ δούραν κώσαντο ἀλλοτρίαν, ἐκ εισέναι πείτερον ἢ τὸν κύριον καλεῖσαι* (b). That when a Man knock'd at another's Door, he forbore in Civility to enter, till the Master had him come in (c).

Those who take the same side of the Question with *Grotius*, add, that a Fear upon account of the Numbers of those who would enter, doth not seem a sufficient Reason to deny Passage; Since a Multitude as well as a few Persons may inoffensively use this Privilege, and not trespass against the Law of Nature. However, the same Law impowers us to take security of the Men, whom we

(a) *Xenophon de Rep. Lac. Add. Levit. XIX. 9, 10. XXIII. 22. Deuteron. XXIV. 19, 20, 21. XXIII. 24, 25. Joseph. Antiq. IV. 8. Comp. with Matth. XII. 1. Plato LL. lib. 8. A Stranger travelling alone, or with one Companion only ought to have the Liberty to taste the Fruit which he meets with in his way, by the common Law of Hospitality. Add. Lex Burgund. Tit. 28. l. 1. It. Selden. l. VI. c. 6. Phocylides. Ἄσπερον εἰς οἶκον δεῖξαι, &c.*

Receive the Banish'd, and conduct the Blind.  
And let the Ship-wrack'd Sailor move thy mind,  
For Sailing is uncertain: kindly run

To lift the Weak; support a Wretch undone.  
Pity thy Foe, and save his Sinking Beast;  
Direct the Stranger, succour the Distress'd, &c.

*Add. l. 10. D. d. incendio ruina. Quintil. Declam. V. GOD hath made us for mutual Support and Succour; and that each Man should endeavour to defend others from what he fears himself. This is not properly Love, or any Personal Esteem and Reverence; but a provident Fear of the like Accidents, and a Religious Apprehension of common Dangers. When we relieve a famish'd Wretch, we do but as it were pity our selves. Hence in a Siege we lay our Provision in common. Hence in a Distress at Sea, the Food of one Passenger hath supported the whole Company. And hence too ariseth, that Affection which puts us on covering with Earth, the dead Body of a Stranger; and how hasty soever our Journey be, we never fail stopping, to perform in some sort or other, this pious Office. (b) *Plutarch in Cim.* (c) And thus *Telephus* in *Dichys Cretens* rightly accuseth the Greeks, that professing to come as Friends, they should give no notice of their Visit. *Masanissa*, in *Livy*, l. 84. c. 62. pursuing *Aphines*, who had left *Numidia*, and carried away many of the Subjects, and was now wandering near *Cirene*, begg'd leave of the *Carthaginians*, in an humble manner to pass through their Territories.*

admit,

admit, to engage them to do no Damage, or to repair what they do. For the common Proverb tells us, that *Opportunity makes the Thief*; and he is a very unwise Master of a House who lets in so many Strangers, as to be turn'd out himself. Nor are there wanting Instances of several Cities, which have lost their Liberty, by unwarily receiving too great a number of Armed Guests. And what should make us more Cautious is, that few Generals deserve the *Encomium*, which Tully (a) on this Score hath given of Pompey the Great, *that he march'd his Legions through Asia, in such a manner, as to keep not only the Hands, but even the Feet of so vast an Army, from committing the least Trespass, on any peaceful and friendly Person*. When the *Helvetians*, or *Suisses* in the *Gallick War*, sent Deputies to *Cæsar*, to beg a Passage through the *Roman Province*, we find *Cæsar* rejecting their Petition, on this very good Account, 'He remembered how the same People had formerly defeated and kill'd *L. Cassius* the *Roman Consul*, and forced his Soldiers to pass ignominiously *under the Yoke*; and he imagined it scarce possible, that Men who were Enemies in their Hearts, should pursue their way fairly, and without launching out into any Injury or Disorder (b).

Many ways of taking *Caution* or *Security* in this Case are propos'd; as first, that they shall pass through without their Arms; but 'tis very hard to get this Condition accepted of by Military Men; ask them *to part with their Weapons*, and they take it as if you desired *leave to cut off their Hands* (c). It may be a more proper Expedient, that the Forces make their Passage in small and separate Bodies, or that Hostages be given for their Peaceable Behaviour. For what some propose, that those who grant the Passage, shall hire sufficient Guards at the Charges of those who desire it, would take up too much Money as well as too much Time.

It is farther said on the same side, that it will not justify us in denying this Favour to alledge, that Passage may be had elsewhere, upon taking a larger Circuit; because should this Pretence always be used, the Request would never be granted, though in the most Reasonable Case, and so the *Right* would utterly cease and come to nothing. It is sufficient therefore, in their Opinion, if without any Fraudulent Design, Passage be there desired, where it lies most ready and convenient.

Some there are who maintain the Right of *free Passage*, on this Argument, that *High-*

*ways* are common to all Mankind, and do not come under the Propriety of those, in whose Territories they lie. As if at the first Creation of the World, the Roads had been chalk'd out immediately by the Divine Hand, and left as Universal Benefits. A Notion too Ridiculous to deserve a serious Refutation.

On the other side there have been good Arguments offer'd, to evince that this *Liberty of Passage* is not owing by a meer Natural Right, without any Compact or Concession intervening; especially when the Case is, that an Enemy to some of our Neighbouring States desires leave to carry his Troops against them, through our Territories. For it seems to be part of the Duty, which we owe to our Neighbours, especially such as have been kind and friendly, not to suffer any Hostile Power to march along our Country, to their Prejudice, provided we can hinder the Design with no great Inconvenience to our selves (d). And it is indeed one express Article in most Leagues, that neither Party shall grant Passage to the Foes of the other (e). Nor will it solve the Difficulty, to say that we ought to allow *Passage*, if the War which is undertaken be *just*; not if it be *unjust*. For there is commonly much time and much Thought, requir'd to make such a Judgment; and besides it is look'd upon as a piece of Rashness, to thrust in our Arbitration between two armed Parties, without their desiring it, and to constitute our selves Judges of so great a Cause. But farther, supposing we grant the Request, it is very possible, we may by this means fix the Seat of the War in our own Country. For what if the other Party should meet and stop his Adversary, whilst yet in our Borders? And I do not see how we could blame him for this Proceeding, since he is by no means oblig'd to receive the Foe into his own Dominions, on purpose to rid us of the Burthen and of the Trouble. It seems therefore the safest way of Acting in this Case, if we can without any considerable Prejudice to our own Affairs, to deny the Enemy Passage, and actually to oppose him, if he endeavour to force it without our Consent. But if we are either too weak to hinder his Progress, or must on this Score engage in a dangerous War; the Plea of Necessity will fairly justify us to our Neighbour (f).

*Ziegler* in his Observations on *Grotius* asserts, that in this Case, no one can *Naturally* have a Right of passing through the Lands of another, but all such Right must be obtain'd by Compact; just as no Man has the Liberty

(a) *Pro Lege Manil.* (b) *Cæsar Comment. de B. G. l. 1.* (c) *Florus, l. 3. c. 18.* (d) And therefore 'twas unreasonable for the *Romans* in *Livy, B. 21. c. 20.* to desire the *Gauls*, that they would not grant the *Carthaginians* a free Passage into *Italy*, and they should rather turn the War upon themselves, and expose their own Country to be wasted for the Security of another, to which they had no Obligation. (e) See the League of the *Romans* with the *Carthaginians* in *Livy, B. 38. c. 38.* and with the *Ætoliens*, *Polyb. Excerpt. Legat. 28.* (f) 'Tis remarkable what *Plutarch* reports in his Life of *Lysander*, that when the City of *Athens* was oppress'd by the Thirty Tyrants, the *Thebans* pass'd a Law, that whoever should carry Arms through *Bœotia*, against the *Athenian* Tyrants, should be free from the Notice of the *Theban* Eyes or Ears.

of going through the Fields of a private Person, unless such a *Service* is imposed on the Fields, by Virtue of their particular *Tenure*. He says this will especially hold good, when we have just reason to apprehend Danger from such a Concession. And this Point too he illustrates by a Parallel Case between private Persons. You may have a Right of making a Thorough-fare of *Titius's* Yard; but if you appear there often with Fire and Torches, so as to endanger the Buildings, *Titius's* Fear cannot indeed, in this Case, absolutely take away your Right; but he may hinder you from going in so dangerous a manner, and consequently may abridge your Privilege, tho' he cannot annul it. But as to this way of arguing we must observe, that in the Question now before us, we do not by the Liberty of Passage understand any settled and constant *Service*, but only an Occasional and as it were a Momentary, use of another's Territories or Possessions, to which we are driven, either by Necessity, or by the Prospect of some extraordinary Advantage, when it would be Inhumanity in the other Party, not to comply with our Wants, and with our Request.

*Examples*, which are of so great weight in determining other Questions, have little Force as to the Decision of this. For generally as People have been stronger or weaker, they have required *Passage* with Modesty, or with Confidence, and have in like manner granted, or refused it to others. '*Agessilaus* in *Plutarch*, when the *Trallians* (a) demanded an hundred Talents, and as many Women for the Price of his Passage thro' their Country, ask'd them pleasantly, *Why the Commissioners were not there ready at hand to receive them*; and without farther delay march'd forward, encounter'd and routed them. He sent to the King of *Macedon*, to desire the same Favour, who answering, that he would take time to consider of it; let him consider of it, says *Agessilaus*, and in the mean while we will go forward. The *Macedonian* admiring, and fearing such Spirit and Resolution, humbly requested him to pass at his pleasure.

But the chief Example produced on this Point, is that of the *Israelites*, when desiring to pass through the *Edomites* Country, they voluntarily offer'd the following Conditions. 'That they would march along the King's High-way, without turning into the private Fields or Vineyards, and would immediately tender Money for every thing of theirs which they should have Occasion to use. The *Edomites* rejecting these Terms, and endeavouring in a Hostile Manner to hinder their Passage, they did not think it justifiable to obtain it by Force, but took a large Compass round about their Borders; and when at length they were oblig'd just to touch on

some part of their Coasts, they did not take occasion from the former most inhuman Treatment, to commit any Violence or Trespas in their March (b). As to the same People, when *Sihon* King of the *Amorites*, not only refused them the like Privilege, but came out Arm'd to oppose them, probably before they had reach'd his Coasts, and therefore set upon them without any Reason or Provocation, we find he was overthrown in the Combat; but he seems to have suffer'd this Fate, not so much for denying them Passage, as for rashly encountering them upon so little Colour or Pretence. For otherwise it would have seem'd too hard, to punish the Neglect of a piece of Humanity with the Ruine of a whole Nation; since it appears that these *Amorites* were seated without the Borders of the *Land of Promise*, the Inhabitants of which God Almighty had by a special Decree, adjudg'd to utter Extirpation and Destruction. 'Nor will it alter the Case to say with some, that the *Amorites* here to make their Fear justifiable, ought not to have rejected so fair Conditions, but should have immediately treated about accepting and regulating them; but that now by refusing all peaceable Conference and Commerce, they had rendred themselves liable to be dealt with, as the most unjust and most unfaithful of Men: For by the common Right and Privilege of Mankind, a Breach of the Law of *Humanity*, does not deserve the utmost Rigour, and Extremity of Proceeding.

VI. Amongst these Matters of *harmless Profit*, which Nature engages us to allow freely to all Men, *Grotius* reckons the permitting Goods and Merchandise, to be carried thro' our Dominions. *Ziegler* accuses *Grotius* of a Contradiction on this Point, whilst in one place he says, That no one can have a Right of hindering any Nation from maintaining Traffick and Commerce with any other Nation that is Remote from them; and yet in another place of the same Chapter he grants, That it is lawful for one Nation to contract with another, for all the Goods of one kind not to be found elsewhere; so that no other People shall have the Liberty of buying them. But now by this Contract of Ingrossment, it is plain other Nations are thus far hindered from trading in the same Country. Yet it is easy to bring off *Grotius*, by saying, that in the former Passage by hindering, he understands not hindering them by Virtue of some precedent Bargain or Covenant, but hindering them by open Methods of Violence. Yet on the whole it must be confess'd, that he has not brought the present Question to a full and clear Decision. For truly speaking, the Law of Humanity does not seem to oblige us to grant Passage to any other Goods, except such as are absolutely Necessary for the support of their Life, to

(a) Or the *Troades* as we find them called in the *Lacon. Apothegm.* of the same Author.

(b) See *Deuteron.* XI. 12, 3, 4. *Numb.* XX. 14.

whom they are thus convey'd. But as for those who import such Commodities, as improve and encourage Luxury; or from which those who deal in them do not seek any Supply of real Wants, but rather an Excessive Gain, and an Indulgence to covetous Desires, I do not see what Right they have to demand Passage through our Coasts for this kind of Traffick, or on what Pretensions they can claim such a Privilege as their *Due*. I confess, there scarce appears any probable Colour on which we should deny unarmed Vessels the Liberty of an open Sea, which we are Masters of, whilst they are bound to a third People, with whom we are at Peace. And to this Point, chiefly relate all those Authorities and Testimonies of Authors usually produced in the main Dispute. But thus much we may reasonably do, we may stop the Vessel in such a Case, and force them to leave their *Cargo* in our Territories, that we may have the Benefit of the first Purchase. For besides that the frequent Passage of Strangers may, some time, create Danger, or at least may give Suspicions to our State; what should hinder us from deriving that Profit on our own People, which would otherwise be made by Foreigners; since in matters of Favour, we ought constantly to prefer the former to the latter. And though in Strictness it be indeed no *Damage* to us, if we permit the free Transportation of these Commodities, and tho' the third Party who receives them, does not properly *injure* us by making a Gain, which 'twas in our Power to have secured before him; yet since he has no Right of excluding us from such a Gain, why ought we not to love our selves best, and to be before-hand with him in the Advantage? which we shall be, if whilst we lye thus in the midst between two People, we take Care not to let such Goods pass from one to the other, without going first through our own Hands. And unless this be admitted for fair and equitable Dealing, I see not on what Grounds we can defend those *Staples*, and other Rights which we find in some Countries, by Virtue of which Foreign Commodities are stoppt and carried to the publick Place of Sale; and Strangers are permitted to Traffick, not immediately betwixt themselves, but at second-hand with the Natural Subjects.

VII. From what has been said, there may well arise this farther *Question*, whether the Law of Humanity will permit us to require *Toll*, or *Custom* for Goods transported through any Land, River, or narrow Sea, subject to our Dominion. For at first sight it seems Inhuman, not to grant such a Privilege without *Price*, which the Law before-mention'd, allows freely to all Mankind.

Now why *Custom* should be imposed on Goods carried over *Land*, there is this manifest Reason, because such heavy Conveyance sometimes trespasses on the Fields, adjoining to the

Common Roads, and because the Sovereign of the Country is put to Charge, both in repairing the Ways, and in securing the Passengers. And farther, if it be necessary to erect Bridges for this purpose, it is plain in Equity that the Sovereign may set up a Toll to reimburse himself for those Expences; and at the same time, he who does require such Toll, is oblig'd not only to let the Bridges stand, but likewise to keep them in constant Repair. *Grotius* on the 1 *Kings* X. 19. observes, that a great Toll was paid to *Solomon* for the Horses brought thro' *Judea* from *Egypt*, to the *Syrians*, or to the *Hittites*; and thus too no *Frankincense* was transported without *Custom*. The like *Impositions* are reasonable in those Places, where by the Industry of the Natives, the Roads are rendred more short or more easy; as by the filling up of Pits and Ditches, or by other useful Labours, for the Convenience of Passengers and of Goods. Thus of old, had any one cut through the *Isthmus*, and join'd the *Ionian* and *Agean* Seas, he might fairly have required some moderate Toll of the Merchants and Sailors; which they would not have been unwilling to give, the Voyage being now perform'd with more Expedition and more Security. And though this Project was never set on foot, *Strabo* informs us, 'That the Merchants of *Asia* and *Italy*, rather than pass out of one of these Seas into the other, by the tedious and dangerous Coast of *Malca*, were extremely well satisfy'd to put in at *Corinth*, and so carry their Effects over Land; notwithstanding the Duties to be paid there for all Imported or Exported Goods. Another Reason which some bring to assert the Equity of Impositions on Land-Carriage, is this, that by so perpetual Confluence of Strangers, the price of Provisions is exceedingly rais'd. To which we may add in Conclusion, that a Sovereign, on this Account, requires some Acknowledgment from the Goods of *Foreigners*, because he suffers them by passing through his Territories, to receive such Goods *immediately* from a third People; whereas should he erect a *Staple*, the Gain and Benefit would be fairly intercepted by his own Subjects.

As to *River* Tolls, this amongst other Arguments, may be offer'd to justify them, that since the Water by continually preying on the adjoining Lands, and sometimes by overflowing them, is the Cause of no inconsiderable Damage, for the Prevention of which it is often necessary to secure them with Banks and other *Works* of great Charge and Labour, it seems by no means unreasonable, that towards the making up of these Losses, some moderate Consideration should be allowed by those who gain Advantage by the River, without being concern'd in its ordinary Mischiefs. It is true in the Capitularies of *Charles* the Great (a), one Order forbids to take Toll in those Rivers,

(a) Lib. 3. c. 12. *Add. Lex Longobard. Lib. 3. Tit. 1. Leg. 21.*

*Ubi nullum adjutorium præstatur itinerantibus, where no Assistance is given to the Passengers;* but this Constitution seems to have been made in Favour of the Natural Subjects, and there is no necessity of extending it to Foreigners.

It is a more difficult Point, to state the Equity of Tolls demanded in Seas. This indeed is beyond Dispute, that the Sovereign of a Sea may impose Duties answerable to the Charge, which he bestows about it; as for the setting up of Marks near Rocks and Quick-sands, for the keeping of Fires to direct Vessels in the Night, or for scowring the Coasts of Pirates. But whatever is demanded farther, than upon these Accounts, will not admit of so good Defence; in as much as the Passage of *unarmed Ships* is plainly one of those harmless Benefits which *Humanity* lays in Common. Yet where such Pretensions are made, the Pleas which support them do not seem altogether absurd; as that no one ought to be blamed for making the Best of his Dominions, and for raising such Profits from his Waters as others do from their Land. That, since he who enters the Territories of another, is for that time his *Subject*, we may compel the Ships of Foreigners, whilst they pass through our Sea, to let our Subjects have the first Purchase of their Goods; and that if we give up this Claim, we may require some reasonable Consideration in *Lieu* of it. That although we cannot perhaps set up a *Staple* in such a Sea, because the third Nation whither those Ships are bound, may not have the use of Sailing, and therefore cannot fetch the Goods from us, neither have we, it may be, the Liberty of carrying them thither; yet it ought not to be thought hard if we put in for some little Share in the Gain, since we permit Strangers to sail through our Water, with so much Expedition and Convenience. But upon the whole, it must be confessed, that since this Toll by *Sea* is, for I know not what Reason, accounted more Odious than what is demanded by *Land*, it ought to be exercised with great Prudence and Moderation, and without the least Appearance of Extortion or Avarice. And after all, there may, 'tis very likely, be a Sovereign (or Two) who shall claim an Exemption from the common Duty, and build his Pretensions on good Reason; as that his Dominions bordering on the same Sea, enclose it so at both ends, as to give him a fair Title to its use; or that on such a use of it, his Commerce with Foreign Nations, and consequently the Good and Safety of his own People almost entirely depends. For in these Cases it would be unreasonable, that to obtain the Liberty of a harmless Passage by Sea, he should be reduc'd to a kind of Tributary Condition; nor will any one be much inclin'd to censure him, if upon so odious a Provocation he endeavour by any possible Means,

to free himself from such Exaction and Oppression. Nor will it render his Resentments less justifiable, to alledge on the other side, that other Nations have agreed to pay the Imposition: because their Support and Safety is not so immediately concern'd in the use of such a Sea, and therefore they may afford to allow the Sovereign of the Sea a share in their Gains, without Grudging or Repining. As the Case is very different, whether a Man desires a Way through my Grounds, because without this Privilege, he would be as it were excluded from the World, and confined to Solitude, or because he could not otherwise carry off the Fruit of his own Land; and whether he makes the same Demand, purely to shorten his Passage, and imposes a Burthen on my Estate, not to relieve his own Necessity, but to promote his Convenience and Ease.

They tell us, that the King of *Abyssinia*, or *Ethiopia* pretended of old to a certain Tribute from *Egypt*; upon account that the River *Nile*, to which that Country owes its fruitfulness, took its rise in his Dominions; and that afterwards when the *Turks* had seiz'd on *Egypt*, and used great Severities towards the *Christians*, the *Abyssinian* Prince made an attempt to have turn'd the Channel of the *Nile* into the Red-Sea, but without effect. These Pretensions and these Proceedings, which bear some Relation to the Case before us, we cannot but look upon as unjust.

Some would determine this whole Business by the means of Compact and Covenant, which Method we think not to be altogether accurate and decisive. For it remains still in Question, what was the original reason of these Covenants; and whether the Master of the Sea may deny passage to others, until such time as they shall enter into the same Articles of Agreement. Though indeed when such a Covenant has once pass'd without any Natural Flaw or Weakness, which might render it invalid, both Parties are oblig'd strictly to observe it; so that the People who use the *Passage* desired, ought on no account to deny the settled *Imposition*, and the Master of the Sea shall not raise the Duty higher, than what has been thus establish'd by joint Consent (a). *Nicephorus* (\*) reports, that the *Caliph* of *Egypt* obtain'd by Covenant of the Emperour of *Constantinople*, Licence for the Merchants of his Country to pass through the *Thracian Bosphorus*. Which Privilege was therefore so easily granted at first, because it seem'd a matter of little Importance. But when in course of time it appear'd to be a Point of very considerable Consequence, it was found impossible to revoke the *Grant*, after it had been by long Custom enforced and establish'd.

But in Case the opposite Shore is possess'd by another People, so that the Sea is either held in common by both, or else as a middle Point divides the Confines of the two Dominions,

(a) *Add. Bacler. ad Groc. l. c. 2. f. 14.* (\*) *Lib. 4.*



he cannot at present hire Lodgings for his Money. And therefore in Ancient Times, when Publick Inns either were not in use, or else were accounted Scandalous, and unworthy to receive a good and vertuous Guest, the Necessity of this Duty was greater and more strictly binding than it is now in most parts of *Europe*, where we meet with so many of these Houses, exactly fitted and furnisht, not only for all Use and Convenience, but even for Ornament and Splendor.

Now although *Inhospitality* be commonly, and for the most part justly censured, as the true mark of a Savage and Inhumane Temper, yet the Point will now and then bear a Dispute, especially as to the Case of those who wander into Foreign Countries, purely on the account of Curiosity; whether or no such Persons may claim free Admission by any Natural Right. The *Spartans* to justify themselves in driving all Strangers from their Coasts, thought this one Reason sufficient, lest the Converse of Strangers should introduce a Corruption, or a Contempt of their receiv'd Manners and Customs (a). In answer to which it is well urged by some, that what we practice at home is not always the best, nor what others do abroad the worst; if then a *Foreign Custom* be really better, it is absurd to despise, and to reject it on the score of its being *Foreign*. That this is the Temper and Property of Curs to fawn on *Dome-stick Slaves*, and to bark at the most noble and excellent of *Strangers*. That those Men usually contract a Roughness and Clownishness of Behaviour, who never breath out of their native Air, and see no more of the World than what passes under their Nose (b). As to the Question before us then, thus much is certain, that if our People are kindly receiv'd by any Nation abroad, we ought to entertain the Men of that Nation with an equal return of Civility. As on the other hand, those who drive us from their Coasts, cannot without the most stupid impudence, petition us for a more courteous Treatment. But supposing that any one Nation contented with what it finds at home, utterly refrains from all Foreign Travel, it does not appear what Obligation such a State can have to admit those who would visit it, without necessary or weighty Cause. The Case is somewhat like that of a private Man, who in his House or Gardens, possesses some rare Curiosity, or other valuable Sight; such an one does not apprehend himself, tied freely to let

in all Spectators; but whoever is thus gratified either rewards, or at least acknowledges, it as an extraordinary Favour. And this seems the more reasonable, because the Grounds of prudent Caution and Suspicion are so numerous, that we may easily make use of one or other of them, to justify us in keeping such Persons at a distance, as would too curiously examine and pry into our Affairs.

Therefore the *Spanish Casuist* (c) has not made many Converts by the Reasons he lays down to justify his Countrymen in their Proceedings against the *Indians*. The first Right on which he founds their Title, is that of Natural Society and Communication, which he draws up into this Assertion, *the Spaniards had a Right of travelling and of living in those Countries, provided they did the Natives no Harm, and from this Privilege none could restrain them*. In reply to which it is well urged, that this *Natural Communication* does not hinder a just Proprietor from communicating his Goods by such Methods, and upon such Considerations as he finds necessary. And farther, that it seems very Gross and Absurd, to allow others an Indefinite or unlimited Right of travelling and of living amongst us, without reflecting either on their Number, or on the design of their coming; whether supposing them to pass harmlessly, they intend only to take a short view of our Country, or whether they claim a Right of fixing themselves with us for ever. And that he who will stretch the Duty of Hospitality to this extravagant Extent, ought to be rejected as a most unreasonable, and most improper Judge of the Case. The Second Principle he lays down is, *that it was lawful for the Spaniards to traffick with those People, and the Sovereigns on either side could not hinder their Subjects from such Intercourse*. But here Men of more sober and moderate Judgments, confess themselves unable to find out any such liberty of Trading, as Princes may not abridge their Subjects of, for the good of the Commonwealth; much less such as shall force and obtrude Strangers upon us, whether we will or no. His third Reason is this. *If the Indians had amongst them any Rights and Privileges allow'd in Common to Natives and Foreigners, in these they ought not to hinder the Spaniards from their Share; for Example, if other Strangers were permitted to dig Gold, the Spaniards might fairly claim the same Liberty*.

amongst the Crimes which brought *Deucalion's Flood* upon the World we find these which follow. They practis'd all kinds of Injustice; for they neither kept their Oaths nor receiv'd Strangers, nor gave a patient Hearing to the request of the Miserable. Of the Humanity which the *Indians* shew to Strangers, See *Diod. Sic.* l. 2. c. 42. *Add. Plato de L. L.* l. 12. *Ælian* (V. H. l. 4. c. 1.) recites this Law of the *Lucanians*, if at Sun-set, a Stranger arrives, and desires Reception in a House; in case the Master refuse to admit him, let him be punish'd as an Offender against the Laws of Hospitality. *Add. Lex Burgund.* Tit. 30. f. 1. *Helmoldus* (in *Cron. Slav.* l. 1. c. 82.) reports of the ancient *Slavi*, If a Man be discover'd to have denied lodging to a Stranger, (a Rudeness which seldom happens amongst them) the People joyn in a Body to pull down his House, and to ruin his Estate; which way of proceeding is permitted by the Laws. *Philo. Jud.* in his Life of *Moses*, says, that Strangers have the same Rights as Suppliants. (a) The *Chinese* have much the same Constitutions in reference to Strangers. *Vid. Neuhof. Gen. Descript. Chin.* c. 1. (b) In *Livy* (l. 41. c. 24.) The Decree of the *Achaans*, by which they forbid the *Macedonians* to enter their Territories, is call'd *exsecrabilis velut desertio juris Humani*, as it were a detestable Desertion of the Law of Human Nature. 'Tis a saying of *Periander* in *Plutarch* (*Sympos*) I commend those States and those Magistrates, which first give Audience to Strangers, and then to their own Subjects. (c) *Franciscus a Victoris* *Reliq.* 5. f. 3.

On which Point some have judged it worth considering, first, whether those Privileges were granted to others, by way of *Debt*, or by way of free Gift and Favour. For of those things which Men cannot claim from me as *strictly* their *Due*, I may be more liberal to one than to another. And in the next place, whether these new Comers will behave themselves with the same Justice and Modesty as the former, who made use of our Goods without our Prejudice or Inconvenience; and whether these late Guests propose no other End of their Visit. Suppose I give one or two of my Neighbours leave to come into my Garden, as often as they please, and to gratifie themselves with tasting my Fruit; it may be, there breaks in afterwards a rude He&tor, who is for tearing up my Trees, and would kick me out, to plant his own Body in my proper Land; my Case is bad if I may not be allow'd to shut the Gate against such an Intruding Villain (a). But let others settle this Controversy. As to our main Question, it is look'd on by most as the safest way of resolving it, to say, that it is left in the power of all States, to take such Measures about the Admission of Strangers, as they think convenient; those being ever excepted, who are driven on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion. Not but that it is barbarous to treat in the same cruel manner, those who visit us as Friends, and those who assault us as Enemies (b). The free Admission of Ambassadors, is deduced from another Head (c).

But having once admitted Strangers and Foreign Guests, to turn them out again, unless upon *good Reason*, is usually censured as some Degree at least of Inhumanity (d). From the number of these *good Reasons*, St. *Ambrose* and with him *Grotius* (e) excludes the Case of Grievous Scarcity and Dearth afflicting a People. To whose Judgment we subscribe with this Supposition, that there are still Means left, though perhaps very hard and pressing, to save both Natives and Strangers, and if the latter have been formerly, or may be hereafter useful and serviceable to us; and of such only St. *Ambrose* speaks. But in case we are not *obliged* to the Foreigners amongst us, and there be no Necessity of their perishing, should we send them off, there seems to be no reason why the Subject on their Account, should be content to struggle with a Famine (f).

X. In the same Class of Duties, *Grotius* (g) places the allowing of a perpetual Habitation

to Strangers, who being driven by Violence out of their own Country, are forced to seek out a new Seat, provided still, that they submit to the establish'd Government, and behave themselves with such Prudence and Decency, as to administer no Occasion to Factions and Seditious (h).

Humanity, it is true, engages us to receive a small number of Men expell'd their Home; not for their own Demerit and Crime; especially if they are eminent for Wealth or Industry, and not likely to disturb our Religion, or our Constitution. And thus we see many States to have risen to a great and flourishing Height, chiefly by granting Licence to Foreigners to come and settle amongst them; whereas others have been reduced to a low Condition, by refusing this Method of Improvement.

But no one will be fond of asserting, that we ought in the same manner to receive and incorporate a great Multitude, especially if now in Arms; or naturally addicted to War; since it is scarce possible, but that their Admission should highly endanger the Natives. Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety. In order to which Judgment, it will be Prudent to consider, whether a great increase in the Number of Inhabitants will turn to Advantage; whether the Country be fertile enough to feed so many Mouths; whether upon Admission of this new Body, we shall be straitned for room; whether the Men be industrious or idle; whether they may be so conveniently placed and disposed, as to render them incapable of giving any Jealousy to the Government. If on the whole, it appears that the Persons deserve our Favour and Pity, and that no restraint lies on us from good Reasons of State, it will be an Act of Humanity to confer such a Benefit on them, as we shall neither feel very Burthen-some at present, nor are likely to repent of hereafter. If the Case be otherwise, we ought so to temper our Pity with Prudence, as not to put our selves in the ready way of becoming Objects of Pity unto others. Farther, since whatever we bestow on such Petitioners, we may justly reckon as a matter of free Bounty in us, hence it follows, that they are not presently to lay hands on what they please, nor to fix themselves as it were by some Right, in any spot of Waste-Ground they find among us; but that they ought to rest satisfied with the Station and the Privileges we assign them (i).

XI. The

(a) Add the Answer given by some of the *Americans* to the *Spaniards*, in *Montaigne's* Essays, l. 3. c. 6. (b) Vid. *Diod. Sic.* l. 1. c. 67. (c) Add; *Ziegler ad Grot.* l. 2. c. 2. f. 23. (d) Vid. *Liv.* l. 2. c. 37, 38. (e) *De Offic.* l. 3. c. 7. *Grot.* l. 2. c. 2. f. 19. (f) Vid. *Sueton. August.* c. 42. & *Baclar ad Grot.* d. l. (g) *Lib.* 2. c. 2. f. 16, 17. (h) *Euripides* *Medea*.

————— A Stranger should conform  
In Manners to the State that entertains him.

So amongst the Articles of Peace proposed by *Aeneas*  
in *Virgil*, we find this for one:

(i) What hath been said may be illustrated by these Historical Examples. *Latinus*, in *Virgil* *Æn.* 11. offers the *Trojans* this Condition:

————— *Sorer arma Latinus,*  
*Imperium solenne socer.,* *Æn.* 12.

*Latinus* shall the Regal Scepter bear,  
*Latinus* first in Peace, and chief in War.

XI. The next Office of Humanity mention'd by *Grotius*, is that we allow every Man the Privilege of procuring for himself, by Money, Work, exchange of Goods, or any other lawful Contract, such things as contribute to the convenience of Life; and that we do not abridge him of this Liberty, either by any Civil Ordinance, or by any unlawful Combination, or Monopoly. For that as Trade and Commerce highly promote the Interest of all Nations, by supplying the unkindness of the Soil, which is not every where alike Fertile, and by making those Fruits seem to be born in all places of the World, which are to be found in any one (a): So it cannot be less than Inhumanity to deny any *Son of the Earth* the use of those good Things, which our common Mother affords for our support; provided our peculiar Right and Propriety be not injured by such a Favour. And therefore the *Megarensians* (in *Plutarch*) when the *Athenians* had forbidden

them entrance to all their Ports and Mart-Towns complain'd that this was done *παρὰ τὴν νόμῳ δίκαια*, *contrary to the Law of Nations.*

But this Assertion will admit of many Restrictions. For we do not seem in Duty oblig'd to communicate to others such Goods, as belong not to the Necessities, but to the Pleasure and the Superfluity of Life. And then, if Scarcity lies upon us, we may justly keep what we have to our selves. Could *Joseph* have discover'd that the Corn of *Egypt* was not sufficient to support the Natives, under the seven Years Famine, he might with good reason have forbid the Exportation of it to Foreigners (b). So the *Athenians* once decreed it to be *Capital* for any Subject of that State, to carry Corn for Sale, any where but to *Athens* (c). Besides, we may fairly exclude others from Trafficking with us for things not absolutely needful for the support of Life, when by such a Permission, our own Country would

*Est antiquus ager Tusco mihi proximus amni,  
Aurunci Rutulique; ferunt & vomere duros  
Exercent colles, atque horum asperrima pascunt.  
Hæc omnis regio & celsi plaga picea montis  
Cedat amicitia Teucrorum & fæderis aquas  
Dicamus leges, sociosq; in regna vocemus.*

A tract of Lands the *Latinæ* have possess'd,  
Along the *Tiber*, stretching to the West,  
Which now *Rutilians* and *Auruncans* Till,  
And their mix'd Cattle graze the fruitful Hill;  
Those Mountains fill'd with Firrs, that lower Land,  
If you consent the *Trojans* shall command,  
Call'd into part of what is ours; and there  
On Terms agreed the common Country Share.

Mr. Dryden.

*Servius* on this Passage observes, from *Cato's Origines*, that the Land here mention'd, contain'd 100 Acres. He tells us likewise, for fear we should think that the King was liberal of what did not belong to him, that to those words *Aurunci Rutulique; ferunt*, we must joyn the *michi* in the preceding Verse; the *Auruncans* and *Rutilians* having that Country allow'd them in a way of free Stipend, or else being placed there by the King as his Husbandmen, to manage the Crown Lands. The Story is told more at large by *Dionys. Halicarnass. L. 1.*

The *Cimbrians* in *Florus* (1. 3. c. 3.) Petition the *Roman* Senate, that so Brave and Warlike a People would give them a little Portion of Land as a kind of Pay, promising in return, that their Hands and their Weapons should be ever employ'd in the Cause of *Rome*. But (as the Historian there reflects) what Land could the *Romans* give them without quarrelling amongst themselves, on the point of such Arbitrary Distributions? And how could the Senate without manifest Injustice, dispose of the Property of private Men? Besides, possessing so many things as were likely to raise the Appetite of needy Strangers, they judg'd it unsafe to admit so strong and so fierce a Nation into their Limits.

In *Cæsar* (de B. G. 1. 4.) the *Teneteri* and *Uspites* petition'd in this boasting manner; that they did not voluntarily leave their own Country to seek a foreign Seat; that if the *Romans* would accept of their Service, they were able to shew themselves no unprofitable Friends; only they desire some Lands to be assign'd them, or to have the Privilege of keeping what they had already gotten by their Arms. The Answer which *Cæsar* sent them was to this purpose, that 'twas unreasonable in those Men to invade another Country, who could not defend their own. That there were no vacant Lands in *Gallia*; especially not to hold so vast a Multitude, without prejudice or danger. Though indeed he had still another more secret Reason, why he would not have those new Neighbours.

In *Tacitus* (A. XIII. c. 55.) the *Antibarri* being at a loss for a Dwelling, having therefore seated themselves in some Lands beyond the *Rhine*, belonging to the *Romans*; excused themselves, not altogether unreasonably, in these words; that the main part of the Land was useless; being only employ'd now and then by chance in feeding Beasts for the Army. That the *Romans* ought to resign a place which was fill'd only with Beasts, when they might relieve the distress of Men; and prefer Friends and Subjects to Desarts and Solitudes. That as Heaven was possess'd by the Gods, so Earth was given to Mankind; and what Parts were void of Inhabitants, lay in Common to all the World. (Which Principle *Sir Thomas More* establisheth amongst his *Utopians*. 1. 2.) This Message deserv'd a more favourable Answer than those most haughty Words of *Avitus*, that they ought to submit to the pleasure of their Betters. That the Gods whose Assistance they now implore, had chosen the *Romans* to be Commanders of the World, and to dispose of it as they should think convenient, without suffering any other Judges but themselves.

The Emperour *Probus* settled an hundred Thousand of the *Bastarna* in the *Roman* Territories; who all proved fruitful and quiet. But He using the same Liberty of Transplanting vast numbers from other Nations, as from the *Gepidi*, the *Gæturanni*, the *Vandals*, &c. all these broke their Promise, and whilst the Emperour was engaged in the War against the Tyrants, wandred by Sea and Land, almost thro' the whole World, and spread no small Cloud on the Glory of *Rome*. *Flav. Vopisc.*

So likewise in *Ammianus Marcellinus*, the *Goths* deserting their Seat for fear of the *Huns*, begg'd leave of *Valens* to fix themselves in *Thrace*, promising to live quietly, and to lend him their Service when he should have Occasion. Soon after other barbarous People put up the same Request, to whom *Valens* granted the like Favour, hoping that from these Numbers he might draw Men for his Troops, without any great charge. Yet this Indulgence proved afterwards his Ruin; as the Historian demonstrates at large. *Add. Socrat. Hist. Eccles. Chap. 4. Chap. 28.*

(a) *Liban. Orat. 3.* God hath not enriched every place with all his Blessings; but hath divided his Gifts according to the difference of Countries, that he might incline Men to Society, by the want of mutual Assistance; and he discover'd to Men the way of Trading, that what was the product of any particular Soil, might by this means be enjoy'd in Common, by the Whole World. (b) *Quintil. Declam. 12.* whilst we were selling to the Neighbouring Nations, and urged on by the hopes of ready Gain, we neglected a due Regard to the Publick Safety; and having emptied our Stores abroad, brought a Famine upon our selves at home. (c) *Lycurg. Orat. contra Leontar.*

lose a considerable Advantage, or sustain (tho' by indirect Consequence,) some notable Evil. For Example, one Kingdom suppose produces admirable Horses; what should hinder the Government there from passing an Act to prohibit the carrying into Foreign Parts, any that are fit for breed? For should the fine Strain grow Common, the Country would lose its greatest Profit, and its greatest Ornament. And this Beautiful Race is affected abroad, not for necessary use, but for Pomp and Pride, for Elegance and Ease (a). In one of the old *Roman* Constitutions, it is made Capital to carry Wine, Oyl, or Arms to the barbarous Nations. They thought the Prohibition about the Wine and Oyl, no less necessary than the other about the Weapons, fearing lest the *Barbarians* by tasting such generous Productions of the Empire, should endeavour to make themselves Masters of so rich a Soil. And we find in *Livy* (b), that when *Arms* of *Clusium* invited the *Gauls* into *Italy*, he made them a Present of *Italian* Wines, as the Encouragement and the Reward of their Expedition (c).

Lastly, there lies no Restraint on a State why, in Reference to the Exportation of Goods, it should not favour its own Subjects more than Strangers; as by demanding less *Custom* of the former, than of the latter, or by giving them the Right of *first Purchase*.

XII. Though, as has been shown, we are *oblig'd* in many Cases to *sell*, yet as *Grotius* (d) observes, no Law ties us to a Necessity of *buying*. In as much as every Man is naturally free to accept, or to refuse what Purchase he pleases; and no one has just Reason to complain, because another is content to want somewhat which he could supply him with. And therefore we find it forbidden in many Places, as well Ancient as Modern, to import some particular Commodities: either lest any Damage should by this means arise to the State; or to excite the Industry of our own Subjects; or to hinder our Money from passing into foreign Hands.

Therefore the *Spanish* Casuist lately mention'd, is widely mistaken when he asserts, that by the *Law of Nations* every one has a *Right of Trading in foreign Parts, of importing what the People there want, and of exporting Gold, Silver, and other Goods in which they abound*. For supposing I declare my self well satisfied with what I possess of my own, with what Face can another force his Things upon me, whether I will or no?

When the contrary is enacted, for Example, when in some Places, every Householder is obliged to buy yearly such a Quantity of Salt, this arises from the Power of Princes over their Subjects, and that Necessity of buying, is a kind of Tax or Tribute. Thus too a Ruler may enjoyn his People, that if they want such a particular Commodity, they shall buy it only of such a Person. Which kind of Laws are very just, when they promote the Interest of the Commonwealth. In the same manner we find it often commanded by Authority, that the Subject do immediately buy up Corn and other Necessaries, even in remote Parts, when there is danger of a Scarcity, (especially upon Apprehension of a Siege;) or to bring down Provisions to a more reasonable Price amongst us. But that I should go about to compel a Man, over whom I have no Power to the purchase of my Commodities, this is what no Reason will justify or excuse. For upon what Pretence can I assume such Authority over the Purse of another, who is not my Subject, as to prescribe the Matter, and the Measure of his Expences, and to teach him how he should provide for his Necessities, or for his Pleasures? And though my Gain be in the mean time hinder'd or lessen'd, yet this Consideration can by no means abridge the other Party of his Natural Liberty. Or, if I would have him thus contribute to my Advantage, I ought to encourage him by mutual good Offices, and render my self worthy of the Favour. But if a Man being stock'd with such particular Commodities, offers to vend his *Abundance*, where-ever he can find Chapmen, it would, in this Case, be most Inhuman, and Unjust to hinder him from thus furnishing himself with other things, which he *wants* for the necessary Occasions of Life (e).

XIII. Another Duty of the same Rank, is the giving Licence to Men of other Nations, especially if seated in our Neighbourhood, to sollicite, and contract Matrimony with our Subjects, when they are at a loss for Women amongst themselves. As for Instance, if a People compos'd only of *Men*, either being expell'd their own Country, or upon some other necessary Account, are fix'd near us, and design to form a new State. For to live without the Assistance of the other Sex, is what the Frame and Temper of few Men can bear. Celibacy in a Healthy Constitution, is the Gift only of excellent Souls; and to seek other Satisfaction in this Case that Nature

(a) In *Livy* (l. 43. c. 5.) upon the Request of the *Gallick* Ambassadors, it was order'd, that they should have the liberty of buying Ten Horses, and of carrying them out of *Italy*. (b) *L. 5. c. 33.* (c) *Add. Num. XIII. 14. Judith X. 20.* (d) *Plato de L. L. l. 8.* Let no Man import Frankincense, nor other foreign Things used in Sacrifices, nor Purple, nor any Colours which are not produced at home; nor in short, any Commodity, but such as is absolutely necessary; and on the other side, let no Man export what is of necessary use in our own Country. *Cæsar de B. G. l. 2.* reports of the *Neruii*, that they allow no Entrance to Merchants, suffer no Wine or any other Incitement to Luxury to be imported; imagining that the Use of these Delicacies must needs weaken Men's Minds, and unbend the Stiffness of their Courage. The same Author tells us of the *Suevi*, that if Beasts are brought from other Parts for their Assistance, they refuse to make use of them; and as for Wines they absolutely forbid the Importation of them, being of Opinion, that those Liquors soften and effeminate the Spirits of Men, and render them unfit for laborious Employments. (e) *Add. Bæcler in loc. citat. Grot.*

advise or allows, would be foul and brutal. Besides, as *Florus* observes, *Res tantum unius ætatis est populus virorum*, A State made up of one Sex, can last but one Age. Upon this Principle, many are willing to defend, or at least to excuse the famous Exploit of *Romulus*, the Rape of the *Sabine* Women. Authors indeed are divided about the Reason and the manner of this Proceeding. *Dionysius Halicarnassæus* reports, that the main design of *Romulus* was to obtain the Friendship, and Alliance of the Neighbouring Nations, by joining with them in Marriage; and that, though he began this Project in an injurious way, yet he imagin'd that in time this ill Beginning would produce a good Conclusion, and that a fair Correspondence and Familiarity, would be establish'd so soon as they should have clear'd themselves to the new Brides, by the Plea of Love, and to the Fathers and Relations by urging that the *Stratagem* was set on Foot, not out of Affront and Abuse, but as a necessary Relief to a desperate Condition. Yet it must be confess'd, this seems a very preposterous way of gaining Friendship (a).

Others pretend, that *Romulus* by this Attempt, only sought an Occasion of quarrelling with his Neighbours, which seems very improbable. The common Defence of the Fact, is to alledge the want of Women, and so to have Recourse to Necessity: but then Authors take care to tell us, that Commissioners were first sent about to treat with the People on the Affair, and to beg that they would not think it hard to let Men like themselves mix with them in Race and Blood: And that when these Agents were dismiss'd after a Reproachful manner, it was then at last thought proper to gain Relief, by the joint Application of Cunning and of Force. And what makes the thing still carry a better Force is, that this way of *catching Wives* was in those Times, not only a Common, but a laudable Practice; *Dionysius* calls it, *An Ancient and a Grecian Custom, and the most renowned Method of obtaining Maids in Marriage* (b). It is true, Violence can seldom be necessary in this Case, since it's never difficult to find Women enough, who shall be ready of their own accords, to accept of any Husbands that are not abominably Vile and Scandalous.

To reject those who seek our Alliance by such Proposals, would be very hard Dealing. And though the denying of a Woman for a Wife, be not *in it self*, a just Cause of commencing a War, yet is it, if the Refusal were

accompanied with Reproach. As the Inhabitants of *Rhegium*, when *Dionysius* of *Sicily* sent to desire a Wife amongst them, returned in Answer, that they would grant him none but the Daughter of their Common Executioner (c). On the other hand, should a Prince by Vertue of his Sovereign Authority, compel the Women of his Country to accept of such Husbands as have nothing in them to deserve Affection, this would look like Inhumanity; especially in Case the Fortunes and Conditions of the Parties were unequal (d). As for those Civil Laws which forbid Marriage with Foreigners, or between Subjects of Different Ranks, they always presuppose, that every one is able to find out a Match suitable to his Condition, and they are generally founded on such Reasons as these, that the Splendour of great Families may be preserv'd; that our Women may more easily get Husbands at home, whilst our Men are not allow'd to get Wives abroad; or that the Riches and the Affections of our People, may not by the means of Inter-Marriages be estrang'd from us, and settled on a Foreign State.

XIV. Lastly, *Grotius* adds, that any Right Common to all, and consequently any Obligation to a Duty to be perform'd towards all, arises from this *Supposition*, that we grant such an Indulgence promiscuously to every Stranger; because then, if any one be excluded from the Privilege, he is manifestly *injur'd*. For it is an Affront and Reproach to debar a Man, without particular Reason, from a *Common Advantage*; this being to make him unequal and inferiour to others. Hence *Grotius* concludes, that if it be in any place permitted to Strangers, to Hunt, to Fish, to Hawk, to gather Pearls, to receive Legacies, to sell Goods, to contract Marriages, (even without being compell'd to it by Scarcity of Women;) no Nation can be denied the same Liberties, except they have forfeited them by their own Default. But this Assertion will scarce hold. For the Concessions here spoken of, must be made either *expressly* or *tacitely*. When we grant a thing *expressly* to another, we do it either *Pre-cariously*, or in the manner of a *Pact* or *perfect Promise*. Now that any one should give a *perfect* Right over a thing of his, (not due by the Law of Nature) to all Nations known and unknown, without Limit or Restraint, is a Case which I believe never did, and never will happen. For every one is desirous to know at least, on whom he bestows his Benefit, and in what measure. But when a Man

(a) See *Tacit. An. l. i. c. 55.* What he reports of *Segester*, that when *Arminius* had stolen his Daughter against his Consent. *Gener invisus*, &c. The Names of Son-in-Law, and Father-in-Law, which when there is a mutual Consent of Parties used to be a Band of Love and Endearment, prove now the Seed of Hatred, and the Incitement to mortal Discord. (b) Add *Judges XXI. 22.* (c) See *Diodor. Sic. l. 14. c. 108.* & *Strab. l. 6.* like Instance is to be met with in *Paulus Venetus, l. i. c. 52.* (d) The Speech of *Cornelius* in *Livy*, where in the Name of the Populacy, he intreats the Senate, that they would allow them the Privilege of Marriage, a Favour granted to Foreigners, and to Neighbour Nations; and that they would not exclude them from the number of Mankind, does not belong to the Question before us, although produced as an Instance by *Grotius*. For the *Plebeians* did not then feel a Scarcity of Women, but the Aim and Design of this Petition, was to raise themselves to an equal Pitch with the *Nobility*, and means of Marrying into *Patrician* Families. Otherwise, when Women are plenty, there is no Occasion of winning a Bride by main Force of Arms: *Invenies aliam si te hæc fastidit.*

either by *Part* or *free Favour*, has granted such a particular Privilege to all that come under his Friendship or Acquaintance, for a meer Stranger to pretend a Right to the same Indulgence, would be very Impudent and very Wicked. As for those things which we permit *Tacitely*, or as it were overlook, they are reckon'd of Course to be of the same Nature with Precarious Favours; and such may be fairly revoked, either upon the Change of our Affairs and Circumstances, or because the Persons who enjoy'd them did not make so prudent and modest a use of them as they ought (a).

XV. What we have hitherto touch'd on, are but Vulgar Degrees of *Humanity*, the Omission of which implies a most base and abject Temper of Mind. A much higher, and more illustrious Strain of the same Duty, is when a Man out of pure Benevolence and Inclination, arising either from a Native Generousness of Soul, or from Pity and Compassion to a Person in Distress, is at some Pains or Charge in bestowing freely on another, what may relieve his Necessity, or procure his Advantage. Kindnesses of this Noble Rank, are by way of Eminence stiled *Benefits*; the manner and measure of Dispensing which are commonly to be adjust'd with regard to the Condition of the *Giver*, and of the *Receiver*. And these are the things which open to Mankind the largest Field of doing Good, and of acquiring Glory, if they are temper'd and regulated by true Prudence and Greatness of Mind. For to throw about Favours without Reason and Judgment, ought, as *Pliny* (b) observes, to be call'd Ambition or Ostentation, or any thing rather than Liberality. Wise Men have made

it their chief Business to prescribe Rules for the guiding and perfecting of these Obligations: And the ancient Books of Morality, are not on any Subject more copious, or more clear.

XVI. The Vertue answering to *Benevolence* in the Giver, is *Gratitude* in the Receiver, by which he demonstrates, that the Kindness was acceptable to him, and upon this Score entertains a hearty Respect for the Author of it, seeking all Occasions of making a Requit, as far as his Abilities will give him leave. For it is by no means absolutely Necessary, that our Return should be precisely, as much in Value as the Courtesie amounts to, but good Will and earnest Endeavour, are frequently allow'd to satisfy an Obligation (c).

The Reason of this Duty ceases, when ever we have a just Exception against the Donour, and are fully assur'd, that his Bounty was more in Pretence than in good Will. But here wise Men give us an Excellent Caution, that we should not be too curious in enquiring upon what Grounds and Motives a Man has been our Benefactor; because this Niceness of Examination will ever afford a Plea, and a Colour to *Ingratitude*.

The more apt in their own Nature Benefits are to unite and to engage the Minds of Men, the more strictly does Reason enjoin us to apply our selves with Vigour and Industry, to a just Requit. When a Man has express'd so much Dependence upon me, as to confer the *prior* Obligation, I am bound at least not to suffer him to be the worse for his Kindness; and I ought never to receive a good Turn, but with Resolution to hinder the Author; if possible, from repenting of what he has

(a) *Add. Bœcler ad Grot. Panegy.* (b) *Tull. Off. 1. Beneficentia, qua nihil est natura humane accommodatius, multas habet cautiones, &c.* The Duties of Liberality or Bounty, than which there is nothing more agreeable to the Nature of Man, fall under many Limitations. For in the first place it should be our Care to see that our Bounty prove not a Prejudice, either to the Person we would oblige, or to any other Body; and then that we do not give above our own Ability, nor above the Merit of the Receiver. As to this last Point, we are Principally to regard those; to whom we our selves already stand Obliged, and then others as they have more or less Need of our Assistance. We are likewise to consider the several Degrees, by which we stand related in the World. Of these the First and most Extensive, is the Universal Society of Mankind. Nearer than this is the Alliance between Persons of the same Nation, of the same Province, of the same Language, of the same City. There is yet a nearer Tye of Kindred. And here the First Society is in Wedlock, the next in Children; the Relation of Brothers comes afterwards, and then of Brothers and Sisters, Children and Men, the Marches and Alliances between different Families. But the most Excellent and Strongest of all Alliances is, when Good and Vertuous Men join in Familiarity, upon account of the Agreement of their Manners.

*Idem de Finib. l. 5. In omni bono, &c.* In all the Compass of Honesty, there is nothing so illustrious or of so great a Latitudo, as the Conjunction and Society of Men with Men, including a mutual Communication of Conveniencies, and general Love for Mankind. This Dearness begins immediately upon ones 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 it self to the whole Extent of Human Race. In the Exercise of all these Duties, we are farther 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 in with his Harvest, than either a 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. See Seneca's Treatise of Benefits, which it would be tedious here to abridge. *Plutarch* (in *Sympos.*) tells us, 'twas a Rule amongst the *Pythagoreans*, not to take a Burthen from their Fellow, but to help him bear it; and this they did to exclude all to Idleness and Ease. Though *St. Paul* could have taught them a better Reason, *2 Corinth. VIII. 13.* Not that other Men be eased, and you burthen'd, but by an Equality, &c.

*Add Ambros. Offic. l. 1. c. 30. and from him Gratian Dist. 86. c. 14, &c. & Cauf. 1. Quæst. 2. Chap. 6, 7. Socrates in Xenophon (ἸΑΡΟΥΝ.)* lays down this as a Rule in our Assistances, to our Friends or to Strangers, and in almost all the Concerns of Life,

(c) *Ovid. de Ponto l. 3. El. 8.*

*Sed qui, quam potuit, dat maxima, gratus abunde est,  
Et finem pietas contigit illa suum.*

To do according to our Ability.

He that repays to his Extent of Power,  
Were not more Grateful with the Noblest Store.  
done.

done. If upon some particular Reason we are unwilling to be obliged to a certain Person, in this Case it is lawful for us to refuse the Benefit he offers. But then great Care must be taken to do this without giving the least Suspicion of Contempt; since otherwise, to reject a voluntary Favour, carries in it a manifest Affront.

Take away the Necessity of returning Kindnesses, and no Man will ever begin them; for then it would plainly be acting against Reason, to part with our Bounty, whilst we know it would be thrown away. And thus all Beneficence, all mutual Trust and good Will must be banish'd out of the World; there must be no such thing as free Help, or antecedent Merit, no way of endearing and engaging one Man to another (a). Tully is admirable on this Point of Gratitude: *It is, says he, of all Duties, the most indispensably Necessary. If Hesiod bids us restore what we borrow, if we can, in a larger Measure; what ought we to do when we are as it were challeng'd by a Prior Obligation? Are we not in this Case to imitate fruitful Fields, that still return more than they receiv'd. For if we make no Scruple to oblige those whom we hope to be the better for hereafter; How then should we behave our selves towards such as we are the better for already? Since there are two sorts of Liberality, the one of bestowing a Benefit, the other of returning it; it is at our Choice whether we will give or no; but an honest Man is not at Liberty in the Point of returning, provided it can be done without Injury.*

It is observable, that Cicero here makes Gratitude a part of Liberality, and consequently, hints, that it is not tied up to Laws, altogether so strict as those of Justice, which commands us to repay what we owe upon Contract, most punctually and precisely (b). It may be remark'd farther, That when he says the former kind of Liberality, the bestowing of Benefits is in our Choice, he ought not to be understood in an absolute Sense, for it is plain we are under some Obligation, even to Antecedent Beneficence, but the Point is, that this Obligation does not carry so much Strictness in it, as that which binds a Man to Gratitude; or to endeavour the approving himself by all

good Will, and good Service to his Benefactors.

It happens, 'tis true, very frequently that in the doing a Kindness, there is more true Love on the part of the Giver, than of the Receiver (c). There being too much Ground in Fact, for that Politick Remark of Tacitus, *Beneficia eo usque laeta sunt dum videntur exolveri posse: ubi multum antevenerit, pro gratia odium redditur* (d). 'Good Turns do so far yield 'an agreeable Satisfaction as we fancy our selves able to repay them: when they much exceed this Measure, the Debt grows desperate, and so produces a fullen and a secret Hatred, instead of a real Kindness and Affection.

XVII. But though the bare Notion of Ingratitude does not imply a real Injury, in as much as it is not the Violation of any full and perfect Right, yet it passes in common Censure, for a Vice more foul, more odious and detestable, than Injustice it self (1). For it is look'd on as an Argument of a most Abject and Degenerate Soul, for a Man to declare himself unworthy of the fair Opinion which another entertain'd of his Honesty, to be Proof against Benefits, and consequently part all Sense of Humanity (e).

The account which Des Cartes gives of Ingratitude, is very Rational and very Elegant. 'It is the Vice, says he, of Men, who are either madly Proud and Vain, and so imagine every thing to be due to their Merit; or else senselessly Stupid, and so unable to reflect on the Benefits they receive; or lastly, pitifully Weak and Abject, who when they feel their own Infirmary and Want, sue with the meanest Submission for the Assistance of others; which if they chance to obtain, they immediately hate the Persons to whom they have been obliged, because either wanting Will to make Requital, or despairing of Ability, and at the same time fancying all the World to be Mercenary, and that no good Turn is done without Hopes of Retribution; they apprehend themselves to have exceedingly baulk'd and disappointed their Benefactors (f).

Learned Men have disputed, whether or no there ought to lie an Action against this Vice, in Courts of Civil Judicature. Seneca (g) takes

(a) Comp. Hobbes de Cive, c. 3. f. 8. Aristot. ad Nicom. l. 9. c. 2. It will hold good for the most part, that we are rather to return a Benefit, than to serve a Friend in the way of Gratuity; as we ought likewise rather to pay a Debt, than give away our Money to our dearest Confident. In General, what we owe of any kind is first to be made good; yet if a free Gift to another Person, would at the same time plead more Honesty, and more Necessity, it is then to have the Preference in our Disposal. Add Socrates, his Discourse of Brotherly Love, in Xenophon. Ἀπομν. 2.

(b) Vid. Ambrose de Off. l. 1. c. 31. Gell. l. 1. c. 4. (c) The Reason of this is enquired into, by Aristotle in his Ethics, B. 9. C. 7. (d) Add Hobbes Leviathan, c. 11, &c. Where he tells us how it comes to pass, that the receiving great Benefits from a Superior, inclines to Love, but the receiving of the like from Equals or Inferiors, produces Hatred, unless there is Hope of being able to requite them. (1) Omnes immemorem Beneficii oderunt, tamque injuriam in deterrenda Liberalitate sibi etiam fieri, eumque, qui faciat, communem hostem tenuiorum putant. Tull. Off. l. 11. c. 18. (e) Greg. Nazianz. He whose fierce Temper, Kindness it self cannot soften into Humanity, is certainly incurable by any other Application. Lucian in Antholog. Φαῖλας ἀνδρῶν, &c.

A Thankless Wretch is like a broken Sieve,  
Lets out, and loses faster than you give.

Add Phoculus's Judgment, concerning the Nature of Man, in Xenophon Cyroped. 8. In Passion. Artic. 294.

(f) Sophocles Ajaxe.

A Favour should be treasured in the Soul,  
And made the Mother of a kind Return.

(g) De Benef. l. 3. c. 6, &c.

A Wretch that stifles Benefits bestow'd  
Scarcely deserves the generous Name of Man.

the Negative side of the Question, and the Reasons he proceeds upon are chiefly these; 'That if a Benefit be strictly to be repaid like a Sum of Money, or as if it were let out to hire, it then loses the Name of a Kindness, and becomes a Loan or Debt; that whereas the requiting of a good Turn is esteem'd an Act highly *Vertuous*, it must cease to be *Vertuous*, were it once made *Necessary*. Lastly, that there must needs arise more *Causes* on this Head, than all the Courts in the World would be sufficient to try (a). Our Design leads us no farther, than to observe, that from every Transgression of the Law of *Nature*, it does not presently follow, that there must lie an *Action*, (or the Resemblance of an *Action*) against a Man in *Natures Court*. This is certain, that the Divine Justice hath reserv'd severe Punishments to be inflicted on ungrateful Persons in another Life: And in this present World they ought to suffer the Hatred and Detestation of all Mankind, and to be adjudg'd unworthy of the least Benefit or Favour. But why a Man cannot be sued in an *Action*, at the *Civil Bar*, for *simple Ingratitude*, that is, forgetting a good Turn, or for neglecting to requite it, when he had Opportunity, there seems to be this plain Reason; that the very Cause of my conferring the Kindness (that is, of my giving somewhat without taking Security for its re-

turn) was to afford the Party an Opportunity of shewing himself Grateful out of pure Honesty, not out of fear of Compulsion; and on my own part to demonstrate that what I bestow'd was not done out of a sordid Desire of Gain, but out of Humanity and good Nature, since I required no *Caution*, or Ensurance of being repaid. *Antoninus* will teach us better *Philosophy*. *When thou accusest a Man* (says he) *of Falseness or Unthankfulness; turn the Censure upon thy self. For the Fault is without doubt thine; that thou didst not confer the Favour freely and undesignedly, without looking for any farther Fruit, than the Action it self. It is not sufficient Satisfaction to have relieved and assisted one that is a Man as thou art? Dost thou demand a Reward for doing what thy Nature obliges thee to do?*

But when a Man is guilty of *mixt Ingratitude*, or when he not only neglects to requite a Courtesy, but answers it with Injuries and Abuses; the Injury thus offer'd, founds an *Action in Natures Court*, or a *Cause of War*; and its being accompanied with an ungrateful Mind, as it highly aggravates the Fact, and renders it more Vile and Odious, so it engages the Sufferer more speedily to seek Redress; and to punish the Villain the more severely, in Regard, that Benefits themselves could not reclaim him (b).

(a) *Themist. Orat.* 3. By the *Persian* Constitution, there is a settled Penalty decreed against Ingratitude; as being the readiest Incentive to Hatred, and Ill Will. And where this Vice is not punishable by Law, it produceth more desperate Enmity, and more fatal Contention. Add. *Xenophon* *Cyrop.* l. 1. Add. *M. Antonin.* l. 9. c. 42. & *Val. Max.* l. 2. c. 6. f. 6, 7. & l. 5. c. 3. f. 5. To these Instances and Arguments, other Authors have answer'd at large. See *Bæcler's Actio Ingrati.* (b) How far the Necessity of returning a Benefit, is taken off by a Subsequent Injury, *Seneca* teacheth us, *de Benef.* l. 6. c. 4, 5. & *Epist.* 81.

#### C H A P. IV.

### Of the Duty of keeping Faith; and the Division of Obligations.

THE Duties hitherto explain'd, are mutually owing upon account of that Common Relation, which *Nature* has establish'd amongst Men; although we suppose no Antecedent *Act* to have pass'd between them. But it would be unreasonable to confine within these narrow Limits, all the Offices that Men are to exercise towards each other. For in the first place, all are not of so good and honest Dispositions, as to perform every thing, whereby they can benefit their Neighbours, out of pure Humanity and Charity; without being secure of Retribution. And then, many things which we should be glad to receive from others, are of such Value and Consequence, that we cannot in Modesty desire them *gratis*. Or perhaps it does not become our Fortune or Station to be *beholden* to another, for such a Benefit. Therefore unless an *Equivalent* be paid, commonly the other Party is unwilling to *give*, and frequently we are unwilling to *receive*. Again, *others* are many times Ignorant, how they might serve and oblige us. Lastly, in as much as the Power of Man being *Finite*,

cannot in the same manner extend it self to all Persons, it is agreeable to Reason, that such Acts as are not already *bespoken* by an Antecedent Obligation lying on us, should be *made sure* to those, who by entering into Covenant with us, first obtain a Right to receive them. Therefore, that the true Fruits of a social Nature, the *mutual Offices* of Mankind might be practis'd with more Frequency, and more Regularity, it was necessary for Men to bargain, and agree amongst themselves, that they would perform to each other, such and such Services, as they could not be absolutely secure of, by the bare *Law of Humanity*. So that their Business must be to settle before-hand, what every Man ow'd to another, and what he should by Virtue of his *Right*, accept and challenge in return.

Hence it is easie to apprehend how the Offices of Humanity or Charity, differ from those which are requir'd by full and *proper Right*, and which are the Objects of *strict Justice*. The former are not owing upon any Covenant, either *Express* or *Implicite*, but purely by force of

of that *Common Obligation* which *Nature* has laid upon Mankind. But what I owe another upon *Pact* or *Agreement*, I therefore owe him because he has obtain'd a *new Right*, holding good against me, by virtue of my free Promise or Consent. Farther, whatever I transact with another by way of *Covenant*, is design'd not for his Profit, but for my own. Whereas in Duties of Humanity, the Case is quite otherwise. For, although the Performance of these be *in general Necessary*, for the rendring the Life of Man Comfortable and Commodious, and consequently be an Advantage to the Performer, by giving him good Grounds to expect fair Treatment; yet with regard to *particular Acts* of Kindness, a Man does them not for his own sake, but for the sake of the Party who receives them. For a *Benefit*, if confer'd upon a Principle of *private Interest*, loses its Nature and its Name.

Thus then the Duties of *Humanity* or *Charity*, and those arising from *Covenant*, do afford a mutual Assistance, and supply to each other; whilst those things which *Charity* either cannot, or does not ordinarily procure, are obtain'd by *Pact*; and in Matters about which no *Pacts* have pass'd, *Charity* comes in, and serves our turn as well. And although to fix the Subject, and the Conditions of *Covenants* be left to the Pleasure of particular Persons; yet that there shall be some such Agreements, the Law of Nature does (indefinitely and in general) command; in as much as without these Transactions, there would be no possible means of preserving Peace and Society in the World (a).

II. When Men have once engaged themselves by *Pacts*, their Nature obliges them as sociable Creatures, most religiously to observe and perform them. For were this Assurance wanting, Mankind would lose a great part of that Common Advantage, which continually arises from the mutual Intercourse of *good Turns* (b). Farther, were not Men most strictly and necessarily tied to keeping their Promises, we could not with any certainty build on the Assistance of others, in the ordinary Affairs of Life. And then *breach of Faith* is the aptest thing in the World to found an endless Succession of Quarrels and Complaints. For in Case I have actually perform'd my part of the Contract, and the other Person fails, whatever I have *done* or *given* is absolutely *lost*. And if I have not as yet proceeded to any actual Performance, it is, however, a Trouble, and it may be a prejudice to me, to

have the Course of my Designs and Business overturn'd; since I could have settled things by other Ways and Measures, had not this Man offer'd to transact with me. And 'tis most Unreasonable, that I should be expos'd to Scorn and Censure, for entertaining a kind Opinion of a Person's Goodness and Honesty. We are therefore to esteem it a most Sacred Command of the Law of Nature, and what guides and governs, not only the whole Method and Order, but the whole Grace and Ornament of Human Life, *that every Man keep his Faith*, or which amounts to the same, that he fulfil his Contracts, and discharge his Promises (c) (1).

III. But in as much as *Pacts* or *Covenants*, those especially which are *Express*, do impose an *Obligation* on us, which Nature did not before enjoin, at least not in so precise and determinate a Manner; it may not be here Inconvenient to run over the Principal Kinds, and Divisions of *Obligations*. *Obligations* then in the first place, are distinguish'd into *Connate* and *Adventitious* (d) (2). The former are such as all Men fall under by Vertue of their being Creatures, endued with Reason, or such as necessarily attend, and accompany the Rational Nature, consider'd in that *simple* and general Notion. Although, in Regard that all Men are born Infants, and as yet incapable of the exercise of Reason, these Obligations do for some time lie without Act or Force; and do then at length exert their Power, and render Men capable of contracting Guilt, when the Understanding improving by Age and Use, makes us sensible of them. And from this Period they date their Influence, and produce their Penal Effects, should a Man be never so Negligent in weighing and considering their Authority. Therefore *Ignorance of the Law of Nature*, is an insufficient Plea, to excuse a Person of mature Years; though he should urge that it never came into his Head to reflect whether this Law had settled such a Point or not. *Adventitious Obligations*, are such as fall upon Men, by the Intervention of some Human Deed; not without the *Consent* of the Parties, either *Express*, or at least *Presumptive*.

IV. Amongst *Connate Obligations*, such as are planted, as it were in our *Being*, the most Eminent is that which lies on all Men with respect to Almighty God, the supream Governour of the World; by Vertue of which we are bound to adore his Majesty; and to obey his Commandments and his Laws. Whoever

(a) *Isocrat. advers. Callimach.* So great is the force of Leagues and Covenants, that scarce any Affairs, either of Grecians or Barbarians, are transacted in any other manner. By means of these we traffick abroad, and bargain at home. By means of these we terminate private Dissentions and publick Wars. These we all make use of, as an Universal Good to be enjoy'd in Common by Mankind. (b) *Aristot. Rhet. l. 1. c. 15.* Take away Covenants, and you disable Men from being useful and assistant to each other. *Tull. Off. 11.* So great is the force of Justice, that even those who live by Outrage and Villany, cannot subsist without some Shadow and Semblance of this Vertue. Which he shews in the Instances of Thieves and Pirates. (c) See *Dionys. Halicarn. l. 2.* where he tells the Story of the Consecrating Faith amongst the Goddesses by Numa. *Euripides Heracl.*

*Ἐν ἀφουδῆς εἶναι τοῖσι θηναίοις σοφία.* Truth the best Mark of Honour and of Race. (1) See *Montaign's Ess.* upon the indispenfable necessity of keeping ones Word. l. 3. c. 9. (d) *Arrian (in Epictet. l. 3. c. 2.)* calls them *ἔθους φυσικῆς καὶ ἐπιθετοῦ*, *Habitudo*, or *Relations Natural and Imposed.* (2) *Vid. Sander. de Oblig. Jur. Prælect. l. 1. c. 11.*

wholly violates, and breaks through this Obligation, stands guilty of the most heinous Charge of *Atheism*; because he must at the same time, deny either the Existence of God, or his Care of Human Affairs. Which two Sins with regard to their Moral Consequences and Effects, are Equivalent to each other; and either of them overthrows all Religion, representing it as a frightful Mockery, introduced to Awe the Ignorant Vulgar into some Decency and Duty (a). Therefore we ought in Justice to Discard and Explode, as most foul and scandalous, that Notion of *Hobbes* (b), in which he would rank *Atheism* amongst the Faults of Imprudence or Ignorance; as if it were not properly a *Sim*, but a *Mistake* or *Folly*, more worthy of Pardon than of Punishment. The Argument he makes use of runs thus, *the Atheist never submitted his Will to the Will of God, in as much he never believ'd there was such a Being. But now it is impossible any one should have a Sovereign Power over us, unless he obtain'd it by our Consent. Therefore since the Atheist was never under the Kingdom of God, it follows that he is not obliged by the Laws of that Kingdom.* But here it is most grossly false, that all Sovereignty is constituted by the Consent of the Subject; for this will hold only with regard to Human Dominion; where unless by our own Contract and Consent, we cannot lose the Power of resisting another, who is by *Nature* our *Equal*. But who will pretend to assert that *GOD* has not a Power of Commanding his Creatures, unless they voluntarily agree to invest him with such Authority? Nay, *Hobbes* (c) has sufficiently confuted himself by deducing the Right, which God has of ruling and of punishing in his *Kingdom of Nature* from his *Irresistible Power*: but did any one ever imagine that an *Atheist* was able to resist the Power of God? And therefore *Atheists* are not, strictly speaking, God's *Enemies* (as *Hobbes* defines *Enemies*, who are neither under a *Common Sovereign*, nor under each other) but his *Rebellious Subjects*, and consequently guilty of *Treason* against the Divine Majesty, as *Hobbes* himself, has elsewhere (d), expressly acknowledged. And agreeably to this he defines *Treason* against Human Power to be, 'When one either by Word or Deed, does in 'General manifest and declare, that he will no 'longer submit to that Man or Council of Men, 'in whom is lodg'd the supream Administration 'of the State; or when a Man wholly throws 'off the Bond of Civil Obedience. It is no such obscure matter, therefore to assign the particular Species of *Sim*, to which *Atheism* belongs. Nor is the following Assertion built on better Grounds, that *Atheists* cannot be punish'd any otherwise, than by the Right of *War*; as the Poets represent the Gods, routing by force of Arms the old Giants that af-

faulted Heaven. On the contrary, that Evils inflicted in *Martial Encounters* are not properly *Punishments*, we shall hereafter have Opportunity to shew. A *Sovereign* must not presently be said to make use of the *Right of War*, when he reclaims his *Refractory Subjects*. For the bare *Right of Sovereignty* includes thus much, that the Person invest'd with it, shall have the Power of reducing those to Obedience by force, who refuse a voluntary Submission. Much less are those *Rebellious Opposers* of lawful Authority, to be accounted *just Enemies*, or such as have a *Right of making Resistance*.

It does not excuse *Hobbes* to alledge that Passage of the *Psalmist*, *the Fool hath said in his Heart there is no God*. As if there was any such Nicety in the Scripture Language, to call those only *Fools* who sin out of *Mistake*, and not those who offend *Wilfully*. Or, as if this too were not the highest *Folly*, by a *wilful Sin* to incur the most intolerable Torments, for the sake of a very slender Pleasure, or perhaps no Pleasure at all. Again, it is by no means a Matter of such Difficulty, to discover the Being of a *GOD* by Natural Reason, as to find out the Proportion between a *Sphere* and a *Cylinder*; the Instance which *Hobbes* makes use of. It may not be indeed in the power of every unlearned Person to form, or to apprehend an Artificial and Philosophical Demonstration of God's Existence; but he cannot thence claim a Privilege of securely doubting or denying it. For in as much as the whole Race of Men in all Ages have constantly held this Persuasion; whoever would attempt to assert the contrary, must of Necessity, not only solidly confute all the Arguments produced on the other side, but also alledge better and more plausible Reasons for his own particular Opinion. And farther, since the Safety and Happiness of Mankind have been hitherto thought to depend chiefly on this Belief, it is requisite, that he likewise prove *Atheism* to contribute more to the Interest, and the good of all Men, than the Acknowledgement of a Deity. Which being a Task manifestly Impossible, the *Atheists* are to be judg'd Offenders, not only against the Divine Majesty, but against all Mankind. And they deserve the less Favour on this Account, because these very Men who would reverse the Judgment of all People, and of all Ages, do arrogantly assume to themselves a deeper Sagacity, a clearer Light of Understanding, than the World was ever acquainted with before. And consequently, though their Unbelief be indeed an Error, and a most fatal and destructive one, yet it is such as they did not fall into through Imprudence or Simplicity, but by a vain and impudent Pretence of more than ordinary Degrees of Wisdom (e).

(a) *Ambros. Offic. 1. 1. c. 26.* Nothing hath more Influence in promoting an honest Life, than our Belief, that we have such a Judge of our Actions, as no Secrecy can escape, no Indecency but will Displease, no good Performance but will Delight. Add. *Lactant. de Ira Dei. c. 8.* (b) *De Cive c. 14. f. 19. c. 15. f. 2.* (c) *C. 15. f. 5.* (d) *C. 15. f. 19.* (e) *Comp. Jean d'Espagne de Erroribus Popularibus, f. 1. c. 6.* *Bacon Essay 16.* and *Advancement of Learning, l. 3. c. 2.* Add. *Plato de L.L. l. 9.* near the End, where he distinguisheth the several kinds of *Atheists*, and directs with what Penalties they ought to be restrain'd.

It will be a very easie Labour to refute those Arguments, which *Spinoza* (a) has alledged in defence of this Notion of *Hobbes*. The *Thesis* he lays down to work upon is this, *every one who cannot govern himself by Reason, may by the highest Right of Nature, live according to the Laws of his Appetite*. And foreseeing it might be here objected, that the Assertion was contrary to the reveal'd Law of God, he answers, that a *Natural State is both in Nature and Time Antecedent to Religion*; which with Regard to *Natural Religion* is as absolutely false, as what he subjoyns, *that no Man knows by Nature, any Obligation lying on him to obey God; and that no Reason can obtain this Knowledge, but such as is confirm'd by the Signs of Revelation*. Therefore the Consequence he draws is most Absurd, that *before Revelation, no Man was bound by any such Divine Law, as it was impossible for him to be ignorant of; and that a Natural State is to be conceiv'd without Religion or Law; and for that Reason without Sin or Injury*. In all this he only ridiculously confounds the *Natural* with the *Positive Divine Law*. He proceeds to assert, that Man consider'd in a *State of Nature*, is free from all Religion, not only upon account of Ignorance, but by virtue of that *Common Liberty, in which all are born*. For, says he, *if Men were by Nature bound to the Divine Law, or if the Divine Law were a Law by Nature, it would be superfluous that God should afterwards enter into a Contract with Men, and oblige them by Oath and Covenant*. Now it is clear that these Paets or Covenants pass between God and Men in *reveal'd Religion*, not in *Natural*, to which a Man immediately stands obliged upon account of his being created by God a reasonable Creature. So that *Spinoza's* Conclusion is most Vain and Senseless, that *Divine Law began from that time, when Men by express Compact, promised to obey God in all things, by which deed they receded, as it were, from their Natural Liberty, and transfer'd their Right upon God, just as Sovereignty is confer'd in Civil States*. For the support of which Doctrine it is necessary to suppose, that Men in a *State of Nature*, had not their Existence from God Almighty.

From this Obligation, by which Men are bound to pay Obedience unto God, springs the Obligation of all Men towards all Men, as such; by Virtue of which they are engaged to lead a *social Life*. How this is to be discover'd, it has been formerly our Business to shew.

V. There is another famous Division of Obligation, into *Natural* and *Civil*; but such as is by different Authors, differently stated (b). *Grotius* observes, that the Lawyers sometimes call a thing of *Natural Obligation*, the doing of which Nature shews to be good and honest, although it be not strictly a Debt: As for an

Executor to pay the entire Legacies, without reserving to himself, what the *Falcidian Law* allows him; to requite a Courtesie receiv'd; to pay Debts which the *Creditor* has in Law forfeited; as those contracted by a Minor (c), without the Consent of his Guardians or Friends. When any thing of this kind is voluntarily paid, a Man cannot recover it again, on Pretence that it was not due, tho' he might at first have refus'd to pay it.

Sometimes we call that a *Natural Obligation* which truly binds us; whether it cause in the other Party a *Perfect*, or whether only an *Imperfect Right*. In like manner by a *Civil Obligation* we sometimes mean such, as is void by the Law of *Nature*, but depends purely on a *Civil Law*, of which the *Obligatio literarum*, (when a Man confesses a Debt in writing, which he really never contracted;) is commonly brought as an Instance; at other times it signifies such as is grounded on both *Laws, Natural and Civil*; or such as will bear a good *Action* in Courts of Civil Judicature.

Others with more Clearness, assign Three Species of Obligation, *purely Natural, purely Civil, and Mixt*. The first depends entirely on *Natural Equity*; and in such a manner, as not to found an *Action* in Civil Courts. The second arises merely from the force of *Civil Law*, in the Strictness and Rigour of which it will bear an *Action*; though such an *Action* will always in Point of *Equity* be invalidated by the Judge; as the *Obligatio literarum* before mention'd. The third is such as is at the same time supported by *Natural Equity*, and confirm'd by the Authority of *Civil Constitutions*. This is the Distinction commonly made by the Interpreters of the *Roman Laws*.

VI. This Division of Obligations into *Natural* and *Civil*, is a Subject which we ought to insist farther on in our present Enquiry; yet not so much to derive thence the *Original* of such Ties, but the *Efficacy*, or Force which they bear in Common Life. So that by *Natural Obligation* we mean such as binds us only by Virtue of the *Law of Nature*; and by *Civil Obligation*, such as is supported and assisted by *Civil Laws*, and *Civil Power*. The Efficacy of both is consider'd with Regard either to the *Subject*, the Person in whom the Obligation inheres; or the *Object*, the Person in whom it terminates, or to whom it is directed. In the first Respect, the Efficacy or Vertue of *Natural Obligation*, chiefly consists in this, that it binds a Man's Conscience; or that every Person at the same time when he fails of performing it, is sensible that he has displeas'd Almighty God; to whose Mercy as he owes his being, so he knows he ought to pay all possible Obedience to his Laws. And although we cannot indeed, in the Law of Nature, discover any precise and

(a) *Traetus Theolog. Politic.* c. 16. (b) *L. 2. c. 14. s. 6.* (c) *Vid. Sueton. Vespas.* c. 11. *de Senatus consulto Macedonico*. Like to which was this Law amongst the *Lucani*. If any Man shall be found to have lent Money to a Luxurious Person, he shall forfeit his Loan. *Nicol. Damasc. de Moribus Gent.*

determinate *Penal Sanctions*, yet we ought on all Accounts to acknowledge, that it is enforced by some such due Fruits and Consequences; and that the Author of Nature will infallibly inflict great Evils on those who violate this *Obligation*, which the just Performers of it shall as infallibly escape. For the Truth of which Belief, amongst many Arguments, one very considerable Presumption is that remorse of Conscience, which attends the Actors of Wickedness, even whilst they are in fair hopes of escaping Human Discovery, and Human Punishment. A Disquiet, which no good and wise Man can imagine to proceed from bare Simplicity, from Custom, or from Fear of secular Justice; but from a much higher Principle, a Sense of God's Sovereignty, and a Dread of his Vengeance (a). Nor can I believe that any Man by flying to the impious Refuge of *Atheism*, ever found there so good Security against these Terrors, but that his wicked Mind would frequently recoil, and shake him with more Violence than before. And we have scarce had an Instance of any such bold Desier of Heaven, who has not at length been driven into a Consternation by his own Crimes, and turn'd a Penitent in Horror (1).

Although to bind the Consciences of Men, be principally the Effect of *Natural Obligation*, yet the same Power is communicated to *Civil Obligation*, provided the Object of the latter, be not repugnant to the former. And therefore, *Civil Laws* do also bind the Conscience, so far as they are consistent with the Law of Nature. Both *Obligations* do farther agree in this Respect, that the Duties they enjoyn, a Man ought to perform Voluntarily, and as it were upon his own internal Motion.

And 'tis this which makes the chief Difference between *Obligation* and *Compulsion*; by the latter, the Mind is, by external Violence, driven upon a thing contrary to its inward Inclinations: but whatever we perform on the former Account, is suppos'd to be done upon the Approbation of our own Judgment, and the Hearty Disposition of our Will.

If we consider these *Obligations* again, as they regard the *Object*, or as they produce some Effect in the Person, to whom by Virtue of them, something is due, they have this Force Common to both, that what being thus due, is paid or perform'd, may be fairly accepted and possess'd. But when the other Party neg-

lects, or refuses to make good his *Obligation*, there is then a Difference in the manner of compelling him, between the *Natural* and the *Civil Obligation*, or between those who live in a state of Nature, and those who are settled under a Polity, or Government. To those who live in their *Natural Liberty*, the Precepts of the *Law of Nature* being of two kinds, do cause the same Distinction in the *Obligation* to perform them. Those things which *Nature* enjoyns one Man to pay to another, without any Antecedent *Pact*, as are the Offices of Charity and Humanity, we cannot challenge any otherwise, than by gentle and easie Methods; as by perswading, admonishing, desiring, or intreating. But we must not apply *Force* to the most obstinate Refuser; unless in Case of extrem Necessity. The Reason of which Proceeding seems to be this, that Human Society cannot be preserv'd, in a very easy or peaceful Condition, without the conferring of those mutual good Offices; and therefore Nature seems to have set them aside, as constant Subjects of exercising Men's particular Benevolence, by means of which they might win on the good Opinions, and the Affections of each other. And now it is clear, that those things which may be recover'd by Force, are not so apt to procure the Favour, or to unite the Minds of Men, as those which we give only upon our own free Motion, and which we might deny without Fear or Danger. But what is *due* to us, upon an Intervening *Pact*, if not voluntarily tender'd, we may procure by *forcible* Means. As we may likewise defend by *Force*, our just Possessions and Goods, when an Attempt is made upon them, by any injurious Assailant. *Civil Obligations*, or such as have been confirm'd by the Authority of Civil Laws, create an *Action* in Courts of *Justice*, by vertue of which I am to carry the Defailant before the Magistrate, who has a Power of compelling him to the Performance of his Duty. But even in *States*, *Obligations* purely *Natural*, or such as have not been enforc'd by the Sanction of *Civil Laws*, are left wholly to the common Modesty, and Conscience of Men, and to their just Dread of a Divine Sovereign and Judge; and the Subject ought not by a Course of Violence, to be brought to the Observance of them.

What *Obligations* ought to be confirm'd by *Civil Ordinances*, it is the Business of *Legislators* to determine; and they are to measure their Expediency and Use according as they seem likely to contribute to the

(a) Cicero pro S. Roscio. Every Man that is Dishonest, lives in a perpetual Fright, every Mans Wickedness haunts him, his Folly and his Madness disturbs him; his evil Thoughts and guilty Conscience terrifie and distract him. These are the Constant and the Domestick Furies, which Plague and Torture the Impious.

Add Selden. de J. N. & G. l. 1. c. C. 4. p. 47, &c.

(1) Hor. l. 1. Od. 34.

Parcus Deorum Cultor, & infrequens  
Insanientis dum Sapientie  
Consultus erro: Nunc retrorsum  
Vela dare, atque iterare cursus  
Cogor relictor.

inward Happiness, and Tranquillity of the State (a).

VII. *Obligation* may again be divided into *Perpetual* and *Temporary*. The former is that which cannot be taken off so long as the Person exists, in whom it inheres. Such is our *Connate Obligation* towards God; which, even with respect to the Exercise, can at no time be suspended or diminish'd. Such likewise is the *Connate Obligation* of all Men, towards all, as Partners of the same Nature, which no Person can throw off, so long as he makes a Part of Mankind; yet the Exercise of it may sometimes, with regard to some particular Persons, be suspended. And this happens, when I devolve into a *State of War* with another. For the *Obligation* being *Reciprocal*, in case one Party break it, and return Hostilities for the good Offices of Humanity, the other Party is no longer bound to deal with him in a friendly manner, but may maintain his own Safety, and his own Rights, although with the hurt of the unjust Opposer. Yet the same *Obligation* may still be said to remain *perpetual* in this Respect, that so soon as our own Safety is provided for, and ensured, we ought to be ready to renew the Peace, and to return to the exercise of all Courtesy and Humanity, towards the Party who began the Contention. Amongst *Adventitious Obligations*, we commonly reckon *Perpetual*, the *Obligation* of Children towards their Parents, and that which passes between Husband and Wife; which shall elsewhere be explain'd at large.

*Temporal Obligations* are such as may cease and be cancell'd, whilst the Persons in whom they inhere, do yet exist in the World.

VIII. Farther, since it generally happens, that *Obligations* answer one another, it may be useful to divide them into *Mutual*, and *not Mutual*. An *Obligation not Mutual* is, when one Party stands bound to perform somewhat towards another; yet so that the other Party shall lie under no Corresponding *Obligation*, nor be tied to make Equivalent Requital. Such is the *Obligation* of Men towards God, by which they are engaged to pay him absolute Obedience; but He on His Part is not constrain'd by Virtue of any such external *Obligation*, to make any Return for their Obedience. Amongst those *Obligations* where both Parties are Men, (if we except a few Contracts, binding only one side,) there are none to be met with of this sort. And the Reason is, because it seems Repugnant to the *Natural Equality* of Men, that one Person should be bound to another, and the other Person lie under no Engagement towards him. For we cannot apprehend them to be sociable

Creatures, who are not united by a common Tie, who have not a mutual Communication of Services; but of whom one seems to be made as it were for the sake of the other, and the other is not bound in Return to contribute any thing towards *his* Interest or Happiness. Nor, when Men by Political Institutions introduced a State of Inequality, was it in their Power, to invest any Person with such an Extraordinary and Transcendent *Right*, as should Disengage him from all *Obligation* and Duty towards other Mortals.

IX. *Mutual Obligations* are such as answer to one another; so that the Party who on the one hand receives a *Due*, on the other hand is bound to repay it. These again are subdivided into *imperfectly Mutual*, and *perfectly Mutual*. The former are such as answer unequally, one of them being oppos'd to another, which is either different in kind, or in Vertue and Efficacy. This seems to happen chiefly on account of one of these two Reasons, either that the Persons are unequal, one having a Right of Commanding, the other a Necessity of Obeying; or because Persons in other Respects equal, as to some particular Business, refuse to receive an *Obligation* of the same Strictness, on both sides. For it is clear that *Obligations* do thus differ in Force or Efficacy, some producing a *perfect Right* in the Person, towards whom they are directed; so as to found an *Action* in Human Cognisance, to be prosecuted either by War, or before the Judge, according as the Parties live, either in a State of Nature, or under a Form of Civil Government, whereas others produce only an *imperfect Right*, so that the Performance of them ought not to be extorted by Violence. From the former of these Causes, arise the *Obligations imperfectly Mutual*, betwixt Princes and Subjects, betwixt States and particular Members, betwixt Masters and Servants, Parents and Children; all which will be examined in their proper Places. The latter Cause of making *Obligations imperfectly Mutual*, chiefly happen in Cases of *Gratuitous Promises*, and the Performances of them. For whilst I promise any thing to another out of free Favour, I perfectly oblige *my self* to give it; and the other Party has a Right of requiring it from me. But because I did not engage him to pay me an Equivalent, he is bound to me only by the Law of Gratitude, which ties him much more loosely than if he were my Debtor upon *Pact*. For we cannot on such unlimited *Obligation*, build our Hopes or our Affairs, and therefore should the Party prove ungrateful in the highest degree, we do not reckon our selves properly to have receiv'd any Loss or Prejudice.

(a) As it would be ridiculously Troublesome, to disturb the Judge on every *petit* Account, so it would be an Error on the other hand, to imitate the Custom of the *Seres*, (in *Strabo* l. 15.) who, he tells us, had no Hearings in Court, but upon Murder or Scandal; these being such Mischiefs as the Sufferer could not prevent; whereas it is in every Man's power not to be cheated in a Bargain, only by considering well whom he trusts. Much to the same purpose, is what he reports of the *Indians*, that they have no *Action* at Law, upon matters of Faith and Trust, nor do they make use of Witnesses or Seals, but believe each other on their bare Words. *Comp. Ælian* V. H. l. 4. c. 1. *Add. Senec. de Benef.* l. 3. c. 15.

For 'tis a Mistake in some Authors to assert, 'That Nature gives us a *perfect Right* to claim 'a Return of our Benefit, from an ungrateful 'Person; though in most Common-wealths, 'the Courts of Law refuse to admit an Action 'on that Score. Nor is this a good Consequence, *the Necessity of returning a Kindness, is greater than that of giving one; therefore the latter is founded upon an Imperfect Right, the*

*other upon a Perfect.*

For, however the Case may stand before, yet when I once promis'd to do a Favour, there lies greater *Necessity* on me to perform it, than on the other Party to return it. For there may be different Degrees in *Obligations* of the same kind; especially when we are to compare such Duties, as concur in point of time (a).

(a) *Comp. Bœcler. ad Grot. l. i. c. i. f. 4.* See what shall be said hereafter in Book the Vth, C. 12. S. 23.

## CHAP. V.

### Of the Nature of Promises, and Pacts in General.

IT now follows in Course, that we enquire 'How such *Obligations* as are not *born* with Men, should by virtue of some Act of theirs, be laid upon them; by which means there arises, at the same time, in other Persons a *Right* which before they wanted. For these two Moral Qualities have such a mutual Relation and Dependance, that whenever there is produced an *Obligation* in one Man, there immediately springs up a Correspondent *Right* in another; for 'tis impossible to apprehend that I am *bound* to any Performance, unless there be some Person in the World, who can either fairly require it, or at least fairly receive it of me. Tho' the Remark will not hold *vice versa*, that where-ever there is a *Right* in one, there must presently be an *Obligation* in another. For Example, the Magistrate has a *Right* of requiring Punishment for Crimes; but such a *Right* as is attended with no *Obligation* in the Criminal (1). Unless we solve the Doubt by this Distinction, that if we take *Right* in a strict and close Sense, for a Power or Aptitude, to *have* any thing, then there is always in some other Person an *Obligation* answering to it; but not if the word be taken for a Power of *doing* any thing. This then, in the first place is clear, that all *Adventitious Obligations* proceed, either from a *Simple*, or from a *mutual Act*; of which the former is properly call'd a *free Grant* or *Promise*, the latter a *Pact* or *Covenant*.

II. But in as much as all acknowledge that *Promises* and *Pacts* do *transfer* a *Right* to others, before we proceed, it may not be improper to examine *Hobbes's* Opinion (a), about the *transferring* of *Right*. He then, from his Project of a *State of Nature*, having inferr'd, that *every Man hath naturally a Right to every thing*, and having farther shown, that from the Exercise of this *Right*, there must needs arise a War of every Man against every Man, a State very unfit for the Preservation of Mankind; he concludes, 'That whilst

'Reason commands Men to pass out of *this State of War*, into a Condition of Peace, 'which Peace is consistent with a *Right* of 'Every Man to every thing, it at the same 'time prescribes that Men should lay down 'some part of this universal *Right*. A Man, 'he says, may lay down, or divest himself, of 'his *Right* two ways, either by *simply renouncing* it, or by *transferring* it to another. 'The former is done if he declares by sufficient Signs, that he is content it shall hereafter be unlawful for him to do a certain 'thing, which before he might have lawfully 'done. The latter, if he declare by sufficient 'Signs to another Person, who is willing to 'receive such a *Right* from him, that he consents it shall be for the future, as unlawful 'for himself to resist him in the doing of a certain thing, as he might before have justly resisted him. Hence he infers, that the *transferring* of *Right* consists purely in *Non-resistance*; or that, he who in a *State of Nature*, transfers *Right* to another, does not give the other Party a new *Right* which before he wanted, but only abandons *his own* *Right*, of resisting such a Person in the exercise of *his*. Which Assertion, according to his *Hypothesis*, he thus makes out; 'Before any such Act of transferring *Right*, the Person to whom it is said to 'be transferr'd, had a *Right* to all things, and 'therefore it was impossible to give him a new 'one; but the Person *transferring*, loses his 'Liberty of just Resistance, which before 'hindred the other, from exercising his *Right* 'in its full Extent. Therefore, whosoever 'in a *State of Nature* acquires a *Right*, only 'gains this Privilege, to enjoy his Primitive 'Right securely, and without just Disturbance; for Example, if a Man in a *State of Nature* by Sale or Gift, makes over his Field 'to another, he only takes away his own *Right* 'to that piece of Ground, not the *Right* which 'all other Men have to it; or which comes to 'the same, he declares that he will not resist,

(1) 'Tis true, Punishments are not due to Criminals by Virtue of any Compact, but since the Right of Life and Death, or the Right of the Sword is conferr'd upon Sovereigns, we are oblig'd not to resist 'em when They make use of that Right, tho' it be upon our own Persons. See Mr. *Barbeyrac's* French Translation of this Book. B. 3. c. 3. f. 4. Note 8. and f. 5th. (a) *De Civ. c. 2. f. 3. &c. & Leviath. Engl. Book. I. Chap. XIV.*

‘ or hinder such a particular Person, who has  
 ‘ a mind to make use of the Field; but he does  
 ‘ not by this Act prejudice the rest of Mankind,  
 ‘ who still keep their Primitive Right, as well  
 ‘ to this Spot of Earth, as to every thing else  
 ‘ which Nature affords.

III. But as we have formerly made out (1), that this *Hobbesian State* is by no means *Natural* to Man, a Creature design’d for a *Social Life*; so neither can we admit of what the same Author thus establishes; as the Consequence and Result of it, such a Right of each Man to all things, as shall produce any Effect in reference to other Men. For the clearer Illustration of this Point, it is necessary to observe, that not every Natural Licence, or Power of doing a thing is properly a *Right*, but such only as includes some Moral Effect, with regard to others, who are Partners with me in the same Nature. Thus, for Instance, in the old Fable, the Horse and the Stag had both of them a Natural Power or Privilege of feeding in the Meadow; but neither of them had a *Right*, which might restrain or take off the Natural Power in the other. So Man, when he employs in his Designs and Services, Insensible or Irrational Beings, barely exercises his Natural Power, if without regard to other Men, we here precisely consider it in reference to the Things or Animals, which he thus uses. But then at length, it turns into a proper Right, when it creates this Moral Effect in other Persons, that they shall not hinder him in the free use of these Conveniencies, and shall themselves forbear to use them without his Consent. For ’tis ridiculous Trifling to call that Power a *Right*, which should we attempt to exercise, all other Men have an *equal Right* to obstruct or prevent us. Thus much then we allow, that every Man has naturally a Power or Licence of applying to his Use, any thing that is destitute of Sense or of Reason. But we deny that this Power can be call’d a *Right*, both because there is not inherent in those Creatures, any *Obligation* to yield themselves unto Man’s Service; and likewise, because all Men being naturally *equal*, one cannot fairly exclude the *rest* from possessing any such Advantage, unless by their Consent, either *Express* or *Presumptive*, he has obtain’d the peculiar and sole Disposal or Enjoyment of it. And when this is once done, he may then truly say he has a *Right* to such a Thing. Or to decide the Business more briefly, we may make use of this Distinction, that a Right to all things Antecedent to any Human Deed, is not to be understood *Exclusively*, but *Indefinitely only*; that is, we must not imagine one may engross all to himself, and *exclude* the rest of Mankind; but only that Nature has not *defined* or determined, what Portion of things shall belong to one, what to another, till they shall agree to share her Stores amongst them, by such Allotments and Divisions. Much less

will the same *Equality* amongst Men admit, that one should naturally claim a *Right* over another. It is rather true, that no Person will have a Right to govern any other Person, unless he acquire it in peculiar manner, either by his Consent, or by some other Antecedent Deed; as shall be made out more at large in its proper place.

IV. The proper Notion then, of transferring and of acquiring Right, will appear with more Exactness, if we premise, that some *Rights* bear a regard to Persons, others to Things; and that the latter kind of Rights is again divided into Original and Derivative. I acquire a *Right* over a Person, if he either expressly, or tacitely consents, that I shall prescribe to him what he ought to do, to suffer, or to forbear; by Virtue of which Agreement he both obliges himself, voluntarily to study Obedience to my Pleasure, and at the same time grants me a Right of compelling him, in case of default, to his Duty, by proposing some considerable Evil; which I shall otherwise bring upon him. A Man then acquires an *Original Right* over *Things*, when all others either expressly or tacitely, renounce their Liberty of using such a thing, which before they enjoy’d in Common with him. This *Original Right* being once establish’d, by virtue of which the Primitive Community of things was taken off, the transferring of Right is nothing else but the passing it away from me to another, who before was not Master of it. Hence appears the Absurdity of saying, that *the transferring of Right consists barely in Non-resistance*. In as much as that negative Term cannot express the force of the *Obligation*, arising from such an Act; which properly implies an inward Inclination to make good the Contract: Though Non-resistance be indeed one Consequence of the *Obligation*, and without which it cannot be fulfilled. The Instance about the *Field* proposed by *Hobbes*, does not come up to the Point in Hand; for besides, that it is very absurd to call that an Act of *Selling*, when I only quit my Pretensions to a thing, whilst all other Men still keep *theirs*; even according to his own Doctrine, *Propriety* of things had its rise from Civil Government, after the *State of Nature* was supposed to be pass’d and gone. Therefore during the *State of Nature*, no Man could call the Field *his own*, and consequently not *Sell* it. ‘He ought indeed, to have express’d himself thus; since in a State of meer Nature, Things belong’d no more to one than to another, therefore if a particular Person desired the sole use of any thing, to make him Master of his wish, it was necessary, that all other Men should renounce the use of the same thing. If they did this *gratis*, the Act had somewhat in it like a *Gift*; if with some Burthen or under some Condition, it was then a kind of a *Contract* (2), for which we have no Name. But

(1) Book II. Chapter II. Sect. 7. &c. (2) We shall Explain this Term in B. V. c. 2. f. 7.

‘ should one Man have renounced his Power  
‘ over such a thing, this could have been no pre-  
‘ judice to others; and consequently, he only  
‘ would have been debarr’d from the use of it,  
‘ who had thus freely quitted all Title to it.

V. Let us now carry on our Enquiries, and examine how a Man may contract an Obligation, and confer a Right on another, by means of his own *free Promise*. To understand the Nature and Effects of this kind of *Tie*, we must in the first place observe, that there are two ways, of speaking about giving, or doing a thing to another, which now is, or which we imagine, will hereafter be in our Power. The first way is, when we barely express our present Mind about a future Act; yet so as to lay no Necessity on our selves, of persevering always in the same Resolution. An Instance we have in what *Tiberius* in *Tacitus* (1), writes to his Favourite *Sejanus*, *Ipse quid intra animum volutaverim, quibus adhuc necessitudinibus immiscere te mihi parem, omittam ad præsens referre. I forbear to tell you at present, by what Fortunes, and by what Alliances I am considering to unite you to my self.* Such a bare Assertion, neither founds an Obligation in me, nor a Right in the other Party (a). And to render it Vertuous and Unblamable, there is only this Condition requisite, that we *speak* as at present, we really *think*, and do not impose upon a Man by Falsehood and Dissimulation. But we are by no means obliged to continue always in this Design; since the mind of Man has not only a Natural *Power* of changing Opinion, but likewise a *Right*; so as to do it without fault, when there is no particular Obligation, imposing a Necessity of holding firmly to a Resolution, already taken and declared. Yet these Changes of Purpose are liable to just Censure, if either the former Judgment from which we receded, was better than this last; or if by altering our Measures so unexpectedly, we expose a Person to Disappointment and Derision, who did not deserve so unkind Treatment at our Hands (b). Though it be often a just Punishment to base Flatterers and Designers, to balk them of their greedy Hopes; and to cheat the gaping Crows, when they have prepared their Mouths for the Morfel (c).

VI. We may call it an *Imperfect Promise*, when a Man determines his Will to the doing a Favour hereafter, with a sufficient Sign to make it firm and lasting; or so as fully to declare his Willingness to lie under an *Obligation*, but not so as to give the other Party any proper Right of compelling him, to stand to his word. The like to which happens in the Duty of returning Kindnesses, where the Receiver is obliged to make a grateful Acknowledgment, though the Giver has not a full *Right* to require it. Some are of Opinion, that it is hardly possible to produce an Instance of this kind

of *Promise*, in the *Law of Nature*, barely consider’d. It is usual to alledge for Examples, the Promise of an absolute Prince made to his Subject, of a Master to his Servant, of a Father to his Son, whilst yet under his Power; by all which the Parties promising, stand obliged to make good their Engagement; but the others seem to want a *Right* of demanding it from them, because they are allow’d in no *Court* to bring an *Action* against them upon Default. But now the Lameness, or Defect, of these Promises does not arise from any intrinsic Weakness or Invalidity; but from that Superior Quality, or Station in the Promisers, which hinders the *Obligation* from taking its full outward Effect. Others instance in an imperfect *Stipulation*; when the Civil Laws enjoin, that Promises shall be made under such a particular form of *Stipulating* Words; and will not permit a Man to sue another upon his Promise, if it did not run precisely in those Terms. Here they observe, that in case the Parties concern’d, fully intended to contract a perfect Obligation, and omitted the set Form of Law, only through Error or Imprudence, the Promiser is by Natural Equity engag’d to perform his word, though the other Person cannot force him to it by an *Action* in Courts of Civil Judicature. But neither have we in this Example a *Promise*, which is *Imperfect* upon account of the Law of Nature, but by Virtue of a Positive Law, which ties up its Effect to such a punctual Form of Speech; a Restraint, which naturally it did not lie under. A true Instance then, of an *imperfect Promise* is, when I express my self in this manner, *I really design to do this, or that for you; and I desire you’d think I am in Earnest, and speak Truth.* In which case I am bound to perform my Word, rather by the Law of *Veracity* than of *Justice*; I lay an Obligation on my self, but I give the other Party no Right of forcing me to perform it. Men have naturally somewhat of Greatness and Generosity in their Temper, upon account of which they had much rather seem to do a good Office, purely on the free Motion of their own *Virtue*, than for the sake of any *Right* which another has to challenge it from them. To this Head we may refer the Promises of Men in Favour and Authority, when not by fair Words and general Complements, but in a serious and particular manner, they engage to assist us by their Recommendation, Intercession, Promotion, or Suffrage; which yet they would not have a Man challenge from them by virtue of any *Right*, but desire they should be imputed wholly to their Generosity and Honour. Even the Law of Nature does not seem to allow, that a Man should be *compell’d* to the Performance of these Promises; since in the very Act of Engaging himself, he made a Tacite Reserve against such Proceeding; that his

(1) L. 4. c. 49. (a) *Vid.* l. 108. f. 1. D. de verb. Oblig. § 1. 45. Tit. 1. (b) See the Passage between Q. Cecilius and T. Marius Urbinas in *Valer. Max.* l. 7. c. 8. § 5, 6. See *Gror. B.* II. c. 11. f. 2. (c) *Vid.* *Plin.* 2. Epist. 20. *Comp. Grof.* l. 2. c. 11. f. 2.

Benefit might carry the more Grace and Beauty in it, by being remov'd as far as possible, from Necessity and Constraint.

VII. A *perfect Promise* is, when a Man not only determines his Will to the Performance of such or such a thing for another hereafter, but likewise shews that he gives the other a full *Right* of challenging or requiring it from him. When we engage to give away a particular thing, or to perform a particular Service, the former is a kind of *Alienation* of our Goods, or at least somewhat in order to it; the latter is an *Alienation* of some part of our Natural Liberty; in as much as we are now to stick to the Restraint and Confinement of our Promise, about a matter, which before we might have used, or done, or omitted at our Pleasure. It must be well observ'd, that what we here deliver, concerns only such Promises as are made betwixt Men. For tho' it be impossible, that the Divine Promises should fail, yet it would be highly Arrogant and Indecent to say, that these seeming Engagements on God's Part do give a *Right* to Man, which shall hold valid against his Maker (a).

VIII. It is a nice Remark of Mr. *Hobbs* (b), and worthy our Notice, that *in relinquishing or transferring Right, if we make use of no Signs except Words, those Words ought to be of the time Present or Past*. For he for instance, who shall say in the *Future, to Morrow I will give*, plainly shews he has not given already; and therefore the *Right* he has over the thing promised continues firm and entire all this day, and all the next day too, and so on, unless in the mean time he actually give it, or pass away the *Right* of it by a new Promise. Yet in Case, besides his Words, he made use of other Signs sufficiently arguing, that it was his Will to transfer the *Right* at present; then the Words, though Grammatically Future, shall not hinder the Engagement from taking full Effect. But where these other Signs are wanting, we ought to be very tender of putting so wide and forced an Interpretation on Verbs of the future Tense, as to make them imply a present Act of Alienation. For since we are not wont to make over our Goods to others, without the Prospect of some Advantage to our selves, which Advantage does not, in these Acts of Grace or free Gift, visibly appear; therefore, in construing such an Act, to which Men are commonly averse, we ought not to presume on any thing farther, than what is by express Tokens of the Will declar'd. Especially since it is usual by these Terms to signify only a *Simple Mark of Good Will* (1), and such as shall, at present at least, have no Effect. So that whilst a Man speaks in the Future, he is suppos'd to be yet under Deliberation; and before the time prefix'd, perhaps his Affection and the Merits of the Person may alter; or some Misfortune may

intervene, rendering it Incommodious for him to part with what he intended. In the same manner as he that makes his *Will*, does not transfer his *Right* immediately on the Heir; but he is suppos'd ever to have this Clause or Condition in his Mind, *such a Person shall be my Heir, unless I alter my Will before my Decease*. Though indeed, it be look'd upon as an Argument of Levity and Inconstancy, for a Man to cheat and delude another, with false Hopes and Expectations.

The Case is very different, if I express myself thus, *I have given, or do give to be deliver'd to Morrow*: For this is plainly, giving a Man to day the *Right* of having a thing to morrow; or transferring to him to day the *Right* over a thing, which ought to morrow to be actually deliver'd to him. Nor is it any Objection against what we have been asserting, that according to the ordinary form and manner of Speech, most Promises are express'd in Terms of Futurity. For in the most solemn Engagements by formal *Stipulation*, or by Oath, we use the same way of speaking, *you shall have such a thing of me, I will give such a thing, &c.* The reason of which Custom is, that the delivering of a thing promis'd, generally follows at some *Distance*. And indeed, we can scarce call it a Promise, when at the same time the Intention of giving is declared, and the thing actually tendred; in as much as there seems here, either to have been no *Obligation*, or such as expired in the very minute that it was contracted. However, it is plain the Generality of Men never think they properly *have* a thing, till they get firm hold and full possession of it. If then these Terms of Futurity occur in a *perfect Promise*, as for Instance, *to morrow I will give you an hundred Pounds*, the sense of them amounts to this, *I now give you a Right to have and to require of me the said Sum; and I likewise oblige my self on the day appointed, to deliver it to you accordingly*. We may settle the whole Point with more Brevity, by only saying, that Verbs of the future Tense, made use of in Promises, and especially the Term of *Giving*, do either imply an *Obligation* hereafter to be contracted, and then they neither transfer the Thing nor the *Right* to another; or else they import the delivering of a thing hereafter, the *Right* to which either is now, or has been formerly transferr'd; and then they do not hinder the *Promise* from being most *Perfect* and *Compleat*.

IX. It is Requisite, that whilst we are engaged on this Point, we endeavour to settle a famous Question, which has been much canvass'd by Authors, Whether there can be a force of *obliging* in bare Promises, or in bare Pacts, whilst they are no more than Verbal Agreements, and are not strengthen'd by any actual Performance betwixt the Parties (2)? *Commanus* (c) the *Civilian* has been the Principal

(a) *Add. Grof. loc. cit.* f. 3, 4. (b) *De Give*, c. 2. f. 6. &c. & *Leviath.* Engl. Pt. 1. c. 14. (1) In the last Editions of the Original there is *effectum* for *affectum* which entirely corrupts the Sense. (2) See what we shall say in B. V. c. 2. f. 2, 3. (c) *Comment. Jur. Civ.* l. 5. c. 1.

Affertor of the Negative Side; whom *Grotius* (a), and others have laboured to confute. And indeed, it has been the fixt Opinion of Wise and Learned Men in all Ages, that *Faith* ought to be kept inviolably, though given only in *Words*; or that a Man by *speaking* only, without the Intervention of any *Deed*, may lay on himself a Necessity of some future Performance (b). Whether *Commanus* has with any Colour opposed this universal Judgment, will appear, if we bestow a little time on taking his chief Arguments under Consideration. In the first place then, he says, that *he who rashly believes a Promise made without Cause is no less to blame, than the vain Person who made it*. Now here all the Difficulty lies in explaining what he means by a Promise made *without Cause*. If he would be understood of such Promises as if not perform'd, bring no Loss or Prejudice to the Party, to whom they were directed, and if fulfill'd, must needs create Trouble or Damage to the Performer, we are willing to allow, that Engagements of this kind produce no *Obligation*. For how can a Man have any Right of requiring me to put my self to any Charges or any Toil, in doing a thing which shall profit him nothing (1)? And it is indeed against Reason, to undertake an Action which can produce no Good, and may produce Evil. Thus for Instance, suppose you had got me to promise you that I would forbear eating four Days together; upon what account should I stand to such a rash Engagement, if so long a Fast would Prejudice my Health, and yet would contribute nothing to your Interest or Advantage? Therefore in this Case, it is alike Vain and Foolish in one Man to make the Promise, and in the other seriously to challenge the Performance of it. Besides, since Promises are matters of *Grace*, or free Favour, they ought to be interpreted under this Condition or Limitation, *provided I can compass the thing I speak of, without any considerable Damage to my self*. Nor can the Person to whom I make the Promise be so impudent and unreasonable, as to desire that my Kindness

should be an Injury to me, and that I should enrich him by my own Losses (c).

But if by a *Promise made without Cause*, *Commanus* understands only a Gratuitous, or free Promise without prospect of Gain; then his Assertion will overthrow the whole Business of Beneficence and Liberality, and make all the Offices of Humanity base and mercenary Performances. For why should not I credit a Man who knowing his own Abilities, has bid me expect some free Gift from him, purely that I may have occasion to love and to esteem him? And since if he had pleas'd, he might safely have forborn the Promise, why did he order me to depend upon his word, if he design'd not fully to oblige himself to the making it good? For the denying of a Benefit is then only void of Injury, when a Man is bound to confer it only by the Law of Humanity; not when by express Promise he has given another a *Right* to receive it.

X. *Commanus* urgeth farther, 'That since Promises of this kind commonly arise from Ostentation, rather than good Will, or at least from Rashness and Inconsiderancy, supposing the Design to be real; the Fortunes of Men would be in great Danger, were they bound to perform every thing they said. It was perhaps on some such Principle, that the Ancients imagined the Oaths and Proteftations of Lovers were invalid, and that the Gods excused the breach of them, as proceeding from Minds blinded with Passion (d). But indeed the Danger here mention'd is chiefly in Imagination. For we do not attribute a Power of obliging to any Promises, but to such as are made upon serious and deliberate purpose; and he that mistakes jest for earnest, ought to pay for his want of Apprehension. On the other hand to promise really more than one can conveniently perform, as it must be acknowledg'd a Fault, so it would be a much greater, and indeed a piece of Barbarity, strictly to challenge and require it (e). And besides, we should take care to distinguish between such Terms of Honour and Esteem as Persons made

(a) L. 2. c. 4. f. 1. & 4. (b) *Tull. Off.* 1. c. 7. The Foundation of Justice is Faith, that is to say, a Firmness and Truth in our Words, Promises and Contracts. Hence some will have the word *Fides* to be call'd *quia fit quod dictum est*, because that which was said is done, *Ulpian in l. 1. D. de Passis*. What is so agreeable to Human Faith, as to observe mutual Agreements? *Vid. D. l. 2. c. 14. de Passis*. It was a very wicked Jest of the petit Prince of *Bantam*, when being reproved for breach of Promise, he answer'd, his Tongue had no Bone in it, to make it more stiff than was necessary for his Interest. (1) *Vid. D. L. 2. T. 14. Leg. 61*.

(c) It often falls out, that even not to keep ones Promise shall be just. For all must be refer'd to the Fundamental Rules of Justice; as first, that no Man be wrong'd, and secondly, that the Publick good be as far as possible promoted. It may likewise happen, that the Performance of a Promise or Contract, would prove highly prejudicial, either to one of the Parties, or to the other. For if *Neptune* (as it is in the Story) had not made good his Promise to *Theseus*, *Theseus* had not been so unfortunately deprived of his Son *Hippolitus*. Therefore neither are we to keep those Promises which are unprofitable to the Person to whom they are made; nor those which are more hurtful to our selves than advantagious to him. It is a breach of Duty to prefer a greater Damage to a less. If you promise to plead another Man's Cause, and in the *Interim* your Son falls dangerous ill, it will be no Violation of your Duty to recede from the prior Engagement; and the Fault will be much greater in the other Party, if he complain of such a Disappointment. *Tull. Off.* 1. *Vid. D. L. 50. T. 17*.

Add. *Senec. de Benef.* l. 4. c. 35. 39. *Tull. Off.* 1. 3. This Case is proposed, I have a Remedy given me for the Dropfie, upon this Condition, that if it cures me, I am never to use that Medicine again. Within a few Years after I have been thus cured, I relapse into the same Disease, and the Person with whom I contracted will not give me leave to make any farther use of it. What am I to do here? It is Inhumanity in him to refuse me, besides, that my using it would do him no hurt. I may therefore safely consult my own Life and Health. (d) *Plato in Sympos. & Poetæ passim*. (e) *Aurelian, in Flavius Vopiscus, c. 35*. Setting out on an Expedition, and promising the People to bestow Crowns of two pound weight on them, if he returned victorious, when the Distribution was to be made, the Crowns proved only of Bread, whereas the People expected them of Gold.

use of to express in an indefinite manner, their good Affection towards us; and such particular Engagements as they bind themselves by, to perform somewhat on our behalf: For Men of good Nature and good Breeding often express their Kindness and Civility in very ample Terms; they declare themselves to be *entirely ours*, and offer all they have to our Service, and Disposal (a). Old *Aeolus* in *Virgil* had this piece of Gallantry:

—Tuus, O Regina, quid optas  
Explorare labor: mihi jussa capessere fas est.  
Æn. I. v. 80, 81.

—Great Queen, be pleas'd to say  
The thing you wish: my Duty's to obey.

Here the Goddess had been uncivil, should she have taken advantage of his general Compliment. Words of this Nature then, however seriously deliver'd, oblige a Man to no certain Performance; but only serve to testify his hearty Respect and kind Inclination towards another (b). But those Promises by which we empower another to expect some particular and determinate Service from us, ought most strictly to be fulfill'd, because the other Party building on our word has adjusted his Affairs accordingly. So, though there now and then happens an Instance of a vain Prodigal, (who should have been put under Government for a Fool or a Madman,) that ruins himself by profuse and inconsiderate Engagements, this ought to be no Reason why we should affirm all Verbal Obligations to be Invalid, and banish them from the use of Human Life: As we don't condemn *Suretyship* in General, though many have suffer'd so severely by it. Upon the whole since an express Promise passes into a Debt, Men ought to be very Cautious of engaging for more than they are able to compass. And 'tis not Modesty, but a vicious Weakness in any Person to be so easie and tender, that he dares not deny the most Impudent and unreasonable Petitioner (1).

XI. What *Connanus* alleges more in defence of his Opinion, may be solv'd with little Difficulty. 'He says, 'tis fit that some things should be left to every Man's Honesty and free Bounty, and that should not be reduced to the Rigour and Necessity of strict Obligation. That the study of Integrity and Constancy would improve amongst Mankind, were there but a Field left for those Vertues to exert and exercise themselves in; which is hardly possible, if Men are compell'd to observe all the Promises they make. But that otherwise, it was a great and glorious thing to perform, what by words or other Signs you shew'd your Intention of doing; and so

'much the more glorious, the less it seem'd constrain'd. But indeed, there is still left scope enough for Liberality, though you give a Man a Right of demanding somewhat from you, which at first you might have securely denied him.

And since there must needs pass such a mighty number of Promises amongst Men, whilst they continually want the Assistance of each other, it is more for the Interest of Human Affairs, that there should be less Glory in the Act of keeping Faith, than that so many Persons should be deluded by other Mens Inconstancy and Irresolution. The Law of Nature commands us to lend to another, so far as we can do it without any considerable Prejudice to our selves. But the Obligation is rendred more strict and binding, if by our own free offer we reduce this general and unlimited Injunction of Nature, to a particular Engagement, and assure the Party that he may expect, for certain, it shall be fulfill'd. So that this Argument is plainly false, *if I had not promis'd, it had been never the less the Duty of a just and good Man, to relieve the Indigence of others; therefore it is laudable to stand to Promises, not because we have bound our selves by giving our word, but because the Party is in real want of our Succour.*

He is willing to grant thus much, that if a Man by breaking his Promise, has caus'd the other Party to suffer Damage; (who for Instance, might depend perhaps on his word, and so neglect to provide for his own Necessities;) that in this Case he should be bound to make good the Loss sustain'd. And from this Concession we may as fairly infer, that Promises may be challeng'd, and that we stand obliged to perform them, least we prejudice the Persons to whom they were directed. But it is very dangerous to draw thence such Consequences as these; That *when you would not be in a worse Condition should I break my Promise, then you was before I made it, I may then have liberty of revoking it; supposing that nothing has yet been done towards the Performance. And it is more against Nature for you to require me to make good this Engagement against my Will for your Gain and Benefit; than it would be for me to recal it without your Detriment.* For the Duty of *Humanity* is not fulfill'd by your not hurting another; but you ought as far as you are able positively to advance his Good. Therefore when you have peculiarly engaged your self to such a kind Performance on his behalf, to repent of your Design only with this Consideration, that it is not like to be the worse for your Inconstancy, looks as if it were a thing not worth a Man's Regard to improve the Condition of his Neighbour. The Case then is the same with these *Verbal Promises* as

(a) See 1 Kings XX. 3, &c. Though *Josephus* in his Antiquities otherwise interprets the place. *Grotius* saith, *Ahab* understood the Words in this Sense, *I give up my self, and all I have in way of Homage and Fealty*; but *Benbadad* took them in a stricter Meaning, *for the very Propriety and Possession.* Add. *Polyb. excerpt. Leg. 13. & Liv. l. 36.* concerning *Phaneas* the *Etolian* Ambassador.

(b) Add. *Fern. Vasq. Controvers. illustr. l. 1. c. 10. f. 20, &c.*

(1) *Vid. Terent. Andr. Act. 4. Scen. 1. v. 5, &c. Vid. Plutarch. in Brut. p. 986. D. Ed. Weob.*

with those *Pacts* which have receiv'd the farther Confirmation of some *Deed* between the Parties; and no one will pretend that we may run from those, when we see that our change of mind will not render the other Persons Condition worse, but only negatively, *not better*. Besides, as *Grotius* well observes from this Opinion of *Commanus*, taken in so gross and general a manner as he expresses it, 'twill follow, that Articles of Agreement made between the Princes and the People of different Nations, so long as nothing has yet been perform'd on either side, are Invalid (1); and especially in such Places where no particular forms of Leagues or Covenants have been receiv'd into use. And were this true, a general Diffidence and Jealousie, must reign amongst Mankind, and no one must believe another any farther than he can see him. Which close and immediate way of transacting, the

(1) This shall be treated of in Book VIII. Ch. 8, 9.

Condition and Circumstances of many Men will not admit of; who may never the less have occasion to settle Business with each other.

The last Argument of *Commanus* taken from the Practice of the *Roman* Courts of Law, which granted an *Action* only upon such Promises as were confirm'd by *Stipulation*; is easily answer'd by observing, that the Reason of this Caution in the Civil Law was not because serious Promises do not bind by the meer Law of Nature; but that the Ceremony of these solemn Forms might put Men on considering throughly, whether it was Expedient for them to enter into a Promise which it would be impossible afterwards to revoke. As likewise, that the things promis'd might by this means be express'd more punctually and plainly, least any Obscurity in that respect might give Occasion to future Cavils and Disputes (a).

(a) *Add. l. 19. tit. 5. D. præscript. verb.*

## CHAP. VI.

### Of the Consent required in the making of Promises and Pacts.

I. **S**INCE the regular Effect of Pacts and Promises is to abridge and restrain our Liberty, and to lay on us the Burthen of necessarily doing such or such a thing, which before we might have perform'd or omitted at our Pleasure; there can be no better Argument to hinder a Man from complaining of this Burthen, than to alledge, that he took it upon him by his own free Will and Consent, when he had full Power to refuse it (1).

II. This Consent is usually declared by express Signs, as by *Speaking, Writing, Nodding, &c.* Yet sometimes without the Help of any such Tokens it is sufficiently gather'd from the Nature and Circumstance of the Business (2). And it is well known that *Silence* it self in many Cases, is interpreted for Consent (a). But in all these Exceptions it is strictly required, that the State and Condition of Affairs be such as shall on every side conspire to ground the Presumption; and that not so much as one probable Conjecture appear to the contrary. For otherwise it would be very hard Measure to put a Man under *Obligation*, upon any little Hint or Symptom of Agreement. And thus we see wherein the proper Nature of a *Tacite Pact* consists; that it happens, when we express not our Consent by the Signs generally made use of in Human Commerce and Transactions; but leave it to be suppos'd from the Business it self, and from the Circumstances that attend it. What we most commonly meet with of this kind is,

that when some principal and leading Contract has been entred upon by *express* Agreement, some other *Tacite* Pact is included in it, or flows from it, as we cannot but apprehend upon considering the Nature of the Affair. In the same manner, most Covenants leave some *Slight* Exceptions and Conditions to be *understood*. But we must have a care of stretching these Indulgences any farther than is well consistent with the carrying on of Trade and Business in the World; least they should prove of ill Consequence to the Validity of Contracts, by rendering them too slippery and uncertain.

Of *Tacite Pacts*, it may not be amiss to offer these few Instances. A Stranger comes into a *State* where Foreigners are treated with great Civility, and he comes in a friendly manner here; though he does not expressly swear Fealty to the Government, yet he is suppos'd by the very Act of his coming, tacitely to have engaged, that according to his Rank and Condition, he will conform to every Law of the place; so soon as he shall understand that such a Law was design'd to reach all manner of Persons who should abide in those Territories. And on the other side, the Government tacitely engages, to grant him Security and Protection, and the Benefits of publick Justice.

A Man is abroad at a distance from his Family and his Concerns, in the mean time a Neighbour without particular Orders, trans-

(1) This is very lively express'd in *Prov. VI. 1, 2.* and Promises are call'd a Bond in *Numb. XXX. 5.*

(2) *Labeo ait convenire posse vel re, vel per Epistolam, vel per nuncium; inter absentes quos; [poss.]: sed etiam tacite consensu convenire intelligitur. D. l. 2, tit. 14. de Pactis.*

(a) Thus to be Silent is to own your Crime, *Euripid. Iphigen. in Aulid. v. 1142. vid. D. l. 50. tit. 17.*

acts some Business for him; here again we must suppose a *Tacite* Pact, by Virtue of which the one having lent his free Assistance and Service, the other is bound to requite the Pains and to refund the Charge. In as much as it may be fairly presum'd, that had the absent Party known how Affairs stood, he would readily have consented to the whole Management.

A Guest sits down to a Table at a publick House; and though he has not exchange'd a word with the Host about the Price of his Dinner, yet by the bare Act of sitting down to eat, he is suppos'd to consent to the Payment of his Scot; since all know that this is not a Place where Men are treated for nothing.

In like manner, the *Obligation* between a *Guardian* and his *Ward*, has its Rise from a *Tacite* Contract (a).

As for those *Tacite* Pacts which we observ'd to flow from Principal Contracts, and which we may call *Accessory*, these Examples will shew the Nature and the Manner of them. A Man that bargains with another to have free *Ingress* to a Place, is suppos'd at the same time to obtain Liberty of *Regress* from it, though this be not expressly mentioned, because otherwise the former Agreement would be to no purpose. A Prince or Magistrate, who by Covenant gives leave to Strangers to frequent his Markets; is suppos'd to consent likewise, that they shall carry home the Goods they purchase there. As on the contrary, it would be most ridiculous Madness for me; supposing I have sold a Field to another, to deny him the Liberty of possessing it here, and to desire he would translate it to another place. In the same manner, he who lets out a Chamber to hire, is suppos'd to consent withal, that the Lodger shall make use of such other parts of the House, as he cannot be without; as of the Doors, Entries and the like; at least so far as to have free Access to his Apartment, and free Passage from it.

Instances of *Tacite* Exceptions and Conditions are so frequent, that 'tis not necessary to set down any in particular. But we must observe this of them in general, that they were ever to be interpreted with the greatest Strictness and Severity of Judgment; and that they will hold good no farther than it appears from very sure Grounds and Presumptions, that they

were consented to by the Parties whom they concern (b). For otherwise, it would be easy to thrust a troublesome *Obligation* upon a Man against his Will. And were too great a Licence given to these secret and *implied* Reserves, there is scarce any Covenant, which might not be either annull'd or evaded (c).

III. To make a Man capable of giving a serious and firm *Consent*, 'tis above all things necessary, that he be master of his Reason; so far as to understand the business in hand, to know whether it be convenient for him, and whether he have Strength and Ability to perform it; and when he has well consider'd these Points, to be able to express his Agreement by sufficient Indications. Hence it follows, that the Promises of Infants, of Mad-men, and of Ideots, are utterly invalid (1). But as to the Case of Madness, it is particularly to be observ'd, that this does not render a Man's Actions null and void in moral Esteem, any longer than during the actual Continuance of it. But so long as he enjoys lucid Intervals of Sense, there's nothing hinders why he should not be able *effectually* to oblige himself for such time as the Distemper allows him the use of his Reason. Yet the Fit returning suspends his Power of contracting or of performing any Business, till he again recover the Government of himself and of his Actions. Therefore the Common Maxim in Civil Law, that *Madness coming upon a Man destroys not any Business which he had before duly perform'd*, is to be understood of such Affairs or Concerns as can be compleated and dispatch'd at once. Of this kind is a *Will* or *Testament* (2), which being once rightly made stands good; unless it be revoked by a sufficient Declaration to the contrary; such as a distracted Person cannot give. But in case a Man lies under such an *Obligation* as is to be fulfill'd by distant Acts, all requiring the use of Reason, it is plain that if he fall into Distraction, the Duty is thereby suspended. Thus if a Person bargain with me to work at my Affairs for a certain time; if he happen to be seiz'd with a Phrenzy, the *Obligation* expires, in as much as he is now incapable of making it good. Although indeed, in hopes that a Person in this Condition may recover his Health, we usually suppose him still to have inherent in him all his former *Obligations*, Powers and Rights, the Charge of exercising which is for a time committed to others.

(a) *Add. Grot. l. 3. c. 24.* See what we shall say hereafter in B. 4. c. 4. f. 15. (b) *Add. l. 22. D. de Probation. & Præsumptionib. leg. 24.* (c) The Roman Lawyers give this Instance of a *Tacite Pact*, in L. 2. T. 14. D. de Pactis, leg. 2. If I restore to my Debtor his Bond or Caution, it should seem there is a tacite Agreement between us, that I demand not the Loan. Yet here according to the Simplicity of Natural Law, there appears to be no Occasion of introducing a *Tacite Pact*, since it is much plainer to say, that by the returning back the Caution the Debt is suppos'd to be forgiven, and consequently no Room left for an *Action* upon it. But that the Civil Law chose this round-about way of proceeding, was the Effect of Caution, least an *Obligation* really contracted should seem to be Cancell'd by bare Consent.

And thus too in the Case propos'd, l. 51. *Princ. D. locati*, it was hardly Necessary to assert that it was silently agreed, the Owner should not be at the trouble of Tilling the Field, tho' he let it at a greater Rent. Since without any such feign'd Agreement, it is more Natural to affirm, that the Conditions on which this kind of Contract was founded, cannot be extended so far as to benefit the Hirer who is indeed worthy of no manner of Favour, in as much as he hath neglected to Cultivate his Land, according to Bargain. *Vid. D. l. 17. tit. 1. Mandati, vel contra, leg. 6. l. 2. l. 19. tit. 2. Locati, condukti, leg. 13. in fine, & 14. Cod. l. 2. tit. 3. De Pactis, leg. 2.* (1) *Vid. Institut. l. 3. tit. 20. De inutilib. Stipulationib. f. 8. & 10.* (2) *Vid. Institut. l. 2. t. 12. f. 1. & Cod. l. 6. t. 22. &c.*

But if the Madness be judg'd Incurable, the Person is in all Legal and Moral Consideration to be accounted *Dead* (a).

IV. Farther, since the use of Reason is exceedingly hindred, and sometimes entirely oppress'd by *Drunkeness*, it is a usual Question, whether a Person under that Disorder, can bind himself by any Covenant or Promise. Which we think ought to be decided in the Negative, in case the Intemperance were so great, as entirely to drown and overwhelm the Understanding. For it can by no means be esteem'd a real and deliberate Consent, if a Man should with never so much Eagerness of Inclination, run into an Engagement, and express his Agreement by Signs which would at other times be Valid, whilst his Mind lies as it were under a stupifying Charm, and he is bewitch'd out of his Reason. It would indeed be highly Impudent for a Person to challenge the Observance of such a Promise, especially if it could not be perform'd without considerable Burthen or Trouble. And if it farther appear, that he purposely took advantage of the other Man's Weakness, and cunningly drew him into an Engagement under that Distemper of his Brain, he stands liable to be punish'd as an arrant *Cheat*. But when a Man after the drunken Fit is over, shall upon being put in mind of his Promise acknowledge and confirm it; it shall then be *Obligatory*, yet not by Virtue of what pass'd when he was drunk, but of what he since did when he was sober. Yet the Merriment of a chearful Cup, which rather revives the Spirits, than stupifies the Reason, is no hindrance to the contracting of just Obligations; especially if they be afterwards renew'd at more sober Seasons. To this purpose, the account which *Tacitus* gives us of the old *Germans* is very remarkable. 'Tis at their *Entertainments*, says he, that they commonly make up *Differences*, contract *Alliances*, chuse *Princes*, and in fine dispatch most affairs of *Peace and War*. They think no time so proper as this, because the generous heat of the *Liquour*, as it opens their *Hearts*, and takes off all *Disguise* from their *Thoughts*, so it inspires them with brave *Resolutions* and hardy *Attempts*. They are *Strangers* to *Craft* and *Dissimulation*, and the *Liberty* of the *Table* gets out all they know, and all they design. But the settling and finishing of *Business* is left to the next Day, when their *Minds* are closed and their *Judgments* grown cool. Thus they make the right use of each Time; they consult whilst they cannot

*dissemble*, and they resolve when they cannot mistake (b).

It is true indeed, that Faults committed in *Drunkeness*, are not on that account excusable (c). Because, though a Person whilst the fit is on him knows not, perhaps, what he does, yet in as much as he voluntarily applied himself to the use of such things as he knew would cast a Cloud on his Understanding, he is supposed to have yielded Consent to all the Effects of that Disorder. Yet it will not follow from this Consideration, that the Promises of *Drunken Men* are *Obligatory*; because there is great difference, between committing a *Crime*, and contracting an *Obligation*. For since there lies an absolute Prohibition against all *Sin*, therefore Men are to avoid all Occasions that may probably draw them into a *Violation* of their *Duty*. And how many *Enormities* *Drunkeness* betrays a Man to, is obvious to the meanest *Apprehension*. An *Action* then in it self sinful, can by no means lose that *Character* by proceeding from another *Sin* which led and disposed a Man to it. But on the other hand, since it is left to our free *Pleasure*, whether we will contract new *Obligations* or no; we are not (as in the other Case) bound to avoid all Occasions which may render our Consent imperfect and invalid. As we are not bound to decline *Sleeping*, out of a fear that others should interpret our *Nodding* or *Winking* for a token of Agreement to somewhat which they proposed (d). Therefore if *Drunkeness* had no other ill Effect, but that it made a Man seem to give some *Indications*, which at another time would imply Consent; it would not on this bare Account be esteem'd unlawful. And since a Man cannot contract an *Obligation* by *Promise* or *Pact*, without agreeing to it, and at the same time understanding the *Business*; we cannot infer his Consent to such an Engagement from his first consenting to make use of a thing, which would probably hinder the Exercise of his Reason. Especially if we consider, that Men seldom drink merely for the sake of stupifying their Brain, but their general design is to comfort and chear up their Spirits; and the former effect steals upon them almost insensibly, whilst they unwarily prosecute the latter. To make the difference appear more manifestly, we may add, that since the property of a *Crime* or *Offence* is to bring some Evil upon some Man, and of a *Promise* to bring him some Good, which before was not his due,

(a) Vid. l. 1. T. 6. D. de his qui sui vel. al. jur. sunt. l. 8. t. 18. D. de Offic. Praesid. l. 2. D. de Procuratoribus, l. 5. f. 2. D. ad. l. Aquil. (b) The like is reported of the *Persians* by *Herodot.* in *Clio.* l. 1. c. 133. *Athenaeus*, l. 4. c. 6. *Curtius*, l. 7. c. 4. *Add. Plutarch Sympos. Quaest.* l. 7. c. 9, & 10. (c) Legislators have then thought fit to punish even Ignorance, when the Person is the cause of his own Ignorance. And therefore a double Penalty is usually enacted against drunken Offenders. For here the Excess, and consequently the Ignorance, was of the Man's own procuring, it being in his power to avoid them. *Aristot. Ethic.* l. 1. c. 5. f. 10. It was one of *Solon's* Laws, that a Governour taken in *Drunkeness*, should be put to death; and *Pittacus* decreed, that a Fault committed under this Disorder should have a twofold Punishment. *Laert.* l. 1. in *Pittac.*

(d) To this purpose, *Sueton* tells us a jesting piece of Knavery in *Caligula*. He made an Auction of his superfluous *Gladiators*; and as the *Cryer* was performing the Sale, a Gentleman of the *Prætorian* Dignity, happening to sleep upon one of the Benches, the Emperour commanded the *Cryer* to take notice of the worthy Chapman that Nodded to the Price proposed. And the *Business* was so managed, that the poor Gentleman had laid out *Ninety Thousand Sesterces* before he knew a Word of his Bargain.

and since to be *positively hurt* or injured, is more odious in the eyes of common Justice, than barely *not to acquire* some Benefit, there is much more reason why Drunkenness should invalidate a Promise, than why it should cancel a Transgression. As for a Man's being bound to pay for that useless load of Wine which he pours down after his Stomack is already overcharg'd, and which he would refuse were he in his Senses; this Obligation arises from the Contract, made at the first sitting down, by which he engaged himself to give the Price of whatever he should drink, though he drank it to no purpose. If during this Fit of sottish Extravagance, he be guilty of any mischievous Frolicks, as throwing away the Liquor, destroying the Vessels or the Windows and the like; he stands bound to make Satisfaction by the general Law of *Reparation for Damages*.

V. How long Children continue under such a Weakness of Reason as renders them incapable of contracting Obligations, we cannot universally determine; in as much as some arrive at a Maturity of Judgment sooner than others. Therefore in settling this Point, Regard is to be had to the daily Actions and Proceedings of the Persons, from whence the best Conjectures are to be made about their understanding; or commonly we have recourse to the positive Laws of the Country; all *States* almost having fix'd this Period by their particular Constitutions, and sooner or later, according as they found their People to be naturally more brisk and apprehensive, or more sluggish and heavy. Amongst the *Jews*, a young Man might oblige himself by Promise after thirteen years of Age, and a young Woman after twelve. But because Persons of tender Age, though they may sometimes tolerably *understand* Business, yet for the most part act with too much Vehemence and Rashness, are too free and easie in their Promises, eager and over-confident in their Hopes, proud of being thought Generous and Liberal, Ambitious and hasty in contracting Friendships, and not furnish'd with prudent Caution and Diffidence; it has been wisely order'd in most Commonwealths, that in contracting all Obligations, they shall be sway'd by the Authority of graver Heads; till such time as their Rashness and Heat of Youth shall appear to be in a good measure abated. Hence in some Places, whatever they do in their own Names, during their Minority, is declar'd Null and Void; in others, if they have been cozen'd or overreach'd, they are allow'd to recover full Satisfaction (a). The Law of Nature it self plainly directs, that these Provisions should be made by positive Constitutions. Especially since he would justly forfeit the Character of his Ho-

nesty, who should make his Advantage upon this *easy* Age, and enrich himself at the Cost of those, who for want of Judgment and Experience, either could not foresee, or do not rightly apprehend the Loss (b). The same Law of Nature enjoins, that when any Statutes or Customs of this kind have been establish'd in a Commonwealth, they shall be strictly observ'd; not only by the Subjects amongst themselves, but in all their Transactions with Foreigners. Not so much (as *Grotius* says in B. 2. c. 11. §. 5.) because he who enters into Contract in any Place, is during that Affair, bound by the Laws of the Country as a kind of Temporary Subject; as because no State will admit of an *Action* in its Courts of Justice, upon a Business not conformable to its Constitutions, unless it has particularly declared, that in judging the Causes of Strangers, the bare Law of Nature shall be followed. The same is to be said of Contracts made by Letter, between the Subjects of different States, when upon default, either of them sues the other in the Courts of his own Country. For though here the injured Party may not have made himself, so much as for a time, a Subject of the other Commonwealth; yet if he desires Redress by its Assistance, he must submit his Case to the standing Laws. Or supposing two Subjects of the same Nation should enter into a Pact or Promise, in some place which acknowledges no Sovereign, as on the wide Ocean, or in some Desert *Island*, they must never the less have recourse to the Laws of their Country, if they would obtain a full and perfect Right to what they bargain'd for; or an *Action* to hold good in Court upon Failure on either side. How the Case stands with Reference to the Acts of those Persons who are placed above the Power of Civil Laws, it will be our Business elsewhere to enquire.

VI. Another thing which invalidates *Consent*, and by Consequence the Promises or Pacts that are built upon it, is *Error* or Mistake (1); through which it comes to pass, that the Understanding is cheated in its Object, and the Will in its Choice and Approbation. We ought here carefully to distinguish, whether the Case relate to a *Promise* or to a *Pact*. As for Promises we may lay down this for a certain Rule, that if a Promise be grounded upon Belief and Presumption of some Fact (2) which really never was, or when in making an Engagement, of this kind I supposed such an Action, or such a Quality, without regard to which I should never have given my Consent; in this Case my Promise is naturally Null and Void; provided it appear evident from the Nature and Circumstances of the Business, that I agreed to the Proposal purely on account of that Fact, or of that Quality, which

(a) *U. d. l. 11. f. 3. &c. l. 24. f. 1. l. 44. D. de Minoribus.* (b) The *Attick* Law in this Respect put *Women* in the Case with *Minors*; not allowing them to Bargain for any thing beyond a Bushel of Barley, *ἵδ' ἢ γρόμους ἀδελύς*, on account of the Weakness of their Judgment. *Dion Chrysost. Orat. 75. Isæus. Orat. 9.* (1) *Demens est, qui fidem præst. Errori*, *Senec. de Benefic. l. 4. c. 36.* (2) The Lawyers distinguish betwixt Error of Fact, and Error of Positive Law, and upon this Distinct. found several of their Determin. See *Daumot. of Civil Laws, 1 Part. B. 1. c. 18. f. 1.*

I took for granted. Because, here I did not promise absolutely, but upon Presumption of a necessary Condition; which Condition failing, whatever was built upon it, must consequently come to nothing (a). Thus, for Instance, suppose I have been inform'd that you have done me a Kindness in promoting and well-ordering my Affairs, and upon this score I have promis'd you a Gratification; you will not say I am bound to stand to my Word, when I find the Intelligence was absolutely false. By the same Rule we may decide the Case proposed by *Cicero* in his first Book *De Oratore*, c. 38. 'A false report was brought home of the Death of a certain Souldier, abroad in the Wars. His Father believing the Story, alter'd his *Will* in favour of another Heir, and afterwards died. The Souldier at last returning safe, sues the Possessor of his Inheritance (b). It was here urged for the Plaintiff, that the *Civil Law* declares such Wills of a Father to be *Null* (1), in which the Son is neither made Heir, nor yet particularly, and by Name, disinherited; neither of which was done in the *Will* now under Consideration. But to this the Defendant might have return'd, that the Law cited on the other side, plainly suppos'd that the Father knew his Son to be living, which here he knew not, but imagin'd the quite contrary. Therefore it might perhaps have been a more clear and easie way of asserting the Souldier's Title, to proceed only upon the Law of Nature, and to alledge, that the Father's Will was ground'd upon Supposition of his Son's Death, which proving false, the Will became Void and Ineffectual; since it appears that his belief of that Report was the sole Reason of his altering his Measures. And hence too it is easie to answer that over nice Question of *Sir Thomas Browne* in his *Religio Medici*; whether it was lawful for the Person whom *Lazarus* had made his Heir to possess the Goods; or whether the Owner upon his being restored to Life, had not a Right to challenge them again. Where the latter must without doubt be affirm'd. For the reason why the Goods of the Deceas'd pass away to others is, because they themselves are taken out of the World, and consequently have no farther need of these Possessions. Hence in many places, some part of the Goods are set aside to be given to the Poor, or to the Church for the Benefit of the Soul of the Deceas'd. And in the Pagan Superstition, it is usual to bury or burn some of the Goods with the dead Body, for the service of another Life.

But in case the Promiser was negligent in searching into, and examining the Condition, upon which he built his Consent; he shall be bound to repair any Damage, that is sustain'd by the other Party, upon account of his idle Engagement.

If the Promise was not ground'd upon the presence or absence of such a Quality, as a necessary Condition, then though the Promiser was mistaken in that Point, yet his *Obligation* shall stand good. If the Promise were but in part occasion'd by an Error, it may as to the rest of it remain valid; unless one part were included by way of Condition in another; or unless the Parts cannot separately be perform'd; for then an Error in part destroys the whole.

VII. As for Mistakes in *Parts*, it seems necessary to distinguish whether the *Person* was through Error, drawn into the Bargain, or whether there proves to be an Error, as to the Thing or *Subject* for which he bargain'd. In the former Case we should again enquire, whether any Step is made towards Performance or not. If I am prevail'd with to enter into a *Paet* or *Contract* upon Mistake, and I find this Mistake out, before any thing is done in order to the fulfilling of the Agreement, it is but Equitable, that I should have liberty to retract (2); especially if upon making the Engagement, I plainly declared the Reason of my Proceedings. But if the *Error* be not discover'd till the *Paet* is either wholly or in part perform'd, then the Person who lay under the Mistake, cannot demand a Releasement any farther than the other shall, upon a Principle of Humanity, be content to allow him. For Instance, A Man being at a distance from home, receives false Intelligence, that he has lost all his Horses. Upon this Information he enters into *Contract* for the purchase of new ones; but before the Money or the Horses are deliver'd, he finds himself to have been deceiv'd in the former News. Here we judge he is not bound to fulfil the Bargain, in as much the Seller very well knows, that the false account of his Misfortune at home, was the Reason of his Purchase. Yet he is in Equity oblig'd to make some Consideration to the Seller; at least to repay the Damage which he sustains by losing the Bargain. But in Case the Money and Horses were on both sides deliver'd, though the Buyer should now find that he has no occasion for his Purchase, yet he cannot force the Seller to refund the Price, and to take back his Horses, unless this Condition was expressly mention'd in the Agreement.

But when there happens to be a mistake about the *Thing* which is the Subject of the *Contract*, then the Business is *Null*; not so much upon account of the Mistake, as because the Laws and Terms of the Agreement are not really fulfill'd. In as much as in all Bargains the *matter*, about which they are concern'd, and all the Qualities of it, good or bad, ought to be clearly understood, and without such a distinct Knowledge the Parties cannot be suppos'd to yield a full Consent. And therefore

(a) 15. D. de *Jurisdic.* (b) *Add. Valer. Man. l. 7. c. 7. f. 1.* (1) Vid. D. L. 28. T. 2. de *Liberis & Posthumis instituendis.* &c. (2) Provided (as our Author says in His Abridgment, of the Duty of a Man and Citizen) that the other that makes the *Contract* receives by it no Damage, or that it be repair'd to Him.

upon discovery of any Defect, the Person who was likely to suffer may either draw back from the Engagement, or may compel the other to supply what is wanting; and likewise to make Satisfaction for Damage, if occasion'd by his Deceit or Default. And this, not only if the Defect be immediately found out, but if it appear at some distance of Time. Which Period or Interval, when it is not fix'd by the Civil Laws, is to be determin'd by the Arbitration of some honest Referee; that no Indulgence may be given, either to Fraud of the one Party in concealing, or to the supine Negligence of the other in examining the Business. And the larger space of time is to be allow'd, if the Defect were such as did not appear to external view, or could not be discover'd but by Men of extraordinary Sagacity and Skill.

As to that Common Maxim with the *Civilians*, that an Error in the *Essentials* of a *Pact*, disannuls the Agreement (a), but not an Error in the *Accidentals* or Circumstances; we are so to interpret it, as by the *Essentials* to understand, not only what makes up the *Physical Essence* of the thing bargain'd for, but likewise those Qualities of it, to which the Contracter had an especial Eye and Regard. For it frequently happens, that in a Bargain some *Quality* of the thing shall be chiefly esteem'd and valued, and the *Substance* or natural Constitution be only look'd on as a necessary Adjunct or Vehicle (b). Thus my Contract will not only be void if I buy such a particular Slave of a Merchant, and he sends me a different Person; but likewise if I bargain'd with him for one skilful in the Art of Cookery, and the Man whom I receive proves utterly Ignorant of the Business, and incapable of serving me in that Condition (c).

VIII. Much more ought a *Mistake* to render a Promise or *Pact Invalid*, if it were occasion'd by the *Fraud* of one of the Parties, who by that means drew the other into the Engagement. What force or effect, the practice of Deceit in these Matters will bear, may be clearly stated by making these Enquiries; first, as to the Author of the Knavery, whether he with whom we bargain'd, or a third Person. And in the next place, whether the Deceit was really the Cause of our Engagement, without which we had not ventur'd upon it, or whether it was only accidental to the Business, which we had nevertheless undertaken, but were now cheated in the *Thing* and its Qualities, or the true price and value of them. If the Trick was put upon us by a third Man, the

Party with whom we transact, not having been accessory to it, and the *Thing* for which we bargain'd proves without fault; in this Case the Agreement shall stand good; but we may recover of the Knave whatever we lose by his contrivance. If the Party himself with whom I contract, by some Deceit draws me into the Business, I am then free from all Obligation to performance (d). If the Deceit were not *Antecedent* to the Contract, but happen'd *in it*, with reference to the *thing* bargain'd for, its Qualities &c. the Agreement shall be so far void, as that it shall be at the pleasure of the suffering Party, either to reverse the whole Business, or to require Satisfaction for his Damage. A Matter not *essential* to the Agreement, nor expressly consider'd in it, shall not prejudice its Validity; though perhaps one of the Parties might have a secret and sly Respect to some such thing in the very Act of driving the Bargain. Upon what Right a Man may proceed, in Case he be egregiously cheated, as to the *Price* of any thing contracted for, we shall hereafter examine and declare.

IX. It comes now in Course, that we consider the Point of FEAR, what Power it has in rendering Human Acts incapable of producing an *Obligation*. There are two Species of Fear, which especially fall under this Enquiry. The former arises from some Vice of ill Disposition in the Person with whom we transact, or else from his ill Will to us in particular; whence we entertain a probable Suspicion, that he will deceive us. The other denotes a vehement terrour of the Mind, caus'd by the threatening of some grievous Mischiefe, unless we engage in the Promise or *Pact* desired. As to the first sort of Fear, this is evident beyond dispute, that if I see a Man who makes it his common practice to cheat all the World, and reckons every piece of Knavery a piece of Wit; or if as to the present Business I find he has a manifest Design upon me; I shall be a ridiculous Fool, if by trusting to his Faith, I expose my self to his Fraud, and to his Scorn. For he that runs into a Snare with his Eyes open, falls not only without help, but without pity (e). But whether this Fear or Suspicion of being deceiv'd, can render invalid a *Pact* already made, and can absolve the suspecting Party from a necessity of Performance, will appear when we shall have consider'd the Opinion of Mr. *Hobbes*, on this Point. He then lays it down for a Rule, that a *Covenant wherein neither of the Parties perform presently, but trust one another, in a State of Nature, becomes void, if on either*

(a) Vid. l. 57. D. de Oblig. & Act. (b) Vid. l. 18. princ. D. de Contrah. emptione. Cicero (pro Qu. Roscio, c. 10.) speaking of a Slave who was at the same time claim'd by *Fannius* and *Roscio*; what belong'd to *Fannius*? (says he) his *Body*; what to *Roscio*, his *Activity*. Not his Face but his Skill was valuable. The share which *Roscio* had in him was worth double to that which *Fannius* could challenge, &c. (c) *Add.* l. 9, 10, 11. 14. 41. f. 1. D. de Contrah. emptione. (d) Vid. *Diodor.* Sic. l. 2. c. 28.

(e) Thus who would yield Credit to such profligate Wretches as *Plautus* describes?

*Promisi lingua, eadem nunc nego;*

*Dicens, non rem perdendi gratia hæc nata est mihi;* in *Curcul.* Act. 5. Scen. 3. vers. 27, 28.

'Twas my Tongue said it; and my Tongue unfays it. Nature never gave me a Voice to be the Instrument of my own undoing. And again in *Rudent*: Act. 5. Scen. 2. vers. 68. and Scen. 3. vers. 17, 18.

either side there arise a just Fear (a). Which Assertion we cannot admit of, but under this Construction; that one Party after the Covenant is made has just reason to fear, that when he has perform'd the Engagement on his side, the other Person will fly off. And by a just Reason to fear, we mean such as is grounded on plain Indications and Proofs. For it is highly Injurious to question a Man's Fidelity without good Evidence, when we have experienc'd it in former Instances. And indeed Mr. Hobbes himself by a subjoyn'd Note, brings his words to this qualified Sense; *unless* (says he) *there arise some new cause of Fear from some Fact, or other sign of the Will, in one Party, tending to Non-performance, the Fear cannot be esteem'd just. For that which could not hinder a Man from promising, ought not to be admitted as an hindrance of performing.* That is, though before the entering into the Covenant, one of the Parties might entertain some Suspicion, that the other would impose upon him; yet by the very Act of Covenanting with such a Person, he as it were renounces this fear, and declares it insufficient to hinder his believing and trusting him. And otherwise, no Engagement could pass between them. But at first this seems to have been Hobbs's Judgment, that a Pact thus made would be void, though there should no such fear arise after the Conclusion of it. As appears both from his Work of a Body Politick, written in the French Tongue (1), where we do not meet with this Restriction; and from the reason assigned by him in the Latin Treatise, for that Rule of his at present under our Examination. And the reason he gives for it is this, *because he that performs first, betrays himself to the covetous Designs of the other Party, upon account of the ill Disposition of most Men, inciting them to study and advance their own Interest by right or wrong. But it is against Reason, that one should perform now, whilst it is improbable that the other will perform hereafter.* Whence it is plain\*, that he derives the Cause of this Suspicion, and Diffidence from the general Pravity of Mankind. And by this means must the greatest number of Mortals, be branded as Persons unfit to deal with; and in general, all Faith and Trust be banish'd from amongst those who are not subject to a common Ruler

or Judge. For since we cannot be infallibly certain of any Man's Honesty, and since the World is for the most part inclin'd to Wickedness; and farther, since in a State of Nature, every Man orders his Business according to his own Opinion, and is Judge of the Justness of his own Fears, it will follow that a Suspicion, though Vain and Groundless, shall render a Contract Invalid; and therefore that Pacts are of no manner of use except under Civil Governments. And it is an exceeding hard Censure, to think the Greatest part of Men so grossly vile and wicked, as that (setting aside the Civil Power) the Fear of God, the Regard to Faith and Trust, and the Force of sound Reason shall have so little Influence on their Minds. Whereas, on the contrary there seems to be stamp'd on the Souls of all Men, in indelible Characters, a just Sense of the Duty of keeping their Faith Sacred and Inviolable; an Argument for which Truth, we may draw this easy and natural Reflection, That we can find no Man who will openly profess *Perfidiousness*, but every one who recedes from his Word or Bargain, pretends to have done it on very just and weighty Reasons. A Commonwealth which breaks its Faith with one of its Neighbouring States, immediately engages its Faith again, to procure the Alliance and Confederacy of another; and thus endeavours to avert the Danger it lay under from that Baseness and Treachery, by the Help of the same Duty which before it violated. We ought therefore to presume, that every Man will do what is just and honest, till his contrary Practice forces us to change our Opinion (b). From all which we may venture to conclude, that this Distrust of Men's Faith arising from the general Pravity of Human Nature, is not sufficient to justify the Non-performance of Contracts (c).

Nay, should we discover some particular Vices in a Person, this is not always a good Reason for us to recede from an Engagement made with him. For there are many Vices which have no ill Influence on the Duty of keeping Faith. Thus suppose a Man to be inclin'd to Lust, Drunkenness, or Cruelty, those ill Habits consider'd barely in themselves, do not hinder but that he may be a strict Observer of his Word, and a constant

*Quæ hæc factio est? non debes? non tu juratus es mihi?*

Leno. *Juratus sum, & nunc jurabo si quid voluptati est mihi. Jusjurandum rei servandæ non perdendæ conditum est.*

What a stir's here? don't you owe it? did not you swear Payment?

Pimp. Yes, I swore and I'll swear again, whenever it pleaseth my fancy. Oaths were invented to preserve Mens Goods and Estates, not to ruin them.

The Character which Polybius in B. 6. p. 498. A. Ed. Wech. Casaub. gives of the Grecians is not much better. The publick Bankers of Greece (says he) if you lend them only a single Talent with ten Bonds, as many Seals, and twice as many Witnesses, yet will never be prevail'd upon to be honest.

(a) *De Civæ*, c. 2. s. 11. (1) This is a mistake of our Author, for 'tis only a Translation into French, as Mr. Barbeyrac observes. (\*) And much more plain from his express Words in the English *Leviathan*, where the same Doctrine is thus deliver'd. If a Covenant be made, &c. p. c. 68. (b) To distrust every Body, says Lucian, is a most ridiculous Folly. (c) And therefore the Excuse of the *Mitylenians* for deserting the Confederacy of the *Athenians*, was Vain and Groundless, as it is given by their Ambassadors in *Thucydides*, B. 3. C. 12. Edit. Oxon. Pag. 154. When they had War, they for Fear courted us; and when they had Peace, we for Fear courted them. Thus our Faith on both sides was not preserv'd as is usual by mutual good Will, but by mutual Distrust; and they who could be first encouraged by Security were likely to be the first that should break the Union.

Performer of his Covenants. And farther still, should we find a Person addicted to such Vices as do commonly prejudice Fidelity and Trust; as if we observe in him a desultory Lightness and Inconstancy of Mind, an insatiable Desire of Riches, or a violent Strain of Ambition; yet even these Qualities do not give us an absolute Liberty of refusing to make good our word, when we have pass'd it on his Account. For in the first place, it may often happen that a Man out of a particular Inclination may practice Dishonesty towards *others*, and yet may live fairly and justly with *me*. And then, (as has been lately observ'd) by my very Act of bargaining with a Person whose Disposition I am acquainted with, I declare those Vices which I know him Guilty of, to be insufficient to hinder me from trusting him, and to renounce all my Privilege of making Exception against his present Morals, after the Business is concluded between us. For otherwise nothing would have been firmly transacted, supposing one Party at first to have made such a Reserve as should when he pleas'd overthrow the whole Proceedings. Though indeed when I have been once deceiv'd by a Man, I shall act very imprudently if I engage in any Contract with him again, without requiring Particular Security. And the very Proverb will tell me, that if such a Knave cheats me once 'tis *his* fault, but if he cheats me a second time 'tis *my own* (a). Or even after the *Pact* is concluded: Suppose I find by evident Tokens, that he is contriving to play me a Trick, I shall be an egregious Fool if I betray my self Voluntarily to his Designs (b).

Thus much we willingly allow, that in case a Man openly disclaims all Religion, or if he entertain such Opinions as amount to the same; we ought to place no farther Trust in his Pacts or Promises, than as either his manifest Advantage, and Interest obliges him to stand to them; or as we can by force reduce him if he fly off. Such Persons are those profess'd Atheists, who either deny the *Being* or the *Providence* of God; and nearly related to them, are the Maintainers of the

Mortality and Impunity of Human Souls. For 'tis impossible, but that Men of these Principles should measure all Right, and all Justice by their own Profit and Convenience. Into the same Herd we may pack all those who practice some Villany or Vice for their set Trade and Employment; as Pirates, Thieves, Murderers, Pimps, Courtesans and other profligate Wretches who take Perjury for a Trifle, and make a Jest of sacred *Obligations* (c).

And this we are farther ready to acknowledge, that altho' the Argument of Mr. *Hobbes*, which we have here endeavour'd to refute, does not perform the Service he intends it for; that is, does not take off the Validity of *Pacts* in a *Natural State*; yet is in some measure capable of good use, in as much as we may draw from it the following Rules of Prudence. Never to depend much on a Covenant, but when we know that the Interest of the other Party is concern'd in the Performance of it, as well as our own; and that upon Default he is likely to suffer some greater Evil or Inconvenience, than he can incur by standing to the Agreement.

That he who enters into a Contract with his Superior should so order Matters, as that his Superior shall be oblig'd to be the first Performer. For if the weaker Person discharge his Part first, the Effect will probably be, either that he shall be disappointed and deluded; or that he must depend entirely on the Favour and good Grace of the other, for what he expects in return (d).

And lastly, that he exposes his Safety to manifest Danger, who by performing a Covenant weakens himself, and strengthens the other Party; upon hopes that in Requital, and according to the Agreement, he shall afterwards receive the like Assistance and Succour. For 'tis a piece of Folly to give a real and substantial *Good*, in Exchange for Words, Writings, or Seals, when we have nothing to oppose to the Charms of Ambition and Covetousness, but the ill-grounded hopes of Honesty and Fidelity (e).

X. We are now to proceed to that other Species of *Fear*, arising from the Approach

(a) *Add. Senec. de Benef. l. 4. c. 27. Cic. de Invent. l. 1. c. 39.* (b) *Cicero de Invent. l. 1. c. 39.* It's the highest Pitch of Madness to rely on their Fidelity, whose Perfidiousness you have often experienc'd. Hence *Menelaus* cries out in *Homer*, l. 3. *Iliad*. v. 105, 106.

Ἀξέσῃα δὲ Πειλάμοιο βίην ὄρε' ὄρνια τάρμην  
αὐτὸς, ἐπεὶ οἱ παῖδες ἐσφάλατοι καὶ ἀπιστοί.

Bring *Priam's* self to see the Contract made,  
For *Priam's* Sons are Faithless and Unstaid.

*Add. Polyb. l. 8. c. 1, 2. l. 10. c. 34. Cicero in Verr.* He who hath proved false to his own Party is the common Enemy of Mankind. No wise Man ever trusted a Traytor. *Idem pro Rabir.* When a Man hath been once Perjur'd, he ought to be no more believ'd, tho' he swear by all Heaven together. *Add. Senec. de Benef. l. 4. c. 27.*

(c) *Tacit. An. II. c. 19.* The Treachery ceas'd to be dishonourable by being practis'd against a perjur'd *Renegado*.

(d) Thus *Socrates* of *Achaia*, replied to the Demands of King *Artaxerxes*; the King deals most unreasonably by us; what he desires to receive from us, he would have to be immediately deliver'd; but what he is to give us in return, he expects we should afterwards humbly sue for. *Diod. Sic. l. 14. c. 24.* For the same Reason, *facilior fides speratur ex pari*, we may trust more safely to the Faith and Honesty of an Equal, *Quintil. Declam. 312.*

(e) *Mauvozen. Hist. Venet. l. 5. p. 193. Ed. Ven.* I dare not venture to place the Security of our Affairs in a League. For such is the Nature of Confederacies, that they are frequently hindred, and interrupted by the various Events of things; different Ends propos'd, draw the Strength and Minds of the Allies different ways; and whilst each State pursues its own private Interest, the common Good is disregarded or betray'd. Reinforcements and Supplies are neither sent in equal Proportion, nor at the time agreed upon; hence arise Suspicions, and Estrangement of Affections, from this open Quarrels, and from Quarrels utter Desertions, and Violations of the main Contract; and thus at length, those of the Confederates who are least able to make Resistance, become a Prey not only to their Enemies but to their Allies.

or the Apprehension of some grievous Mischief. And in stating this Point it is necessary, that we go back to furnish our selves with some clear and fundamental Principles. And such is this undoubted and original Truth, that *our Will naturally inclines to what it looks upon as good*. Now it appears no less Good, and Desirable to the Will, to avoid an imminent Evil, than to acquire an absent Benefit; and towards the attaining of both these Ends, we employ the most likely *Means*, although they be such as we should not barely on their Account chuse or embrace. For we commonly make use of Methods in themselves ungrateful and troublesome for the escaping of a Danger, as for the acquiring of a Pleasure. Tho' indeed, the Hopes of compassing a Good does more sweeten the Grievousness of these Means or Methods, than the Care of preventing an Evil. For which Reason *Aristotle* (a) calls those only *mixt* (that is, partly voluntary, partly involuntary) Actions, which are undertaken for the sake of declining some Mischief which we are like to suffer; as in that trite Instance, of throwing Goods over-board in a Storm. Though as great Hardships as any of this kind, are undergone by the Wrestlers, and other Engagers in the publick Games, to prepare their Body for those Exercises (b). What we would observe then is this, That although Actions perform'd upon Fear of a greater Evil, ought to be accounted Spontaneous, and tho' the lesser Evil, which in those Cases we chuse, is as Things then stand, the real Object of our Desire; yet all this is not sufficient to found an *Obligation* in us towards another. For since every *Obligation* is directed towards some other Party, to whom it is to be made good, and who thereby obtains a Correspondent Right of compelling us to Performance; to produce such an Engagement, 'tis not enough that one Person has in him the due Grounds or Principles of an *Obligation*, but it is requisite, that there be in some other Person Principles fit to create a *Right*. For we can have no Notion of an *Obligation*, unless a *Right* answer to it, or be consequent upon it. As I can owe nothing, if there be no Person who can rightly demand any thing from me. Therefore such *Fear* alone invalidates and destroys an *Obligation*, as is caus'd by some *Vice* or Imperfection in the other Party, rendering him incapable of acquiring a *Right* (1). And such a Defect is every *injurious* Action; which cannot be said to produce a *Right* without a manifest Contradiction. For to pay what another has a *Right* to demand, is a Precept of the *Law of Nature*; and should an Injury (that is, a *Deed* or *Fact* directly contrary to that *Law*) be able to cause any such Effect, the *Law of Nature* would lend Strength and Assistance to its Enemy, and manifestly contribute to its own Destruction. We may as well say,

that a Law which forbids Thieves, may at the same time reckon their Trade and Practice amongst the honest ways of Gain.

XI. But, before we apply these Remarks more closely to the Point, it is necessary that we make farther Enquiry, whether the Author of the *Fear* was the Party with whom we are engaged in Business, or some other Person. And then again, whether he had a just Power and Authority of presenting such a *Fear* to our Mind or not. For this is true beyond Dispute, that in case I have taken an *Obligation* upon me through Fear of Mischief, threatened by a *third Person*, neither at the Instigation, nor with the Confederacy of the Party, to whom the Engagement was made, I stand firmly bound to perform what I promis'd him. For there appears no Fault in him, which might render him incapable of acquiring a *Right* upon me; and on the contrary, he may justly challenge a Requitall, in that he lent me his Assistance, in warding off the Danger I apprehended from another Quarter (2). Thus, if I hire a Guard of Souldiers to defend me against Robbers, I am no doubt oblig'd, strictly to pay them the Price of their Service. And a Man who being reduc'd to a low Condition, procures by large Promises, the Help of others, and having by their Means escap'd the Danger, is afterwards backward in performing, contracts the double Guilt of Perfidiousness, and of Ingratitude.

A Promise is likewise Valid, if made to a third Person, through our Awe and Dread of a lawful Superior; who had a just Right of Commanding us, and of denouncing a Penalty upon Default (3). For here the Party to whom I make the Engagement is in no fault; and I can only blame my self for being driven to a thing through Fear of Punishment, which I ought Voluntarily to have undertaken. Thus should a King lend a Body of his Souldiers for Guards to a Foreign Prince; and for the greater Security, command them to swear Obedience to the Stranger; they shall not afterwards fly from their new *Obligation*, upon pretence that they were brought to it by *Fear*; since the *Fear* proceeded from *him*, who had a Sovereign Right of laying this Injunction on them, and of forcing them by any Methods to their Duty. In the same manner, should we suppose that a Father might betroth his Daughter to a Man, quite against her Inclination; in this Case, when she, out of fear of her Father's Authority, has given her Faith to the less agreeable Spouse, she cannot afterwards disappoint him. For there is no Fault in him, to prejudice his *Right*, accruing from that *Promise*; and the Daughter ought freely to have obey'd her Father's Pleasure; and so cannot plead *Compulsion*, when she had no Right to resist. Thus far then it is a Point of Moment to consider, who was the Author of

(a) *Ethic.* l. 5. c. 1. See what we have said of these in B. I. c. 4. § 9. (b) *Vid. Epictet. Enchir.* c. 35. (1) *V. D.* l. 50. tit. 18. *De diversis regulis Juris*, leg. 116. *Vid. Ciceron. de Offic.* l. 1. c. 10. (2) *Vid. D.* l. 4. tit. 2. leg. 9. f. 1. (3) *Ibid.* leg. 3. f. 1.

the Fear. But in other Cases, the Rule of the Roman Lawyers holds good, that it makes no difference from what Person the Fear proceeds; that is, when no one has a Right of putting us into such a Fear; and when the Fear is actually the Cause, not the bare Occasion only, of the Promise or Pact, consequent upon it (a).

Those Promises then, or Pacts we take to be Invalid, which a Man is compell'd to engage in, by the unjust force of the Party, to whom they are made. For since he who extorts any thing from another, by using unjust Terrours, is by the Law of Nature bound to restore it; and must consequently make good what the other Person loses by such a forced Bargain (1); the Necessity of Reparation in the Party who offer'd the Violence, takes off all Obligation to payment in the Party who suffer'd it; because should he offer to do, or to give what in the Agreement he promis'd, he ought in common Justice, immediately to receive full Recompense, or full Restitution (2). And 'twould be a foolish and idle way of acting, when we are once got clear of the Danger, to pay voluntarily what we promis'd upon force, and then to require Reparation of the Damage (b). Especially since the other Party, when he demands or accepts our Promise, does by that very Act declare manifestly, that 'tis far from his Thoughts and Designs to make us any Satisfaction. Besides, how ridiculous would it be in you to reckon it a piece of Merit, when you forbear a Mischief which the Laws forbid you to commit, to pretend that you do a Man a Kindness, by refraining from some notorious Villainy. And therefore Cicero (c) utterly denies himself to have been obliged to Antony, for not killing him at Brundisium: *What Benefit, what Favour is it (says he) that you withheld your Hands from the foulest Wickedness? What Kindness can Thieves boast*

*of but that they spared a Man's Life, when it was in their power to have murder'd him (d)?*

No more is a Man bound to perform his Promise, who in a Case of this Nature, gives Security for the Person in Distress; although his own Fear is not the Cause of his entering into the Engagement. For since Suretyship is a kind of Inferior Contract, admitted to confirm and strengthen the main Business; it would be absurd (at least with regard to Natural Law) to attribute more Efficacy to the former than to the latter; to make the Principal Debtor less strictly obliged, than he who comes into the Business purely for his Assistance (3). The Case is otherwise, if this third Party for the relief of the Sufferer, contract an Obligation, in which he himself is the Principal, not the Surety, or the Accessory. For Instance, if a Man out of Kindness and Pity, should promise some Reward to a Villain, upon Condition he will set a poor Wretch at Liberty, whom he has got under his Power. For here the Contracter himself is not properly put under Fear, nor can he use those Exceptions, which might be made by the Person he delivers; in as much as he engages upon his own Score, not in the name of the Other; and cannot be said to build his Bargain on a primary Obligation; since indeed, none pass'd but what he freely set on Foot, and of which he took the whole Burthen on himself. And he ought to esteem it a thing well worth his Pains or Cost, to have saved the Life of an innocent Man, and to have acquired the Glory of Beneficence, in so extraordinary a Degree.

But if a Person in this Captive Condition, upon making Terms for his Liberty, shall leave Hostages to continue under the power of the Villains, till such time as he shall have perform'd what he promis'd; he is then indeed bound to make good his Word; yet not

(a) Vid. l. 4. t. 2. Leg. 14. f. 3. *D. quod metus causa. Senec. l. IV. Controv. 26.* The Question is whether Force and Necessity render a Business Invalid, when they did not proceed from the Party contracting? What Influence, (will he say) 'Can your Compulsion have on me when it was not I that compell'd you? The Punishment cannot be mine, unless the Fault were mine. But the other denies this way of arguing. The Laws, says he, as to the present Case, doth not prosecute him that offers the Violence, but assists and relieves him that suffers it; it seeming unreasonable, that a Man should be bound by an Engagement thrust upon him against his Will. Whence the Necessity proceeded, is a Point of no Weight in the Dispute. That which renders the Contract unjust, is the hard Fortune of the Sufferer, not the Person of the Doer. *Idem. Controvers. l. 4. c. 8.* If it be said it was not I that applied the Force but another; the Answer is, that Man who makes his Advantage by Violence, offer'd by some other Hand, is no less Guilty, than if he had been himself the actual Performer.

(1) Vid. *Instit. l. 4. t. 13. de Exceptionibus, f. 1.* (2) This is a Term of Law by which is understood a Discharge which two Persons Debtors to one another, give one another. Of this our Author will treat in B. 5. c. 11. f. 5. *Vid. D. l. 44. t. 4. De doli mali & metus Exceptione, Leg. 8.*

*Quid si me tonsor cum stricta novacula supra est, Tunc libertatem divitiarumq; roget?*

*Promittam: nec enim rogat illo tempore tonsor, Latro rogat; res est imperiosa timor.*

*Sed fuerit curva cum tuta novacula theca, Frangam tonsori crura manusq; simul.*

(c) *Philipp. 2.* (d) *Horat. l. 1. Epist. 16.*

*Non furtum feci nec fugi si mihi dicat Servus, habes pretium loris non ureris aio. Non hominem occidi; non pasces in cruce Corvos.*

*Id. de Arte P.*

*vitavi denique culpam, Non laudem merui.*

*Add. l. 7. f. 3. D. de pactis. Seneca, l. 2. Controv. 13.* To omit a Villainy will never pass for a Benefit. *Quintilian. Declam. 330.* To make an end of an Injury is by no means to begin a Kindness. (3) *Vid. Instit. l. 3. t. 21. De Fide iussor. Sect. 5.*

by Virtue of his Contract with the Rogues, but of that whereby he stands engaged to the Friends whom he has left in his room. In *Morocco*, and other parts of *Africk*, the whole Body of *Christian Slaves* pass their Faith for each particular Man of their Number, that he shall not go off; and by means of this *Security*, they are allow'd to walk the City without their Chains; and in case one of them make their escape, the rest are obliged to pay the Price he was valued at. Whether an *Oath* added to Promises of this kind, does more confirm and establish their Force, we shall hereafter examine.

It is a noted Saying of *Tully* in his third Book of *Offices*, c. 30. *If you have agreed with Thieves to give them such a Sum to save your Life, it is no Deceit to recede from your Promise, though you have given your Oath too for the Performance. For Robbers or Pirates are not in the number of any particular and lawful Enemies, but should be look'd on as the common Adversaries of Mankind; and therefore no true Faith or Oath can properly pass between us and them.* Which Assertion we thus far allow holds good, that a Promise made to such Men through the Compulsion of Fear shall not be binding. But the reason on which *Tully* proceeds, is not satisfactory to many Persons; especially, if extended to such *Pacts* or *Promises*, as we commence with the same Villains, without being brought to it by Violence. For though by the common Custom of Nations, a Lawful Enemy and a Robber are treated in a different Method (a), yet the latter cannot be said immediately to lose all *Rights* of Humanity; at least, if he still deal with some Persons in a fair and peaceable Manner. For when he transacts with me, without influencing my Consent by Fear, he bargains not as a *Robber*, but like any other Man. Now a Robber is call'd a *common Adversary*, because he does not like other Enemies, offer War peculiarly to any Party, but practises hostile Force upon all, without Distinction, that fall into his hands. Upon which account, in order to quell, and to suppress him, there is no need of the Formalities of denouncing War, and lifting Soldiers against him; but Nature Commissions every Man to prosecute him in a military way. But it may still be affirm'd, that as by *Tully's* own Confession, a State of Hostility does not hinder us from being bound to observe Faith with an Enemy; so neither is this *common Hostility* of the Robber an Hindrance to our performing a Covenant made with him; especially if, as we have all along suppos'd, he lays aside the Part of an Enemy, in the Act of Covenanting.

*Grotius* forms another Objection to this purpose (1); 'Such as are notoriously Wicked, and are no part of any Civil Society, may if

'we regard the Law of Nature, be by any Man punish'd. (This *Hypothesis* we shall examine in another place.) Now they who may be punish'd, and even with Death, may likewise be dispoil'd of their Goods, and dispossess'd of their Rights. But, amongst their *Rights*, that which accrues to them from our Promise is one; and therefore that too may by way of Punishment be taken from them. But *Grotius* answers this Argument with great Ease. For he that Voluntarily bargains with a Thief, knowing him to be such, does by that very Act renounce all Exception against his Person, which might otherwise render the Promise Invalid. Else the Business was Vain and Insignificant, and nothing really pass'd between them. Should I be got out of my Road, and promise a Thief some Reward for setting me right again, there is no doubt to be made, but I ought freely to pay it. And thus too the *Roman* Lawyers, rightly maintain (2), 'That whatsoever is deposited with us by a Thief, ought to be restored to him, if the true Owner of it does not appear. To which, they should add this farther Condition, that the Man who receives the thing in Trust, does not know the Fraud of the other. For in Case he is satisfy'd, that the Person is a Villain, and that the Goods are stoln, I do not see how he can take them in Charge, without bringing himself in as an Accessory to the Crime.

XII. But many indeed there are, who maintain that *Pacts* and *Promises*, though extorted through Fear, have yet the Force and Power of *Obliging* (3). Some urge the Authority of the *Roman* Law, which by giving full Restitution, should seem to suppose, that those Engagements are in strict Justice *binding*, but ought to be reliev'd and corrected in Courts of *Equity*. But 'tis easy to vindicate the Practice without drawing any such Conclusion from it. For since the Parties are Members of a Civil State, the *Court* does not presently take it for granted, that one of them offer'd Violence to the other; and since that Point may bear a Dispute, it seems convenient, so long to keep up such a Contract, and to suppose it good, till the Judge shall receive manifest Evidence, that the Allegation of *Fear*, on which the *Action* was grounded, was really just and true. But it does not follow hence, that Contracts of this kind, or other Business which may be disannull'd, by a *peremptory Exception* at Law, are in themselves Firm and Obligatory; since the Formality of that way of Proceeding, though proper for *Civil* Judicature, yet is not agreeable to the Simplicity of the Law of Nature; at least, when the Case happens between Persons who do not acknowledge a Common Judge.

(a) *Heliodor. Ethiop.* l. 1. c. 3. p. 56. When we make War upon Thieves, we do not finish it with the usual Ceremonies of Articles and Leagues, *Vid. Grot. l. 3. c. 19. §. 2. n. 2.* (1) See B. 3. c. 19. §. 3. (2) *Vid. D. l. 16. tit. 3. Depositi vel contra, leg. 31. §. 1.* (3) See *Montaigne's Essays*, B. 3. c. 1.

Grotius asserts (a), 'That a Man who makes a Promise through fear, is therefore Naturally oblig'd to perform it, because he plainly gave his Consent, and such Consent as was full and absolute, according to the present posture of Things (b); though he had never pass'd his Consent, had he been secure from the Danger. But in Answer to this, 'tis sufficient to repeat what we formerly observ'd, that since every *Obligation* arising from a Contract, supposes a Correspondent *Right* in the other Party, it is not enough that I have in me the necessary Causes, and Principles of an *Obligation*; but 'tis Requisite, that the Person with whom I deal, be free from all such Defects as might hinder him from obtaining a *Right* upon me. And therefore my having the *Power* to give a thing, does not presently make another have a *Power* of receiving it. Since then an *Obligation* without a *Right*, answering to it, is of no use or purpose; it cannot be imagined, that my bare Consent should bind me to a Performance, which the Law of Nature forbids the other Person to receive at my Hands. And this is manifestly the present Case. For the same Law which prohibits the Application of Violence and Terror, must needs at the same time prohibit the Acquirement of any *Right*, or any *Gain*, by such wicked means. What Grotius subjoins appears not altogether agreeable, 'That if he to whom the Promise was made, did obtain it of the other Party, by putting him in a *Fear*, though never so slight, he is oblig'd to release the Promiser if he desire it; not because the Engagement was Invalid, but by reason of the Damage which he unjustly occasion'd. Now if I can at my Pleasure or Desire be freed from my *Obligation*, I am already actually quit of it. What need is there then of this round-about way of Application. *You ought to release me from my Obligation, if I request it?* Is it not more Easy, and more Natural to say, *Since you compell'd me by force to make the Promise, I owe you nothing; and 'tis idle in you to demand that of me, which should I pay, you are oblig'd immediately to restore* (c).

XIII. The same Opinion is defended by Mr. Hobbes (d), tho' by different Arguments. He says, *Covenants entred into by fear, are not therefore Invalid, because they proceed from Fear; for then it would follow, that those Covenants by which Men unite in Civil Life, and make Laws, must be Invalid; for the fear of mutual Slaughter, is the Cause of one Man's submitting himself to the Government of another. It would follow likewise, that a Man acts Irrationally, who believes*

*his Captive, bargaining with him for his Ransom.* Now in the first of these Reasons there is a plain Ambiguity in the Term of *Fear*. For that *Fear* which engages Men to enter into *Civil Societies*, is of a quite different kind from that which we are now considering. The former is a Caution against some Evil which may happen Indefinitely; I know not when, nor which way. The latter is a dreadful Apprehension of grievous Evil, just now coming upon me; and which I am not able to resist. Therefore the Covenants which we make for the Procurement of mutual Assistance against a common Enemy, are entirely of another Nature, from those by which we promise some Reward, to free our selves from a Danger, which a Villain unjustly brings upon us. As to the latter Reason, we readily acknowledge, that a Rogue acts very *irrationally*, when having first extorted a Promise by Force, he afterwards yields Credit to the Person, as if the whole Business had been honestly and fairly transacted. For that Wickedness and Folly should meet together, is no Contradiction (e). On the other side, we may venture to say, that he would not act very *rationally*, who being got safe from a Mischiefe, with which he was Unjustly threatened, should freely pay the Ruffian the Price of his Villany (f).

He adds, 'tis universally true, that Pacts oblige, whensoever a Good is receiv'd, and when the Act of promising, and the Thing promis'd are both lawful. But it is lawful for me both to make a Promise for the rescuing of my Life, and also to give what I will of my own, even to a Robber. But indeed, what the Robber in this Case performs for the Traveller, in forbearing to take away his Life unjustly, cannot be call'd a Good. The abstaining from an *Injury*, ought not pass for a *Benefit*. And we are then only said to have done some Good to a Man, when we have confer'd some Advantage on him which he wanted, or secured and preserved some which he before enjoy'd; or have deliver'd him from some Evil or Danger, which fell upon him without our Fault (g). As to the latter part of the Argument, it is no good Consequence to say, 'It is lawful for me to promise and to pay the Villain; therefore he has a Right of requiring the Performance from me; or therefore I stand bound towards him by some inward Tie upon my Conscience. We may do many things lawfully, which we cannot be engag'd to do by any *Obligation*. I may lawfully throw away my Goods; but does it therefore follow, that another can oblige me to such an Extravagance. So that the Rule

(a) Lib. 2. c. 11. f. 7. (b) For, as Heliodorus says, l. 5. c. 15. p. 253. Edit. Lugd. Life is so precious, that we seldom think we buy it too dear. (c) *Add. Senec. Controvers. 4. 26. vid. D. de div. reg. Jur. leg. 51.* (d) *De Civie, c. 2. f. 16.* (e) It is a Saying of Menander, recorded by Stobæus, Sermon. 2. ἀσυνλόγητον ἐστὶν ἡ πονηρία, Wickedness is a thing that always wants Reason and Consideration. (f) Dionys. Halicarnas. l. 8. p. 509. in fin. Edit. Lips. Whatever is extorted from private Men, or from publick States, by Force and Necessity, holds no longer than the Necessity it self continues. (g) And therefore it was a foolish Excuse alledged by Polycrates, in Herodotus, B. 3. p. 112. *Thal. Edit. Græc. H. Steph.* when he pillages his Friends and Enemies without Distinction; that to restore to his Friends what he took from them, would be a greater Obligation, than if he had altogether forborn the Injury.

which the same Author lays down on this Subject in his *Leviathan* (a), is likewise false; *Whatsoever I may lawfully do without Obligation, the same I may lawfully Covenant to do through Fear; and what I lawfully Covenant, I cannot lawfully Break.* For he ought to have added this Condition, Provided the other Party can honestly demand it of me.

XIV. There is on this Point, still one Question behind, which requires our Examination; Since Promises made through Mistake, or thro' Fear, are void; suppose the Party after he gets rid of his Mistake, or of his Fear, is inclin'd to stand to his Bargain, What must be the way of ratifying such Promises, and of putting them in full Force? For an *Obligation* that was at first Invalid (1), may afterwards recover its Strength, by the Intervention of some new Cause, fit to create a *Right*; which in the present Case, must be a clear and voluntary Consent. Some then are of Opinion, that for the Confirmation of such a Promise, no more is Requisite, than an internal Act of the Mind, or a full and free Agreement to the Business, though it be not express'd by any outward Sign. For the outward Sign, they say, has pass'd before; and this being now enforced by the clear and free Determination of the Mind, nothing is wanting to the Production of a firm Engagement. Others dislike this way of deciding the Controversy; because they conceive that the Internal Consent, and the External Sign, ought to exist together; and that therefore an antecedent external Act, cannot be a Token of a subsequent internal Act, which perhaps was not then thought of. And upon this account, they to make such a Promise Valid, require a new Verbal Promise and Acceptance. *Grotius* (2) offers a middle Judgment, that 'tis indeed absolutely necessary, some Signs should be used to Declare such a subsequent internal Consent; because, the other Party would else have no Assurance of his Right; but there is no Necessity the Signs should be *Verbal*, since others may serve as well to the purpose; as suppose the Promiser understanding his Error, or being deliver'd from his Fear shall voluntarily give what he engaged for, or if the thing be already given, shall not endeavour to re-

cover it, when he has convenient Means; or shall treat afterwards with the other Party, about the same thing as he would about any thing else, which the said Party lawfully possesses. To which Decision we readily subscribe.

XV. We are farther to observe, that to the rendering of a Promise good and valid, there is required, not only the Consent of the Person who makes it, but likewise of him to whom it is made (b); and this latter Consent too (as well as the former,) must be express'd by sufficient Signs; and for this a bare Nod will serve, if the thing offer'd, either be a matter of free Bounty, or have been before requested. For if the other Party do not Consent, or do absolutely reject the Proposal, the thing promised still remains in the power of the Promiser; though he had sworn to part with it; for even an Oath cannot transfer a Right before *Acceptance*; and has only this effect, that makes it unlawful for me to revoke my Offer, till I am assured of the other Man's Refusal. For he that proffers any thing of his own to another, does neither intend to force it upon him against his Will, nor quite to give it over, and throw it away at a Venture; and therefore he loses nothing of his Right and Title to it, in case the other Person refuse to take it. If a *Request* pass'd before hand, it shall continue in Force, unless it be expressly revoked; and in this Case the *Acceptance* is supposed to have been made in the very Petition; provided still, that what is offer'd, be equal to what was desired. For if a Man ask me to lend him a greater Sum, and I proffer a less to make such an Engagement good, his *express Acceptance* is necessary; in as much as this lesser Sum may perhaps no ways answer his Occasions, or turn to his Profit; and therefore unless this *express Acceptance* intervenen, he shall be responsible only for such a Sum as he first ask'd me to supply him with (c).

Since in all *Obligations* whatsoever, there is required the Consent of the Person to whom they are directed, or who obtains a *Right* by them; declaring (by himself or Deputy,) that he accepts the *Obligation*, and the *Right* which it transfers to him; and this with Signs sufficient, to express the inward purpose of his

(a) Cap. 14. (1) *Vid. D. l. 50. tit. 17. de div. reg. Jur. leg. 210. Quæ ab initio inutilis fuit institutio ex post facto convalescere non potest.* (2) B. 2. c. 11. f. 20. (b) L. 19. f. 2. D. de Donatione. (c) It may not here be amiss, to consider *Plutarch's* Observation, *Sympos* l. 9. q. 13. p. 742. B. Edit. *Wech.* that the words of the Person that proposeth the Conditions, have much more Power and Authority, than his to whom they are offer'd, in as much as he has no Liberty of adding to them. That is, because the latter can obtain no Right, but what results from the Consent of the former. If the Promiser shew his Agreement to the Request of the other Party, barely by Nodding, or any other Sign of the like Nature, he shall be suppos'd that the Request was tacitely repeated. *Add. Grot. l. 2. c. 16. f. 32.*

*Add. l. 3. D. de pollicitat. Vid. D. l. 50. tit. 12. de pollicitat.* Whence some have concluded, that to render a Promise Valid, the bare Act of the Promiser is sufficient. *Grotius* (l. 2. c. 11. f. 14.) answers, that a Promise once made cannot indeed be revok'd; so as always to lie ready for Acceptance, though before Acceptance, the Obligation is not fully contracted. But those who look more closely on that Passage in the Civil Law may find, that *Ulpian* teacheth no more than this, a Covenant is the Consent and Agreement of two Persons, but a Promise is only on the part of the Offerer; where it is not-denied, but that Acceptance makes even the latter Firm and Obligatory. And indeed, the State or City, of which *Ulpian* speaks, had before signified its Acceptance, in case the Promise were made on the account of Honours, already granted or now desired; and only refused it when the Promise was made without Cause, *Vid. l. 1. f. 1. d. t. l. 19. D. de donat.* And again, l. 3. f. 1. d. t. Things thus deliver'd without Cause, are forbidden to be claim'd; because the Propriety of the things being already transfer'd on the Community, they could not properly be deliver'd without the Publick Acceptance.

Mind; we may hence understand somewhat as to the *Firmness of Religious Vows*, or Engagements voluntarily undertaken with regard to Almighty God. And it seems impossible to make these with any *Force*, unless God has by Revelation declared His Acceptance of them; or unless He has constituted some Vice-Gerent upon Earth, to judge of their Validity. For otherwise a Man cannot be certain, whether it is the Will of God he should, or should not bind himself in this manner; whether his *Vows* are pleasing or displeasing to Heaven. Especially since the Subject of *Vows* must be such matters as God has not by way of Command, punctually and precisely required at our Hands. For 'tis absurd and contradictory to reckon that an extraordinary Performance which is a matter of strict and necessary Duty; and how can we be assured except by Revelation, that any Act which God has not enjoyn'd will be acceptable to him? And to engage in *Vows* without knowing whether they will be receiv'd or not, is idle and useless. But may we not in many Cases, reasonably presume on the Divine Consent and Approbation? This we think can only be done in those things which are *Indefinitely* agreeable to the Law of Nature, and therefore to the Will of God; but in which the Application to Persons, Places and Times, and the Allotment of the particular *Quantity* are left to the Pleasure, and the Judgment of Men. Thus we take those *Vows* to be good and justifiable, by which a Man binds himself to bestow such a Sum of Money in Charity to the Poor, or on other pious Uses; provided that such an Act of Bounty be no hindrance or prejudice to any Duty absolutely necessary. Or if he enjoyn himself set Days of Fasting; or resolve to abstain from some particular Meats and Drinks, within a fixt Measure and Quantity; or if he deny himself the use of some superfluous Ornaments; as the wearing of Jewels, Pearls and Gold; or lay any Command, or Prohibition on himself of the like Nature; all which Performances fall under some general *Vertue*, though the determinate Manner and Proportion of them are not matters of strict Precept. On the contrary, such Vows as only create trouble to the Undertaker, and no Benefit to other Men; we esteem no better than Idle and Superstitious, especially if they prove an hindrance to other Duties.

A Scruple has been sometimes moved, whether the *Obligation* in the *Promiser* begin at the very Moment, when the Offer is *accepted* by the other Party; or whether it is farther necessary, that the *Acceptance* be formerly made known to the Promiser. And here it is certain, a *Promise* may be design'd, and be expounded two ways, either thus, *I engage myself to do the thing if it shall be accepted*; or thus, *I engage myself to do the thing if I shall under-*

*stand that it will be accepted.* Now which of these two *Senses* the Promiser intended, is to be gather'd and presumed from the Nature of the Business. If the *Promise* were a matter of pure Generosity, without Restriction or Limitation, we are to believe it was meant in the former Sense; because here the Promiser hastens as it were to *bind* himself, without staying for any Formality in the other Party. But those Promises are to be understood in the latter Sense, which express any Clause or Condition essential to the Engagement (a).

XVI. It remains that we add a Remark or two about the *Signs* of Consent, which are absolutely necessary to the producing of any Obligation, in as much as the bare Acts of the Will can have no effect amongst Men, unless manifested and declared by some external Tokens. Of *Signs*, the more imperfect are some particular Motions and Gestures, necessary to be used in Commerce, when the Parties transacting are unacquainted with the Language of each other. The more perfect are *Words*, and such Words as are understood on both sides (b). And to make these declare the Will more clearly and more firmly, it has been a constant Practice, both to make use of Witnesses in Contracts of Weight and Moment, to whose Memory and Conscience Appeal might be made, in Case either of the Parties denied the Engagement, or cavil'd at the Expression; and also (as a higher degree of Confirmation,) to set down the Terms of the Covenant in *Writing* (c). For the Memory of Witnesses may be treacherous, or their Integrity capable of Corruption; but Writings are a much stronger Security, both against Forgetfulness, and against Unfaithfulness. And as for *bare Words*, it is a usual way to elude them, by pleading that they were utter'd through Rashness, before the thing had been consider'd. But *Writings* do exclude all such Prevarication; whilst they are drawing up, they set the Business clearly and leisurely before the Eyes of the Contracter; so that if he once declare his Approbation of them, he must be judg'd to have yielded full consent to the Engagement, and cannot afterwards pretend that he was drawn in by Passion or Precipitancy. Nor are *Writings* liable to such violent and crafty Interpretations as are often put upon Men's Discourse; in which one Particle artificially inserted, and through the quickness of the Pronunciation passing undiscover'd, shall unravel and overturn the whole Affair. And there it is not without good Reason, that more Credit is given to Authentick and Unquestion'd *Instruments*, than to the Depositions of *Witnesses*; since what a Man testifies against himself, is much stronger Evidence than what can be offer'd by others; and since the Charge never lies so heavy upon him, as when his

(a) Compare *Grot. l. 2. c. 11. f. 15.* (b) See *1 Corin. b. XIV. 11:* I say understood on both sides; whence perhaps it is that the Turks think themselves obliged by no Covenants, but such as are written in their own Character and Language. *Vid. Marselaer Legat. l. 1. c. 30.* (c) Instead of which the *Grecians* sometimes used

*Tallies. v. D. L. 22. Tit. 4. de fide instrum;*

own Authority is produc'd against him. Yet the Force of Unquestionable Witnesses must then be admitted as Superiour, when they make out by sufficient Proofs, that the Instruments produced, are Supposititious or Corrupted.

Farther, although the Strength and Firmness of *Covenants* does not absolutely depend on such Writings or Deeds, in as much as they may rightly be made without them (a), and may as to the Law of Nature still hold good, though these Tokens should by any Accident be lost (b); yet in Courts of Civil Judicature, where they proceed on full and manifest Evidence, the greatest Regard imaginable is had to Credentials of this kind. And commonly if such are not produc'd, the Party who shews another upon a Debt or Promise, loses his Cause; unless he can make it

appear, that they were once actually in his Custody, and that he has been depriv'd of them by some Misfortune. And for this reason it will become a careful Man to secure his Business by good and legal Instruments; and not to rely too much on the bare Words, or Faith of those he deals with (c). It is vulgarly known, that if a Creditor shall restore the Instrument of Obligation, or shall cancel, or destroy it with his own free Consent, and with the Privity of the Debtor, it shall be suppos'd that the Debt is forgiven; but not if the Debtor got the Writings out of his hand by Stealth, or any other unlawful Means. And from all this it appears, that *Seneca* (d) carries his Philosophy a Strain too high, when he calls Bonds and Papers of Contract, by no better a Name than, *Inania habendi simulachra*, Vain and idle Images of Title and Possession.

(a) *L. 5. D. de fide instrum.* (b) *L. 1. 4, 5, 7, 8, 10. C. de fide instrum. l. 20, 21. C. de Probat.* (c) Thus King *Perseus* (in *Plutarch de vitioso pudore*, p. 533. B. T. 2. Ed. *Wech.*) lending a Friend Money, required Security in the common Form. The Gentleman desiring the reason of his Strictness; I lend according to Law, (replied *Perseus*) that I may receive without Law; in a fair and friendly manner. *Juvenal, Sat. 13.*

*Tam facile & pronum est Superos contemnere testes,  
Si mortalis idem nemo sciat.*

When *Murana* (in *Appian. Mithridat. p. 214. C. Ed. H. Steph.*) made War upon *Mithridates*, and was accused by that King's Commissioners of Acting against the League, he sophistically denied, that he ever saw any League. The meaning of which was, that *Pompey* had not indeed left *Articles* of Peace in Writing, but thought it sufficient to shew his Agreement by *Fact*, and accordingly had drawn off his Army. *Richerius* reports of the *Turks*, that they are so constant to their Promise, so secure of mutual Fidelity, that in their Bargains they use no Bond or Writing; but the whole Business depends on the Word of the Parties, if present; if not, on the bare mentioning of their Names. *Garcilass de la Vega* testifies the like of the old Inhabitants of *Peru*. *Royal Comment. l. 8. c. 16.*

(d) *Benef. l. 7. c. 10.*

## C H A P. VII.

### Of the Matter of Promises and of Covenants.

WE are in the next place to enquire into the *Matter* or Subject of Promises, and of Covenants; or to what things only we can bind our selves by our Word or Bargain. In this respect then, it is indispensibly Requisite, that we have both a *Natural* and a *Moral* Power of doing what we engage for; or that the Performance be neither above our *Strength*, nor forbidden us by any *Law*. For when a thing is placed within my Reach and Ability, and I have likewise a Liberty to dispose of it, there is no Reason why I should not voluntarily oblige my self to confer it on another, so often as I can by this means contribute to the Use and Advantage of Human Life. On the other hand, it would be Vain and Impertinent to contract an Obligation about such Matters, as either exceed our Strength, or are prohibited by a stronger Obligation lying upon us; in as much as, directly and lawfully, it could produce no Effect.

II. It follows evidently from hence, that no Obligation can lie to *Impossibilities*; (1) a Sentence commonly in the Mouths of all sorts of Persons, but such as cannot fully be understood without a clear and accurate Examination. In

order to which it may be, in the first place, convenient to distinguish between those Obligations which we voluntarily bring on our selves by our own Act, and those which are laid on us by the Command and Authority of our Superiours. He that of his own free Motion, binds himself to perform a thing which he knows to be impossible, cannot be reckon'd well in his Wits. For he resolves and engages to do that, which at the same time he foresees he shall never be able to Compass.

But it does not always follow, that he who by Pact or Promise undertakes an *Impossibility*, shall be Entirely free from all *Necessity* of Performance, though the thing it self cannot strictly be accomplish'd. Indeed if I have promis'd a Man somewhat, which I had then good Grounds to think would be in my Power, but which is now above my Power, or will be rendred so before the Day of Performance, by an Accident of which at the time of the Bargain I was Invincibly Ignorant; I seem in this Case, neither obliged to make good my Word, nor to repair the Loss, which the other Party suffers by the Disappointment. Especially if the Possibility of the thing, were either ex-

(1) See what we have said in B. i. C. 5. S. 8.

presly mention'd as a necessary Condition, or tacitely pre-supposed on both sides (a). For Instance, I promise to lend a Horse, which at present is at some distance from me; and the Horse dies before he gets to me; as I cannot here be bound to make the Horse forth coming, so neither am I responsible for any Damage the Man sustains, who was to have used him. For he must conceive me to have built my Promise on this Tacite Condition, *provided the Horse arrives safe at my Hands*; which Condition failing, without my Default, the Force of the Promise sinks and is Ineffective. If both the Promiser, and the other Party know the thing to be Impossible, and know each others Consciousness as to this Point, the Engagement shall pass for no better than a Jest. But if the Promiser only knew the Impossibility, and not the other Party, he shall pay to him what he loses, by being thus imposed on. If the Promiser was careless, and neglected to examine and weigh his own Strength, so as to promise an Impossibility, which upon due Consideration, he might have found to be such; the main Obligation shall be void; because he supposed the thing to be Possible, as a Tacite Condition of the Agreement. Yet upon account of his Neglect and Default, he shall be bound to answer the Damage which befalls the other Party, through the Disappointment; but then it must be observ'd, that the Hope, and Expectation of Advantage from such an Insignificant Promise, ought not to come under the Notion of Damage. The same Rule holds good in Covenants; so that he who through Negligence has bargain'd to perform what is impossible, shall be free upon paying what the other Party suffers; but then he must likewise release the other Party, from any Obligation made on *his* side; or if the thing be already given or perform'd, he must either restore it, or offer an Equivalent.

III. But farther, when the thing at the time of making the Promise or Pact appear'd Possible, and afterwards becomes Impossible; we must enquire whether this happen'd by meer Chance, or by Default and Deceit. In the former Case the *Pact* is disannull'd, if nothing has yet been perform'd on either side. If any thing have been already done towards it by one of the Parties, the other shall give it back, or pay to the value of it (1); if neither of these can be done, he is to use his best Endeavours, that the Man be not a Loser by him. For in Contracts, the first Regard is had to the thing expressly mention'd in the Agreement; when

this cannot be obtain'd, it is sufficient to give an Equivalent; but whatever happens, all imaginable Care is to be used, that the other Party suffer no Prejudice. But when a Man shall by Trick and Design render himself incapable of performing his Part; he shall not only be bound to do the best he can, but he ought likewise to have some Punishment inflicted on him, as it were in supply to his Defect.

These Principles well applied, might determine most of the Doubts in the Case of *Insolvent Debtors*. A Man that falls into such a Condition by Misfortune, and without his own Default, is obliged only to use his utmost Endeavour, to give every one their due. And here Equity and Humanity, engage us to make an allowance of Time, so much as shall be necessary for him to look about him, and to seek out all honest ways and means of Payment (b). For to seize immediately on all he possesses, and to send him and his Family a Begging, would be a most unmerciful Barbarity. The *Roman* Laws were so favourable to certain Persons, in Cases there specified, as to order that they should be condemn'd in no deeper Sum than they were able to make good (c). Yet unless the Creditor shall have forgiven all that exceeds their present Abilities, they shall be bound to pay the Residue, upon the Improvement of their Fortune and Condition. Those who have turned Bankrupt out of Knavery, or some other way by their own fault, may be justly compell'd to undergo some painful Punishment; that their Body may in some measure pay for the Defect of their Purse (d).

In the Case between the Creditor and the Debtor, there is another Point that ought to be consider'd; through what Cause or what Necessity the Man contracted so deep Scores. And he deserves more or less Commiseration and Favour, as the Cause was more or less grievous and unavoidable. For this reason Merchants and other great Traders, though undone by meer Accident and Misfortune, are reckon'd to be in a Condition less capable of Mercy, than others who have been driven by some particular Urgency, to the like Insolvent State. For the former took up so large Sums on Trust, purely for the sake of making farther Gain and Advantage by them. And in as much as they profess *the Art of growing Rich*, as their peculiar Calling, they are to be blamed for not foreseeing and preventing even Casualties; such as the losing all they are worth at one sudden Stroke; since they ought not to have ventured their whole Effects in a single Bottom (e).

IV It

(a) Vid. L. 2. S. 3. *Et. D. Si quis cautionibus, &c.*

(b) See *Matth. XVIII. 25, 26.* (c) *Vid. l. 12. D. de Solutio Matrimonio, l. 6. l. 16, 17, 19, 21. D. de re judicata, l. 49, 50. d. t. l. 4. l. 6. l. 7. D. de cessione bonorum.* (d) *Vid. Gell. l. XX. c. 1. circa fin.* as likewise *Appian's* Discourse in *Dionys. Halicarn. l. 5. p. 330, &c.* Ed. *Lips. in fin.* compared with *Livy, l. 8. c. 28.* (e) This is contrary to the Judgment of *Pliny*, who thinks it the safest Course to try the Uncertainty of Fortune by Variety of Possessions. *Epist. 19. l. 3. numb. 4.* Ed. *Cellar. King Philip* (in *Justin. l. 9. c. 1. in fin.*) besieging *Byzantium* without Success, at the same time made an Inroad into *Scythia*, for the sake of Plunder; seeking (according to the Policy of Merchants and Dealers) to defray the Expences of one War with the Spoils of another.

*Livy (l. 40. c. 21. p. 661. in fin. Ed. Gronov.)* reports of *Antigonus*, that being in great Distress at Sea, when he had all his Friends with him in the Ship, he call'd his Children about him, and strictly charg'd them both to remember themselves, and to caution their Posterity, that they never engaged with their whole Family together in Difficulty or Danger.

Yet

IV. It is proper for us on this Subject to examine the Notion of Mr. *Hobbes* (a), which he seems to lay down in too general a Manner, that *Covenants do not oblige to the thing it self, but only to the utmost Endeavour*. That is, since we are not obliged to Impossibilities, and since nothing is in our power but our utmost Endeavours, what we cannot by its means obtain, is to us impossible, and consequently is excluded from being the matter of Obligation. But he ought indeed to have inserted this Condition, *provided we have not by our own Fault, or Fraud, Incapacitated our selves for such a Performance*. For if this be our Case, the Obligation is not satisfied by our utmost Endeavour; but when our power of Payment ceaseth, our Punishment must come in to make up the rest. Therefore the Assertion ought to be limited to those Covenants, in which upon account of some *Thing* or *Action* at present reach'd out unto us, we promise some future Labour or Assistance. For here, since such Futurities are uncertain to Human Foresight, so that either our strength may by some Accident be impair'd, or some unaccountable turn of Things may render it extremely difficult, if not utterly impossible for us to meet with an Opportunity of Performance; and farther, since our Sagacity may be mistaken either in rating our own Power, or in weighing the Difficulty of the Undertaking; the Contractors must for these Reasons be suppos'd to have been mindful of their own frail Nature, and consequently not to have agreed on any future Action or Work, but with this Condition and *Proviso*, that their Abilities and Opportunities remain'd the same, and that they had not over-rated their present Strength. In these Cases then, he who has us'd his utmost Endeavour, may be rightly said to have done his Duty; especially when in the very midst of the Performance, some cross Adventure which we could not possibly have prevented falls in, and either quite intercepts, or wrests aside the Fruit of our Labour.

That the Rule will hold good, only in this kind of Covenants, is farther evident from what Mr. *Hobbes* discourseth immediately before. *We very frequently, says he, contract about such things as then indeed seem possible, but which afterwards we find to be impossible* (b), *yet this does not free us from all Obligation. And the reason is, because he who promises an Uncertainty hereafter, receives a present Good, on the Condition of returning the like. But*

*now the Will of him who offers the present Good, has for its absolute Object, any return of good equal in Value to the thing expressly promis'd by the other Party; but the thing it self is affected, not strictly and absolutely, but under Condition of its Possibility*. Yet on the contrary, I would chuse to say, that whosoever exhibits to another any present Good, does absolutely and directly bend his Desire towards that particular future Good, express'd in the Bargain; and this as well in Contracts of *giving*, as in Contracts of *doing* (c). But when he cannot obtain what was peculiarly promis'd, he then to keep himself from suffering Loss, desires something of equal Value. And if this too cannot be paid him, nor the thing restor'd which he first gave on his part, the other Man fully satisfies his Obligation, by offering what his Abilities will admit of.

But, in Contracts of *Lending*, and others of the same Nature, it will not hold that the Debtor is freed from his Obligation, by using his utmost Ability and Endeavour. For when any thing is taken in way of *Loan*, (especially if it be not in a case of extream Necessity) the Creditor supposes that the Debtor is both willing and able to pay, and the Debtor himself pretends as much; and on this Supposition, the whole Contract is founded. If then at the time prefix'd for Payment, the Debtor with all his Stock and Effects cannot make up the Sum; though here it be at present impossible to squeeze more out of him; yet he shall stand engaged to make good the rest hereafter (d).

In *simple Promises*, when he engages to do a thing which is not, as to the Event, fully and absolutely in our power; some such Condition as this ought always to be understood, *if Fortune favour me, if no cross Accident intervene, or what better becomes the Piety of a Christian, if it please God* (e). But positively to swear or vow that we will accomplish such an uncertain Enterprize, is not only most extravagant Rashness, but most wicked Presumption. Such was the Oath of *Labienu*s and his Party, recorded by *Cesar*, by which they engaged themselves not to return into their Camp without obtaining the Victory (f).

V. There is another knotty Question proposed by Mr. *Hobbes* (g), which we ought here to discuss, Whether a Man can by Covenant oblige himself to suffer such Evils, as exceed the ordinary Strength, and Constancy of Human Minds; for Instance, whether he can bind himself *not to resist another, who shall*

Yet it is plain the Ancient *Romans* had little regard to these different Circumstances. For thus *Seneca* argues; (*Benef. l. 7. c. 16.*) Can you imagine our Forefathers were so imprudent, as not to apprehend how unjust it must be to put a Man who had wasted a Loan in Dice or Lewdness, in the same Case with him, who by Fire, Thieves, or some sadder Misfortune, had lost other Men's Money with his own? They allow'd no Excuse, that Men might learn in all Cases, most strictly to keep their Faith. And it were more safe to reject the just Plea of a few, than to admit all to a Privilege of offering their Apologies. In *Muscovy*, insolvent Debtors are first soundly whip'd, and then compell'd to be Slaves to their Creditors. (a) *De Civ. c. 2. f. 14.* (b) It must be supposed, that we have not had Opportunity of making Tryal. (c) For the Law of Nature doth not seem to afford Ground for that Distinction which some make, that in Bargains of *Giving*, a Man is precisely obliged to give, whereas in Bargains of *Doing*, he is not precisely obliged to do the Work, but may be releas'd by a Commutation.

(d) See *Matth. XVIII. 25. &c.* (e) See *Ja. IV. 15.* (f) *Cesar. de Bel. Civ. l. 3. c. 8. n. 6. Add Act. XXIII. 21. & Selden. de J. N. & G. l. 4. c. 7.* (g) *De Civ. c. 2. f. 18.*

go about to kill or to wound him. Now whoever closely and carefully considers this Point, will be able to discover on what account Mr. *Hobbes* thought good to take the Negative Side; Namely, to shew that bare Pacts, are not a sufficient Guard and Caution, to the Security of Mankind; and that 'tis not enough for a Man to engage by Covenant, that he will freely undergo due Punishment, so often as he shall commit an Injury; but for the Preservation of Peace in the World, it is farther necessary that Civil Governments should be establish'd, which may bring Offenders to Justice, though against their Wills. Which Principle we acknowledge to be most just and true, and shall enlarge upon it in its proper place. At present it may be worth our while to examine more nearly the Arguments which he produces. He says then, *no Man is by any Covenant which he shall make, obliged not to resist another, when he offers mortal Violence, or Wounds, or any bodily Mischief. For here is implanted in every one the highest degree of Fearfulness, by which he apprehends the threaten'd Evil, as the greatest Imaginable, and therefore by a Natural Necessity, flies and avoids it as much as possible; and is suppos'd incapable of doing otherwise. When he is arriv'd at such a height of Fear, it cannot be expected but that he will consult his own Safety by Flight or by Combat. Since then no Man can be obliged to an Impossibility, those to whom Death, or Wounds, or other corporal Pains are presented, and who have not Constancy enough to bear them, are not bound to venture the Tryal.* Upon this Argument, we may remark, that to suffer Death without Reluctancy, is not a thing absolutely beyond Human Strength. And therefore if God has Commanded us to lay down our Lives, rather than commit some particular Action, no doubt but we are strictly bound to yield a ready Obedience. But thus much we are willing to acknowledge, that since such a Degree of Constancy is beyond the Strength of the Generality of Men, no one shall be presumed to have bound himself by his own free Covenant to such a rigorous Task. For Human Laws and Human Contracts, ought all to be made with an Eye and Regard to Human Infirmary.

Yet this Consideration ought not to be drawn so far as to prejudice the Force of Military Discipline; as if a Souldier under imminent Peril of Death might desert his Post, upon Pretence, that a Man cannot be obliged to undergo Death, as being a thing Impossible. For we deny that it is a thing above the Fortitude of Mankind, especially of the military Sex, to sustain a probable Danger of Death, still joyn'd with a Power of resisting to the last. And there scarce ever happens such a

Case in War, that some Persons must be throwt away, and offer'd up as Victims to the Enemy, without a Liberty, and an Opportunity of defending themselves by Courage or by Craft. So that it appears from the Necessity of preserving Commonwealths, and from the use and practice of all Nations, that whenever it is Requisite, a Commander may lawfully enjoin a Souldier, to oppose the Enemy in such an assign'd him Station to his last Breath, though 'tis probable he may die upon the Spot; and may as lawfully inflict Capital Punishment on those who shall quit their Post, after such an express Order to the contrary. For he that lifts himself in the Number of Armed Men, does by that Act lay aside all Claim to the Excuse of Natural Fearfulness, and is bound not only to enter the Field, but likewise, not to leave it, without the Order of his Leader. Neither is there any Absurdity in that Martial Punishment of killing a Man, because he declined being killed. For is it not much worse to suffer ignominiously under the hand of the Executioner, than to fall with Honour under the Sword of the Enemy (a)? We must add, that in Case a Person be of so weak and cowardly a Temper, as to shrink at those Dangers which the Common Hardiness of Men is able to sustain; his peculiar Infirmary of Mind shall by no means absolve him from his Obligation.

Mr. *Hobbes* proceeds to observe, that since we dare trust him, who is bound to us by Covenant, whilst we lead Criminals to Execution in Chains, and under Guards; it should seem that they are not by Covenant sufficiently obliged to Non-resistance. The Remark in most Cases is true (1), yet sometimes Persons really bound by Covenant to us, are not so absolutely trusted but that we think it expedient to provide against their Perfidioufness, by a Security of armed Men (b). He adds, *a Covenant of this kind would be useles, a Man indeed may Covenant thus, unless I do this or that upon the appointed day, kill me; that is, you shall have a Right of proceeding to Capital Punishment against me upon my Default; but to Covenant thus, unless I do so or so, I will not resist you when you come to kill me, is a thing both unpractis'd and insignificant.* He proves his Point after this manner. 'Such a Covenant must be made, either between a State and a Subject, or between two Subjects of the same State, or between two Persons living in a Condition of Natural Liberty. In the first Case it would be useles, because 'tis enough to secure to a State the Power of punishing Offenders, if each particular Subject engages by Oath or Fealty, that he will not forcibly defend or rescue any Person, who shall be thus led to suffer Justice. In the second Case it

(a) *Add. l. 1. c. 28. De Senatusconsulto Silariano & Claudiano, &c.* By one of the Roman Laws, Servants who prefer'd their own Lives before their Masters were punish'd with Death, *D. B. 29. t. 5.* (1) See *B. 8. c. 3. l. 5.*

(b) *Senec. Thyest. v. 644, 645, 646.*

*Arx urbem premit,  
Et contumacem regibus popululum suis,  
Habet sub iura.*

— A Castle awes a Town,  
And holds a People, stubborn to their Kings, under the stroke.

would be alike impertinent; because in Civil Governments private Men have not the Right of killing. In the third and last Case, it would be of no more use or force than in the former; because if the Parties covenanted, that one of them should be kill'd upon Non-performance, a preceding Covenant must be suppos'd to have pass'd, importing that he shall not be kill'd before the Day fix'd for Performance. For according to his *Hypothesis*, in a *State of Nature*, before any Pa&ts have been introduced, each Man hath a Right of killing each Man else. Therefore upon default of Performance, on the set Day there returns a Right of War, or a Hostile State, in which it is lawful for any Man to attempt what he pleases against another; and consequently the Right of resisting will return at the same time. I would rather chuse to Establish the Truth of the Assertion another way, by saying, that the Force of Covenants if strain'd to the highest, does reach so far, as not only to lay on the Parties an intrinsecal Necessity of performing the Conditions, but likewise to give each of them a Right of Compelling the other to a Compliance, in case he draw back, by proposing and presenting some Evil. And that therefore every Covenant may be resolv'd into this Sense, *I engage to do this, or this for you, if I fail, you shall have a power of compelling me by violent Means.* Now to add a second Covenant about Non-resistance, would here be useless and absurd. For then this second Covenant must be enforc'd again by a third, including some Penalty, as *if I resist you, when you attempt to compel me to Performance, you shall have a power of offering Violence, or Evil to me.* Thus it is plain, the second Covenant adds nothing at all to the first; for the first gave a power of reducing the Defailant by Violence; and 'tis as easy to break this as that. What need is there then of backing one Covenant with another, when ten may as well be broken through as one?

The last Argument urg'd by Mr. *Hobbes*, runs thus, *Could there be such a thing as a Covenant for Non-resistance, we should by it be obliged out of two present Evils, to chuse that which appear'd the greater. For certain Death is a greater Evil than Resistance and Combat. But of two Evils it is impossible for us not to chuse the lesser; therefore by such a Covenant we should be tied to an Impossibility, which contradicts the whole Nature of mutual Engagement.* Now here it is necessary, that the Rule about *chusing the lesser Evil*, be accurately stated and explain'd. And this properly speaking, can take place only in two *unprofitable* or *hurtful Evils*, consider'd as such. In which Case it looks like a kind of Gain, to suffer only a Part of an inevitable Loss or Damage. But the same Rule must by no means be extended and applied to the Case of two *dishonest Evils*, or of two Evils, the one *dishonest*, the other un-

*profitable.* For of two Evils of Commission, we are to chuse neither. But it sometimes happens, that we cannot fulfil two Affirmative Precepts, the Omission of which separately consider'd, would be sinful, yet upon their meeting together the Omission of one of them is look'd upon as lawful. And in this Case of the two *Evils of Omission*, the lesser is to be chosen; or rather the interfering with a more noble Precept, shews the Omission of the less noble Precept to be no *Evil* or *Sin*. For in all inferior, and subordinate Laws, this Restriction is ever understood, *so far as we can comply with them, and not intrench on Engagements of a higher Nature.* Thus not to obey God, and not to obey the Civil Magistrate, if taken asunder, are both notoriously Sins; and yet, supposing both the Obligations cannot at once be answer'd, as when the Magistrate commands any thing contrary to the Divine Law, in this Case, Disobedience to our Earthly Governours ceases to be Evil; because that Law which binds us to conform to the Will of human Sovereigns, is always understood with this Proviso and Condition, that they enjoin nothing repugnant to the Laws of God.

We are in many Cases likewise permitted, rather to chuse the bare Execution of another Man's Sin, or a Concurrence by way of Instrument, than some Evil, very prejudicial, or very grievous to be born, with which we are threatned upon Refusal. Which Point we have elsewhere (†) more largely discuss'd.

Neither is it allowable, as was just now hinted, to make any such Comparison between an Evil, Troublesome, or Damageable, and a Sin, so as to chuse the latter rather than the former; as for Instance, If a Man should rather act contrary to his express Duty, than slip the Opportunity of some Advantage, or sustain some real Loss; how positive soever his corrupt Judgment may be in concluding the Sin to be the Lesser Evil. For, were this admitted, the Force and Efficacy of Obligations would depend upon every Man's Opinion; and consequently would vanish into nothing, if I were not bound to an Action, when the Omission of it upon account of some external Regard, appear'd to me more desirable than its Performance. Thus it would be but a poor Excuse for a Thief to alledge for himself, that he thought it a less Evil to lay Hands on the Goods of his Neighbours, than to get his Livelihood by his own Pains and Labour. Indeed Obligations are so far from losing their Force in these Cases, that they never exert it more vigorously; for 'tis the very Nature of such Engagements to produce in Men an intrinsecal Necessity of such Performances, as they would otherwise be averse to, upon outward Considerations and Respects.

VI. To make a Promise or Pa&t truly *Obligatory*, it is farther Requisite, that we have a *Moral Power* of performing the Thing agreed

(†) B. 1. c. 5. f. 9. See B. 8. c. 1. f. 6.

upon. And if the Thing be unlawful, and we consequently want this Power, we cannot tie our selves by any such Engagement (1). For every Promise receives its Force from the Ability of the Promiser, and never reacheth farther; or a Man cannot bind himself with any Effect to a Business which he wants Ability to compass. But now the Law by forbidding any Action, takes from us the Moral Power or Ability of setting about it, and of entering on any Obligation to perform it. For would it not be most Absurd and Contradictory, that an Obligation which derives its Vertue from the Law, should put us under a Necessity of doing somewhat which the Law absolutely prohibits? And when we are once plac'd in Subjection to Laws, the bare Act of our own Will is not sufficient to repeal or to evade them. Therefore he who Promiseth a thing unlawful, sins, but he sins doubly, who performs it (a). Whence this farther Consequence may be drawn, that those Promises are not to be kept (2), which would prove hurtful to the Person, to whom they are made; it being a general Command of the Law of Nature, that we do no Harm to another, knowingly and wilfully, though he out of Folly should desire it.

Moreover, since a good and valid Obligation cannot be contracted about Unlawful Matters, it follows that Acts undertaken against legal Constitutions, are by Vertue of the same Law Null and Void, or the Magistrate is supposed to have already declar'd them so (b). Yet in many Cases, it is a constant Practice in Common-wealths, to impose a Fine on the Performer of some unlawful Act, and not to disannul the Act, because there was perhaps, more Indecency in the Momentary Performance, than in the Effects consequent upon it; and because frequently the Inconveniencies attending a Disannulment would be greater than the Act it self, if permitted to stand Valid, would produce (c).

VII. To proceed distinctly in a closer Examination of this Point, it is first mov'd as a Question, whether an Obligation for the Performance of an Act in it self Vicious, be Good and Valid, whilst things stand as at first, and no Step is made towards the Execution. And here it is certain, that such a vicious Agreement does produce an Obligation on neither side, and that Parties ought in Honesty to recede from their Bargain (d). Thus for Instance, if a Man hire an Assasine to commit a Murder, and the Assasine upon better

Thoughts resolves against the Villany, the Hirer cannot compel him to fulfil his Covenant. And on the other hand, if the Hirer repenting of his wicked Design, orders the Assasine not to proceed, the Assasine shall not force him to continue in his Resolution for fear of losing the promis'd Wages. Neither shall he in this Case demand the Money of the Hirer, as on whose account purely he now desisted, and was hindred from earning it. Nay, if after he has been thus countermanded he go on, and accomplish the Mischief, the Hirer shall not be Guilty of the whole Fact, but shall be condemn'd, only in so much as shall seem a proportionable Penalty, for conceiving a Murder in his Imagination, of which he repented before it was put in Execution.

Grotius (e) observes, that a Promise of this kind is therefore Vicious and Void, because it is made to excite a Man to do a wicked Act (f).

VIII. It is a second point of Enquiry, whether in Case such a Villany having been once committed, according to the Bargain, the other Party be obliged to pay the Price agreed upon. Which Grotius affirms; because says he, the Price or Reward before the Fact was accomplish'd had indeed a Blemish and Imperfection, as being the Incentive to Wickedness, which blemish ceaseth, when the Wickedness is once past, and the Crime perform'd. But we cannot but declare our selves of a contrary Opinion; for a Bargain of this kind is so far from ceasing to be Vicious, when the Deed is over, that it seems then to arrive at its highest pitch of Baseness, as having gain'd its end. Unless it be a smaller degree of Sin to have stolen, than to think of stealing, to receive the Wages of Villany, than to hope for and expect them, to pay the Reward than to promise it. Indeed if the Promise be in it self Vicious, because it is the Incentive to Wickedness, the fulfilling of the Promise will certainly be Vicious, as being the *Recompense of Wickedness*, and an Encouragement and invitation to new Mischiefs. And on this account some secret Stain or Blemish is commonly thought to stick on such Rewards, even after they have pass'd to a third Possessor by a just Title; because they were at first the *Wages of Iniquity*. Thus the Jews were forbidden to bring the Price of Whoredom, as an Offering, into the House of God (g). Thus when Judas (3) brought back the Wages of his Treason, the chief Priests thought it not lawful to put it into the Treasury. And thus it is a known Pro-

(1) 'Tis indisputably certain, that *Pacts* made against Laws, Constitutions and good Manners, have no Power of binding Men. C. de *Pactis*, leg. 6. Vid. D. 28. tit. 7. de *Condition. Institut.* (a) *Add.* l. 15. D. de *Condition. Institut.* l. 35. f. 1. l. 123. D. de *verb. obligat.* (b) *Lex Wisigothorum*, l. 2. tit. 5. c. 7. (c) Thus in *Apollonius Rhodius*, *Argon.* B. 4. *Alcinous* being constituted Umpire between the *Colchians* and the *Argonau.* gave Judgment as follows, 'That if *Medea* had been acquainted with *Jason's* Bed, she should still remain in his Possession, if not, she should be restored to her Father. We have the same Story in *Hygin. Fab.* 23. *Apollodor. Biblioth.* l. 1. f. 25. *Orpheus in Argon.*

(2) See B. 5. c. 12. f. 22. near the End of it. (d) *Senec. Hercul. Oct.* v. 480, 481.

*Præstare fateor posse me tacitam fidem,  
Si scelere careat; interim scelus est fides.*

(e) L. 2. c. 11. f. 9. (f) Thus *Apollonius Tyaneus* (in *Philostat.* l. 3. c. 7. p. 130. Ed. *Morel. Paris.*) having promised to bring a Vessel richly laden into the hands of Pirates, led 'em a quite contrary Course, and deluded their Expectations of Booty. (g) *Deuteronom.* XXIII. 18. *Joseph. Antiqu.* IV. 8. (3) See *Matth.* 27. 6.

verb, that a Family seldom thrives on an ill-gotten Estate. Therefore we can by no means assent to what *Grotius* delivers, that till the time of performing the Villany, the Force and Efficacy of a Vicious Promise, remains in suspence; just as doth the Efficacy of Conditional Promises till the Condition be made good, and of Promises about things at present Impossible, till the things do really fall under our Power, as we have probable Hopes they will, at our first making the Bargain: But that when the Fact is once committed, the Obligation then breaks out, and exerts its Force, which was not at first entirely wanting, (in as much as the thing was done by mutual Consent,) but was only hindered from displaying it self by that Vice or Defect, with which it was attended; namely, its contributing to the Commission of a Sin. But should we admit this Doctrine, the Edict of Natural Law forbidding us to enter into Covenant about unlawful Matters, would be void, if when the wicked Terms of the Covenant on one side were put in Execution, the other Party must by the Law of Nature be bound to stand to his Agreement. What an insignificant Order would it be to prohibit Theft, if the Act of stealing being once over, the Goods were to remain in the Possession of the Thief, without Blame or Danger? And that Remark is very false, 'That there was not Originally 'wanting to the Vicious Covenant, an internal 'force of obliging; but that it was only kept 'in Suspence upon account of the attending 'Wickedness, till such time as it ceas'd to be 'an Incentive to Sin. For to give a Pact an inward Obligatory Force, it is not enough that it be made with the Consent of both Parties, but the Subject of it ought to be such a thing as Men have a Right and Power of disposing of at their Pleasure. Otherwise if mutual Consent were sufficient to produce an Obligation, it would be easy to overthrow all Laws, should Men but enter into a Covenant to break them; and thus the Law of Nature would manifestly contribute to its own Destruction. It is our Judgment then, that with regard to the Law of Nature, neither the Actor of a Villany, can by any proper Right demand the Wages promis'd him, nor is the Person who hired him bound to pay the Reward by any inward Tie affecting the Conscience. And that therefore the Court of Natural Justice, does not think it self concern'd to enquire, whether or no a Man has committed a Wickedness, gratis, or to trouble it self in giving him relief. Indeed, if the Cut-throat here, or any other Man retain'd for the Execution of some unjust Violence, shall upon the other Parties refusing to pay him his Hire, do him some Mischief in Revenge, no body will pity the Sufferer, nor think that he has been treated injuriously, but only that he has been dealt with in his own

way. This then we must observe, that although Covenants in themselves Vicious, are not Obligatory by any Intrinical Force or Vertue, nor fit to produce an Action in Courts of Justice, yet they have some kind of Effect upon a Man, who having at first freely consented to them, refuses afterwards to make them good. For they hinder him from having any Right to complain of hard Usage, in case the other Person violently bring him to a Compliance, or inflict some Evil on him for his Refusal. It is true the Law of Nature forbids, that a Man should have forfeited his Claim, by another's dealing injuriously, or be compell'd to pay what he does not justly owe, or should be punish'd for denying so unreasonable a Demand. But he who agrees to a vicious Covenant, does by that very Act quit all claim to the Favour of this Law, in as much as he endeavours, so far as he is able to give another an unjust Power over him. And those Evils are adjudg'd to fall very deservedly on Persons, to which they give Occasion by their own Fault. For Instance, the Law of Nature forbids, that a Virgin should be rob'd of that Title and Character against her Will; yet if she once consents to her own Dishonour, she has suffer'd indeed an irreparable Loss, but she cannot complain of any Injury that has been done her (a). And thus too in Commonwealths, where Duels are prohibited by Law, a Man who has receiv'd a Challenge, is not bound to come into the Field, though he has given his word to appear. Yet if he freely meets his Antagonist, and happens to be wounded in the Incounter, he cannot say that he has suffer'd Wrong, or demand the Charges of his Cure.

*Grotius* in favour of his Opinion, urges the Example of the Patriarch *Judah* in the Scripture (b), who appear'd very earnest and solicitous to send *Thamar* the Price of her playing the Harlot. To this *Mr. Selden* (c) answers, 'That in the Judgment of those times it pass'd 'for lawful, for a Woman free from Marriage, 'and other Restraints, to bestow her self upon 'a Man, without any Condition of living together; and this either *Gratis*, or for a Reward. And that therefore this Agreement 'was able to produce a Good and Valid Obligation, being made about a Matter, which if not 'Naturally, yet was civilly lawful, or according to Opinion of States and People in those 'Days. We may say farther, that most Men think they ought in point of Generosity to pay something for the purchase of their Pleasures. And besides, *Judah* might not express so much Care and Concern, least the Harlot should lose her Wages, but least he himself should lose his Staff and Ring, the Pledges he had left in her Hands. Another Argument on *Grotius's* side, may be alledged in that Passage of the Roman Laws (d), *What is given to a Strumpet cannot*

(a) Though in this Case *Ovid's* Rule commonly holds true

*Crimine dotata est, demeruitque virum.* Epist. *Heroid.* 6. 137, 138.

She brings her Portion in her Crime, and wins the Husband in the Spark.

(c) *De J. N. & G. l. 5. c. 4.*

(d) *L. 4. f. 3. D. de Condiēt. ob. turp. Caus.*

& 1. 12. tit. 5.

(b) *Gen.* XXXVIII. 20. &c.

be recover'd; yet not because both Parties are in a fault; for indeed the whole Offence, as to this Point is on the side of the Giver. 'Tis vicious in the Strumpet, to practice such a Profession, but 'tis not vicious in her to receive the Fees of her Profession. The meaning of which Determination is no more than this; though to make an open Trade of Lewdness, and to own as much before the *Adiles*, did not fall under the Penalty of the Laws in the Roman State, yet all Good and Vertuous Men, thought it most Base and Scandalous to engage in such a way of Life. However, when Persons had once fix'd themselves in so vile a Calling, they contracted no new Vileness, by making the usual Gain and Advantage of it. Or to speak more concisely, the Business was thus; the Romans granting Toleration to *Courtesans*, the Bargains and Contracts made on the Score of that Profession, were in their Law adjudg'd to hold good and valid (a).

This still remains true, that a Man cannot fairly pretend to be displeas'd with a piece of Wickedness, which has been undertaken with his Consent, and for his Service (b). Though it be a very usual, and a very good Custom of Princes, to take the benefit (in some Cases) of Men's Treasons and Villanies, and to punish the Traytors and the Villains, that the Infection may not spread by Encouragement. Of this Proceeding, we have a very remarkable Instance, recorded by *Paulus Orosius* in his History (c), *Sulpitius* having been voted in Senate a *Publick Enemy*, was brought into their Hands by the Treachery of his own Slave; the *Consuls*, with a Wise Distinction, order'd the Fellow to be presented with his Freedom, as a Reward for his Service to the State, and to be cast head-long down the *Tarpeian Rock*, as a Punishment for Betraying his Master (d).

IX. The third Question moved on this Head is, whether a Reward given for Villainous Service, may be redemanded or recover'd. And here the Law of Nature affords no Pretence for such a Recovery, provided the Receiver has not dealt deceitfully with the other Party. In as much as the Giver by delivering up the thing promis'd, intended no doubt to transfer the Propriety of it; and this too in way of Debt, in Consideration of a Service perform'd

for him, which he himself valued at this rate. Now we know that when any thing is given, even gratis, all Right of recovery ceaseth. Nor will it alter the Case to urge, that the thing was here obtain'd on an unjust Title, and by Ways and Means expressly forbidden by the Laws. For this Allegation cannot with any colour be made by the Person who gave the Reward; in as much as he voluntarily bargain'd for the wicked Service, and when that was perform'd for him, thought himself to receive somewhat equal in value to the Price agreed upon; nor can he complain of a Villany, of which he himself was the Principal Author. Indeed the *Illegality of the Means* by which the Reward was acquired, if consider'd in regard to the Publick Authority, shall produce this Effect, that it shall be in the Magistrates Power, to take the thing from the Receiver by way of Punishment, and (if he sees fit) to restore it to the first Owner. For Instance, if a cunning Strumpet shall chouse an unwary young Man out of a considerable Summ of Money, she may fairly be obliged to refund; since even in the most vicious Bargains, some Shadow of Justice is kept up, and the Laws of Contracts in some sort observ'd.

But farther, since it is accounted most base and vile in a Man, to demand a Reward, for doing a thing which it is his Duty to perform gratis, it is made another Question, whether what he have promis'd or given for a thing before justly due to us, may be with-held or recover'd. Some answer absolutely (1), that if we respect the Law of Nature, Promises of this kind are Good and Valid, since those likewise are so, which we make without any particular Reason or Prospect. Yet that at the same time whatsoever Damage is sustain'd by violent Extortion, ought to be fully repair'd. Perhaps the Business may be more clearly settled, if we distinguish whether the thing which we say was before due to us, was due upon an Imperfect, or upon a perfect Obligation. If the former, our Promise of a Reward for it shall hold good, and we cannot sue for Recovery. Thus for Instance, although the Law of Humanity obliges me to set a Traveller in his Way, and though such a piece of Service may perhaps cost me no Trouble, yet if I bargain to receive some Consideration on that

(a) *Ovid* indeed, hath accused these Bargains of Injustice upon another Score.

*Sola viro mulier Spoliis exultat adeptis:  
Sola locat noctes, sola locanda venit.  
Et vendit quod utrumque iuvat, quod uterque petebat,  
Et pretium, quanti gaudet, ipsa facit.  
Quæ Venus ex æquo ventura est grata duobus;  
Alter cur illum vendit & alter emit?*  
*Amor. Lib. I. Ep. 10. v. 29, &c.*

'Tis the Nymphs Priviledge the Spoils to win,  
To let her Nights to hire, and traffick with her Sin.  
She sells what both enjoy, what both invite,  
And sets the Price upon her own Delight.  
What both with Pleasure doth alike supply,  
'Tis hard if one must sell and t'other buy.

(b) *Medea* to *Jason*, in *Ovid's Epist. Ep. 12. 131, 132.*  
*Ut culpam alii, tibi me laudare necesse est,  
Pro quo sum toties esse coacta nocens.*

Others may blame, you must of force commend,  
For whose sweet sake I dared so oft offend.

*Nisus* to *Minos*, *Metamorph. l. 8. v. 130, 131.*  
What's to my Country, and my Friends a Sin, to you's a Kindness.

———— *Scelus hoc patriæque patrique, Officium tibi sit.*  
———— *Senec. in Medea, v. 500. 503.*

*Tibi innocens sit, quisquis pro te est nocens.*

Is deem'd the Actor; he that sins for you, should in your Eyes be spotless Innocence.

———— The Gainer by a Villany  
(c) *L. 5. c. 18.*

(d) Add *Zonar. Tom. III. in Theophil. ab initio.* (1) See *Grotius, B. 2. c. 11. f. 10.*

account, I may fairly demand the Payment, and the other Person cannot recover what he thus parts with; unless I forced him to make a large and unreasonable Promise, by filling his head with false Frights, or any other Stragem of Knavery. Those Promises are likewise Valid, which we make to incite another to the more ready, and the more exact Performance of his Duty. For these pass for matters of free Bounty and Gratuity. But if the thing was before owing to us in a *perfect* manner (a), and yet the Person who is to perform it, refuses Compliance, unless upon our Promise of a new Reward, we take this Case to be the same, as in Engagements made through Fear or Guile; and therefore to require the same way of Proceeding. If then in a State of Natural Liberty, a Man refuse to pay me my due, it is plain he does it upon Presumption of his own Strength, and because he believes it is not in my power to compel him. And consequently, if he deny to fulfil a Covenant fairly made, without a new Supplemental Condition, he immediately gives me just Cause of using Hostility to reduce him. And if my present Affairs will not permit me to engage in a Method of War, but incline me to agree, though on hard Terms, I may afterwards require Satisfaction for the Damage I now suffer; unless I end the matter by an act of voluntary Forgiveness. Yet it quite alters the Case, if his denial did not proceed from meer Unfaithfulness and Wickedness, but from his being able to shew that he was exceedingly injured in the former Covenant, to which he now demurs. As for the Members of Commonwealths, if *they* refuse to answer an old Bargain without some additional Reward, they will be compell'd to be honest by a Course of Publick Justice.

To this we may add the Distinction of the *Roman* Lawyers (b) in Cases of *Vicious Service*, whether the Fault or Wickedness was on the part of the Receiver only, or of the Giver only, or of both. In the first Instance, they allow an Action of Recovery; but not in the other two.

X. We are likewise *Morally* unable or incapable to perform any thing, or to oblige ourselves to such Performance, about the Goods or Actions of other Men; which are not subject to our Pleasure and Disposal. And being thus independent from us, we cannot by any Act of ours; whether of Promise or of Bargain, give another a Right over them, by Virtue of which he should claim them as his Due. Hence 'tis a Rule with the *Civilians* (c), 'That in Case one Man promise that another shall give or shall do such or such a thing,

'neither of them shall stand obliged (1). Which is very just and true, if we stick to the bare Words of such a Promise. But because it seems inconvenient, that an Act seriously undertaken should produce no Effect, we are apt commonly to interpret Promises of that kind in this Sense, that the Person promising, will take care to bring the other Party to Performance; in whose Name he now seems to make the Engagement. But if I make a Promise to a Man in so express and direct Terms as these, that I will endeavour to prevail on a third Person, to do for him so or so; I am then obliged to labour by all means *morally possible*, to move that Person to a Compliance. We say by all *means morally possible*, that is, so far as the other Man can honestly desire me, and so far as is consistent with the Nature and Method of Civil Life. And if in this Case, I omit nothing on my part (2), and yet the third Person refuse to grant the Request, I am not bound to make good the Default; unless this was an express part of my Promise, or was implied in the Nature of the Business (d). But if I promise in this manner, *unless a third Person do so or so, I will forfeit thus much*, it is manifest that if the third Person fail, my Engagement will stand good against me. Somewhat like this we meet with in the *Roman* Constitutions, which decree that in Case a Person disposes in way of Legacy, a thing which belong'd to another Man, and which he knew so to belong, the *Heir* shall be obliged to redeem, and to restore it, or if it cannot be redeem'd, to give the value of it to the Owner (3). Yet certain it is, that a Promise of what kind soever, cannot lay an Obligation on the third Person, nor give the other Man a Right of requiring any thing immediately from him.

But if the third Person be one placed under my Governance and Command, his Things or Actions are not accounted anothers, but my own; so far as my Authority over him extends. And thus far I can by Promise or other Engagements effectually dispose of them; so as not only to bind my self to see the Agreement made good, but to cause that the Person in whose behalf I transact, shall as soon as he is acquainted with my Pleasure, be obliged by vertue of my Power over him, to perform the Condition. Though the common and regular way of proceeding in these Cases, isto apply to the principal Promiser, and to require him to force the Person under his Care and Direction to a Compliance; and upon the Obstinacy and Default of the govern'd Party, the Action at Law shall lie against his Governour, unless he has resign'd his Charge, and left him wholly to his own Disposal.

(b) *Add. l. 12. Tit. 5. D. de Condiç. ob turp. Caus.* (a) *Liban. Orat. 5.* I receive only those Advantages which the Law allows me; and where is the Favour in this Case. He that hath been obliged with a Kindness, ought to make Requit to his Benefactor. But we can owe no such return to a Judge, who doth not act out of Favour to us, but as the Necessity of the Law directs him. (c) *Add. f. 3. l. 3. tit. 20. Instit. de inutil. Stipulat.* (1) See *D. de oblig. & action. B. 44. tit. 7. l. 11.* (2) See *Grotius, Book II. c. 11. f. 22.* and *Book III. c. 21. f. 30.* (d) *Liv. l. 2. c. 31.* He seem'd to have satisfied his Obligation, inasmuch as he contributed nothing on his side, to hinder the Business from being perform'd. (3) See *Instit. B. II. tit. 20. de Legatis. f. 4. vid. D. l. 32. Leg. 30. f. 6.*

XI. Lastly, I am Morally incapacitated to make a Promise with any effect, to a third Person, about such Things or Actions of mine, to which another has already acquired a Right; unless perhaps this other Party be content to wave his Claim. For he who by a former Engagement has made over his Right, can have no power left to dispose of it anew. And all Pacts and Promises might be cancell'd and eluded with very little trouble, were we allow'd to enter into new ones, either directly contrary to the former, or any way inconsistent with them, as to the Performance. In this case therefore, the latter Contract is dissolv'd and rendred ineffectual by the former, or as we should rather speak, the former shews that the latter can be of no force or use. Hence for instance, are all those Covenants void, which Subjects make either among themselves or with others, in prejudice of the Duty and Allegiance they owe to their lawful Sovereigns (a).

It is a common Rule, that *he who has the Precedency in Time, has the Advantage in Right.*

(a) *Gramond. Hist. Gall. l. 5.* He that is born under a Prince, doth originally engage his Faith and Allegiance to him; and whosoever attempts to draw them away, is a most unjust Invader of another's Rights; nor will any such Covenant hold good, being made contrary to the Laws and Constitution of the Kingdom. He that gives his Promise against his Prince, is by the very Act releas'd from the Obligation. (1) *Vid. Instit. l. 3. tit. 20. de inutil. Stipulat. f. 6.* (2) *Vid. D. l. 47. tit. 20. Stellionatus.*

Not that Time consider'd barely in it self can make any such difference; but because the whole power over a thing being formerly secur'd to one Person, bars all others from obtaining a Title to it afterwards. And hence too it comes to pass, that a Servant cannot dispose of his Labour (1), otherwise than his Master pleases, to whom by Vertue of a former Contract it entirely belongs. By the *Roman Laws*, a Slave could not enter into any *Obligation*, even with his own Master, besides the general *Obligation* implied in that State and Condition of Servitude; and the Reason of this was, because his Master had before a full Right over all that he possess'd, and all that he could do to any advantageous Purpose.

If a Man, contrary to these Duties, shall have deceived and prejudic'd another by promising a thing, which either was not his own, or was before otherwise bestow'd and secur'd; he shall be oblig'd to make good the Damage; and in many Cases, shall be liable farther to suffer the Penalty of *Cousenage* (2).

## CHAP. VIII.

### *Of the Conditions of Promises.*

Concerning Engagements by Promise, this is farther to be observ'd, that some are made *purely*, or *simply*, and some under *Condition* (1); or that sometimes we oblige our selves *absolutely* to such or such a Performance, and sometimes we suspend our Obligation, till certain Clauses or Proviso's are made good.

II. A *Condition* is an Appendage (2) added to such Acts, as are productive of Rights and Obligations, by Vertue of which their whole Force and Efficacy is made to depend on some particular *Event*, proceeding either from Fortune, or from Human Pleasure (3). So that to the true Nature of a *Condition*, these two things are requisite, first that it have the Power of deferring and suspending the force of the Obligation, and secondly that the *Event* express'd in it do not as yet appear; at least that it be at present uncertain, as to our Understanding.

III. Hence we may conclude, that those additional Clauses are not properly *Conditions*, (tho' they seem to be such in a Grammatical sense) which refer to the time present or past.

For *Futurities* only are dark and obscure to Mortal Apprehensions, but as for things which are now before us, or have already gone over our Heads, we have usually a clear Knowledge of them; and therefore they can include no power capable of suspending our Assent. And therefore it is given as a Rule in the *Institutions* (a), that Conditions which regard the time present, or the time past, as suppose I should say, I will give such or such a thing, *if Titius has been Consul, or if Mævius be still alive*; do either immediately cancel and annul the Obligation, or else do not put it off at all, nor hinder it from being pure and absolute. For if the things annex'd for Conditions, are not as they are suppos'd to be, the Engagement is to no purpose; but if they are so, the Promise is Valid as soon as it is made, and begins *absolutely* to oblige. Yet here it must be observ'd, that a Condition regarding the time present or past, may be added to an Obligation, in case both or either of the Parties transacting, be uncertain of the thing. And Promises of this kind seem to imply a convenient space of Delay. In as much as nothing can be de-

(1) The *Roman Lawyers* add to this Division, the Determination of the Time and Place of their Performance. *Vid. Instit. B. 3. tit. 16. f. 2. & 5.* (2) See the Eighth Chapter of this Book, § 2. (3) See Mr. *Barbeyrac's* Second Note upon this Section. (a) *B. 3. tit. 16. f. 6. de Verb. Oblig.*

manded by Vertue of them, until it shall be made clearly apparent to the Promiser, that the matter inserted as a Condition, has really happen'd; and the Proof of this must necessarily take up some time. For Instance, a Man unskill'd in History, may be drawn in to promise Another Person Ten Pounds, if *Cæsar* ever pass'd the *Rhine*. Now here before the Sum can be claim'd, it must be made evident from the Authority of Creditable Historians, that such an Adventure was actually perform'd. Again, if I promise in this manner, 'I will give so much Money, in case *Mævius* who is travelling abroad be still alive; the other Person can then only require the Money, when I have receiv'd certain Assurance of *Mævius's* Life. But if we take a closer View of these Matters, we shall find that the above-mention'd Promises, and the rest of the same Nature, ought to be interpreted in this Sense, I will give you so much *if you prove to me that Cæsar pass'd the Rhine, or that Mævius the Traveller is now living*; and thus they become truly *Conditional*; but then the *Condition* is not the Truth, and Certainty of the *present, or past Act* consider'd in themselves, but the *future Proof* of it to the promising Party. It is certain therefore, that if the Truth of the Matter inserted, was known on both sides, and the Persons were in earnest, the Promise is not *Conditional* but *Absolute*. Again, if both knew the matter to be false, the Promise shall pass for a Jest, and consequently produce no Obligation. If a *future* thing be added which they knew must infallibly come to pass, or suppose, *if the Sun rise to Morrow*, 'tis generally agreed that such a Clause ought not to be reckon'd a *Condition*; in as much as the *future* Event being already known to be most Certain and Necessary, does not delay the Obligation, nor hinder it from taking place this very Instant. Yet because we ought not easily to presume that the Clause is added for no Reason, it is worth while to consider, whether in such a Promise, the Particle *if* be not put for the other Particle *when*; so that the Engagement shall not be *Conditional*, but only made for a Day hence; as suppose thus, *I will give such or such a thing to Morrow when the Sun riseth*.

And thus we find that every *Condition* properly so call'd, includes somewhat which is at present uncertain, at least to one of the Parties, between whom the Business is transacted; and the Obligation remains in Suspence, till the thing shall hereafter come to pass, or shall be demonstrat'd by good Evidence, to have already happen'd. When the *Condition* appears true, the *Obligation* begins to have a pure and absolute Force; if the *Condition* fail, the *Obligation* expires with it.

IV. Conditions are commonly divided into *Possible* and *Impossible*. The former are such

as make an Obligation depend on some Event, which may *Naturally* or *Morally* happen. And are again subdivided into *Casual*, *Arbitrary*, and *Mixt* (a). A *Casual Condition* is such as depends, either on the pleasure of a third Person, not obnoxious to our Power and Authority, or else on meer Chance and Fortune in respect of us; as suppose in such a Promise as this, *I will give you ten Pounds if Caius marries Titia; or if it don't rain within these three Days, &c.* an *Arbitrary Condition* is such as depends as to its being or not being on the Will and Power of him, to whom a Promise is made under that Limitation (b). But should a *Condition* be annexed, depending on the Pleasure of the Promiser, the Engagement would be insignificant (c); as if one should say, *I will give you ten Pounds if I think fit*. For the Sense of such a speech amounts to no more than this: I make you an absolute Promise that at present, and hereafter too, it shall be at my Choice, to promise absolutely or not. And therefore the other Party can hence require no *Right*, unless the Offer be afterwards improved to a full and perfect Engagement; since the *Condition* here mention'd may be perpetually sloop, or eluded by the Promiser. So that We may reasonably say, that *what is perfectly in our Power, ought not to be confounded with, or thrown amongst, matters of Chance and Accident*. If the *Condition* be indeed in the power of the Promiser, and yet such as he is not able or is not willing always to elude, it must be enforced by supposing a particular time, beyond which it cannot be deferr'd; as if I say, *I will give you such a Summ of Money if I Marry*, that is, *when I Marry*.

From what has been hitherto offer'd, we may be able to explain more accurately, the Assertions of *Grotius* (d) upon the same Head. He says, *That if the thing promised, be not at present in the power of the Promiser, but may be hereafter, then the Strength and Efficacy of the Promise lies in suspence; for it must then be supposed to have been made conditionally, that is, in case the Promiser should have it in his Power*. Now this Rule we allow to hold good, provided that the other party knew the thing not to be at present in the power of the Promiser. For otherwise it looks like Knavery, when a Man expects an absolute Promise, which shall begin to bind immediately, to put him off with a *Conditional* one, which cannot take place till hereafter. He adds, *if the Condition whereby the thing promised, may be brought into our power, be it self in our power, (\*) we are obliged to do whatever is Morally fit and just, for the Performance of it*. That is, if I promise you any thing, which at present it is impossible to me, but may by my Pains and Care be hereafter rendred possible, I am bound to use all my endeavours, that I may become able to discharge my Engagement. For In-

(a) *Vid.* l. 6. tit. 51. f. 7. *C. de Caducis toll.* (b) Which is likewise call'd a Promiscuous Condition. l. 35. tit. 1. f. 11. *D. de condit. & demonstrat. &c. Leg.* 11. f. 1. (c) *Vid.* l. 18. tit. 1. *D. de contrah. emptione.* l. 44. tit. 7. *D. de Obligat. & Action.* l. 45. tit. 1. *de verb. oblig.* (d) *L.* 2. c. 11. f. 8. n. 2. (\*) *Si conditio sit potestativa.*

stance, a young Student in the Law, promises a Man to plead all his Causes in the Court, if he arrive at any good skill in his Profession. Here according to *Grotius's* Rule, the Student is under an Obligation to ply his Business with his utmost Strength and Diligence, that he may make himself fit for the Bar. But this will not hold, unless the Person Promising, has expressly declared or given fair Presumption, that he will set himself in earnest to the acquiring strength for the Performance. Otherwise the Condition may be delay'd *in infinitum*. We may observe too, that *Grotius* here useth the Term, *Conditio Potestativa*, quite contrary to that Sense, in which we have above defined it; he makes it to be in the power of the Promiser, we in the power of him to whom the Promise is directed.

Lastly, a *Mixt* Condition is that, the fulfilling of which depends partly on the Power of him, who receives the Promise, and partly on Chance; as thus for instance, *I will give you a Sum of Money, if you marry such a Gentlewoman*. Now, this is not purely at your Pleasure; for the Gentlewoman may refuse your Suit, or may die before the Match is finish'd.

We have only this to add, that a Condition is then look'd upon as perform'd, when the other Party concern'd, does himself hinder it from being perform'd (a).

V. *Impossible* Conditions, are either *Naturally* or *Morally* so; that is, some matters by the Nature of things *cannot* be done, others by the Laws *ought not* to be done. Such Conditions annex'd, especially if both Parties knew them to be such, do according to the plain and simple Construction of the words, render the Promise Negative, and therefore Null (b). In Business transacted between those who live in a State of Natural Liberty, a *Condition naturally impossible*, does plainly shew that the whole thing is void. Only with this difference, that to deny some Requests, in such a round about way, by making the Answer run Affirmatively, but clogg'd with an impossible

Condition, is usually reckon'd an Affront; when a plain Denial might not have been taken ill (c). And as to this Point, if the Condition be Morally impossible, the Case is the same, as if it were Naturally so. Should the other Party accept of this vile Condition, and actually fulfil it, how far he may then claim the Performance of the Promise, is easily to be gather'd from the preceding Chapter, §. 8. (1).

In Commonwealths, Provision may be made by Civil Ordinances, that in a Promise utter'd under a Condition Naturally impossible, especially if the Party to whom it is directed, knows not that it is Impossible, the Condition shall be Null, and the Man rescued from the Cheat and Delusion. As for those Pacts and Promises, to which vicious Conditions are annex'd, the Laws of all Countries most wisely declare them void; lest the Contracts of private Men should tend to the Subversion of the Publick Establishment. And thus the *Roman* Laws, disannul'd all Impossible, Vile, or Jest-ing, Conditions inserted in *Wills*; because it was thought most absurdly unreasonable, that Men in a Business so very serious and grave, should be put upon with trifling and impertinent Clauses (d).

VI. If in Promises, mention be made of a certain place, without mention of a certain time, it is taken for granted, that so much time shall be allow'd for performing the Promise, as will serve to bring a Man conveniently into the place of Action (e).

VII. But in case a limited Time be expressly added, this will cause that the Obligation shall not exert its Effect till such a Space be expir'd, or that no Demand shall be made before the appointed Day (2).

VIII. It may be convenient in the last place to examine, in what Points these *Conditional Promises* differ from *Pacts*, and in what Points they may be resembled to them. In this then both those kinds of Engagements seem to agree, that as the former do not bind, unless the Condition be made good, so the latter, when

(a) *Vid.* l. 50. *D. de Contrab. empt.* (b) *Vid.* l. 1. f. 11. l. 31. & l. 44. tit. 7. *D. de oblig. & act.* (c) When *Miltiades*, in *Corn. Nep. c. 1.* & 2. summon'd the *Lemnians*, to yield up their Island to the *Athenian* Power, they answer'd in a scoffing manner, that they'd then surrender, when the North-wind, which was directly contrary to *Athens*, brought him from home to *Lemnos*. The General took no more notice, but sailing by them, possess'd himself of *Chersonesus*, and there fix'd his Seat and Command; and soon after return'd to *Lemnos*, whither now the North-wind directly carried him, and claim'd their Promise; his Home, as he said, not being now *Athens* but *Chersonesus*. The Inhabitants not daring to make Resistance, fairly quitted the Island; but it was *non dicto sed secunda fortuna adversariorum capta*; not won by the force of their Word and Engagement, nor by the good Fortune of their Enemy. Such was the Promise of *Lesdeguier*, made to *Maphæo Barberini*, about professing the *Romish Religion*; which we find *Gramond. Hist. Gal. l. 16. p. 708.* (1) See Mr. *Barbeyrac's* 4th Note upon this Section.

(d) Thus *Eumolpus's* Will runs in *Petronius*, Let all those to whom I have given Legacies; besides my Children, receive them upon these Terms and Conditions; That they cut my Body in Pieces, and eat it amongst them before the People. Of the same kind is *Tiresias's* merry Story in *Horace*, l. 2. f. 5, 84, &c.

*Me Sene, quod dicam, factum est. Anus impræba Thebis, Ex Testamento sic est elata: Cadaver Unctum oleo largo nudis humeris tulit Hæres;*

*Scilicet elabi si posset mortua: Credo Quod nimium insisterat viventi.* —

Which place the *Scholias*t thus interprets, The old Gentlewoman order'd by Will, that her officious Heir should carry her Body naked, well oil'd upon his Shoulders to the Grave, with this pleasant Thought; That she might at least slip from him now she was dead, tho' he had stuck so close to her during her Life; that she could never before escape his Importunity. See more on this Point in the *Civilians*, in B. 7. tit. 8. *D. de usu & habit.*

(e) *Vid.* *D. l. 73. princ. l. 137. f. 2. de Verb. Oblig. & Instit. l. 3. tit. 16. de Verb. Oblig. f. 5.*

(2) *Vid. Instit. l. 3. tit. 16. f. 2.*

one Party forbears to perform the Articles, do by no means oblige the other (1). And hence it is a common Remark, that the particular *Heads* of a Contract are in the manner of so many *Conditions*. Some indeed make one Exception to our Rule about Pacts; that in case any Article should be added, not for use, but perhaps out of Gallantry or Complement, the Non-performance of such a matter shall not release the other Party from his Obligation. But as little Indulgence as possible, should be granted to this Exception; as well left Men should abuse it by applying it to the Principal Articles, as because it is not to be presum'd, that Persons would clog a serious Covenant with Clauses impertinent and unnecessary (a).

(1) See hereafter in B. 5. C. 11. S. 9. of Marriage between Charles the First, when Prince of Wales, and Henrietta of Bourbon, that they were added by the most Christian King in Complement to the Court of Rome; neither Party imagining, that they were intended to be kept.

Promises under a *Potestative* or *Arbitrary Condition*, do in this agree with *Pacts*, that in both a Man must perform somewhat on his side, before he claim the Promise or Bargain of the other Party. But in this they differ; that in the former, the Person promising does not think it much his Interest, whether the thing be perform'd or no; at least he does not intend to oblige the other Party to a Compliance, but leaves him to use his own Pleasure. But in Pacts, as the Reason why I have undertaken any Performance, is the prospect of somewhat to be done for me by the other Person; so if he fail in his Part, I am not only releas'd at present from mine, but I may oblige him by Force to stand to the Agreement.

(a) *Gramond. Hist. Gal. l. 16.* observes of the secret Articles

## C H A P. IX.

### *Of the Ministers, or Agents, concern'd in contracting Obligations for other Men.*

**I**T is very usual for us to confirm and ratify Pacts and Promises, not immediately by our selves, but by some Agent or Proxy. What Rules are to be observ'd in such Proceedings, it is now our Business to explain. This then is certain, that a Man is *oblig'd*, not only when he makes known his Consent to the Person, towards whom the *Obligation* is directed, immediately from his own Mouth, but also when he signifies the same to another Man, whom he has empower'd to transact on his Behalf. The Agent in such an Affair is to be look'd on as a kind of *Instrumental Cause*; in as much as he not only does all by another's Authority, but likewise acquires no proper Right, brings no Obligation on himself, referring to the Person with whom he is appointed to treat; but obtains a Right only for the Person who has employ'd him, and to him indeed, he stands under an Obligation to manage his Concerns with Honesty and Faithfulness. For those Actions of another do produce an *Obligation* or a *Right* in us, and are consequently to be esteem'd *ours*, for the performing of which we have invested the other Person with full Power, and have openly profess'd that we will acknowledge them for our own. But before a third Man can treat to any effect or purpose, with such a Person, 'tis Necessary he be well assured, that we have chosen and constituted him the Interpreter of our Will, and that we will ac-

count whatever he acts, as perform'd by our selves (a).

II. Now we are wont to depute another to Covenant in our Name, either by a general Commission, empowering him to do whatever he thinks most convenient for our Affairs; or by an express and limited Form, prescribing him both the Subject and the Manner of his proceeding. In the former case, I stand oblig'd by whatsoever he has concluded about the Business in hand, Honestly, or *Bonâ fide*. It is necessary to add this Restriction; for he cannot bind me by what he does treacherously and with a knavish Design of circumventing and abusing me. In as much as when I confer'd such Authority upon him, I must be thought to have suppos'd his Integrity, as an essential Condition. Nay, the acting *bonâ fide*, or uprightly and faithfully implies this farther, that what the *Substitute* performs, shall not derogate from the Honour and Advantage of his *Principal*; at least so far as the present Posture of things will bear. For to be ignorant of these Points, is almost as gross a Fault, as open Dishonesty. The same must be said of those blank Papers with our Names subscribed at the bottom, which we often deliver to our Agents to be fill'd up and turn'd into Instruments of Obligation. These shall not bind us at all, if any matters be inserted in them, as are Disagreeable to the Nature of the Affair given in Charge, and such as

(a) From these Principles are deduced most of the Divisions, which we find in the Roman Laws, *super actione exercitoria & infitoria. Vid. D. l. 14. tit. 3. & Instit. l. 4. tit. 7. & l. 15. tit. 4. D. Quod jussu.*

we cannot be presumed to have consented to (a).

If I depute a Man with limited Orders, he cannot lay an *Obligation* on me, beyond the Bounds of his Instructions.

If any Assent be sent with a double Commission, one Open, to shew the Person, with whom he is to transact, the other *Secret*, prescribing what Steps he shall take, and how far he shall proceed; it may be made a Question, Whether the *Agent* shall *oblige* his *Principal*, if he exceed his private and secret Orders, yet so as to keep within his *open* Commission: where the Affirmative side ought to be maintain'd (1). For by my *open Instructions*, I bind my self to the third Person, with whom the Contract is made, that I will ratify and make good what my Agent shall conclude on. And by my *secret Orders* I bind my Agent, not to recede from such positive Terms; in which Point if he transgress, he stands accountable to me, for so much as I lose by his Mismanagement. But I am still tied to perform to the third Person, what was thus granted in my Name. For otherwise there could be no manner of Safety in treating by Commissioners, it being ever to be fear'd least their *secret Directions* should differ from their *open Powers*; neither could there be a more specious Pretence made use of, to overthrow all Affairs transacted by Mediation, and to deceive and abuse Men with vain Treaties (b). But it must be observ'd, we suppose here, as in the former Case, that the Agent when he thus transgresses the Bounds of his private Instructions, did it not out of a dishonest and treacherous Design.

III. If we make use of a Deputy in transmitting a Promise to another Man, and the Person employ'd, happen to die before he have declar'd our Proposal to the other, or obtain'd his Assent, it is plain his Promise may be revok'd (2). For my express Will in this case, was to contract an Obligation by the Words of this Person only whom I intrusted with the Affair. And therefore although he may have declar'd his Message to a third Man, whence it may come to the Ears of the Party, to whom it was directed, yet this way of Communicating the matter, can lay no Tie upon my Conscience. For it was neither my Design in the least to render my self *oblig'd*, by the means of this third Person, nor is he so fully

acquainted with my Will, as to give another any good Assurance of it. But the Case is otherwise, as to a Bearer whom I intrust only with Letters of mine, expressing my Pleasure to a Person at a Distance. Though the Bearer die before he reach the Person, and the Letters are deliver'd by another, yet this is no Hindrance to the contracting of a firm Obligation. For here the Letters, and not the Bearer, are the instrumental Cause of the Engagement; and it signifies nothing to either of the Parties concern'd, by what hands the *Deeds* were convey'd and presented (c).

IV. On many other Accounts there is great Difference, whether a Man act by my Deputation purely as a Messenger, and a Bearer of my Opinion and Pleasure, or as an Agent and Mediator, with a Liberty of interposing his own Judgment, in some Points of the Business. Which *Grotius*, in *B. 2. C. 11. S. 17.* thus expresseth in other words, *Whether the Person be pitch'd on to signify the Promise I make, or whether he be authoriz'd to make the Promise himself.* In the former Case, if I revoke my Promise before it have been accepted by the other Party, my Revocation shall stand good, although the Messenger being unacquainted with it, should go on in signifying my first Resolution (d). But if a Man acts for another in the latter way of Deputation, unless the Change of Mind be notified to him, it shall be void, and his *Principal* shall stand *oblig'd*, if he proceed to settle the Business, as he was at first commission'd. For the *Principal* when he chose to offer his Promise by such an Agent, lodg'd the *obliging Power* in his *Person*, and not in his *Pocket*; that is, he intended him not barely for the Messenger of his Purpose, but for one that should employ his own Judgment as well as his bodily Service in the Affair (e). The same Distinction the *Civilians* apply to the Question, whether a Grant should hold good, in case the Donor die before it be accepted. Which they affirm, if the Person deputed to carry the Grant, were of the former kind, because then nothing would be wanting on the Donor's part. But they deny it if the Agent's was, of the latter sort; because the Donor did not fully make the Grant, but only order'd it to be made; or had not yet actually offer'd the thing, but only given Commands for its being offer'd (f).

(a) We have a famous Instance of such a Cheat in Blanks, recorded by *Zonaras*, Tom. 3. and by *Glycas*, Tom. 4. in *Roman. Lacapen. circa princip.* The Patriarch *Trypho* being accus'd of extream Ignorance, and as one that was not so much as capable of Writing, to confute the Censure, wrote down his Name in a fair Paper, before the Judges appointed. This Paper *Theophanes* of *Cesarea*, fill'd up with a formal Resignation, and so brought it to the Emperor; who as the Plot had been laid, took hence an Occasion to eject the Patriarch. See Mr. *Barbeyrac's* Third Note upon this Section. (1) See *Grot. B. 2. c. 11. f. 12.* (b) *Vid. Memoires touchant les Ambassadeurs.* pag. 582, 583, 588. — (2) *Vid. Instit. l. 3. tit. 27. f. 10.* (c) *Comp. Grot. l. 2. c. 11. f. 17.* (d) *Comp. l. 4. D. de manumiss. vindict. & l. 40. tit. 2.* (e) *Vid. l. 15. D. mandati. Comp. l. 1. tit. 18. D. de Offic. Praef. & Costal. ad l. 3. tit. 3. D. de procuratoribus, cap. un. de renunciat. in Clementin.* (f) Yet see *Ziegler* on *Grot. l. 2. c. 11. f. 17.* where he delivers it as his Judgment, that the Donation may be accepted, in case the Person deputed, made offer of it, during the Donor's Life. But one would wonder how the other Party should make any stop or delay at Acceptance, if the Donation be suppos'd to have been thus communicated. *Grotius* says, that the same Rule is to be follow'd in deciding the Controversy, whether a Person thus acting by a Commission, can bring an Action against the Heir of the *Principal* or *Donor*, for recovery of the Charges he hath been at since the Donor's Death, in executing his Orders. In which Case the Author of the Books to *Herennius*, *B. 2. c. 13.* informs us, that two *Roman* Judges gave a quite contrary Sentence.

V. As we may declare our Consent to an Engagement, by an Agent or Minister, so it is a farther Question, whether a third Person may accept in our behalf, a Promise made to us by another. And here the Dispute is not about those Persons whom we have commission'd to make Acceptance in our Name; for what we do by them we are suppos'd to have done our selves, and when we have intrusted a Matter to another Man's Pleasure, our Will and Consent is included in his. But the Doubt regards only those whom we have not in this manner authorized. And here *Grotius* (a) observes, 'That we ought to distinguish, whether he who makes us a Promise on behalf of a third Person, does address and bind himself immediately to us, or whether he promises directly to the absent Party, and useth us only for Witnesses of the Act. That is, whether the Words run thus, *I promise you that I will give Seius such a thing, and you are Witnesses of this my Resolution.* In the former Case according to the Natural Sense and import of the Promise, so soon as I have accepted it, I acquire a Right of taking care that the thing mention'd, be transferr'd to the third Person, if he too will accept it; so that the Promiser in the mean time cannot revoke his Engagement. Yet he to whom the Promise was immediately directed, may remit it before the third Man has declared his Acceptance. The Promise then seems on the whole, to amount to this, *I will give Seius such a thing, if you please.* And consequently it is in your power and choice, whether you will transfer the Promise on *Seius*, or whether by refusing the Offer, you will hinder it from coming to him by your Means. And this is all you can do; for if I am absolutely resolv'd to confer the Kindness, I may perform it without your Mediation or Assistance. But if you declare your Approbation of the Proposal, I am not then at liberty to repent, before the matter had been made known to *Seius*; and if he joyn his Acceptance to yours, the Promise shall by the Law of Nature be good and valid. Indeed the *Roman Laws* declared all those *Stipulations* to be *Null* (1), which were made for the benefit of a third Man, without having a Penalty annex'd to them. And the reason they gave for their Judgement is this, that the original design of inventing *Stipulations*, was to enable a Man to obtain somewhat for his own Advantage; whereas if the thing promised be to pass to a third Man, he who obtains the Promise, does not serve his own Interest, nor is himself concern'd in the Gain. But if I make a *Penal Stipulation*, that is, if I procure such an Engagement as this, 'Unless you give *Seius* an Hundred Pound, you shall by way of Punishment pay me Fourscore, I then acquire thus much *Right* at least, that if you do not make good the first Sum on my Friend's account, I

can demand the latter on my own. This Rule of the *Roman Courts* seems to have been introduced for the lessening the Number of *Suits*. For the Judge might well rebuke the Importunity of such a Complainant, who should give him and others a publick Trouble, without being himself concern'd, or interested in the Affairs. And though it cannot indeed be said to be no Advantage to us, when by our Means we derive a Benefit on a third Person, in as much as we thereby oblige him to a grateful Sense of our Service; yet it was thought very Improper, to grant a Man an *Action* for the recovery of a thing in *another's Name*, which that other Party could not demand in *his own*; and consequently to give a Man the Priviledge of purchasing the Friendship of a third Person, at the Charges of a Second.

But in the other Case, when the Promise runs after this manner, *I engage, or I declare before you, that I will give Seius such a thing*, if you are not Commission'd by *Seius* to accept the Offer, your Agreement to it will have no Force or Vertue; you neither acquire a Right for your self, nor for *Seius*, who does not acknowledge your Act for his own. And therefore it signifies nothing, whether the Witness here yield his Consent to the Promise or not; since it is not directed to his own proper Person. And the Promiser, in as much as *Seius* obtains no Right by the Witnesses Acceptance of the Proposal, may revoke it without Injury; though not always without a breach of Constancy and Truth.

VI. It is farther certain, that if any Offer be made to a Person yet living, by Letter, Messenger or the like, and he happen to die before he has accepted of it, his Heirs cannot accept of it for him; and consequently that such a Promise may fairly be revoked. For the Promiser seems plainly to have refer'd the Acceptance to the choice of the Deceas'd Party, not to his Heirs. Nor is he presumed to have thought of this Accident, or to have been willing that his Promise should stand good upon such a Supposition. We are often inclined to make a Grant to a Person, to be afterwards by him transfer'd to his Heirs, which we are by no means dispos'd to give to his Heirs immediately; it being a very material Point to consider, on whom we bestow our Favours (b).

VII. It may in the last place be enquired, whether a Man can add a *Charge* or *Burthen* to his *Promise*, after the Words have been once deliver'd (2). For that he may before annex what Conditions he pleaseth, is true beyond Dispute. This then may be done, so long as the Promise is not yet perfected by Acceptance, nor made irrecoverable, by the plighting of Faith for his Performance. For the other Party before he accepts of the Proffer, can acquire no Right to it; and therefore in the mean time, as the Promiser may, if he thinks

(a) L. 2. c. 11. f. 18. (1) Vid. *Instit.* l. 3. tit. 20. de *inutilib. Stipulat.* f. 19. (b) Vid. l. 191. D. de *divers. res. Juris.* & l. 50. D. de *div. reg. Juris.* (2) Vid. *Grot.* l. 2. c. 11. f. 19.

fit, utterly withdraw it, so he may load and clog it with new Conditions. But when a Grant is compleated by the Act of both Parties, no farther Terms can be annex'd to it (a).

'Twill be ask'd, what if the Burthen be added for the sake and benefit of a third Person; as suppose I say, *I'll give you such a Sum of Money, provided you'll engage to maintain Seius a Year at the University?* We answer, that he who binds himself under this Burthen, may recall it so long as *Seius* has not yet confirm'd the Promise by his Acceptance; before which it does not of *Right* belong to him.

VIII. The most general Division that can be applied to *Pacts*, seems to be this, all of them create a *Right*, but in some that *Right* extends it self to the common use of Mankind, in others it is limited to the particular Benefit of certain Persons. For the Life of Men would have proved too plain and simple, had they not to the Ordinances of Nature, added their

own Institutions; by means of which their Proceedings were regulated, not only with more Convenience, but with more Comeliness and Grace. Of this latter kind, the Principal are (1), *Speech* or *Discourse*; the *Propriety*, and the *value* of Things, together with *Sovereignty* or Command; all which presuppose some Universal *Pact*, *tacit* or *express*, by Vertue of which they have been tied up to certain *Forms* and Rules. And the introducing and settling of these Engagements, was what Nature her self, supposing the increase of Mankind to a great Number, directed and advised; as conducing in the highest degree to the Peace, and to the Ornament of Human Life. Having therefore finish'd our Enquiries about Covenants in general, we will proceed to examine these Institutions, to discover on what *Pacts* they are founded, and what Precepts of the Law of Nature, such as we have already term'd *Hypothetical* or *Conditional*, do arise from them.

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(a) Vid. l. 4. lib. 8. tit. 55. C. de donat. quæ sub modo, &c. Perfecta donatio conditiones postea non caput. (1) See Mr. Barbeyrac's Note upon this Section.

O F T H E  
L A W o f N A T U R E  
A N D  
N A T I O N S.

B O O K I V.

C H A P. I.

*Of Speech, and the Obligation which attends it.*

**T**HAT Man was design'd by Nature for a Life of Society, this alone might be a sufficient Argument; That he only of all Living Creatures is endued with the power of expressing his Mind to Others by Articulate Sounds: A Faculty which, abstracting from this Social Condition, we cannot conceive to be of any use or advantage to Mankind. 'Tis well observ'd by *Aristotle* (a), *Nature doth nothing in vain; and Man is the only Animal whom she hath invested with the Privilege of Speech*: Not such as consists in the bare repetition of borrow'd Sounds, like the *Talk* of Parrots, but such as is join'd with a Sense and Understanding of what the Words import. By means of which one may be able to teach another; one may in the most convenient manner command another, and the other apprehend his Commands; without which assistance, there would scarce be any shadow of Society, Peace, or Discipline among Men; or at best, such only as would be in the highest degree rude and unpolish'd. For (as the Philosopher goes on,) *Voice* (or a certain kind of Inarticulate Sound,) *is no more than an indication of Pleasure or Pain, and is therefore to be found in other Animals. Nature having in them proceeded so far, as to give them a sense of what is agreeable, or distasteful; and an ability of signifying, in some sort, these Affections amongst themselves.* (Whence it appears, that the Sounds utter'd by Brutes, of whatsoever

kind, are determin'd by Nature, not by Custom and Institution, like Human Discourse.) *But Speech was given to signify farther what was useful or prejudicial; just, or unjust: It being the Prerogative and Property of Men, above their Fellow Creatures, to have a sense of Good and Evil; of Justice, and Injustice, and the like; since from their Society and Communication, proceed the united Bodies of Families and Commonwealths.* (b) And since that Want and Weakness which particular Men lie under, may by the assistance of others be conveniently remov'd, and yet another cannot apply himself to my aid, unless he first understand what I desire; which he may do most readily by means of some Signs and Tokens, and especially by Articulate Words; therefore, that the most useful Instrument of Human Life may duly obtain its End, in uniting Men in Society; and lest by the abuse of Speech, Man should be rendred less Sociable, than if he were Dumb, or Silent, it must be suppos'd a Precept of the Law of Nature; *That no Man deceive another by those Signs which have been instituted to express our Meaning and our Thoughts.*

II. Now, to trace this Point from its first Head, we must understand, that the Nature and Ability of those Objects which affect our Senses, is such, as not only gives us notice of their own presence or approach, but likewise affords our Reason an opportunity of attaining the Knowledge of other things. And this

(a) *Polit.* l. 1. c. 2. (b) *Add. Isocrat. ad Nicocl. paulo post princip. Plin. N. H.* l. XI. c. 51. *That Power of explaining our Mind, which hath distinguished us from the Beasts, hath caused another distinction between Man and Man, no less considerable than that between Man and Beast. Quintilian* is large on this Subject, — *Institut. Orat.* l. 2. c. 16. *Sophocl. Oedip. Colon.* p. 310. *Ed. H. Steph.* The Wise Inventions which our Mind conceive

Our Speech declares — *Pliny* (N. H. l. 7. c. 1.) Expresseth the necessity of Speech in a very smart Sentence, when he observes that, *Externus alicui non est hominis vice; One Foreigner is not a Man to another.* *Add. Garcilass. de la Vega, Comm. Reg.* l. 7. c. 1.

either because there is a Natural Alliance and Connexion between those Objects, and the Things with which they thus bring us acquainted; or because Beings endued with Sense and Understanding have, without this Natural Relation, fix'd such Notions upon them, as to make them capable of representing continually the Images of certain Things to the Mind. Hence ariseth the distinction of *Signs* into those which are Natural, and those which owe their force and validity to Custom and Compact. Of the former kind we are on every side supplied with Instances from the Frame of Nature; as the Day-break is the sign of the Sun's rising quickly after; Smoak is the sign of Fire, and the like. By Compact, Men have imposed the use and power of *Signifying*, on certain Things, Actions and Motions, and above all, on *Words*, or Articulate Sounds form'd by the Tongue, and afterwards reduced into Letters: And all these are found to be in use, either with some certain Persons, or with the greatest part of Mankind, or in general, with all the World. Under the first of these Classes may be rank'd the Light-Houses and Nightly Fires on the Coasts, for the direction of Vessels: By the abuse of which, *Nauplius* of old is reported to have driven the *Grecians*, in a Tempest, upon the Rock of *Caphareus*, to revenge the Death of his Son *Palamedes* (a). As likewise those other Marks set up to guide Ships by Day, and to point out the Rocks and Quicksands; together with the *Mercuries*, pointing Hands, and other Conveniencies for information of Land-Travellers. And thus heretofore the *Persians* by lighting Fires all along on the tops of their Hills, used in a very little time, to spread some Reports or Alarms through every part of the Kingdom (b). An infinite variety of these Signs are met with in Commonwealths, employ'd for the acquainting the Subjects with some particular matters. To which Head belong, Clocks, Bells, Spears set up at Auctions, Bushes, *Signs* before Houses, and the like. In War the Sound of Trumpet, Beat of Drum, discharge of Canons, Waving of Colours, &c. And so too, certain Gestures and Motions have been taken up amongst most People, to denote such, or such Intentions of the Mind: To go out of the Way, to Rise up, to Bow, to Kiss the Hand, are Signs of Honour and Respect with the greatest part of the World. To uncover the Head in the Ceremony of Saluting, or to pluck off the Shoes in some Places, is interpreted as a Mark of Honour, in others, of Contempt. It is in some Countries looked on as reproachful to point with the Finger, to bend the Nose, to

bid, *A Fig for one*, (*fare le fica*) as the *Italians* call it) with many the like Motions. To take by the Beard is in some Nations the highest Affront, with others it passes for a Token of Veneration; as with the *Tartars*, with some of the *Indians*, and, as some think, with the *Ancient Gauls* (c). 'Tis likewise a common Practice to express by some Gesture our desire of performing such an Action as would require that particular Motion of the Body, by which in strange Countries we, after a sort, supply our Ignorance of the Language. To affirm a thing by gently bending our Head; to deny by throwing it on our Shoulders; to refuse by turning our Back, are Customs almost universally receiv'd. As for our pointing out a certain Thing or Place, by stretching our Hand or Finger towards it, this perhaps ought to be reckon'd amongst the Natural, rather than amongst the Arbitrary Signs. What Discoveries may be made by Nods, Winks, Motions of the Fingers, or of the Feet, when particular Men have once agreed on those ways of Intelligence, is vulgarly known, and need not be farther insisted upon in our present Design (d). *Lucian* (e) tells us of a Famous Artist in *Nero's* Court, who express'd the Amour of *Mars* and *Venus* as well by Dancing, as he could have done by Narration; whom for this Reason, a certain Barbarous Prince begg'd of the Emperour, for an Interpreter. And the *Sieur de Sancy*, the *French* Ambassador, at the *Ottoman* Court, gives an account of two *Mutes* whom he saw there, one by Nation a *Turk*, the other a *Persian*, who by reason of their using different Signs and Motions, could not understand each other; till at length a third *Mute* was found out, who was able to perform an Interpreter's Part between the two former.

III. But that which we are chiefly concern'd about in our present Enquiries, is Speech or Discourse, the most common and the most useful Sign amongst Men, and introduc'd for the sake of communicating Notions and Thoughts. Of the rise of which, *Diodorus Siculus*, B. 1. p. 8. Ed. *Rhodom.* through his ignorance of the true Origine of Mankind, gives this Fabulous Account: *The first Men who were born into the World, led a Savage Life, without culture or refinement; going out in Herds to the Pastures, and feeding on the most juicy Plants, and those Fruits which plain Nature produced. Being infested with the wild Beasts, Use taught them to assist each other, and Fear compell'd them into Society; by means of which they grew acquainted, by degrees, with the resemblance of their Shapes and Features. And having from Confus'd Voice, and without signification, arriv'd by slow attempts*

(a) Add. l. 10. D. de incend. ruin. Naufrag. & lib. 47. tit. 9. (b) Which Custom is described by *Barclay* in his *Argenis*, l. 1. Add. *Polyb.* l. 10. c. 39, &c. *αὐτὸ πνεύματι καὶ φροντισίαι*, *Casaubon.* Epist. 112. Edit. *Græv.* *Jul. African.* καὶ δὲ, l. 2. c. penult. See likewise *Ferdinand Pinto*, c. 61. where he speaks of the Horn, which amongst the *Japanese* every Man keeps in his House for a Signal, upon occasion. (c) From that place in *Livy*, l. 5. c. 41.

(d) *Æschyl.* *Agamem.*

αὐτὸ δ' ἀντὶ φωνῆς φερέει καὶ ὑποβάτω χειρὶ.

(e) *De Saltatione*, Tom. 1. p. 807. Ed. *Amsterd.*

————— *Barbarian*, let your Hand  
Supply your want of Speech ———

to pronounce *Articulate Words*, shewing every thing by *Signs*, that they had occasion to observe, and to communicate; they at length gain'd ability to inform one another of all Matters by *Discourse*. But, inasmuch as there were many of these Communities establish'd in different parts of the World, and every Man join'd his words together meerly as it happen'd, all did not speak in the same manner. And hence arose the number and the variety of all sorts of *Languages*. *Lucretius's* Description is exactly of a piece with this: l. 5. v. 1027. &c.

*At varios linguæ sonitus Natura subegit  
Mittere, & utilitas expressit nomina rerum;  
Non alia longe ratione, atque ipsa videtur  
Protrahere ad gestum pueros infantia linguæ,  
Cum facit ut digito, quæ sint præsentia, monstrant.  
Proinde putare aliquem tum nomina distribuisse  
Rebus, & inde homines didicisse vocabula prima,  
Desipere est: nam cur hic posset cuncta notare  
Vocibus, & varios sonitus emittere linguæ,  
Tempore eodem alii facere id non posse putentur?  
Præterea, si non alii quoque vocibus usi  
Inter se fuerant, unde incita notities est  
Utilitatis? & unde data est huic prima potestas,  
Quid vellet, facere ut scirent, animoq; viderent?  
Cogere item plures unus victosque domare  
Non poterat, rerum ut perdiscere nomina vellent;  
Nec ratione docere ulla suadereq; surdis,  
Quid sit opus factò: faciles neq; enim paterentur;  
Nec ratione ulla sibi ferrent amplius aures  
Vocis inauditæ sonitus obtundere frustra.*

Kind *Nature*, power of framing *Sounds* affords  
To Man, and then *Convenience* taught us *Words*;  
As *Infants* now, for want of *Words*, devise  
*Expressive* Signs, they speak with Hands and

Their *Speaking* Hand the want of Words }  
[Eyes; }  
[supplies. }  
That *One* the various *names* of things contriv'd,  
And that from *Him* their Knowledge *All* de-

'Tis fond to think: For how could *that Man* }  
[tell? }

The *Names* of Things, or lisp a *Syllable*, }  
And not another Man perform't as well? }  
Besides, if others us'd not *Words* as soon,  
How was their *Use*, and how the *Profit* known?  
Or how could He instruct the *Other's* Mind,  
How make them understand what was design'd?  
For *His*, being *single*, neither *Force* nor *Wit*, }  
Could conquer *many* Men, nor they submit }  
To learn his *words*, and practise what was fit. }  
How *He* perswade *those* so unfit to hear?  
Or how could *Savage* they with patience }  
[bear? }

Strange *Sounds* and *Words* still rattling in their }  
[Ear? }

Mr. Creech.

He concludes, That since *Brute Creatures* could  
by different *Sounds* express different *Motions*  
of their *Mind*,

— Quid in hac mirabile tantoperè est re,  
Si genus humanum, cui vox & lingua vigeret,  
Pro vario sensu varias res voce notarent (a)?

— Since *Organs* fit, since *Voice* and *Tongue*,  
By *Nature's* Gift bestow'd to them belong;  
What wonder is it then, that *Men* should frame,  
And give each *different* thing a *different* Name?

Mr. Creech.

The chief Design of *Lucretius* in these Arguments, seems to have been to oppose *Cratylus* in *Plato*, who celebrates the first Inventor of *Words*, and the first Author of the *Names* of Things, as a Person of the highest *Wisdom*: An Opinion which we shall examine by and by. And indeed those who believ'd the first *Mortals* to have crawl'd out of the *Earth*,

*Mutum & turpe pecus,*

*A Dumb and Dirty Herd,*

could not easily hit on any other Account. For 'tis manifest, that no *Languages* are born with a *Man*, but all are learnt by *Use* and *Experience*. Whence it comes to pass, that Persons born *Deaf*, are likewise *Dumb*. And 'tis look'd on almost as a *Prodigy*, when such an one is taught to speak; as hath been in the present Age perform'd on the Brother of *Velasco*, Constable of *Castile*; who having been *Deaf* from his *Cradle*, was made to speak, to write, to read and to understand *Authors*. And an Instance of the like wonderful Operation, was not long since given by *Dr. Wallis* at *Oxford*. Nor doth it look probable, that some one *Man* in the Beginning should have fram'd a whole *Language*, with an exact *Contexture* of *Words*, and a just *Agreement* and *Conformity* to the Things which they were to represent. But 'tis the general Opinion of *Christians*, founded on the Authority of the *Holy Scriptures*, That the first *Language* was by *Almighty God* immediately infus'd (1) into the *Original Pair*, which their *Children* easily learnt, by the *Use* and *Custom* of hearing. And that, as for the *Diversity* of *Tongues*, this was miraculously produced by the *Confusion* at *Babel* (2). Yet some have doubted, whether even the *Language* which *Adam* spoke, was at first completely full and perfect, and rich enough to express all manner of *Conceptions*; inasmuch as the *Scripture* directly mentions only the *Names* which he set on living *Creatures*. As it is certainly true of most *Tongues*, that they were at first but very poor, and very plain, but were

(a) Add. *Diog. Laert.* l. 10. p. 754. Edit. *Steph.* *Vitruv.* *Architect.* l. 2. c. 1. (1) See Mr. *Le Clerck* upon *Genes.* II. 23. and his Remarks upon the *Critical History* of *Father Simon*, pag. 422. See likewise the *Preliminary Dissertation* upon the *Bible*, by Mr. *Dupin*, pag. 122. Edit. *Holl.* (2) See Mr. *Barbeyrac's* Third Note upon this Section.

enrich'd in time with Copiousness and Elegance: As likewise that they have in a long course of Years, undergone very signal Alterations; and that from their Corruption and Confusion, many new ones have within the compass of a few Ages, sprung up in the World (a).

IV. But this is most clear and evident, that the power of signifying determinately, thus, or thus, that is of raising such certain Ideas in our Mind, doth not belong to Words by Nature, but ariseth purely from the Pleasure and the Imposition of Men; for otherwise no Reason could be given, why different words should in different Languages, be applied to express the same thing (b). Nor is it any Presumption to the contrary, that we believe *Adam* to have given Names to the Creatures, not as it fell out by Chance, but with the highest Reason and Design; such as were taken from the peculiar Nature of the Things, and fully and accurately express'd their distinguishing Properties, so as that upon the first sound of the Words, the Nature of each Thing might be understood; as *Philo the Jew* reports (1). For although we should grant that the Names set on Animals, and some other things, (for no Man can easily prove this of all,) were such as denoted their Genius and Disposition, or their principal Affection; yet those very *Primitives* whence these Names were derived, signify merely at Pleasure. For Instance, tho' *Adam* gave this Reason for the Name of *Eve*, *Because she was the Mother of all Living*; yet that the Word *hava* should import to *live*, is absolutely owing to Imposition: And though in all Languages, Things allied by Nature, are usually allied in Name, there being observ'd in most Words of this kind, some Conformity of Structure, and which the Grammarians term *Analogy*; yet this is by no means constant and regular, many Words having very particular ways and methods of Variation: and even this *Analogy* it self, inasmuch as it consists in a certain Inflection and Combination of words, is it self establish'd by Human Appointment. This is the Judgment of *Quintilian* himself (c); *We must remember*, says he, *that the Rule and Method of Analogy cannot universally be drawn, since in many places it is apparently inconsistent with it self: For Analogy was not at the first Production of Mankind, sent down immediately from Heaven, to teach them the due Form of Speech, but was invented after they had accustomed themselves to discourse, and had observ'd the peculiar Cadences of every word. It is not*

*therefore built upon Reason, but Example; nor is it the Law, but the Experiment and Remark of Speaking; Analogy being indeed the Effect of nothing but Custom.*

In *Plato's Cratylus*, the Opinion of the Person whose Name the Dialogue bears, is to this purpose; That every individual Being includes in its Nature the true Reason of its Name; which is vain and absurd: And that that is not properly the Name of a thing, by which Men agree to call it, by uttering such or such a Portion of their Voice: Which in one sense may be admitted for true; that is, when some particular Men, contrary to common use, impose odd Names on things for the Deception of others: as in the Case of Jugglers, Strawlers, and Gypsies: With regard to which, *feign'd Names* are oppos'd to *true*; being fix'd on Persons or Things, contrary to the publick Imposition. But that there is one and the same true Reason of Names, innate alike to the Greeks and Barbarians: which Assertion is likewise false. *Hermogenes* in the same Dialogue, thus delivers his Opinion on the other side; *I can never be perswaded that there is any other Rule or Standard for the Names of things, than Compact and Consent: 'Tis my Judgment, that the Name which a Man fixeth on any thing, whatever it be, is true and proper: And that if he afterwards alter'd that Name for another, the last is no less true and right than the former; as 'tis usual with us to change the Names of our Servants: (Which will hold good, provided no Prejudice be hence done to the Common Agreement.) For nothing Naturally hath such or such an Appellation, but derives it purely from the Law and Custom of Speaking.* What *Socrates* disputes on the side of *Cratylus*, doth by no means turn the Cause. Thus for Instance, when he scouts it as an Absurdity, *If I should give the Name of a Horse to what we commonly call a Man, it would follow, that the same thing might be truly stiled, A Horse and a Man.* It may be answer'd, in short, That words of publick Use derive all their Force from publick Imposition, which private Persons ought not, to its Prejudice, to contradict; as we shall shew more at large hereafter. Again, That Argument of his is no better than a Fallacy; *If a whole Proposition may be false, therefore a part of it, as suppose, the Noun, or Name of a thing may be likewise false.* For a single Word is not capable of that Falsity which we sometimes discover in entire Propositions. The long Discourse he afterwards makes about the Propriety of Terms, will only hold in some

(a) Comp. *Hobbs's Levi*. c. 4. (b) Which is likewise true concerning the different Forms and Characters of Letters. *St. Austin*. (de Doctrin. Christian. l. 2. c. 24.) hath made this Observation on the Point; 'That one Letter fashion'd like a Cross (X) imports one Thing amongst the Greeks, and another amongst the Latins; not by the Appointment of Nature, but by the Pleasure and Consent of Men, in fixing such different Significations; and a Person who understands both Languages, when he would express his Mind in Writing to a Grecian, useth this Character differently from what he doth when he writes to a Roman. Thus to the Word *Beta*, under one and the same Sound in Greek, is the Name of a Letter, in Latin, the Name of a Pot-herb: And when I say, *lege*, these Two Syllables are by those different People understood in different Senses. See the *Art of Speaking* by Father *Lami*. B. 1. c. 14. Edit. Amst. 1699. (1) This Opinion is ill-founded as Mr. *Le Clerk* makes appear in his Notes upon Gen. II. 19. See *Malebranche's Search after Truth*, Pag. 387. (c) *Instit. Orat.* l. 1. c. 6.

Derivatives, but not in Primitives. And since the same things are in different Countries express'd by different words, it likewise frequently happens, that words which signify the same thing, have an *Etymology* utterly distinct. Thus θεός the *Greek* Name for God, is deriv'd from τρέω to run; because the Stars which are perpetually running their Course, were look'd on as Gods by the Ancients: But what Affinity is there in the *Latin* Tongue between *Deus* and *Curro*? So Man is in *Greek* term'd ἀνθρώπος quasi ἀναθρώπων ἀ ὄρωμε from considering or contemplating the Objects which he beholds. But must we therefore say, That *Homo* in *Latin* comes from *Contemplatio*? The Soul in *Greek* is named ψυχή from ἀναψύχων to cool or refresh: But is *refrigeratio* in *Latin* for this reason the Theme of *Anima*? And the same may be shown in any other Instances. In short, however diligent any Person may be in tracing *Etymologies*, and assigning the Reasons of Words, yet when he hath gone as high as he can, to the Primitive and Simple Terms, he will be forc'd to acknowledge, that they are purely owing to Imposition (a). What can be more ridiculous, than that of *Socrates*, when in the Disputation of which we have been speaking, he is required to give a Reason for the Words πῦρ & ὕδωρ, he can say nothing else, but that they owe their Original to the *Barbarians*? Indeed he himself confesseth, that there can be no farther Questions or Answers about Reasons and Derivations, when we are once arriv'd at the first Element of Both. Though he afterwards is very Ingenious to no purpose, in tracing out the Reasons even of primitive words: And yet after all, when he hath argued so long, in all Appearance, for *Cratylus's* Opinion, he at last fairly doubts on the whole matter.

*Sofipater Charisius* (b) the Grammarian thus discourseth out of *Varro*; *The Latin Tongue is made up of Nature, Analogy, Custom, and Authority. The Nature of Verbs and Nouns is immutable, and delivers to us neither less nor more than what it receiv'd. Thus if a Man should say scrimbo instead of scribo, he would be convinc'd, not by the power and virtue of Analogy, but by the very Constitution of Nature* (c). But we must confess our selves at a loss to find out this Necessity of Nature, unless it be said, that the *Latin* Tongue having in it an extraordinary sweetness, wonderfully agreeable to the Ear, it must hence come to pass, that we reject at the first hearing, any harsh and untunable Conjunction of Letters in that Language (d). *Arnobius* (e) speaks excellently to this Point; *No way of speaking, says he, is by Nature*

*either true and right, or false and improper: For what Natural Reason can be given, or what Law, in the General Constitution of the World, that we should say, hic paries, and hæc sella? Since neither do those things admit of different Sexes, so as to be distinguished by the Masculine and Feminine Genders; nor can the most learned Critick inform me of the Original Reason and Meaning of these Terms, hic and hæc; or why the first should be applied to the Male, and the second to the Female Sex. All this proceeds from the Arbitrary Appointment of Mankind.*

*Grotius* (f) rightly rejects the Opinion of those who make this to be the difference between *Things* and *Words*, that the latter are Naturally the Signs of our Thoughts, the former not. Indeed if the meaning of the Assertion be no more than this, that Words were instituted for no other end, but to be the Signs of our Conceptions, and that therefore their whole Nature and Essence consists in their power of signifying; whereas when *Things* are used for Signs, this is merely extrinsecal and accidental to them: we ought then by all means to admit it as true. But if it be intended in this sense, That the power of signifying such or such a particular Matter inheres Naturally in Words, but not in Things; the Position is false and groundless. And on the contrary it is true, that words Naturally, and without respect to Human Imposition, signify nothing at all, unless it be some such confused and Inarticulate Sound as we make use of in Sorrow, or in Laughter which ought rather to be call'd *Noise*, than *Speech*. If the said Notion be thus explain'd, that such is the Nature of Man above all other Animals, that he can signify to others the Conceptions of his Mind, and that words were invented to be the Instruments of Communication, then the Assertion is true, but not compleat: For it should be added, that these Discoveries are conveyed not by words alone, but by Nods and other Motions. As we find several Dumb Persons who are able to express their Inward Conceptions after a very surprizing and artificial manner. Hence, in the *Roman* Law, (g) those who have not the Gift of Speech, are yet supposed to say thus or thus, *by that striving and straining which they use, and that Sound and Inarticulate Voice which is utter'd by them.* And 'tis a Rule in the same Law (h), That Dumb Persons may contract Matrimony, by *Mutual Consent without Words*: That is, it shall be sufficient if they express their Agreement by Dumb Signs. Nay *Pliny* (i) tells us of some Nations of *Aethiopia*, who had no other Speech amongst them, besides these Gestures and Motions of the Body (k).

(a) To this we may add the Remark of *Quintilian*, *Institut. Orat. l. 1. c. 6. p. 64. Ed. Lugd. Bat. Shall it be affirm'd likewise, that Man took his Name of Homo, because he was humo natus, Born of the Earth? As if all Animals had not the same Original! Or, as if those Primitive Mortals first set a Name upon the Earth? and then upon themselves!*

(b) *Institut. Grammat. l. 1. ex Varrone.* (c) We meet with the same in *Diomedes. l. 2.* (d) *Vid. Huart. Tryal of Wits. C. XI.* The Reason alledg'd by *P. Nigidius*, to prove that Words signify according to Nature, in *Aul. Gell. l. 10. c. 4.* is altogether vain and frivolous. (e) *L. 1. advers. gent. p. 45. Ed. Paris. 1605.* (f) *L. 3. c. 1. f. 8.* (g) *L. 33. t. 10. D. de Supell. leg.* (h) *Cap. 25. X. de Sponsal.* (i) *N. H. l. 6. c. 30.* (k) *Add. Quintilian, l. 11. c. 3. Institut. Orat. Of the Marks or Signs used by the Peruvians under their Yucas, See Garcilass. de la Vega. l. 6. c. 9.*

To the same Head belong those Marks and Characters which do not denote Voices or Words, but immediately the very Things themselves. And this, either upon account of some agreeableness which they bear to the things represented; as in most of the *Egyptian Hieroglyphicks*; or because the Imposition of Men hath invested them with such a power, as in the *Chinese Characters*, by which they express entire Notions and Sentences.

It may not be inconvenient to remark somewhat concerning that kind of Imposition, by which such a peculiar or Proper Name is affix'd to Persons, Places, and some other Things; the design of which is, that one Man, one Place, one City or Country, may be distinguish'd from another; and that by these Marks there may be a mutual understanding between Men, in determining their Words or Actions. Now as the Proper Terms of other things follow the manner of Appellative, or Common Nouns, so with regard to the Proper Names of Men, it is to be observed, that the power of imposing them usually belongs to those who have others under their Authority and Government: Thus Parents are wont to give Names to their Children, Masters to their Slaves and Vassals, and Princes to those of their Subjects, on whom they confer any Signal Honour. In case this Office be omitted by those Superiors who have such a right to perform it; or in case many have been invested with the same Title, it shall be lawful for every Person to take upon himself some term and note of distinction: But as no Man ought to assume another Name, when by such an Act of his, the General End of imposing Names may be intercepted and hindred; or when upon this Alteration, any damage or prejudice, or any probable danger and Suspicion of it, is likely to accrue to another Person; so neither ought any Man to hide or dissemble his true Name; unless in such a Case, when by this concealment we do not prejudice the Rights of others, and yet procure some advantage to our selves, or effect our deliverance from Loss or Danger; according to those Rules which we shall hereafter deliver about the Obligation to speak Truth (a).

V. As all Signs, except those which we call *Natural*, denote some determinate thing by Virtue of Human Imposition, so this Imposition is attended with a certain Agreement, Consent, or Compact, tacit or express; from the force of which, there ariseth a necessity of applying such a Sign to such a particular Thing,

and to none else. The like Covenant must be supposed in relation to all those *Things* which we use for *Signs*, whatever account we follow of the Origine of Human Speech. For although we conceive the Primitive Languages to have been immediately infused into Men, yet since each Person separately enjoy'd his power of Discourse, and could use it freely as he pleas'd, by applying any Words to any Things; this Faculty would not have obtain'd its proper End and Use, unless an Agreement had pass'd between Men, that each Party should exercise their Talent in the same uniform manner, and constantly express the same things by the same Words. For since he who is placed in a State of Natural Liberty, doth not hold his Powers at the beck and controul of others, but hath the Priviledge of using them as his own Judgment shall direct, another Person would have no manner of Right to require of me, that I should apply my Powers in such a particular way, and no otherwise, so as to enable him to apprehend my Thoughts and Intentions, unless we had before settled this Point by some Pact between us: The full extent and force of which Pact is this; That although Signs do not inform us of the Minds of others by an Infallible, but only by a Probable, Certainty, Men being Naturally capable of Dissimulation and Disguise; (b) yet that which any Person hath express'd by these Signs, shall be presumed to be his serious purpose. And therefore as to matters of *Right*, the Effect shall follow the Consent of the Party, as by Signs declar'd; though perhaps his Inward Thoughts and Resolutions were really different from these Outward Indications (c): For otherwise the Use and Design of such General Marks would be utterly frustrated. But the Mutual Communication of good Offices amongst Men could not be exercis'd, unless they had some certain information of the Wants and Wishes of each other; and since the Condition of Human Nature would not allow this to be convey'd in any other way than by Signs striking upon the Senses; therefore the use of those Signs was by some settled Compact to be ratified and circumscribed, that every Person might clearly apprehend what Service or Assistance was desired of him by Others (d).

VI. This Compact and Agreement about the Use of Signs, and especially of Words, is either *General*, or *Special*: The former is suppos'd to pass between Men who speak the same Language, engaging them to express particular Things, and principally those which

(a) Add. *Valer. Max.* l. 9. c. ult. and l. 7. c. 3. n. 8, 9. See the Oration of *M. Anton. Majoragius* on the same Subject; and *Casaubon ad Baron. Exercitat.* XIII. n. 13. (b) To this purpose the Saying of *Archidamus* in *Plutarch* (*Apophth. Lacon.* p. 219. B. Ed. *Wech.*) is observable: *A Sheep always useth the same Tone; but a Man hath the Art of varying his Expression and Address, till he carries his Design.* *Moschus Idyll.* l. v. 8, 9. *Κανὰι φέρετες, &c.*

— The Foulest Heart, — the Fairest Tongue:  
His Mouth belies his Mind —

(c) Add. *Grot.* l. 2. c. 4. f. 3. (d) On this Occasion we may observe by the by, that we find the People of *Cuma* obtaining leave to use the *Latin Tongue* in common Talk, and to have their Sales proclaim'd in it, after their humble Petition for this Priviledge, *Liv.* l. 40. c. 42. Though generally the *Romans* appear to have been very ambitious of spreading their own Language, without being solicited to that purpose. *Vid. Valer. Max.* l. 2. c. 2. f. 2.

belong to daily Intercourse and Commerce, by such certain Words as the Use of the present Times shall approve and authorize: For 'tis this Use,

*Quem penes arbitrium est & jus & norma loquendi,*

And at the Will of which,

*Multa renascentur quæ jam cecidere, cadentque,  
Quæ nunc sunt in honore vocabula — (a).*

Use may revive the Obsolete Words,  
And banish those that now are most in Vogue;  
Use is the Judge, the Law, and Rule of Speech.

My Lord Roscommon.

There are, says *Sextus Empiricus* (b), and were, and ever will be, various Alterations and Revolutions of Words; for the Age is still delighted with Change; and not more in Plants and Animals, than in Speech. And the same Author (c) hath this admirable Remark to the same purpose; As in a City or County, he who is contented to take the Money that commonly passeth, may live under that Government, and buy and sell, drive Bargains, and Trade without Molestation or Hindrance; but he who will not comply with the Coin ordinarily Current, but frames a New kind according to his own Fancy, and offers it in Payment, is manifestly out of his Senses; so in Life, he who will not follow the common Speech, (like the common Coin) when establish'd by Use and Custom, but invents a new Language peculiar to himself, is not many Degrees remov'd from a Madman. Indeed, that such a Compact is absolutely Necessary, appears from hence; That Men could receive no manner of Use or Benefit from Speech, unless the Parties speaking were mutually understood. We are all Deaf, says *Tully* (d), in those Languages with which we are not acquainted. And so *Ovid* (e) complains in his Banishment,

*Barbarus hic ego sum, quia non intelligor ulli,*

Not understood, I'm a Barbarian here.

We may observe farther, That as most Tongues are varied by Dialects, so it often happens that Words of the same Tongue have in different Places different Significations: The Meaning and Importance therefore of such Words shall be determin'd by the Custom of the Place where the Business is transacted; unless it shall appear that the Stranger hath not yet agreed to quit his own Native Phrase, and to conform to the Idiom of the other Party. And thus too there are several Words

which in some Places and Times are look'd on as scandalous and reproachful, in others not. Of this the Name of *Tyrant* is a known Instance. In the same manner, the Term of *Barbarian*, which the *Greeks* and *Romans* held to be so disgraceful, the *Gothic King Theodoric* frequently applies to his own Nation. And in the Law of the *Burgundians*, *Barbari* is very often the Style which those People bestow on themselves. It is here likewise worthy to be consider'd, that most Terms of Speech have besides their principal, a kind of accessory (1) or additional Signification, by which we at the same time express our Judgment, Passion, or Esteem. And this is the reason, that of many words which as to their main Importance exactly fall in with each other, some are Opprobrious and Injurious, others not; because this additional Signification is found in some and not in the rest. Thus if I give a Man the Lie, I not only signify that his Speech is disagreeable to his Thought, but farther denote, that he did this with an ill Intention, and on account of procuring my Prejudice or Hurt. And 'tis on the score of this latter Indication that the Words are look'd upon as contumelious and injurious. So if I call any Person an *Impostor*, or an *Ignoramus*, I affront him; because those Names, besides their proper meaning, include by the by, somewhat of Contempt and Reproach: whereas there are many other words by which I may, without any such Affront or Abuse, signify my self to have been hurt by another, or shew that another is ignorant of some things; and which consequently shall only declare the direct sense, without any such Indication of Disgrace. Sometime this *additional Mark* ariseth, not from the General Imposition of Men, but from the Tone of the Voice, (which is different according as we either teach and admonish, or flatter and court, or chide and reprove,) from the Lines of the Face, from particular Gestures, and other Natural Signs, which are wont very considerably to alter, diminish or increase, the principal Signification of words. And thus too a Figurative Speech very often denotes some Passion in the Speaker, whereas a plain Expression barely imports the thing asserted: *Usque adeo mori miserum est* (2)? denotes no more than if we should say barely, *non est usque adeo miserum mori*: because it includes a Contempt of Death. From the same *accessory Meaning* it comes to pass that some Words are accounted Obscene, others not; though as to the main they signify the same Thing; nay, though the Thing be not really in it self foul or indecent. The reason of which Difference seems in part to be this; that since some words express a Thing or an Act more loosely and generally, others in a more distinct Manner, and with particular

(a) *Horat.* A. P. v. 70, &c. *Quintilian.* Instit. Orat. l. i. c. 6. p. 60. Edit. *Lugd. Bat.* To retain Words that have been long abolished and abrogated, is a Mark of Insolence, and of vain Boasting in things of no Importance.

(b) *Advers.* *Mathemat.* l. i. c. 3. p. 17. Edit. *Genev.*

(c) *Ibid.* c. 10.

(d) *Tusc. Quæst.* l. 5. c. 40.

(e) *Trist.* 5. El. 10. v. 37.

(1) See the *Art of Thinking*, Part I. c. 14.

(2) *Virgil.* *Æn.* 12. v. 646.

Circumstances; therefore he who makes use of the latter sort, at the same time betrays his Lust, with Regard to such a Thing or Act, and discovers a Satisfaction and Approbation which a Man of Vertue and Breeding would be asham'd of: Sometime too the Obscenity of words proceeds from hence; that they either denote a Contempt of the Thing signify'd, or else are used only among the baser People, or towards such to whom we owe no Reverence or Respect (a). *Casaubon* in his Comment on *Persius* (b) hath disputed at large, whether it be allowable to apply Obscene Words even to the Reproof and Correction of Vice, which is the ordinary Practice of Satyrical Writers.

Those words are grounded on *Special Compact*, which either have been invested with a peculiar Signification, different from what they bear in common use, or which are utterly unknown to the ordinary Methods of Speech. Of which kind are all those *Terms of Art*, used by Mechanics and others; which on account of either the Multiplicity and Confusion of Things, or the meer Pleasure of the Authors, have either been invented anew, or applied to another Meaning than what they obtain'd in Vulgar Discourse. Now, that no Man may be deceiv'd by these Terms, amongst Persons who understand the particular Art, the very Nature of the Business in hand, will be a sufficient Caution and Security. And amongst the Unskilful, they ought to be explain'd and limited by common words. Which Explication and Settlement is likewise necessary, when either Artificers differ about the use of their Terms; or when any Person for some particular Reasons, thinks fit either to coin new words, or to fix a new sense on old ones (c). Some few Persons in Confederacy may, and often do frame to themselves peculiar Words and Marks of Things, or put a different Signification on Vulgar Terms, so as to be understood by each other, and by none besides. (And how far this Practice is Lawful, will appear from the Sequel of our Enquiry.) In which Point it is enough, if those Words or Marks rightly discover my Mind to those, with whom I have thus entred into a particular Covenant about their Use: And this holds too in other Signs, determin'd by the peculiar Imposition of certain Men. Amongst these the Principal are the Military Tokens and Signals of War; of which *Silence* it self hath been sometimes used for one. Thus in *Polyænus* (d), the *Arcadian* General, undertaking by Night to surprize the *Spartans* at the *Tegæa*, gave his Souldiers no other Sign but this, That they should kill all who ask'd for any Sign. The *Arcadians* therefore were silent; but the *Spartans* not knowing their Fel-

lows in the Dark, and so demanding the *word*, were slaughter'd by the Enemy. And so *Pammenes*, in the same Author (e), put a Cheat upon his Enemies by altering the Signal of the Trumpet, and quite inverting the ordinary Method and Use; commanding his Men to fall on when the Trumpet sounded a Retreat, and to retire, when it seem'd to call them to a close Engagement.

VII. But we must carefully observe, that although by this general and special Compact we are bound to use our Words and other Signs in the manner that hath been agreed upon; yet we are not hereby in the least oblig'd to open and discover our Minds to all Persons (f). But to effect this, it is necessary that another Obligation be added, arising either from some particular Covenant, or from the general Command of the Law of Nature; or lastly, from the Quality and Condition of the Business which is at present to be transacted by Speech (1). Thus, for Instance, if I undertake to be an Instructor to any Person, I am engag'd, (by the Contract of *Letting and Hiring*,) to explain and communicate to him all that belongs to that Art or Profession. If I send a Person with Commission to search into the State of such or such an Affair, he is bound by Covenant to acquaint me with all the Discoveries and Informations he hath gain'd about that matter. If I am to exercise towards another any Duty of Humanity which must be perform'd by Speech, it is manifest my Words must be agreeable to my Thoughts and Intentions. If a Man undertake to write an History, he is to deliver nothing which he knows to be False, by Vertue of that general Obligation by which we are bound to promote the Use and Benefit of others. As we are likewise, by a common Engagement, tied to express our Minds by the clearest and plainest Signs, in all such Cases, when if we do otherwise, we may bring some hurt or prejudice on Innocent Persons. So, lastly, in all Commerce and Business between Men, in which, by the consent of the Parties, some Right or Obligation is to be produc'd, we are to declare our Meaning openly and clearly to the Persons with whom we deal. For otherwise there could be no possible way of rightly adjusting those Concerns. But, since it doth not always so happen, that I am bound by any of these Rules to open my Thoughts to another about any Affair, especially such as is private and particular; it is evident from hence, that I am not under an Engagement to unfold all my Opinions and Intentions to Men alike, but those only which they have a right (either perfect, or imperfect,) to understand; which Right supposeth a correspondent Obligation on my part: And that therefore I may fairly conceal and dissemble

(a) *Vid.* Ciceron. *Epist. ad Famil.* IX. 22. (b) *Sat.* 4. p. 342. (c) Add *Bacon's* Advancement of Learning, B. 3. C. 4. the Beginning. (d) *Stratagem.* l. 1. c. 11. & l. 5. c. 16. (e) l. 5. c. 16. (f) To which may be applied the Saying of *Apollonius Tyanæus* (in *Philosofrat.* l. 4. cap. 11. pag. 191. Edit. *Par. Morel.* an. 1608.) *Palamedes invented Letters, not only for the sake of Writing, but likewise that Men might come to the Knowledge of those things which were not to be written.* (1) See Mr. *Barbeyrac's* First Note upon this Section.

those Things, which another hath no Right to know, and which I my self have no Obligation to disclose (a): Nay, in such Cases, where no Body else is injur'd in his Right, and where the Advantage or the Safety of my self, or of some other Person cannot otherwise be procur'd, it shall be allowable for me to apply the Common Signs in such a manner, as to express what is really contrary to my Judgment. For since the Compact about applying Signs in such a certain way, bears a regard to other Obligations, which are by the means of these Signs to be fulfill'd; therefore when those Obligations cease, there appears no reason why I may not make a different use of the Signs, if I injure no Man, and at the same time have no greater convenience of benefiting my self or others.

VIII. From these Principles and Fundamental Rules, it is easy to understand both the Nature of *Truth*, which Men are obliged to speak and profess; and the Nature of a *Lye*, which is so abhorr'd by all the Good and Honest, and the imputation of which every Man looks on as the foulest Disgrace (b). The former then consists in this, that the Signs which we make use of, and especially our Words, do in a proper and convenient manner represent our Thoughts to another, who hath a right to understand them; and to whom we are bound, either by a Perfect or an Imperfect Obligation to discover them: And this to the end, that he by apprehending our meaning, may obtain some Benefit, or may escape some undeserv'd Evil, which would have follow'd upon our deceiving him. So that besides that *Logical Truth* which consists in a conformity between Words and Things, this *Ethical* or *Moral Truth*, of which we are now treating, superadds the Intention and Obligation of the Speaker: On which Score, he who declares the Truth out of Error or Imprudence, hath barely recited the Logical Truth, but hath not exercis'd the Moral. And he who blabs out any Matter without any Obligation in himself, or any Right in the other Party, ought to be esteem'd rather an Idle Prater, than a Speaker of Truth. And hence 'tis easy to gather, what must be the Nature of a *Lye*; namely that it is, when our Signs or Words bear a different Sense from our Real Conceptions; whereas the Person to whom the Signs were directed, had a Right to understand, and to judge of those Conceptions; and we on our part, lay under an Obligation to make him apprehend our Meaning. I take this to be a more clear and distinct way of shewing the necessity we stand under to declare our real and undisguis'd Intentions, than if I should derive the Sin and the Baseness of *Lying*, barely from that General Rule of Natural Law,

that no Man is to be hurt; as if the whole Nature of a Lye consisted in its power of *hurting*. For strictly speaking, we do not hurt another by with-holding from him what he hath only an *Imperfect Right* to receive: and yet the violation of such an *Imperfect Right* is sufficient to constitute a Lye. For the same reason *Philostrotus's* Notion of a Lye is confus'd and unaccurate; when he reports (c), That amongst some of the *Indians*, any Student in Philosophy who was found guilty of this Vice, was rendred incapable of bearing any Magistracy or Honour, *Because he had by Lying cheated the Common Society of Mankind*. But, as in all Acts by which we recede from Law, Error, Imprudence, and Rashness are distinguish'd from *Malice*, or Wicked Design, so neither is any Man properly said to *Lye*, but he who with Evil Intention, and preconceiv'd Malice, tells another what is really different from his Sentiments or Resolutions, either to prejudice or to delude him. And hence, he who having been deceiv'd by another Man, delivers things which he himself takes to be true, reports a *Lye*, but is not himself the *Lyar*. Yet a Person, who catching up things with too hasty a Credulity, afterwards disperseth them amongst others, exposes himself to the Censure of Rashness and Folly. Nay, the spreading of another Man's Lye, or of a Matter not certainly known, may in some Cases bring an Obligation on the Publisher to repair the Damage occasion'd by the Report: especially when such a Publication approacheth near to that Trespass which the *Civilians* term *culpa lata* (d).

IX. Having thus discover'd the true source, and the Genuine Foundation of Truth and of Lyes, we may assure our selves, that those Authors are mistaken, who assert, That a *Lye*, and an *Untruth* are really the same thing, and that he deserves to be branded with the Name of a *Lyar*, who says any thing differing from his Judgment; and that consequently to speak otherwise than we think, is in its own Nature base and sinful. An *Untruth* is when you apply Words in such a manner, as that another shall conceive from them a Sense not agreeable to your inward Imaginations. But now, if the other Party have no Right by Virtue of which he ought clearly to understand my Meaning; and if I do not hereby prejudice any Man without cause, there seems to be no reason, why, if I find it convenient for me, I may not use those Words rather according to my own pleasure, than the pleasure of another. Hence every *Lye* is an *Untruth*, but every *Untruth* cannot come under the Name of a *Lye*: And if we take *Aristotle* (1) in this Sense, when he affirms, *That a Lye is in it self foul*

(a) *Æschyl. Cœphor.* σ' γὰρ θ' ὄπω, &c. v. 580: The Art of Silence and of well term'd Speech.

(b) *Sophocl. Trachin.* p. 347. Ed. H. Steph. ὡς ἐλαδέρῳ ἰδδῆι χαλεῖται, &c.

What Fate so grievous to a Free-born Man  
As to be call'd a Lyar — — — ?

Add. *Montaigne's Ess.* l. 1. c. 9. l. 2. c. 18. (c) *Apollon. Tyan.* l. 2. (d) See the Story of *Cassell, Bassus* in *Tacit. Ann.* l. 16. c. 1. &c. (1) *Vid. Ethic. ad Nicomach.* l. 4. c. 13.

and disgraceful, there will be no need of *Grotius's* Limitation; who explains *καθ' αὐτὸ in it self*, by *Generally*, or *without regard to the Circumstances* (a). For such an *Untruth* as escapes censure, by *Virtue* of some particular *Circumstances*, ought, on no account, to suffer the *Odious Character* of a *Lye*. And, on the other side, that every *Lye*, properly so called, is in its own *Nature* base and scandalous, seems to be beyond dispute.

It is worth remarking on this Head, that the very speaking what is true may sometimes create and constitute a *Lye*: Which not only happens when a Person affirms the Truth with the Air and Address of a *Lye*, and by his Manner, his Gestures, and his Actions, which used to be as it were the *Life* and *Soul* of *Discourse*, makes his Hearers believe the contrary to what he delivers; as *Quintilian* (b) shews us how 'tis possible to be guilty of a *Lye*, as well as of a *Solacism*, by base Action, when we speak one thing, and hint another, by a Posture or a Nod: but it chiefly takes place in those, who by a practice of frequent Lying, have depriv'd themselves of all *Credit* and *Belief*. Now such Persons as they are not easily regarded, how willing soever they may be to deliver serious Truths; so they have an opportunity of abusing the diffidence of a hearer, to his deception and delusion; who thinking them to be always like themselves, may easily be cheated by believing quite the contrary of of what they aver. The Instance in the *Fable* is well known, where the Boy so often tricked the Countrymen with a false Alarm of the Wolf, that at length when the Wolf really appear'd, he could not gain *Credit* enough for their assistance. *Agesilaus* turn'd this Fetch into a *Stratagem* of War. For inasmuch as 'tis reckon'd most impolitick in a General openly to proclaim his Resolutions, for which reason the Enemy is not wont to believe what is given out in this free and *secure* manner, *Agesilaus* by this piece of *Subtlety* prevail'd on the *Persian* Nobleman who oppos'd him, to march his Army quite another way than what he had thus publish'd, that he would take himself (c).

But, as no Man will presume to condemn the Wise Gravity of *Epaminondas* (1), who could not bear to utter a *Lye* though in jest: So, on the other hand, it is very weak to believe, that a Person always incurs a heinous guilt, when, without injuring any one else, and for the advantage of himself and others, he delivers Words differing from his real Thoughts. It were therefore to be wish'd, with *Cicero* (2), *That all Simulation and Dissimulation were utterly banish'd from Human Life*: and that Men were arriv'd at such a happy temper, as that no one should envy the

the Goods of another, or plot to rob him of them; that no one should abuse the *Simplicity* and *Credulity* of others, to their prejudice or deception; and lastly, that no one should in any Instance, resist the *Command* of *Right Reason*: Such a strict and accomplish'd Person *Achilles* pretends to be in *Homer* (d); it is his *Brave Declaration*,

Ἐχθρὸς γὰρ μοι κείνῳ ὁμῶς αἰδέομαι πύλησιν,  
Ὅς γ' ἔπειν ῥα κεύθει ἐνὶ φρεσίν, ἄλλο ἢ βάζει.

*Like Hell I hate the Man, whose Tongue reveals  
A different Tale from what his Heart conceals.*

But since he who is ever freely publishing and declaring his own Concerns, lays himself open to the *Fraud* of wicked Men; and since most Persons are inclined rather to be won upon by *Artifice* and *Shew*, than to be convinc'd by solid *Plain-dealing*; therefore it may not be advisable for us to exclude from *Human Society*, the *Art* of *Innocent Diffimulation*, till all the *Wickedness*, and all the *Folly* of *Mankind* is turn'd into *Probity* and *Wisdom*. *Pindar's* Remark is excellent to this purpose (e).

*Not Truth with open Face, and open Heart  
Is serviceable always, always wise:  
But often 'tis in Life the Noblest Art,  
To know the prudent Use of Silence or Disguise* (f).

Though 'tis certain, at the same time, that he who makes use of these Practices of Concealment and *Cunning* farther than is necessary for his own *Defence*, renders himself unfit to be trusted, and incapable of being dealt with in any *Honest* *Affair* or *Business*: inasmuch as 'tis impossible, but that such a Person must be suspected in all that he says or does.

The Arguments by which some attempt to prove that every *Untruth* is in it self odious and sinful, are of no weight. They tell us, 'That the False Speaker defiles and disgraceth his Tongue, that most noble Member, by such an abuse: that he deprives himself of *Credit*, to the great stop and hindrance of many good Offices amongst Men; since he never fails to gain this amongst other advantages, *not to be believ'd tho' he speak the Truth*. But this Charge holds good only against a strict and proper *Lye*, not against such *Falsties* as *Prudence* often adviseth and recommends. They add, 'That to falsifie, argues a Man to be of a low and abject Spirit; since he who could rely upon solid Plainness and Truth, would have no need to seek refuge in Tricks and Shifts. But those *Untruths* which are both innocent and unnecessary, do not always proceed from meanness of Soul: And sometimes, amongst wicked Men, *Honesty* and *Truth* it self cannot

(a) L. 3. c. 1. f. 9. (b) Institut. Orat. l. 1. c. 5. p. 47. Ed. Lugd. Bat. (c) Xenophon Rer. Græcar. l. 3. p. 292. Ed. H. Steph. Cornel. Nep. in Agesil. Cap. 3. To this Head likewise belongs the Sleight of the Old Fox in Terence Heautontimor, Act. 4. Scen. 3. (1) See Cornel. Nep. c. 3. n. 1. (2) Offic. l. 3. c. 15. (d) Iliad. 9. v. 312, 313. (e) Nem. Od. 5. v. 30, &c. (f) Theſeus's Wish in Euripides, Hippol. Coron. v. 925, &c. is but vain and fruitless.

be supported, but by indirect and artificial Methods. Others are more fond of this Argument; 'Speech is given to be an Interpreter of the Mind; since then every Untruth is contrary to this End, it ought likewise to be esteem'd repugnant to the Order of Nature: and, farther, that to have the Tongue differ from the Mind, quite disturbs that Harmony which should appear in the Powers and Faculties of Man. In reply, we willingly allow, that Speech is the Interpreter of the Mind; but 'tis in such a manner, as that it ought not to blab out more than the Mind gives it commission to disclose; the Mind being to judge what is convenient to be declared, and what to be concealed.

X. We have asserted every Lye to be a violation of some *Right*; but what kind of Right this is, and how acquired by Men, all are not agreed in explaining. Some conceive, that since both God and Men have a Natural ability to understand the Truth, which is obstructed by the contrary Speeches, therefore they have on this very account, a Right of requiring others to express themselves in an intelligible manner. Now with regard to Almighty God, the thing is beyond dispute; For to use any kind of Falstiy in our Addresses to him, is not only extremely irreverent, as if bare and open Truth were not as prevalent with the Divine Majesty, as Colours and Fictions; but also in the highest degree foolish, since God doth not stand in need of the Information of Men. And therefore *Cain* (1) was not only impious, but stupid, in endeavouring to conceal his Brother's Murder from God, especially by so impudent and so rude a Reply. And thus far that of *Sophocles* (a) will hold good; *I hate a Man, who being taken in Wickedness, attempts to make his Excuse.* But otherwise, this is no good Consequence; a Person is Naturally capable of understanding a matter, therefore he hath a Right to understand it; nor doth a *Physical* ability always infer a *Moral*. As for that which some add to what we are now saying; That he who hears an *Untruth*, doth yet understand the Words; and therefore that false-speaking doth not take away the Right of *Understanding*; this is nothing at all to the purpose. For such an one understands indeed; but he understands only a Shadow and Fiction, instead of the Truth which he desires.

Others there are which derive that Right which is violated by *Lying*, not from *Nature*, but from the Art of Men; that is, from some tacit Compact: For, say they, since Discourse, and other the like Marks and Tokens were introduc'd by Human Institution, Men at the same time laid a mutual Obligation on each other to use these Signs in such a manner, as to be able hence to make a Judgment of the Person's Sentiments, with whom they should confer (2): Because, without such an Obligation, and if every Person were allow'd to apply

Words how he pleas'd, and to hinder others from apprehending his Meaning, this Invention of Signs had been altogether vain and fruitless. This is the Opinion of *Grotius* (b); on which we may make this Remark; That there is not sufficient Care taken in it, to distinguish between those Two Obligations, one of which regards the Applying Signs in General in such a due manner, that another may understand our Thoughts; and the other engageth us to discover by those Signs our Real Meaning to such or such a particular Person; which two are very different and proceed from distinct Principles: For inasmuch as Words borrow their Signification from the Force of Imposition, we must suppose some Agreement to have pass'd between Men who speak the same Language, that, in common Use, they would apply such Signs to express such Things. But the Obligation which ties me actually to address those Signs to another, or to open my Mind to him about such a certain Affair, ariseth either from some general Command of the Law of Nature, or from particular Covenant; as has been above explain'd. Hence it appears what Judgment we should make of their Notion, who deny the Nature of a Lie to consist in the Violation of a Pact on this Principle, 'That whatever is constituted, not by Nature, but by the Compact of Men (especially *tacit*) is to be derived, and to be valued from the Point of Profit, and from that alone. Whereas, that Men should understand all that others say, doth not seem to be a thing so very profitable and beneficial. On the Contrary, it is much for our Interest, that we should have a full liberty of covering either with Silence, or proper Colours, such Matters as may be kept secret without the Prejudice of other Men, and with our own Advantage. Here those Points are confounded, which ought to have been with Accuracy distinguish'd. For in this, that a Man should understand the Thoughts of all others; or that all others should understand his; there is indeed no Profit; nor did Men by introducing of Speech, lay any such mutual Obligation on themselves. But we have already shewn how far any Person is bound to declare himself to another, and how far the other hath a Right to understand him. Supposing then an Obligation in us to communicate our Thoughts to such or such a Man, upon this the other Obligation which attended the Introduction of Speech falls in, and exerts its Force, engaging us so to apply our Words, that the Party may apprehend our Meaning. And of this the Profit or Advantage is so very great, that without it there would be no manner of use in Speech.

XI. Thus much being premised, it will not be difficult to judge how rightly those several Cases in which the Truth is not precisely spoken, are yet in common Estimation, exempted from the Character of Lies. And here

(1) *Genes.* 4. 9. (a) *Antigone*, p. 234. init. Ed. H. Steph. (2) See Mr. *Barbeyrac's* 2d Note upon this Section.

(b) L. 3. c. 1. f. 11.

first of all some distinguish between speaking what is *False*, and not speaking, or dissembling some part of what is *True*; affirming the former to be unlawful, but the latter to be often innocent. On which Point we are to know, that although to hold our Tongue cannot properly be term'd a *Lie*, especially if we used no other Sign equivalent to Speech; yet our *Silence* may on another account become Criminal: As suppose we hinder by it some Good which we were oblig'd to procure; or cause some Evil, which we were bound to avert. This is what the Poet calls

—*animumque nefas scelerare silendo* (a);

The Soul with silent Mischiefe to defile.

Thus a Watchman who is set to give notice of the Enemy's Approach, shall incur the severest Punishment upon Neglect of Information. *Polybius* (b) says, *That an Historian who professeth to give an account of Affairs, is no less a Liar, if he suppress and conceal what really happen'd, than if he relate what is false.* But in a matter which I am not obliged to declare to another, if I cannot with Safety conceal the whole, I may fairly discover no more than a part. An Instance of this is usually given in the case of *Jeremiah*, who in the 38<sup>th</sup> Chapter of his *Prophecy*, vers. 25. *6c.* (1) being consulted by the King, concerning the Issue of the Siege, prudently hides that Particular from the Princes, as the King expressly order'd him; assigning another Reason of the Conference, which notwithstanding was also really true. Here the *Prophet* told only a part of the Truth, being no wise obliged to disclose the whole. To the same purpose the Story of *Athanasius* is produced, who meeting himself with those who were sent to apprehend him, and being ask'd, Whether he had seen *Athanasius*; answer'd, *That he saw him lately pass by this way, and that he was now gone on Board.* For here he was under no Obligation to betray himself. As to the Example of *Abraham* in *Genesis* XX. 12. some question whether that most holy Man acted prudently in calling *Sarah* his Sister, and concealing their Marriage: For he knew her Beauty to be such, as might kindle a Passion in the Beholders, and at the same time, that Unmarried Persons are reckon'd more capable of Addressees than others. Nor, say they, was *Abimelech's* Expostulation with him unjust: and on the contrary, it was most inhuman in *Abraham*, to suppose, that there was no Piety or Honesty in a State, before he arrived to be their Instructor. Others excuse the *Patriarch*, on this Argument, That the Hope of Life commonly bends the greatest and most stubborn Souls; and that scarce any thing is look'd on as base and infamous, which is undertaken

on the Score of declining Death. But this Point we leave undecided.

XII. *Grotius* (c) distinguishes likewise between those Signs which have been invented and determin'd, *μετὰ συνθήκης* or with a mutual Obligation, and other things about which no such Agreement hath pass'd: (For no doubt when a Compact hath been made concerning the use of any thing, we are exactly to conform to that specified Use.) And as to the latter sort, he is of Opinion, that 'tis allowable to misapply them, even when we foresee that the other Party will thence be led into a false Judgment; provided either that no farther Hurt follow this Deception, or that the Hurt which follows it, is (setting aside the Consideration of the Deceit,) Lawful; and when we might fairly have hurt him in an open manner: And to this we willingly subscribe. For since no Agreement, either general or particular, is suppos'd to have pass'd, which might have laid a Necessity on me to apply the Thing in such a manner, and no otherwise, to the end that the said Party might gather my Meaning from it; therefore I am presumed to be left at full Liberty, as to its Use, so long as I hurt no Man injuriously, or without Cause. The Party may thank himself for the wrong Notion he hath form'd; and attribute it to his overcurious Impertinence in passing Judgment on other Men's Business. Whilst I am exercising my proper Right, I am not always obliged to hinder another from taking up a false Opinion in other respects harmless. For Instance, if a Man to keep himself from being frighted in the Night, or to have a Light always at hand for some Occasion, should sleep with a Candle in his Chamber; he is not bound to put it out, how deeply soever his Neighbour may fancy that he sits up at his Business. The Example of our Saviour, *Luke* XXIV. 28. is a Case of no Difficulty. For every Man may, at his Pleasure, use the Gesture there represented: And nothing is in Common Life more frequent, than to feign our selves in a Readiness to be gone, that we may discover whether or no we are welcome Guests: We being seriously resolv'd to depart, unless we are solicited and importun'd to stay. The Case of *St. Paul* in *Acts* XVI. 3. seems a Matter of higher Consideration (2). But as to the other Instance alledged by *Grotius*, of deceiving an Enemy, by counterfeiting Flight, Cloaths, Colours, Sails, Arms, and the like; this Practice is allowable beyond Dispute; since we might lawfully have done him what Mischiefe we could, by the most plain and open Means.

XIII. It is the Judgment of the same Author, (d) 'That we do not always contract the guilt of *Lying*, when we use an Ambiguous Word or Expression, which admits of divers Significations, either in Common-Speech, or by

(a) *Sil. Ital.* l. 16. (b) *L. 12. c. 7. p. 660. B. Edit. Casaub. Wech.* (1) See *Grot. B. 3. c. 1. f. 7.*  
 (c) *L. 3. c. 1. f. 8.* See Mr. *Barbeyrac's* Note upon this Section. (2) See *Ibid.* (d) *De Equivocis*, l. 3. c. 1. f. 10. n. 1, 2.

‘ the Custom of *Art*, or by some Figure not  
 ‘ unusual or intelligible, provided our inward  
 ‘ Meaning is agreeable to any one of these Sig-  
 ‘ nifications; although we believe that the  
 ‘ Person to whom we speak will understand it  
 ‘ in a different sense. But he very rightly adds,  
 ‘ That such Equivocal Speeches are not rashly  
 ‘ to be approv’d of and allow’d; being only  
 ‘ Justifiable when they serve for the Instruction  
 ‘ of one committed to our Care; or for the  
 ‘ avoiding some pernicious and insinuating Que-  
 ‘ stion (a); or for the procuring some Benefit  
 ‘ to our selves, without the Damage of others  
 ‘ (b): For else, if you are under an Obligation  
 to discover your Mind clearly to me, ’tis the  
 same thing whether you deceive me by a plain  
 Lie, or by a doubtful Expression: Especially  
 since the latter must, to serve your purpose,  
 be so fram’d and contriv’d, that I may lay hold  
 on the more obvious and vulgar sense, whilst  
 the more abstruse and uncommon answers to  
 your inward Conceptions: Otherwise, if both  
 Significations are alike probable, scarce any  
 Person will be so supinely negligent, as not  
 to ask you, which way you would be under-  
 stood? But to speak ambiguously, or obscurely  
 to one whom we intend to instruct, or whose  
 Proficiency we would thus try and examine,  
 is on no account Faulty; if the good End we  
 propose may by this means be better obtain’d,  
 than by more plain and direct Application.  
 To this purpose is the Instance in *St. John VI.*  
*vers. 5, &c.* (1). So if I am not oblig’d to  
 declare my Mind at all to such or such a Per-  
 son, nothing hinders but that I may as well  
 let him be mistaken, as let him be ignorant,  
 if besides that Mistake, he incur no other un-  
 deserv’d Prejudice. And therefore no one will  
 censure *Athanasius* for the Deception he put on  
 his Pursuers, which we have already recited (c).

It is hence evident, that we ought to in-  
 terpret *Grotius* with some Caution, when he  
 says (2), ‘ It is requisite to the general No-  
 ‘ tion of a *Lie*, that what is either spoken or  
 ‘ written, or by any Marks and Tokens ex-  
 ‘ press’d, cannot otherwise be understood, than  
 ‘ in such a Sense as is different from the In-  
 ‘ tention of the Person thus declaring. For  
 in Cases, where a Man is bound clearly to  
 discover his Meaning, he ought so to frame  
 his Expressions, as that the same Sense which  
 either the Nature of the Business in hand, or  
 the common Use and Custom of Speech sug-  
 gests, shall be likewise agreeable to his real  
 Thoughts. Nor can he, with the least reason,  
 bid the Hearer thank himself for the Mistake  
 or Damage he suffers, only on the account of  
 not diving into all the remote Quirks and  
 Terms of Expression, utterly foreign to the  
 present Affair; that is, for not being a Con-  
 jurer. And the Remark of *Isocrates* (d) must  
 be own’d for a certain Truth, *That to use am-*

*biguous Sayings in Judicial Contentions about  
 Bargains, and Matters of Interest and Moment,  
 is scandalously base, and shews a very high degree  
 of Wickedness.*

XIV. Much more ought we to abhor and  
 detest those *Mental Reservations* (3), which  
 the wicked Artifice of some Men hath in-  
 vented, by wresting Words to a quite contrary  
 Sense to what they outwardly and plainly im-  
 port; and this even in Cases where there was  
 an Obligation to speak the Truth, and in  
 Assertions confirm’d by Oath. The Effect of  
 which is, that a Person seems outwardly to  
 affirm what he inwardly intends to deny, and  
 so *vice versa*. A Practice by which the whole  
 Use and Design of Speech is utterly perverted,  
 no Man being sure in what Sense he ought to  
 take the Words of another. Nor is the In-  
 vention less absurd than it is pernicious. For  
 since Discourse was Originally introduced, as  
 a Means of declaring what we conceive in  
 our Minds; and since our Thoughts, so long  
 as they do not come abroad, are of no manner  
 of Use or Effect in Human Life; by what  
 Authority can these secret Reserves, so re-  
 pugnant to the common Custom of Mankind,  
 take away that Effect which the uttering of  
 Words would otherwise naturally produce?  
 Thus much indeed is usual with us, to annex  
 to a General Expression some Tacit Condition  
 or Restriction, taken from the subject Matter,  
 or some other Circumstances; by Means of  
 which we dexterously adapt our Speech to the  
 Business under Debate, and free it from Con-  
 fusion or Inconvenience. But where would  
 be the Reason, or where the Subtilty of my  
 Proceeding? If for Instance, being ask’d, whe-  
 ther I have done such a Thing, I swear *I have  
 not done it*, meaning another Thing, or the  
 same at another time? Or if when a Man de-  
 sires Money of me, I tell him, *I have none*;  
 that is, none to give him? Or, if I promise  
 that *I will give it him*; that is, meerly for  
 Form and Fashions sake, so as to take it im-  
 mediately again? ’Tis a foolish Argument which  
 is urg’d to excuse such Persons from the Sins  
 of *Lying* and of *Perjury*, *That they do not in-  
 deed speak that particular determinate Truth  
 which the Hearers apprehend, and which the  
 Words imply, yet they speak another Truth of  
 a different kind*. As if it were at all satis-  
 factory to my Question, to be told a Truth of  
 any other different kind, and utterly foreign  
 to the Business which I am now upon: Or as  
 if a Man did at all promote my Purpose, or  
 the Reason of my Enquiry; if when I ask of  
*Chalk*, he answers me of *Cheese* (e)! No less  
 ridiculous is that other Plea, that if in these  
 Cases, we put the open Speech, and the *mental  
 Reservation* together, they will make an entire  
 Proposition; which taken in that united sense,  
 shall not be false: As for Instance, if I say,

(a) *Vid. Senec. Troad. v. 597, &c.* (b) *1 Sam. XXVII. 10.* (1) *Vid. Grot. ubi supra.* (c) *Vid. Theod. Hist. Eccles. l. 3. c. 9.* (2) *B. 3. c. 1. f. 11. n. 1.* (d) *Panathenaic. 486. Ed. Par. 1621.* (3) See Mr. La Placette in his Treatise of a *Lie*, &c. C. 8, &c. (e) Add Mr. *Pascal's* Letters Provincial. Lett. 9.

*I am not a Priest*; keeping this Clause in my Mind, so as to be under any Obligation of telling you that I am; this whole Proposition taken together will be true, *I am not a Priest, so as to be under any Obligation of telling you that I am.* But in as much as Discourse was invented with regard to others, not that every Man should talk to himself; so the Truth or Falshood of it is measur'd according to that which we openly declare to those with whom we converse.

XV. That we are not guilty of *Lying*, tho' we speak a Thing which bears a wrong Signification, to Children or Persons out of their Senses, is generally asserted; and therefore 'tis thought very allowable (a). The Reason assign'd by *Grotius* (b) is, *Because since such Persons have not the liberty of Judging, they cannot suffer Injury with respect to that liberty which they want.* This Principle we do not take to be sufficient: for to speak chiefly of the Case of Infants, it is plain indeed, that they so far want the Faculty of Judgment, as simply and rashly to catch at any thing, spoken or represented to them in a wrong manner; not being able by Reasoning to distinguish Truth from Falshood: Yet since they make a part of Mankind, and on that account have a Right, not to be hurt by others, as they have likewise to receive the common Office of Humanity, and to be furnished with good Notions, particularly by their Parents, and those who have the Care of their Education (c), and are at least capable of apprehending what is easy and familiar; we are by all Means to hold, that they have thus far the same Right with Persons of advanced Age, that what ought to be shewn or declar'd to them, shall be propos'd in such manner as that they may understand it. But for as much as through the weakness of their Reason, and the strength of their Passions, they have scarce any Relish for plain Truths, therefore 'tis convenient to instruct them by Fables, and to keep them in Awe by false Terrors, 'till such time as they grow weary of Trifles, and are able to apprehend and to value the real Solidity of things. And thus we address to them by Fiction and Disguise, not to sport with their Ignorance, or to procure their Harm; but only because they cannot well be apply'd to in any more serious Method of Information, *Strabo* (d) is admirable on this Point; 'Not the Poets alone, says he,

but long before them Publick Societies and States made choice of the Art of Fables; and the Lawgivers themselves, in regard to the common Advantage, when they had first reflected on the Genius and Temper of Rational Creatures. For Man is led on with a most greedy Desire of Knowledge; and our Earthly Acquaintance with these feigned Relations, is the first step this Passion makes towards its own Satisfaction. Here Children begin their Information, and willingly improve their Stock, for the sake of communicating it to others. The Reason of all this is, because Fables do ever carry somewhat of Novelty in them, whilst they report not common and consistent Things, but what is very strange and unusual. But now whatsoever is thus new and surprizing, and what Men never heard of before, cannot fail to be sweet and agreeable: And 'tis this which breeds in them a covetous Sollicitude, and an Eagerness after farther Delight. In case the Story be wonderful and prodigious, this Delight is highly increas'd; which is the Bait that tempts the Young Learners to Industry and Study. It is fit therefore that they should at first be thus caught and insnar'd with Pleasures: but when they have attain'd to a more mature Age, they are to be disciplin'd and instructed in the Solid Knowledge of things; their Mind and Judgment being now strengthened and confirm'd, and they no longer standing in need of being flatter'd and humour'd in their Good (e). In the same manner it is very lawful to apply Fictions to Persons out of their Senses, in all such Cases where they are not capable of apprehending true Reason.

XVI. And indeed, all in general, upon whom we cannot by plain Speech obtain the good end we design, we may, without the Censure of *lying*, by feign'd Addresses, lead into a Mistake, for their own Interest and Safety. Nor is it needful to draw the Reason of this Practice from hence; 'That we may presume, in such a Case, the other Party will not think hard of our Trespas on his Liberty of Judgment; nay, that he will give us thanks for the Advantage he receives from it: and therefore what is done with his consent and approbation, can be no injury to him. For he had indeed a Right, that our Speech should procure him some Benefit, or deliver him from

(a) *Lucretius* expresseth this by a fine Similitude, *Lib. 1. v. 935, &c.*

———— *Pueris absinthia tetra medentes  
Cum dare conantur, prius oras Pocula circum  
Contingunt mellis dulci flavoque liquore,  
Ut puerorum atas improvida ludificetur,  
Laborum tenuis; interea perpetet amarum  
Absinthii laticem, deceptaque non capiatur,  
Sed potius tali facto recreata valeat.*

So the Mother in *Theocritus*, *Idyll. 15. v. 40.*

———— *ἐκ ἀξῶ τὸ τέκνον' μορμὸν, δάκρυα ἰππῶ.*

(b) *Uli Supra.* (c) Add *Matt. XVIII. 10.* (d) *B. 1. p. 13. Geogr.* (e) See the Fables of *Æsop*, particularly recommended by *Philostratus*, *Apollon. l. 5. c. 5.*

———— Physicians use

In giving Children Draughts of Bitter Juice  
To make them take it, tinge the Cup with Sweet,  
To cheat the Lip: this first they eager meet,  
And then drink on, and take the Bitter Draught,  
And so are harmlesly deceiv'd, not caught:  
For by this Cheat they get their Health, their Ease,  
Their Vigour, Strength, and baffle the Disease,

*Mr. Creech.*

———— You must not go my dear Delight,  
For there are Bugbears, and the Horses bite.

some Mischief; but not that it should produce the quite contrary Effect; which it would have done, had he understood the plain Business without Art or Colour. And therefore in these Cases, we ought as much to accommodate our Discourse to the Temper and Condition of the Hearer, as Physicians do their Medicines to the Patient's Strength and Constitution. Since then no Person can be said to have had a Right of hearing Words under such a Form as would have prov'd fatal to him, it cannot be properly affirmed, that there is any waving or remitting of Right in the present Case. And then for the Speaker, since he was on his part obliged to perform this Office through the mediation of Speech, either by the Law of Humanity, or by some stricter Engagement, 'tis manifest, that he cannot be bound to apply his Speech in such a manner as shall make it lose its End and Effect. Therefore all such feign'd Speeches, as either save and protect Innocence, appease Rage, assuage Grief, or procure any Benefit or Convenience to others, which could not have been obtain'd by direct and open Expressions, are not only to be exempted from the number of Lyes, but to be applauded as so many Instances of Wisdom (a). We have a famous Example of this proceeding in the Story of *Rahab* the Harlot, *Josb.* 11. 4. (1). And tho' *Grotius* observes on this place, that *before the Gospel, a Lye which contributed to the preservation of Good Men, was not esteem'd faulty; and that therefore this Act is commended by the Apostles, Heb. 11. 31. and James 2. 25. as agreeable to the Times in which it was perform'd;* yet 'tis our Judgment, that the same thing may even now be lawfully done, provided no Civil Obligation be prejudiced by it (b). To the same Head belongs the Case of those Commanders, who in the Heat of an Engagement raise the drooping Spirits of their Men by some False Insinuation or Report, on the strength of which Encouragement, they may force their way to Victory and Safety: Or those, who before a Battle, lessen and undervalue the Number of the Enemy (c). Though

I know not whether *Agessilaus's* Stratagem of this kind deserves commendation; who when he saw his Soldiers in some fright and concern at their being like to be overpowered by the opposite Forces, wrote in his Hand the Word *VICTORY*; and taking the Beast's Liver out from the Sacrificer, printed those Letters upon it, and then shew'd it to the Troops, as a Divine Promise of Success (d). For the same Reason Physicians are not to be accounted Lyars, when they perswade a nice or a froward Patient of the sweetness or mildness of what they apply for his Cure (e). The Conduct of *Joseph* is justifiable on the like account: who to work his Brothers to a serious Repentance for their Crime in selling him, and to judge how they stood affected towards his Father, and towards *Benjamin*, held them a long time in consternation and suspense, by Feigned Accusations (f). Lastly, that the Fables of the *Poets*, by which they insinuated *Truth* under a taking Disguise, are not to be condemn'd for Criminal Falsities, every one will easily admit (g). And thus far the Saying of *Sophocles* will hold good,

Δικαῖον ὡς ἔστιν ψῆμα οὐκ ἔστιν κερδὲς κερδόν. (b)

I judge no Speech amiss that is of Use.

XVII. The Governors of States may sometimes too very lawfully use a manner of Speaking not strictly true (2); inasmuch as their Counsels and Resolutions, if divulg'd, frequently come to nothing, or perhaps turn to the prejudice of the Commonwealth. And therefore when bare silence is not a sufficient Covering, they may veil their Designs with Feign'd Speeches, to divert the Curiosity of Inquisitive Men. *Lying* (says *Plato* (i)) is useful to Mankind only in the way of Physick; and therefore should be allow'd to Publick Physicians, but ought not to be touch'd by Private Patients. Princes and Governours (if any Persons else) may be permitted to use the same Stratagem, either for the ruin of the Enemy, the preservation of the Subjects, or any way for

(a) Vid. *Exod.* 1. 17. 19. 1 *Sam.* 19. 12, &c. 20. 5. 28, 29. 2 *Sam.* 14. 4, &c. 2 *Corinth.* 9. 2, 3, 4. *Plin.* 1. 3. *Epist.* 16. *Of Arria.* *Horat.* *Od.* 1. 3. XI. v. 35, 36. *Of Hypermenestra*:

*Splendide mendax & in omne virgo  
Nobilis ævum.*

Gallantly false, and prais'd in Endless Fame.

*Euripid.* *Phæniss.* v. 998. &c. *Sadi Rosar.* *Persic.* c. 1. *A Beneficial Falsity is better than a Destructive Truth.* *Heliodor.* *Ethiop.* 1. 1. c. 3. p. 52. *Ed. Lug. Bat.* Feign'd Speeches are then good and commendable, when they turn to the advantage of the Hearer, and do not prejudice the Speaker. (1) See Mr. *Barbeyrac's* 2d Note upon this Section. (b) *Add. Sacrat. Eccl. Hist.* 1. 3. c. 12. (c) Vid. *Cornel. Nep. Eumen.* c. 3. The like Instances are frequent in all Histories. *Xenoph.* *Apomn.* 1. 4. p. 462, 463. *Ed. Græc. H. Steph.* If a General observing his Men to be in a Consternation, falsely tells them, that there are fresh Succours ready at hand for their relief, and by this Stratagem composeth their Fears, and keeps them in heart; under what Species of Actions shall we reckon it? In all appearance under those that are just and good. In *Sophocles*, (*Philoctet.* v. 108, 109. when *Neoptolemus* asks *Ulysses*, Don't you think it base to affirm a Falsity? His Answer is, No in case the Falsity be a means of Safety. *Add. Frontin. Stratag.* 1. 1. c. 11. 1. 2. c. 7. *Polyæn.* 1. 1. c. 33. *Stratag. Of Leotyehides. Maxim. Tyrius. Dissert.* 3. p. 29. *Ed. Lugd.* The bare telling the Truth is no such brave and comely thing, unless it be done to the benefit of those we are to instruct. Thus a Physician often deceives his Patients, a General his Soldiers, a Master of a Ship his Crew, and we censure neither of them upon this account. For in some Cases, a feign'd Story doth Men good, when the plain Truth would do them harm. (d) *Plutarch Apoth. Lacon.* p. 214. *E. T.* 2. *Ed. Weck.* (e) *Liban. Declam.* 29. p. 664. *D. Ed. Paris. Morell.* We see the Physicians beguiling their Patients Appetite with harmless Deceits. The same we ought to practise towards those who are in Health, so often as 'twould be better for them to be deceiv'd than to be truly inform'd. Yet I question whether the Artifice of *Erasistratus*, Physician to King *Seleucus*, in making him believe that his Son *Antiochus* was in love with his Wife, may be admitted into this number. Vid. *Lucian de Dea Syra.* (f) *Gen. XLII.* &c. *Joseph. Antiq. Jud.* 1. 2. c. 3. (g) Vid. *Plutarch de audiend. Poet.* (h) *Electra.* v. 61. (2) Vid. *Grot.* 1. 3. c. 1. f. 12. (i) *De Repub.* 1. 3. p. 611. *Ed. Weck.*

*the Advantage of the Community: But all others ought strictly to abstain from this Practice* (1). A famous Instance we have in *Solomon's Judgment*, 1 *Kings* 3. 25. And so *Claudius*, in *Sueton* (a), brought a Woman to own her Son, whom she first, on probable Arguments, deny'd, by commanding her to marry him. Thus a Father and a Son being arraign'd together for murder of a Priest, when it could not be made out which of the two had committed the Fact, each refusing to accuse the other; *Charlemagn*, as we are told, gave Sentence of Death upon them both; upon which the Father confess'd himself the Murderer. So, it being a Law in *Spain*, That in case a Female Slave be with Child by her Master, she shall be immediately restor'd to Liberty: Once it happen'd that a Nobleman's Maid was discover'd to be in this Condition; the Nobleman denied the Thing, and the Proofs alludg'd not being evident, King *Alphonso* order'd the Child to be publicly sold into Servitude; the News of which Sentence mov'd the Father to discover himself (b). So when *Neleus*, being about to lead abroad a Colony, was commanded by the Southfayers, to purge his Army of all Polluted Persons; he pretended that he himself had murder'd a Child, and so stood in need of Expiation: and by this means perswading others to confess themselves guilty, he left all those behind him, whom he had thus convicted of Impurity (c). 'Tis a Proverb with the *Spaniards*, *Tell a Lye, and you'll get out the Truth*. To the same Head belongs the Dissimulation and Concealment about the Sickness or Death of Princes, for the prevention of Tumults. Though we are not willing to extend this Liberty so far as to justify the Politick Devices of *Numa* (d). Nor will the same Priviledge hold at all, in the Case of Promises and Engagements (e).

XVIII. But farther, *Grotius* (2) having thus asserted, That every Lye ariseth from the impairing of some Right which one Man may have to understand the Mind of another; concludes from hence, that we cannot be charg'd with this Fault, when we direct a Feign'd Discourse to one who is not deceiv'd by it, though a third Person should thence happen to entertain a wrong Opinion. For 'tis to be suppos'd that I, and he to whom I address'd my self, are transacting some private Business, which doth not at all belong to the Person who overhears us. Therefore the Man with whom I am dealing, is certainly not deceiv'd with my manner of Speech, because he well apprehends my Meaning by it; just as if I should relate a Fable, or use an Irony or Hyperbole to one who knew how to put the Right Construction upon the Words. And as for the third Man, I do not contract the Guilt of Lying in respect of *Him*, because I have no business with him, and consequently he hath

no Right to understand my Sentiments. So that if he take up a false Notion, from Expressions applied to another Person, not to himself, he is to lay all the blame on his own Curiosity and Impertinence. But least this Position should be abused to ill purpose, we are to add, as a necessary Caution; that 'tis by no means allowable for two Persons to make use of such Occasions as these, by way of Stratagem to delude or expose a Third. For although it be never so true, that this Third Man hath not a perfect Right to know my Judgment, yet the Law of Humanity and Charity requires, that my Speech do not occasion his undeserved prejudice. Therefore we ought on all accounts to make this distinction, whether the Third Party overhears our Discourse without his own Fault, or whether either out of a busy or a malicious Humour, he purposely intrudes into our Secrets. And therefore this Assertion chiefly holds good against those Inquisitive Gossiping Knaves, who make it their Employment treacherously to catch up what other Persons drop in Private Company. Now when we apprehend our selves to be watch'd by such sly Designers, and yet are not inclin'd to be altogether silent, we are wont to disappoint their busy Curiosity, by throwing in a set of Talk quite impertinent to the Affair which we were before debating; or by agreeing to tell some Story, which our Politick Evesdropper hugging as a mighty Discovery, may, upon his communicating it to others, be sufficiently laugh'd at for his pains; provided neither he nor any Person else suffer any farther damage by this Contrivance. We know very well 'tis a general Duty, not to lessen the Honour and Reputation of others, nor to ridicule and expose them. Yet, as we do not think our selves guilty of any Sin, when we discover the Mistake of another, supposing it to be done without either Bitterness or Insolence, (things so unworthy of Men of Sense and Breeding,) although we should hereby rather diminish, in some respect, than improve his Credit: So what should hinder us from correcting a Fault in a Man's Morals, when it proves troublesome to us, even by Sport and Ridicule, that we may incline him to leave off the Habit? For to amend and reform others, cannot therefore be judg'd unlawful, because it tends to the Disparagement of their Worth and Excellency. Thus, since 'tis the common Interest of Mankind, that each Man should not understand the Secrets of all, it is establish'd, as 'twere by the general Consent of Nations, that seal'd Letters should be open'd by Him only to whom they are directed: therefore if I find any Person intercepting and searching my Letters, it can be no Crime if I contrive to let some Writing fall into his

(1) See what our Author says in His Dissertation *De concordia vera Politicæ cum Relig. Christiana*, f. 10.  
 (a) Cap. XV. (b) See Mr. *Barbeyrac's* 5th Note upon this Sect. *Panormitan. de reb. gest. Alfons. l. 2.* (c) *Ælian* l. 8. c. 5. (d) Add. *Polyan. Stratagem. l. 2. in Edmund. n. 6, & 12. Polyb. l. 16. c. 11.* (e) Add. *Bacon's* Ess. 6.  
 (2) B. III. c. 1. f. 13. n. 1.

Hands, which shall give him no great satisfaction in the reading. As a greedy Boy who hath got a Trick of plundering the Cupboard, suffers no Injury, if amongst the other Provision he meets with a Bait not very sweet or savoury. It was a pleasant piece of Deception, that which *Herodotus* (a) reports of *Nitocris* or *Semiramis*, who order'd the following Words to be engraven on her Sepulchre, *If any Babylonian Prince happens to be in great distress for Money, let him open this Tomb and take out as much as he pleaseth.* King *Darius* afterwards removing the Stone, found no Treasure, but only this Rebuke, *If thou hadst not been insatiably Covetous, thou wouldst never have plunder'd Coffins to enrich thee:* Or, as *Maximus Tyrius* (b) gives the Story, *All Curses follow thee, thou most greedy of Mankind; who for the sake of Gold, hast presum'd to disturb and violate the Dead.* To give Credit to such Inscriptions is no more an Argument of Avarice, than of Folly. In the Story of *Papyrius* in *Gellius* (c) (1), the Senators rightly commend the Cause of the Young Gentleman's Fiction; that is, the Wit and Secrecy of so unexperienc'd Years; but adjudge the manner of it to be a little Undutiful and Disrespectful to his Mother; especially since the Jest occasion'd a Petition not much to the Honour and Credit of the Ladies, That one Wife should rather have two Husbands, than one Husband two Wives. Nor could I ever prevail with my self to be heartily angry with that Senator in *Plutarch* (d), who to divert his Wife's Importunity in asking about the Secrets of the House, told her a strange Tale of a Quail, said to be seen fly thro' the Forum, with a Golden Helmet. Though he ought indeed at the same time to have taken care that this Babbling Dame should not put others into a groundless Fright by her Report. For then the present Mistake, which lasted but an Instant, would have been sufficiently recompenc'd by the Diversion and Satisfaction which follow'd it. Now if we are bound to use Caution, that the Person whom we have justly and deservedly impos'd upon, should not deceive others; much less will it be allowable, to persuade one Man of what is false, with design that he may delude a third Person; although perhaps the former do not hereby suffer any particular Hurt. For indeed to be thus made the Instrument of deceiving another, is in it self mean and unworthy: and as for our part, 'tis the same thing, whether we abuse a Man immediately by our own Act, or by the Intervention of some Person else, whom we have suborn'd for that Service. Though 'tis an Art which many practice; first, to cheat those

whom they intend to make use of for the cheating of others (e).

XIX. This is manifest, that since the Obligation to disclose our Mind, ceaseth with regard to Enemies, it cannot fall under the Sin of Lying, to give them a feign'd Relation (2), to terrify them with False Rumours, or any way to procure their Prejudice, provided no undeserved Loss or Damage ensue to a Third Party who is our Friend. For why may not we by Stratagem and Subtlety, and without endangering our own Persons, hurt him whom we have Licence to attack with Open Violence? The Reason why some have disdain'd this Method of Hostility (3), was not because they thought any Right to be violated by it, but because among the most Fierce and Martial Souls, no Action against an Enemy is look'd on as Glorious, but such as carries in it some sort of Vigour and Force of Body and Mind. But what we speak about deceiving and circumventing an Enemy, is by no means to be extended to any Pacts or Treaties set on foot about concluding, or intermitting, the War. For since the Law of Nature commands us to maintain Peace as far as may be done with Convenience, and to repair any Breach that may happen in it, we must suppose our selves commanded at the same time, to use those Means without which this End can ne'er be obtain'd. But now Enemies cannot possibly come to an Accommodation, unless there be on both sides an Obligation to the clear Discovery of their Mind, in reference to what is transacted between them; and, consequently unless their Mutual Diffidence be remov'd by a Necessity and Engagement to speak the Truth in all Articles and Conditions of Peace. And when 'tis asserted as Lawful to delude or mischieve an Enemy, by any feign'd Report; this ought on no account to be carried so far as to justify the spreading of false Crimes and Imputations, in order to the impairing his Honour and Credit. The state of Hostility doth indeed license me to conceal my Meaning from my Foe, or by scattering false News to open my way to his Hurt. But he that goes about to charge an Enemy with any grievous Crime, and would have his Accusation believ'd by those who are at peace with him, must lay aside all the Stratagems and Deceits of War, and set up for an Assertor of plain Truths; and therefore with regard to those Persons, who are suppos'd to be his Hearers, he is to play the part of an Historian, or ordinary Relator. Whence, if he voluntarily recede from the Truth and Reality of Things, he cannot avoid the double Guilt of Lying and Slandering. Again, to charge an Enemy falsely to his Face, is a Mark of a low

(a) L. 1. p. 48. Edit. H. Steph.

(b) *Dissertat.* 10. in fin. Vid. *Olearii Itin. Persic.* 1. 4. c. 7.

(c) L. 1. c. 23.

(1) This Story is related in Mr. *Bouhours's* *Entretiens d'Ariste & d'Eugene*, Entret. 34.

*Du Secret.*

(d) *De Garrulitate*, Pag. 507. Tom. 2. Edit. Wech.

(e) Vid. *Senec. Thyest.* v. 320. As

*Davus* observes, there's a great deal of difference, *ex animo omnia, ut fert natura, facias, an de industria?* Whether a Man acts according to real Intention, and the plain Guidance of Nature, or according to the Affectation of Art and Design. *Terent. And.* A. 4. S. 4. add. *Gell.* 1. 12. c. 12.

(2) See *Grot.* B. 3. c. 1. §. 17, 18.

(3) Vid. *Grot.* ubi supra & §. 20.

and impotent Reviler. To return Lies for Lies, is to imitate the Folly and Vanity of the Adversary (a). As for the Notion of *Lipsius*, in his Treatise of Politicks (b), who reckoning up the Persons towards whom we may be allowed to practice Simulation, or Dissimulation, joins Foreigners to Enemies; this ought no farther to be admitted, than as it is for our Advantage to hide our Designs or our Affairs from their Notice. For that we should by feign'd Speeches procure their Harm or Loss, is what Nature it self will not bear; on account of that Nearness of Blood by which all Mankind stand related and allied to each other.

XX. 'Tis a Question of more Difficulty, Whether a Criminal or an Offender arraign'd on any Account, may deny the Fact with which he is charg'd, or endeavour to elude the Accusation by feign'd Arguments, and yet not incur the Guilt of Lying. And here we do not speak of the Divine Tribunal, in respect of which the safest Course is, to fly immediately to humble Confession, and an earnest imploring of Pardon: since it would not be less Impiety than Folly, to use Excuses or Denials before an Omnipotent Judge. And 'twas on this Principle that *Josua* made the Exhortation to *Achan*, which we have in *Josb. VII. v. 19, 20*. For there the Criminal was before detected by the Hand of Heaven. The present Enquiry therefore is confin'd to Human Judgments; which are Principally design'd for these two Ends and Uses: First, that every Man may obtain what is his Right and Due: And Secondly, that fit Punishments may be inflict'd, for the Correction and Restraint, both of those who have dared with wicked Purpose, actually to Violate the Rights of others; and of those too, who by Reason of their cold Affection towards Justice, would have proceeded to the same Commissions, did they not dread the Suffering those Evils, which they have seen fall so heavily on other Offenders. Now, to decline the Severity of this Process, some think it by no means allowable, to make use of False Speeches. First, because the Judge hath an especial Right to understand the Truth. Wherefore neither the Sanctity of the Magistrate, who presides in the Name of God, nor the Necessity which the Subject lies under to Obedience, will give the least Place or Countenance to Contumacy or Circumvention. Besides, they say this Permission appears rather Dangerous, than Needful or Beneficial; inasmuch as conceal'd Crimes do the more Mischief. Especially if what is deliver'd in Excuse, be not only false in Fact, but in Theory; every such Untruth being of ill Consequence, not only consider'd by it self, but likewise in regard that one Error gives Occasion and Rise to an infinite Train

of others. Yet the contrary Opinion is by many preferr'd; who say, we ought to distinguish in every Crime, between the Damage done, and the base Guilt or Commission; to the former of which, Restitution properly answers, and to the latter Punishment. By the Law of Nature every Man ought to make Restitution for Damage occasion'd by his Fault; and at the same time the suffering Party ought, upon his Sorrow and Reparation, to admit him to Pardon. Therefore every Guilty Person is, by an Obligation strictly so call'd, bound to be always ready to repair any Damage he hath caus'd.

But no Man is tied to offer up himself freely to Punishment, and to be an Informer against himself. So that if the Fact be not known, and an open Restitution would be a Confession of the Guilt, in this Case the Restitution is to be made in some Indirect and Secret manner. All Punishment must be inflict'd upon Men against their Wills; otherwise it could never obtain its due End, which is to deter the present Offender, and all other Persons from Sin. But whatever we lay under an Obligation to perform, is to be undertaken by our own free and voluntary Motion. Since then no Person is properly obliged to invite and call down Punishment on his own Head, (c) but must, indeed, as he is a Man, Naturally abhor it in the highest degree; especially if it tend to Death, or some other grievous Evil; there appears no reason, why he may not decline it any way possible, provided he do not hereby injure a Third Party (d). Nor can it much conduce to the Interest of a Commonwealth, that after Reparation hath been made for the Damage, any such Fact, as we now speak of should be punish'd; that is, a Fact not open and notorious, and which consequently might be disguis'd or excus'd by some Colour or Plea. Therefore, as none but a Fool will deny manifest Faults; so from what hath been here alledg'd, It seems allowable for a Man to wipe off an Imputation by a False Defence. Though for a Prisoner to urge False Opinions, can seldom turn to his advantage, the Court being suppos'd well skill'd in Right and Equity. A Judge indeed hath Power and Liberty to get out the Truth by any possible Means, in Case the Fact be of such consequence, that the Safety of the Publick absolutely requires it should be punish'd. And therefore he cannot be tax'd with Lying, if to bring the Party to a Confession, he make use of some Stratagem of Fiction: As suppose, by pretending that he hath receiv'd full information some other way, or by threatening that he will proceed to such or such Severities, if the Person accus'd persist in his Obstinacy, and the like (e). But it cannot hence presently be concluded, that the Criminal himself is bound to own the

(a) Add. Mr. *Pascal's*, Epist. 15. cum Annotat. (b) L. 4. c. 14. n. 31. (c) Vid. D. I. 48. tit. 21. de bonis eorum qui ante sentent. &c. (d) Yet compare, l. 13. D. de custodia. & exhibitione reorum. (e) Yet *Grotius*, on Deut. ron. XIII. 8. observes that the Jews were allow'd to use Artifice in the discovery of Criminals, only when the party was accus'd of enticing others to Idolatry.

Charge: Because neither doth every Power which denotes the bare exercise of some Act, infer an *Obligation* in the Object towards which it is directed: And besides, there are other ways for the Judge to penetrate into the Business, as by Arguments and Witnesses, which Witnesses, when examin'd about the Crimes of others, are oblig'd, though unsworn, to declare the Truth, in obedience to the Command of Authority. Farther, Self-preservation is a thing which challengeth so much Favour and Allowance, that 'tis reckon'd odious to punish the most Notorious Offenders, without giving them a Hearing. On which account; no Person is blamed for casting any Veil or Colour over his Fault (a). The Divine Tribunal and the Human are not in all respects alike; nor doth a Mortal Judge preside with such Majesty and Authority as Almighty God. And if a Prisoner be not bound to make a voluntary Confession, his Denial cannot in the least impair that Obedience, which he owes to the Civil Power. 'Tis true, a Crime which hath been resolutely and stubbornly disown'd, commonly meets with the severer Punishment; because free Confession is generally a Sign of Penitence, which much lessens the Malignity of the Offender: Yet whether it be more advantageous cunningly to deny a Fact, or to embrace the Ingenuity of an Open Acknowledgment, is a Point which belongs to another kind of Enquiry, not to that which we are now engag'd in, and which confines it self to Matters of strict Duty, what a Man is bound to do, and what not. Which of these two Opinions ought to be chosen rather than the other, any Man will apprehend, who hath Judgment enough to weigh the Arguments offer'd on both sides. 'Tis very remarkable, that which *Haytho* reports in his History of the *Tartars*, c. 48. *That although in other respects they are most notorious Lyars, yet in Two Things they strictly observe the Truth: First, That no Man among them arrogates to himself the glory of an Exploit which he really hath not perform'd: And Secondly, That whoever hath committed a Crime, though such as he knows will cost him his Life, when examin'd by his Lord, never conceals the Matter.* And amongst the *Japonese*, to be discover'd in a Lye before the Judge, is a Capital Offence.

XXI. But 'twill be ask'd, What liberty may the Council, or the Advocate fairly take in this Case? Our Opinion is, that we ought here to distinguish between *Civil Cases* and *Criminal*. In the former it doth not appear that the Advocate can with a safe Conscience hinder the injur'd party from obtaining his Right, as soon as possibly he may. And therefore in such Controversies, we condemn as unlawful, not only false Allegations, and feigned Reasons, but likewise all dilatory Ex-

ceptions and Demurs; inasmuch as all these are a Let and Hindrance to the one Party from paying what he owes; and to the other from receiving what is due to him (b): But in Criminal Cases, where the Dispute regards only the Punishment, we judge it ought farther to be consider'd, whether the *Council* be assign'd by the Publick Authority, or by the particular Appointment of the Prisoner. If by the former, it doth not seem allowable for them to make use of feign'd Arguments, and false Colours; since the Design of the Court in deputing them, was only, that they might wipe off any Calumny thrown upon the Prisoner, and take care that he suffer no Injustice. Which End is sufficiently answer'd by a bare refutation of the Proofs offer'd by the Accuser. But he whom the Prisoner particularly chuseth and retains to plead in his behalf, since he only acts as his Client's Interpreter, may, in our Judgment, lawfully use the same Method of Defence, which the Prisoner might have used, had he answer'd for himself. *He is under a very great Mistake, says Tully (c), that fancies he hath got our real Opinion and Authority for all that he meets with in our Judiciary Orations. Whatever we deliver'd on those Subjects is to be ascrib'd to the Causes, and to the Times, not to the Man, or to the Pleader.* And in his Second Book of *Offices*, he maintains, sometimes to defend a guilty Person, is not contrary to any Duty of Religion. Nor is Justice in any great danger of suffering by this Permission: For, since the Judge is supposed fully to understand the Law, the Advocate by producing false Laws, or false Authorities, is not likely to prevail to any purpose: And he is never credited upon his bare Assertion, but oblig'd to produce sufficient proof. And therefore, if a guilty Person, do by this means sometimes escape unpunished, the Fault is not to be charged on the Advocate, or on the Prisoner, but on the Judge, who had not the Wisdom to distinguish between Right and Wrong: Yet *Plato (d)* would not grant even this degree of Indulgence in his Commonwealth. And the Ancient *Egyptians* held it for a certain Maxim, that the *Harangues* of the Lawyers very much darkned and perplex'd the Law (e). Especially since as *Euripides (f)* observes, *Truth always speaks plain*; and therefore doth not stand in need of the Windings and Turnings of Interpreters: Whereas, *Unjust Speeches being always sick and weak in themselves, require strong and subtle Medicines for their support.* 'Tis a saying of *Pindar*, *Three Words are enough to set off a Good Cause.* And *Isocrates* amongst his other Rules to *Demonicus*, adviseth him, *Never to undertake in Court the Defence of a Wicked Man: For, says he, People will think you are inclined to those Practices your self, which you defend in others.*

(a) Vid. l. 48. tit. 17. *Princ. D. de requir. vel absent. demand. & Gratii Annotat. in Flor. Sparsonib.* (b) Comp. l. 9. f. ult. *D. ad. L. Cornel. de falsis.* (c) *Pro Cluentio*, c. 50. Vid. *Quæst. Hieronym. d. Mr. Le Clerk, Quæst. 8. f. 14.* (d) *De LL. l. 11. sub. fin.* (e) *Diodor. Sicul. l. 1. c. 6.* (f) *Phaniss.*

It is hence evident how far we may admit of *Quintilian's* Assertion; *A Wise Man*, says he, (a) *is on some occasions allow'd the privilege of Lying: and an Orator, if he cannot otherwise bring the Judge to Reason and Equity, must necessarily apply himself to the moving his Affections.* And again, (b) *That which at the first Proposal appears so harsh and strange, may however be maintain'd upon reasonable Grounds; namely, that a Good Man in defending a Cause, may sometimes go about to perplex the Truth, and deceive the Judge.* But the Instances which he offers requires a more strict Examination. First, he affirms that *A Person arraign'd for plotting against a Tyrant, may be defended by false Allegations.* And this is built upon the *Grecian Hypothesis*, which makes the killing of Tyrants lawful. Otherwise, to defend by feign'd Arguments, a Person guilty of Treason against the Prince to whom we have our selves sworn Allegiance, is therefore unlawful, because every Subject is bound to guard and preserve his Sovereign to his utmost Ability. Whereas the desire or endeavour of sheltering a Conspirator from Just Punishment, would be utterly inconsistent with that Obligation. He proceeds to urge, *What if a Judge should be about to condemn a Man for some Good Actions, unless we can prove the Actions not to have been perform'd, shall not the Orator who appears in his behalf be allow'd the use of such means, to preserve this Innocent, and what is more, this worthy and commendable, Member of the State?* But indeed such a Case as this can hardly be suppos'd. For nothing ought to be honour'd with the Name of a Good Action, but what is agreeable to the Laws of the Commonwealth. And it doth not appear how any Man should be brought into Judgment for such a Performance. Let us Imagine therefore, that a Person by some Good and Noble piece of Service hath

incurr'd the Envy of Wicked Men, and that these Wicked Men have afterwards got possession of the Seat of Justice. Here if the Fact were openly known, and an Accusation brought against him for it, 'twould signifie nothing to disown it. As 'twould have been idle for *Cicero*, had he been arraign'd for putting to death the Associates of *Catiline*, to deny the Charge. But if the Fact may still be dissembled with some colour and probability, there's no reason why an Innocent Prisoner may not be defended by feign'd Arguments before a Wicked Judge. As for the other Instance of *Quintilian*, *When a Man is to dissuade some Undertaking, just indeed Naturally, and in it self, but in the present juncture of Affairs disadvantageous to the State:* there's no need he should endeavour by false Reasons to prove those Just Things to be Unjust; but 'tis sufficient for him to shew, that what may justly be done, is not always necessary to be done; and that the Times now require us to chuse what is Useful and Profitable, rather than what, in Strictness may seem more Commendable and Right: and all this may be urged without receding from the Truth. Another Case propos'd by *Quintilian* is, "When an Orator hath good Hopes of the Criminal's future Reformation. And this indeed may prevail with him to be the more willing to lend the Prisoner all his Parts and Cunning in order to his Deliverance, because he is assur'd that 'twill not be to the Prejudice of the Publick, that such a Person should go unpunish'd. But to rescue a good Commander from suffering for a manifest Crime, when his Life is Necessary for the Honour and Success of the State, the best Expedient is, not to have Recourse to Falshood and Fiction, but rather to take that plain and open Method which *Tully* tells us (c) was us'd by *Antoninus* the Orator, in his Defence of *M. Aquilius*."

(a) *Institut.* l. 11. c. 17.

(b) *Institut.* l. 12. c. 1.

(c) *In Verrem.* l. 5. c. 1. circa fin.

## CHAP. II.

### *Of an OATH.*

WE proceed to examine and state the Nature of an *Oath*, which is judg'd to add great Strength and Confirmation to our Discourse, and to all our Acts which have any Dependence upon Speech: which though we might have treated of very properly and conveniently hereafter, when we come to explain the Enforcements of Pacts and Covenants; yet we chose to assign it this particular place rather than any other, because the Custom of Swearing is us'd for the Establishment and Security, not only of Covenants, but of bare Affir-

tions. (To which purpose it may, not impertinently, be observ'd, that amongst the *Jews* no Oaths nor Vows were esteem'd Obligatory, but such as were openly deliver'd in words (a).) An *Oath* the very *Heathens* look'd on as a thing of so great Force, and of so sacred Authority, that they believ'd the Sin of Perjury to be pursued with the severest Vengeance; such as extended it self to the Posterity of the Offender, and such as might be incurr'd by the bare Thought and Inclination without the Act (b). Thus *Diodorus Siculus* (c) reports of the *Egypt-*

(a) Vid. *Grot.* in *Levitic.* V. 4. *Numer.* XXX. 3. *Deut.* XXIII. 23. (b) Vid. *Grot.* l. 2. c. 13, 5, 1. *Philo Jud.* de *Sacrificiis Abel. & Cain.* p. 113. E. Ed. *Genev.* Our Assertion derives its Force from the Oath, the Oath from God.

(c) L. 1. c. 77. p. 69. A. Ed. *Rhodom.*

tians, That by their Laws Persons who had forsworn themselves, were adjudg'd to Capital Punishment; as guilty of the two greatest Crimes, in violating that Piety which they ow'd to God; and in destroying Faith from amongst Men, the strongest Pillar of Human Society.

II. An Oath then, is a Religious Affeuration, by which we either renounce the Mercy, or imprecate the Vengeance of Heaven, if we speak not the Truth. That this is the Sense and Purport of Oaths, appears from those Forms of words in which they are commonly express'd, *As so help me God; God be my Witness; God be my Avenger*, and other Equivalent Terms, which amount to much the same. For when a Superior, who hath a Right of Punishing is appeal'd to as a Witness, his Vengeance is likewise invoked in Case of Breach of Faith (a); and God who knows all Things, being ever a Witness, is ever an Avenger. Nor can a more grievous Punishment light upon Mankind, than their losing all Title to the Protection and Assistance of Providence. Yet when we say that God is invoc'd as a Witness in Swearing, it ought on no account to be hence infer'd, that an Oath should be look'd on as the Testimony of God; or as if God himself gave Attestation to the Veracity of the Swearer; which seems to be the Opinion of Bp. Sanderfon (b). But when an Omniscient and Omnipotent Being is call'd to be both a Witness, or Guarantee, and likewise an Avenger, we therefore presume upon the Truth of what is deliver'd, because we cannot conceive any Person to be arriv'd at such a pitch of Impiety, as lightly to stir up the Divine Vengeance against himself. And hence Perjury appears to be a most Monstrous Sin, inasmuch as by it the forsworn Wretch shews, that he at the same time contemns the Divine, and yet is afraid of Human Punishment; that he is a daring Villain towards God, and a sneaking Coward towards Men (c). The Scope, and Meaning of Oaths is likewise suggested by the End for which they have been introduc'd: And that is, that Persons might be the more

firmly engag'd to declare the Truth, or to perform their Promises, by the just Awe and Dread of the Divinity, infinite in Knowledge, and infinite in Power; whose Wrath they thus invite down upon their own Heads, if they knowingly deceive: whereas perhaps there would not have been Force and Security enough in the Fear of Men, whose Strength they might fancy themselves able to baffle or to decline; or whose Discovery they might hope to escape (d). For in Cases where the Party with whom we transact, if he deceive us after his bare Word or Promise, cannot possibly lie conceal'd, nor avoid Human Punishment, it seems superfluous to put him to his Oath. 'Tis the Advice of Demosthenes (e), *Those who escape your Justice, leave to the Vengeance of the Gods; but those on whom you can lay hands, never consign over to Providence, without punishing them your selves*. And for this Reason we should judge it to be an Absurdity in the Civil-Law (f), when, on the contrary, it allows a Woman to swear that she is not with Child. This Caution will appear to have the more weight, if we consider that the too frequent use of Oaths, doth in many Persons much impair the Reverence due to them. It was an Excellent Lesson which Pythagoras gave his Scholars; *Very rarely and very hardly to be brought to an Oath, but if they had once sworn, most inviolably to observe it*. Nor is Isocrates's Precept on the same Subject to be despis'd; *Never swear, saith he, on the account of Money, though you could do it with the greatest Safety and Assurance; least you draw upon your self a double Imputation of Perjury with some, and of Avarice with others* (g).

But as 'tis just and Right to pay the most Religious Reverence to Oaths, so is it vain Presumption to expect or desire, that their Truth or Falshood should be evinc'd by an immediate Miracle; as if God were oblig'd to exercise his Judicial Office, at the Pleasure and Humour of Men. And yet this was a Superstition which very much obtain'd of old, not only amongst the Heathens, but in the

(a) Plutarch. Quæst. Roman. 44. observes, That every Oath terminates in the Curse of Perjury; or, that is the Ground and Bottom upon which all Swearing depends. In the same place enquiring into the Reasons why the *Flamen Dialis* amongst the Romans was not allow'd to swear, he delivers himself to this Purpose. *Was it because an Oath is a kind of Torture, or the only Force that may be applied to the Souls of free Subjects: Whereas the Priest ought to be exempt from all Violence, as well in Mind as in Body. Or because every Oath terminates in the Curse of Perjury: Whereas all Cursing is Ominous and Unlucky; which is the Reason that the Priests are forbidden by the Laws, to use Imprecations towards others? And indeed the Conduct of the Athenian Priest was commended, who being order'd by the People to devote Alcibiades with the usual Ceremonies, refus'd, alledging, That his Business was to preside in good Wishes, not in Bad. Or, was it because the Guilt of Perjury might turn to be the Danger of the Publick, if an impious forsworn Wretch were to offer Vows and Prayers in Behalf of the State, and to perform the Offices of Religious Worship?*

(b) De Obligat. Jurament. Prælect. 1. f. 6. (c) Vid. Charron. de la Sagesse. l. 3. c. 8. n. 7. (d) Lucian Phalar. l. 1. p. 731. Ed. Amst. *It may perhaps be an easy matter to deceive Men, but 'tis Impossible to lie conceal'd from God*, Plin. l. 4. Epist. 25. n. 4. Ed. Cellar. *Men of wicked Inclinations take Confidence and Encouragement from that Reflection, quis sciet? Who will ever know what we do?* (e) De falsa legat. p. 209. Ed. Genev. (f) Vid. l. 3. f. 3. D. de jurejur.

(g) Hobbes de Cive, c. 2. f. 23. Add. Dæmonic. Add. Valer. Max. l. 2. c. 10. f. 2. ext. *They are the truest Men, qui colendo fidem jurant, who have no other Oath than to keep their Word without Swearing.* Vid. Curt. l. 7. c. 8. 2. 29. Ed. Cellar.

In Sophocles, Oedip. Colon, Oedipus thus bespeaks Theseus, p. 293.

I'll not require an Oath as from the Wicked.

Theseus replies,

Oaths could not force more than my Word shall pay.

Epist. Enchir. c. 44. & Simplic. in loc. Vid. Not. Grot. in Matth. V. 34.

Ignorant

Ignorant and Barbarous Ages amongst *Christians* themselves. *Sophocles* (a) (1) plainly speaks of the *Fiery Ordeal*;

ἡμεν δ' ἔτοιμοι καὶ μύθους αἶψαν ἔχειν, &c.

Prepar'd we stood to lift the Burning Steel,  
To tread the Flames, and by all Heaven to swear.

'Tis Remarkable what *Phil. Baldeus* in his Treatise of the Idolatry of the *Indians* (b), reports of the *Malabars*, That amongst them, the Person who is to take a Purgative Oath, hath his Three first Fingers dipt in Melting Butter, and then wrapt up in Leaves, which three Days after are uncover'd to see the Effect. Others are order'd to swim over a River between *Colchis* and *Cranganor*, full of Crocodiles: Others to reach an Apple out of a Pot stuf't with Serpents, and by the Success of these Attempts a Judgment is made of their Innocence (c).

And, indeed, if we would confess the Truth, Oaths either infer or presuppose the Diffidence, Unfaithfulness, Ignorance and Impotency of Mankind. For what need would there be of such Engagements, if we could securely rely on the Faith and Constancy of others; or, if there were no Examples extant of Perfidiousness; or, if we had Strength enough to compel Persons to make good what they owe? Lastly, what Occasion would the Judge have to enquire the Truth of Sworn Witnesses, unless he were ignorant of it himself? And from this Principle I should draw the Reason of that Speech of the Emperor *Frederick* in the *Poet* (d),

————— *Nado jus & reverentia verbo  
Regis inesse solet, quovis juramine major.*

The Sacred Awe that guards a Prince's Word,  
Hath stronger Tyes than strictest Oaths afford.

Not only because to have Faith and Honesty kept up inviolably in the World, is in the highest manner the Interest of Princes; but likewise because 'tis unbecoming their Majesty, to seem liable to the least suspicion of Perfidiousness, Falshood, or Deceit. Thus we are told, that amongst the old *Peruvians*, Oaths were not at all in use; but the Persons who were to give their Testimony, barely promised they would confess the Truth to the *Ynca* (e).

III. Since GOD alone is of Infinite Knowledge, and of Infinite Power, the Absurdity is

manifest of Swearing by any thing which we do not look upon as Divine; in such a Sense as to invoke it for a Witness of our Speech, and for an Avenger of our Perjury. Hence as it was usual for the *Heathens* to swear by the Stars, because they judg'd them to be so many Deities; so for a *Christian* to imitate them in that Practice; would be a mixture of Impiety and Folly. As for those Forms attributed to some of the Ancients, as that of *Socrates*, by a *Dog*, by a *Goose*, (whatever *Porphyry* (f) pretends to the contrary,) and by the *Plane-tree*, that of *Zeno*, by a *Caper*; and that of others, by *Crambe* (g), we are to esteem them merely Jocular. They swore by these, as *Apollonius* (h), not as by Gods, but to avoid Swearing by the Gods; when by the practice of the generality of Men, it was grown into an Ill Custom, to apply Oaths as the Supplemental Ornament of Speech.

But that which was most in use by the Ancients, was to swear by those Things which each Person held most dear, or set uppermost in his Veneration and Esteem. So *Ascanius* in *Virgil*,

*Per caput hoc juro, per quod pater ante solebat;*  
Æn. IX. v. 300.  
By this my Head; my Father's Oath before.

So we every where read of Persons swearing by their own Life and Soul, and by the Life and Soul of those Friends who stood first in their Affections. And the Lovers thought themselves very Religious in swearing by the *Bright Eyes*, the *Sweet Lips*, the *Golden Tresses* of their Mistress. (i) All which Speeches are by no means to be interpreted in this Sense; either that those things were invoked as Witnesses and Avengers of Falshood, as *Apuleius* (k) amongst others believed; nor that they were cited to give Testimony under the Notion of belonging to God, and expressing somewhat of the Divinity, namely his Truth, Goodness and Power, and which the Person thus swearing hereby acknowledgeth, that he enjoys by God's Mercy; and that he is unwilling to lose by God's Justice; as if he should say, *I swear by my Life*; that is, *by God to whom I owe my Life*; which is the Opinion of many, and particularly of *Bishop Sanderson* (l). But they only thus invoc'd GOD himself, desiring that if they swore falsely, he would be pleas'd to punish their Crime in those things especially, for which they were most nearly and tenderly

(a) *Antigon*. V. 269. (1) See *Dr. Potter's Grecian Antiq.* B. 2. c. 6. (b) See the Forms of Exorcisms in *Marculph. Cap. ult.* (c) See likewise *Bern. Varen. Descrip. Japon.* c. 18. & *Jodoc. Schouten.* in *Descript. Regn. Siam.* where he gives an account of their Judicial Proceedings. *Euseb.* in *Stob. Serm.* 27. *It's the Advice of many Men, that we should strictly make good what we swear: But I think it no less a Duty of Religion to consider well before we swear.* Add. *Grot.* in *Matth.* c. 5. v. 34. (d) *Gunther Ligurin.* l. 3. v. 510, &c. (e) *De la Vega,* *Comment Reg.* l. 2. c. 3. (f) *L. 3. ἐπὶ ἀποχῆς.* (g) *Vid. Athenæum.* *Deipnosoph.* l. 9. c. 2. (h) In *Philostrat.* l. 6. c. 9. (i) *Ovid. Amor.* l. 3. El. 3. 13, 14.

*Perque suos illam nuper jurasse recordor,  
Perque meos oculos; & doluere mei.*

On her own Eyes and mine a Curse she lay'd;  
And mine have smarted for the perjurd Maid.

(k) *De Deo Socrat.* (l) *De Jurament. Obligat. Prælect.* l. 1. Sect. 4.

concern'd (a). Thus it was the ordinary Custom of the *Athenians*, in their Solemn Oaths to devote themselves and their Family to Destruction, if they deceiv'd; and on the contrary to beg all happiness from the Gods on themselves and Friends, if they swore truly: as is evident from frequent Instances in *Demosthenes* (b). And they firmly believ'd, that the violation of such Engagements would draw down the Anger of Heaven upon the Heads of others, as well as upon their own. *Pliny* (c) tells a Story of one *Regulus*, who made a gainful Trade of Perjury, in relation to Wills and Testaments; that, giving a Visit to a sick Lady, (*Verania*, Wife to the Famous *Piso*.) and persuading her that by his Astrological Observations he foresaw she should recover: The Lady being easily credulous under so great an apprehension of danger, call'd for her Will, and set down *Regulus* for her Heir; but soon after falling into Extremities, she dy'd with this Exclamation against her Deceiver; O wicked and perfidious! O worse than perjurd Villain, who forswore himself by the life and safety of his own Son! The Reflection which *Pliny* makes on the thing, is this; *Regulus useth this Stratagem not more frequently than wickedly; whilst he imprecates the wrath of the Gods, whom he every day deceives, upon the Head of the unfortunate Youth* (d).

And hence too we may gather the Meaning and Design of those Oaths, which were heretofore made by the *Life*, the *Genius*, the *Safety* of Princes; which we are told are still customary amongst the *Persians*, and are esteemed more strict and sacred, than those in which the Name of God is immediately invoked. For they did this, not as thinking there was any Divinity in their Princes, whilst alive, nor as imprecating their Displeasure if they spoke false; but because many of them either in good earnest, or at least in Flattery, intended hereby to shew, that they prefer'd their Prince's safety to their own; and therefore look'd upon it as a more horrid Perjury to devolve the Wrath of God upon *Him*, than upon *Themselves*. So that the Sense of those *Protestations* was properly this; *So may my Prince be happy and safe, as I perform what I now promise; that is, unless I fulfil my Engagement, I desire the Divine Judgments may light upon my Prince's Head.* *St. Augustin* (e) speaks very pertinently to this purpose. *What else, saith he, is that which we call (Jurare) to swear, but (Jus reddere) to pay the Due or Right; to God, if we swear by God; to our Children, if we swear*

*by them? And what Right do we owe to our own Safety, to our Children, or to our God, but the Right of love and of truth, not of Treachery and Falshood? When any Man says, by my Safety, he pawns and engageth his safety to Providence, for the truth of what he affirms; when he says, by my Children, he consigns over his Children as so many pledges to God; desiring, that whatever comes out of his own Mouth may fall upon their Head; Truth, if he declares Truth; Falshood, if he speaks falsely. Whatsoever therefore a Person names in his Oath, whether his Children, his own Life or Safety, or any thing else, he devotes and binds it over to Almighty God.* And hence, altho' *Philo the Jew*, is justly to be prais'd for condemning rash and profane Swearing, yet we can by no means approve of his Doctrine, when he delivers himself so loosely, as in the following Terms: (f) *If, says he, the exigency of Affairs, necessarily requires an Oath, it is more becoming to swear by the Health or the prosperous age of our Father or Mother, if alive; or by their Happy Memory, if they are dead. For their Act of producing their Children into life from nothing, makes them the Images and Representatives of the Divine Nature. They too deserve Commendation, who as often as they are urged to swear, by delaying and hesitating, strike an awe, not only into the Spectators, but into those very Persons who require the Oath at their hands. For 'tis a custom with some, when they have pronounced the first Words of the Form, So help me, to leave off abruptly, adding what they please besides in their Mind and Thoughts. For the Sentence may be fill'd up by subjoining, not only the Highest, or the Creator of all things, but the Earth, the Sun, the Heavens, or the World. Nor do I see any Excuse that can be brought to justify that Oath of the Christian Soldiers, recited by *Vegetius* (g), which carries in it too gross an excess of Reverence towards the Emperors. They swear, says he, by God, and by Christ, and by the Holy Spirit, and by the Emperor's Majesty, which next to God is to be loved, and to be worship'd by Mankind. For when our Prince hath been once invested with the Title of Augustus, we are to pay to him as to a present and Mortal God, Faithful Devotion, and most watchful Service. For though we should grant the following Clause, A Civil or a Military Person then serves God, when he faithfully loves him who reigns by God's Appointment and Authority; yet this is by no means a Reason why they should swear by the Majesty of the Emperors in the same manner as by the Name of God.*

(a) *Ovid*, *Trist.* l. 5. *El.* 4. 45, 46.

*Per caput ipse suum solitus jurare, tuumque Quod scio, non illi vilius esse, suo.*

(b) *Add. Antiphon.* *Orat.* 15. (c) *L.* 2. *Epist.* 20. n. 5, 6. (d) *Lysias* *Orat. advers. Diagiton.* *I am ready with a well assured Mind, whenever you please to require it, to swear by the Lives of these my Children, and of those which I have since had by a Second Bed. And I am not yet arriv'd at so desperate a degree of misery, nor am so unreasonably covetous of Money, as that I should be willing to devote my Family to a Curse, only that I may leave them a Maintenance; or by an Unnatural Wickedness to rob my Father of his Estate.*

And here likewise it may be remarked by the by, that the *Banjans* in *India*, who set the highest Value and Respect on their Cows, esteem it a most Sacred Oath to hold a Knife near the Cow, and say, *If what I affirm be false, or, if I do not perform my Bargain, may the Cow be struck through with this Knife,* *Pietr. della Valle* *Itin.* Part 2. *Epist.* 1

(e) *Citat a Grotius* in *Flor. Sparf.* ad l. 23. *D. de jurejur.* (f) *De special. legib.* (g) *De re militari* l. 11. c. 5.

Nor is it to be supposed that Common Soldiers should be capable of so much Subtilty, as to distinguish the Word (*by*) in the same Form into two different Senses, one as apply'd to God, another as spoken of the Emperor. This is certain from *Eusebius's* Ecclesiastical History, (a) that to swear by *the Fortune of the Emperor*, was accounted one of the Marks of abjuring Christianity; which therefore St. *Poly-carp* resolutely refus'd to the last. And so too it may be justly question'd whether we ought to approve of that Oath prescribed by *Charles Gonzaga*, to his New Order of Knights, in the Form following; *I swear by the Immortal God, and by the Ancient Nobility which I profess* (b). Hence likewise it appears, that the Ancients had good reason for punishing with the utmost severity Persons who had forsworn themselves by their Princes Life or Safety; inasmuch as they were thought hereby to make him obnoxious to the Divine Punishment, whose success and preservation is yet so closely connected to the publick security (c). Thus we find the *Scythians* in *Herodotus* (d), as often as their King happen'd to be sick, making strict enquiry whether any of the Subjects had sworn falsely by the Royal Throne; and if such a Person was discover'd, he suffer'd Death for his Perjury. In *Zozimus* (e) the *Roman* Magistrates declar'd they could not accept of the Proposals of *Alaric*, though fair and just, because they had sworn by the Life of their Prince, that they would never consent to a Peace with the Invader. *If their Oath had been directed to God, they say, they might possibly have wav'd it in this necessity, relying on the Divine Mercy for the pardon of so Impious a Crime; but since they had bound themselves by the Life of the Emperor, they thought it absolutely unlawful for them to break through so solemn an Engagement.* In the *Capitulary of Charles the Great*, (f) we find a Prohibition against swearing by the Life of the King, or of his Sons. As to the *Civil-Law*, *Ulpian* (g) doth not deny it to be an Oath, when a Man swears by his own safety; but says, it is not valid, unless it were expressly propos'd to him in those particular terms (h). Because Oaths being taken for the Benefit and Security of him that requires them; therefore Custom makes it necessary they should be form'd in the Words which he proposeth, so that they may fully bear his Meaning and answer his Design (i). Whereas if the party who is to swear might chuse his own Words, he would have an opportunity by invidious or equivocal Expressions, to evade the

force of his Obligation. Another Reason for *Ulpian's* Assertion may be, because, such Speeches and Protestations continually losing somewhat of their Reverence by daily use, no Man can be bound to let the Trite Form of another party (with which he often lards his Discourse when he doth not think on't,) pass for a Serious and Solemn Oath. And Mr. *Hobbes* (k) is in the right, when he censures these Customary Expressions, as not properly Oaths, but profane abuses of the Name of God, arising from an Ill Habit of being too positive and vehement in Talk.

From what hath been offer'd it is clear, that Execrations, although strictly taken; as when a Man barely lays Curses or imprecates Mischief on himself or others, they are not Oaths; yet are on all accounts to be reckon'd part of an Oath, as they respect any Assertion or Promise, which they are added to bind (l). And this is to be extended likewise to those Prayers or Wishes by which a Man makes the performance of his Oath the Condition of his obtaining such or such a Blessing. As that of the Boy in *Ælian*, (m) *So may I crack Timostias's Skull.* Thus we find *Julian* to encourage his Army, constantly swearing (as the Historian speaks,) (n) not by the *Graces*, but by the Greatness of his Commenc'd Exploits; *So may I bring the Persians under the Yoke; so may I relieve the weak condition of the Roman World.* As *Trajan* is reported sometimes to have confirm'd his Speeches, by adding, *So may I see Dacia reduc'd into the Form of a Province; So may I lay Bridges over the Danube and Euphrates* (o). 'Tis remarkable in the *Patanes*, a People of *Indostan*, that they are so extravagantly proud, as to use for an asseveration, *May I never come to be a King in Dehli, if I don't make good my Promise.* And hence too it appears what Interpretation we ought to put on those Oaths which we meet with in Scripture, when even good and pious Men swear by some Created Thing (p). That amongst the *Jews* of the latter Ages, nothing was more common than Oaths, *by the Head, by Heaven, by the Temple, by the Gold of the Temple, by the Altar, by the Gift upon the Altar,* is evident from St. *Matth.* 23. v. 16. &c. Where our Saviour reproves them severely for their profane abuses, and impertinent cavils in this matter. The *ἄνθρωπος οὐρανῶν* in *Homer* (q), *Didymus* thus expounds, *We are to know, says he, that in swearing by the Sceptre, they swear by God himself, the great Governor and Controller of Kingdoms* (r). Yet *Ovid* hath given us another sort of an Explication:

(a) L. 4. c. 14. (b) *Gramond. Hist. Gall.* l. 5. (c) *Vid. Grot. in Spars. Flor. ad leg. 23. D. de jurejur.* (d) *Melpomen.* p. 154. init. Ed. H. Steph. (e) L. 5. in fine. (f) B. III. c. 42. (g) *In lib. 12. tit. 2. & l. 33. D. d. t.* (h) *Add. l. 3. f. 4. l. 4. l. 5. princ. d. t.* (i) *Comp. Liv. l. 22. c. 38. ab init.* (k) *Leviath. c. 14.* (l) *Comp. Ziegler ad Grot. l. 2. c. 13. f. 10.* (m) *V. H. l. 12. c. 9.* (n) *Amnian. Marcellin. l. 24. c. 5.* (o) *Add. Grot. ad Genes. Chap. XXIV. v. 2.* (p) *Vid. Genes. XLII. 15. 2 Sam. XIV. 19. 1 Sam. XXV. 26. 1 Kings II. 23. 2 Kings II. 4. 6.* (q) *Iliad a. V. 234.* (r) This place of *Homer* is thus imitated by *Valerius Flaccus*,  
*Hanc ego magnanimi spoliū Didimaonis, hastam*  
*Quæ neque jam frondes, virides nec proferet umbras,*  
*Ut semel est excussa jugis & matre perempta,*  
*Pada ministeria & duras obit horrida pugnas;*  
*Testor, & hoc omni ductor tibi nomine firmo. l. 3.*  
*Comp. Virgil. Æn. XII. V. 206.*

This Spear, the Spoils from Stout *Didimaon* won  
 Which ne'er shall bud, or form a Shady Crown,  
 Since from its dying Mother rudely torn  
 On Bloody Services it hath been born,  
 (Faithful in rough Encounters!) here I call  
 To bind my Oath, whilst I engage for all.

*Nam sibi quod nunquam tactam Briseida jurat  
Per sceptrum; sceptrum non putat esse Deos.* (a).

Who by his Sceptre swore *Briseis* free,  
Ne'er took the Wood to be a Deity.

We learn from *Procopius* (b), that the *Per-  
sians*, in the latter Times of that Nation, used  
to swear by *Salt*. And in one of the *Byzantine*  
Historians, we find *Mabomet* the *Turkish* Em-  
peror adjuring by *Bread and Salt*, his Vizier  
*Bajazet* (c).

IV. To proceed: That part of the Form  
in *Oaths* under which God is invoc'd as a  
Witness, or as an Avenger, is to be accom-  
modated to the Religious Perswasion which the  
Swearer entertains of God: It being vain and  
insignificant to compel a Man to swear by a  
God whom he doth not believe, and therefore  
doth not reverence. And no one thinks him-  
self bound to the Divine Majesty in any other  
Words, or under any other Titles, than what  
are agreeable to the Doctrines of his own Re-  
ligion; which in his Judgment, is the only  
true way of Worship. \* And hence likewise  
it is, that he who swears by False Gods, yet  
such as were by him accounted True, stands  
oblig'd; and if he deceives, is really Guilty  
of Perjury. Because whatever his peculiar  
Notions were, he certainly had some sense of  
the Deity before his Eyes; and therefore by  
wilfully forswearing himself, he violated as  
far as he was able, that Awe and Reverence  
which he ow'd to Almighty God (d). Yet  
when a Person requiring an Oath from ano-  
ther, accepts it under a Form agreeable to  
that Worship which the Swearer holds for  
True, and he himself for False, he cannot in  
the least be said, hereby to approve of that  
Worship. Thus a *Christian* when he admits  
of the Oath of a *Jew*, doth on no account  
subscribe to his Opinion, who denies the One  
only True God, the Maker of Heaven and  
Earth, to be the Father of our *Lord Jesus*  
*Christ*. Yet I doubt whether the Example of  
this Case, alledg'd by *Grotius* (e), from *Gen.*  
*c. 31. v. 53.* comes up to the Purpose; For  
*the God of Abraham, and the God of Nabor,*  
*and the God of the Fathers, was the Living and*  
*True God* (f).

V. But farther, it is requisite to the Force  
and Obligation of an Oath, that it be taken  
with deliberate Thought, and real Design.  
And therefore he shall by no Means stand  
bound, who not thinking himself to swear,  
hath happen'd to utter Words which imply

an Oath; or who hath barely recited the  
Form; or who being by Virtue of some Office,  
appointed to give other Persons their Oath,  
tells them how they shall speak after him (g).  
In this Case, *Lucian's* Saying will hold good,  
*We are not to consider his Mouth, but his Heart*  
(h). It was vain therefore in *Cydicpe* to fancy  
her self Religiously oblig'd, by reading the  
Oath which *Acontius* had wrote upon the Apple.  
And so indeed *Ovid* (i) hath taught her to  
argue,

*Quæ jurat, mens est; nil conjuravimus illa.  
Illa fidem dictis addere sola potest.  
Consilium prudensque animi sententia jurat,  
Et nisi judicii vincula nulla valent.  
Si tibi nil dedimus præter sine pectore vocem,  
Verba suis frustra viribus orba tenes.  
Non ego juravi; legi jurantia verba. &c.*

The Mind must swear; with that we never  
[swore;  
Yet that alone can add a binding Power.  
*Oaths* are the Act of Wisdom and of Thought;  
Words give the Thread, but Judgment ties the  
[Knot.  
Since all we said an Empty Sound we prove,  
Sound without Sense hath lost its Force to  
[move.  
We did not *take*, we did but *read* the Form,  
[&c. (i)

But 'twould be most senseless and absurd,  
If a Man designing to swear, or at least pre-  
tending such a Design, should yet refuse to be  
ty'd by what he says; and should urge in Ex-  
cuse, that when the *Oath* was administer'd to  
him, his Intention was barely to recite the  
Formal Words, but not to lay any Obligation  
on his Conscience (2). Not so much (if we  
consider the immediate Reason,) because Ob-  
ligation is the necessary Effect of an *Oath*, and  
inseparable from it; as because otherwise the  
whole use of Oaths, nay and the whole Me-  
thod of engaging each other by mutual Signs  
would be banish'd out of Human Life; if any  
Person might be able by his secret Intention  
to hinder an Action from obtaining such an  
Effect as it was first instituted to produce.  
Therefore, whatever your inward Purpose  
might be, you shall certainly be bound by  
your Oath, when both the Party to whom  
you swore, apprehended this to be your  
Meaning and Design, and you your self when  
you utter'd the Words, evidenc'd by all out-  
ward Tokens, that you were in Earnest, and

(a) *Ovid. de Remed. Amor. v. 783, 784.* Add. *Græc. l. 2. c. 13. f. 11.*

(b) *De Bell. Persic. l. 1. c. 3.*

(c) *Ducas. Hist. Byzant. c. 22.*

(d) *Juvenal. Sat. XV. 37, 38.*

Numina vicinorum  
Odit uterque locus; cum solos credit habendos  
Esse Deos quos ipse colit.

Each calls the other's God a Senseless Stock,  
His own, Divine, though from the self-same Block.

Mr. Tate.

Add. l. 12. t. 2. l. 5. f. 1. *D. de jurejur.* which is not contradicted by *Seçt. 3. d. 1. &c.* or the Decision of *Canon-Law*,  
*Qu. 5. Cauf. 22.* (e) *L. 2. c. 13. f. 12.* (f) *Add. Jus. Can. XVI. Qu. 1. Cauf. 22.* (g) *Add. l. 44. t. 7.*  
*l. 3. f. 2. D. de Oblig. & Action.* (h) *Pro Laps. inter salutand.* (i) *Ep. Heroid. 21. v. 135, &c.* (i) *Antoninus*  
*Liberalis*, (*Metamorph. c. 1. sub init.*) relates such another Story of *Cressylla* a *Cean* Virgin, circumvented by *Hermi-*  
*chares*, a Young Man of *Athens*, with the like Stratagem. (2) See *Grot. B. 2. c. 13. f. 2, 3.*

not in Jest. And 'tis indeed a downright Contradiction, to desire to take an Oath, and yet not to be oblig'd by the Oath; to desire to promise, and not to be bound by your Promise; to desire to utter Words in a serious manner, and yet not to let them bear that Use and that End which hath been assign'd them by the common Agreement of Men. Thus 'twas grossly ridiculous for the *Milanese* to tell *Frederick* the First, *We swore indeed, but we did not promise to keep our Oath* (a). And 'tis much to the same Effect, what *Father Paul* reports in his History of the Council of *Trent* (b); That *during the Vacancy of the Holy See, the Cardinals are wont to draw up a Form consisting of so many Heads, for the Reformation of the Papal Government, which each of them swears he will exactly observe, in case the Election falls on him. Though the Experience of all Ages testifies, that not one of them so stands to the Engagement; inasmuch as immediately after their being chose Popes, they declare, that either they could not be tied by any such Bond; or that their very Investiture with that Dignity quite releases them from the Obligation.* If therefore any Person shall pretend that he took an Oath with such a preposterous Design, the Excuse shall avail nothing towards reversing what he promis'd, but shall pass for meer Trifling. We may illustrate the Case by a like Instance: A Person who hath his Doctor's Degree conferr'd on him in the Schools, is nevertheless a Doctor, though we should suppose that he who pronounc'd the Form of his Promotion, thought all the while of dignifying an Ass. But if a Player upon the Stage invest another with the Habit and Formalities of that Degree, he shall be just as much a Doctor as he was before. *Ipsa statim scena rem fictam esse testatur, as Quintilian* (c) observes on a like Occasion; *The Place shews the Action to have been Insignificant.* Whence we see that 'tis an idle Question, Whether a Person be oblig'd, who deliberately utters the Words of an Oath, yet with an Intention not to swear? For if he barely rehears'd the Words without any farther Purpose, 'tis plain he hath neither sworn nor is oblig'd. But when the Matter hath been perform'd in Earnest; that is, when he who spoke the Words, gave all Proofs of his real Design to swear, and the other Party understood him in that Sense, no doubt but the Oath is properly taken, and the Obligation contracted, whatever secret Drift the Swearer might entertain in his own Mind.

VI. We ought likewise carefully to observe, that Oaths do not of themselves, produce a new and peculiar Obligation (1), but are only applied as an additional Bond to an Obligation in its Nature Valid before. For whenever we swear, we always suppose some Matter, upon Non-performance of which, we thus im-

precate the Vengeance of Heaven. But now this would be to no purpose, unless the Omision of the thing suppos'd, had been before unlawful, and consequently unless we had been before oblig'd. Though indeed it frequently happens, that we comprehend in one Speech both the principal Obligation, and the additional Bond of the Oath; as for Instance, if I say, *So God be my Helper, as I shall pay you an Hundred Pounds.* And yet it doth not follow, that an Oath is unnecessary or superfluous, because it is thus added to an Obligation before firm and good in it self. For although all Men, except Downright Atheists, believe, that God will punish the Violation of Promises, not confirm'd by Oath; yet they believe at the same time, and with good Reason, that those Wretches will feel a more severe Vengeance, who have in express Terms call'd down the Wrath of God upon themselves, and so far as in them lies have shut themselves out from all Hopes of Mercy; whilst they engag'd in Wickedness with so full a Purpose and Design, as to shew, that they valued not the Displeasure of him who is able to bestow the greatest Goods, and to inflict the greatest Evils. Whence we may conclude, that those Acts which were before attended with some inward Flaw hindring any Obligation to arise from them, cannot be rendred obligatory even by the Addition of an Oath. As neither can a prior Obligation truly valid, be disannul'd by a subsequent Oath, or the Right which it gave another Person, be revers'd. Thus for a Man to swear that he will not pay a just Debt can be no Prejudice to the Claim of the Creditor.

VII. And hence too it follows, that since in Promises and Pacts, Consent grounded upon Mistake, is not Effectual towards producing an Obligation, therefore an Oath is not binding, in Case it be Evidently made out, that the Person who swore suppos'd some Matter to be otherwise than it really proves to be; and which if he had not thus suppos'd, he would not have taken the Oath: especially, if his Mistake was caus'd by the Deceit of the Party to whom he swore. For here the Point suppos'd was in the Nature of a Condition, which failing, all that was built upon it falls of course. Thus if a Person brings me some very welcome News from a remote place, in Consideration of which I solemnly swear to reward him; in case I afterwards find his Relation to have been false, my Oath shall hold no Tie upon me. *Grotius* (d) adds, *If it be doubtful whether a Man would not have sworn although he had not been thus mistaken, then he shall stand to his Oath. Because Simplicity and plain Meaning are the most agreeable attendants of Oaths, and all Tricks and Evasions are strictly to be banish'd from them: And likewise, because*

(a) *Radevic* l. 2. c. 25. Add. *Grot.* ad. *Matt.* s. v. 33.

(c) *De* l. 2. c. 342. (1) *Grotius* supposes the contrary, Note upon this Section.

(d) L. 2. c. 13. f. 4. n. 1.

(b) *Lib.* 1. Add. l. 5. p. 358. Edit. *Gorinch* 1658.

as may be seen in B. 2. c. 13. f. 14. See *Mr. Barbeyrac's*

The Promise was not built on that Mistake only, though such a false Prospect might be the Occasion of its being express'd in larger Terms. But this doth not clearly settle the Case; for who shall be the Judge whether in this Case, abstracting from the Mistake, the Promise would have been nevertheless made? Certainly, not the Party towards whom the Oath was address'd: For how is it possible he should be able rightly to discern what mind the other Person would have been of, upon supposal of such or such a Condition? But neither can the Person who swore give a full Determination of this Difficulty; since we are not wont to be equally pleas'd with the same things propos'd at different times, or at the same time in different manners. It seems probable therefore that even such an Oath is not valid; at least, so far as it is founded upon Mistake. Yet if the Party who made it, thinks he shall pay some kind of Regard to the Honour of God, in not receding from it altogether, he ought to judge by the Condition of his Affairs, how far he may conveniently go in the Performance. And whilst we are speaking of this Case, it will not be improper, to make a Reflection or two on the Oath which *Joshua* perform'd to the *Gibeonites* (a). Where we may first observe, that the Subtlety used by that People was not culpable, nor did fall under the Notion of a Lie strictly so term'd. For who will blame a Man for endeavouring by some Fiction of Speech to preserve his Life from an Enemy bent upon his Destruction? Nor, properly speaking, was this Stratagem the Cause of any Damage to the *Israelites*: For what doth a Man lose by being hinder'd from shedding the Blood of another Person, whom he may nevertheless spoil of all his Possessions, and drag into perpetual Servitude, so weaken'd and disarm'd, as to be incapable of future Opposition or Resistance? The whole Point therefore turns upon this Question, Whether or no it was the express Command of God, that they should kill all and each of the Inhabitants of *Canaan*, without Distinction; even such as should voluntarily Submit to their Yoke, and from whom they could apprehend no Danger hereafter? If this be absolutely affirm'd, *Joshua's* Oath was void. For then, the only use of it would have been to evade a Divine Injunction: That is, *Joshua* would have invoc'd God to punish him if he did not break his Command. Nor can it be urg'd, that *Joshua* was therefore willing to keep his Oath, least it should somewhat abate the Awe and Reverence towards the Divine Majesty, in those Nations, to see him break a Covenant which he had call'd God to attest. For the Inconvenience in this respect would have been the same, had he neglected to put the Divine Command in Execution. *Grotius* (b) therefore is of Op-

nion that the Order in *Deut.* 7. 2 and 20. 16. is to be understood with this Limitation, unless any People should submit upon the first Summons; which he urgeth many Reasons to confirm (1). Mr. *Selden* likewise has shewn at large (c), that the utter Slaughter and Extirpation of those People, was rather a Permission to the *Israelites* than a Command. And others think this the more Probable, because the Reason assign'd for that Commission against the *Canaanites* was, partly lest the *Israelites* should imitate their Idolatry, being then strangely prone to foreign Superstition; and partly lest the ancient Inhabitants, if left in any considerable Numbers, should gain Strength to turn out their New Guests; especially in case they were allow'd to live with them upon equal Terms (d). This Danger therefore being once surmounted, they judge it would have been no Fault to admit some to Mercy and Favour; especially such as should abjure their Idolatrous Worship. However this were, 'tis plain that *Joshua*, upon Discovery of their Fraud, interpreted his Oath in a more strict and severe Sense. They had profess'd themselves the Servants of the *Israelites*, a Phrase common with the *Eastern Nations*, and had desir'd a League. *Joshua* had promis'd them their Life, and had enter'd into League with them, according to their Petition: And by this Agreement, (had they prov'd such as they pretended; that is, none of the Number of those Nations which God had design'd to Destruction,) they had been left in Possession of their Goods and Liberties (e). But on account of the Deception they had us'd, he insists strictly upon his Words; and, as it appears, left them nothing but their Life and necessary Maintenance (f).

VIII. But what are we to think of Oaths extorted by unjust Fear? Surely the Person who by means of this Fear procur'd a Promise upon Oath, is no less obliged to release the Promise thus violently obtain'd, than if no Oath had been added to confirm it. Therefore there appears no reason, why Compensation should not be admitted in this Case, in opposition to the claim of the Injurious party; according to the Rules laid down by us, when we treated of the general Subject of Fear. Indeed 'tis the Opinion of *Grotius* (g) that, if either the Words of the Oath do not respect the Man, by conferring any Right upon him; or if they do respect him, yet so as that somewhat may be opposed to his Claim, then the effect of the Oath shall be this; that the Man shall obtain no Right, but that the Swearer shall nevertheless stand to his Oath, by virtue of his Obligation to Almighty God. And he urgeth as an Instance, the Case of one, who by some Unlawful Fright or Terror, hath forced a Promise from another. But if we would truly settle this Point, we ought to distinguish between the different Kinds and Natures of

(a) *Josh.* IX. (b) *Ibid.* (1) See Mr. *Barbeyrac's* Note upon this Section. (c) L. 6. c. 16.  
 (d) See *Judg.* I. 34. II. 2. III. 5, 6. (e) 1 *Kings* XX. 4. (f) *Add. Ambros. Off.* l. 3. c. 10.  
 (g) *Ibid.* Sect. 14.

Oaths. First, for those Words which are directed not to Man, but to God; as if I say either alone, or before Witnesses, *I swear to God that I will give Seius thus or thus.* (a) Here the Oath hath the Nature of a Vow, by which I promise to God that I will perform somewhat in respect to his Honour; and consequently by which I intended to transfer a Right on God, and not on Man. The Case is quite otherwise in Oaths which are directed to Men, or in which I promise a Man somewhat, calling God to witness. For here the Obligation seems altogether to expire, if it appear that the Person to whom the Promise was made, lay under some Fault which rendered him incapable of receiving it. Thus in a Promise to a Thief, I neither directed the Engagement towards God, nor express'd my self thus, that I would in regard to the Honour and Glory of the Divine Name, pay the Man what was mention'd. And though we should grant never so freely and absolutely, that even such an Oath hath likewise the force of a Vow: Yet since a Vow binds not unless it be accepted by God, how shall I be sure that 'tis consistent with the Divine Pleasure and Approbation, that I an innocent Person, should rob my self of my Goods, to bestow them on an ungodly Villain, only to put him into a way of making some gain of his Wickedness? And then there is no fear that my neglect of my Oath should lessen the Awe and Reverence of God in such a Wretch, who by his very Profession and way of living, shews how much he values God and Religion. Yet if there be any Man who in this Case, to avoid giving Scandal to the Weak, and that he may not seem, now he hath escaped the danger, to treat the Divine Name in a slighting or irreverent manner, which before was the Cause of his Deliverance; if any Man, we say, on these Considerations, is resolv'd to part with the Sum thus promis'd, it seems not only to be more safe and expedient, but likewise more acceptable to God, that he should rather convert it to Pious Uses, than to the maintaining of the Wretch in his Villanous Courses. And this method of proceeding, is the more justifiable and secure, in Governments where all Oaths of this kind are by the Municipal Laws declared void (b) (1). The Examples alledg'd by *Grotius* to the contrary, will to those who rightly consider things, appear not at all to reach the purpose. 'Tis strange that *Matthæus* the Civilian (c) should in his Discourse on this Point, commend the Act of *Julius Cæsar*, *Who being taken by Pirates, and*

*made swear to pay his Ransom, sent the Money, but afterwards putting to Sea, took them and brought them to Execution.* For *Plutarch* (2), *Velleius* (3), *Sueton* (4), and *Polyænus* (d), who all tell the Story, do none of them mention a word about any such Oath: And *Matthæus* seems in this to follow the Notion of those, who fancy that a Person thus compell'd to swear, may satisfy his Oath by paying, just for the present, what he promis'd; yet so as that it shall be lawful for him immediately after to recover what he gave, either by his own Strength, or by calling in the assistance of the Magistrate. Which is indeed but a vain piece of Superstition, it being the same thing not to pay, and immediately to take back what we paid. *Tully* asserts, (e) That it is no Fraud to withhold from a Robber a Ransom promis'd him for saving our Life, for this Reason, *because a Robber is a Common Enemy to all Mankind, to whom no Faith can be engag'd, with whom no Covenant can be transacted.* For which he is censured by *Grotius*, (f) who observes, that although a Robber hath no Title to those Common Rights which the Law of Nations hath establish'd between Enemies, in a Fair and Open War, yet he ought to be admitted to Fellowship and Communion so far as the Law of Nature extends; one Precept of which it is, That Covenants be faithfully observ'd. And yet there are not wanting Arguments which might be urg'd in *Tully's* defence, As, that since a Robber is a Common Foe to all Men, or such an one as without any precedent Injury or Provocation spoils and murders all that fall into his Hands, and consequently makes it his very Profession to break and disturb that Society which GOD hath ordain'd amongst Men; therefore he ought to receive no benefit from any such Common Bond, (as Oaths are,) invented by Men to knit themselves more firmly together, after the Divine Appointment hath made them Sociable Creatures. And that a way of Life, which declares for Atheism, ought not to be admitted to any Gain or Advantage from Religion. As, on the other side, the Oaths and Protestations of such Villains are little regarded or relied on by Wise Men (g). And we find the *Pander* in *Terence* (6), reckoning it amongst the necessary Accomplishments of his Art, *to have the knack of Perjury* (g).

IX. It is farther requisite in order to the Validity of an Oath, that the Obligation be lawful, which it is added to confirm (7). Therefore a Promise, though sworn to, shall

(a) Add. *Paul Servit. de Inquisit. p. 55, 56, 57.* when he distinguisheth between an Oath directed to God, and an Oath given to Men. (b) Vid. *Authentic. Sacramenta puberum C. lib. 2. tit. 28. si advers. venditionem. Leg. 1.*

(1) See *Guntherus. B. VIII. v. 793, &c.*

*Juramenta metu, mortisve dolore coacta, &c.*

*Nullius meriti vel ponderis esse jubemus.*

(c) *De Criminibus, Tit. de perjur. n. 5.* (2) *In ejus vita init.* (3) *C. 41, 42.* (4) *C. 4. & 74.* (d) *L. 8. c. 23;* (e) *Offic. III. 30.* (f) *L. 2. c. 13. f. 15. & l. 3. c. 19. f. 2.* (5) See what has been said in *B. III. c. 6.* towards the End. (6) *Adelph. Act. 2. Scen. 1. v. 35.* (g) *Nic. Machiavell. Hist. Florent. 1. 3.* *When Religion and the Fear of God are once extinct, the consequence is, that Men regard and observe their Oaths, only so far as suits with their Advantage; using them not with an Intention of performance, but as Means and Instruments of deceiving with greater ease; and thinking themselves to have won the more Praise and Glory, the less trouble, and the greater Security they have met with in bringing about their Knawish Designs.* (7) See *Mr. Barbeyrac's 1st Note upon this Sect.*

be of no force or effect, if the Subject of it were a Matter either repugnant to the Natural or Divine Law, or to any Human Law, (if the Party lives under Civil Government,) inconsistent with the Natural and Divine. (a) The Example of *David* (i) is most illustrious in this Case; who having in his Passion sworn to destroy the House and Family of *Nabal*, for denying him a reasonable Kindness in abusive and slanderous Language, yet being pacified by the Intercession of *Abigail*, he thanks God, that he hath been thus hindered from a more sinful Performance of a sinful Engagement. And so *Alboinus* was no doubt in the right, for retracting a Vow which he had made to cut off all the Inhabitants of *Pavia*, upon their refusing to surrender at his Summons. (b) For 'tis absurd to invoke the Divine Vengeance upon any Action, but such as God himself hath, under a severe Penalty, forbidden. To do otherwise would be to abuse the Awe and Reverence which we owe the Divine Majesty, in making it, as it were, a means of affronting him. And the design of introducing Oaths amongst Men, was, that they might add Strength to good Actions, not that they might afford excuse and protection to bad (c). The very *Alcoran* (d) forbids Men to swear unlawfully; as suppose, that they will never come near their Wives: and enjoins any Person who hath happen'd to make such an Oath, to set a Slave at liberty by way of Expiation, before he presumes to break it. And here too 'tis made a Question, Whether a Man falling amongst Thieves, and being by them compell'd to swear that he will for ever keep silence, and as far as in him lies, provide for their Security, be bound to stand to his Oath? To which we are inclined to answer in the Negative; in Case his Silence be likely to prove the occasion of exposing many other Persons to danger. For as to his own part he might lawfully enough suffer the Villains to escape with Impunity; but not if their safety was to be follow'd by the murder and ruin of many innocent Men. And we might apply to a Person under these Circumstances the Saying of *Tacitus*, (e) *Sand lentus in suo dolore esset; reipublicæ injurias ne largiretur; So far as he was concern'd himself, or, in regard to his own particular grievance, he might be as merciful as he pleas'd; but he ought not to forgive the Injury done to the Commonwealth.*

X. But to go farther, although the thing promis'd be not in it self unlawful, yet the Oath shall be invalid, in case it hinders any greater Moral Good, or if we are by it withheld from discharging any Duty of Humanity or Piety (2). And under this Head we may rank those Oaths by which Men tie themselves up from discovering and communicating to others any Honest Art, tending to the Use and Benefit of Mankind (f). "Unless I or others who are already privy to the Secret, can sufficiently supply the Needs of Men, in this Particular; and upon supposal that my discovery cannot prejudice and endamage the Party who required the Oath from me (g). The Reason of all which is, because we owe all our Proficiency in Good and Useful Things to Almighty God, and are each of us bound to carry our Endeavours to the highest degree that we are capable of attaining: So that 'tis not in our power to abridge our selves of this Liberty, or by our own Acts to absolve our Consciences from a Duty enjoin'd by the Law of God. Oaths of this kind were not uncommon amongst the *Jews*, which are insisted on at large by other Authors (h). Thus too we judge that Oath to have been invalid, which *Narses*, in *Paulus Diaconus*, (i) requir'd of an Old Man who had dug up a quantity of Gold, engaging him never to acquaint any Person with his good Fortune. And the old Man was in the right, when upon the Death of *Narses*, he discover'd the Treasure to *Tiberius* the Emperor. And in this respect the Case of a Vow is the same with that of an Oath: For neither is a Vow to be look'd on as good and valid, not only if it be unlawful, but if it be silly and impertinent. The *Spartan* who had sworn to throw himself headlong down the Promontory *Leucate*, when he beheld the dreadful height, turn'd back at the prospect; and being reproach'd for his want of Resolution, wisely answer'd (3), *I did not consider that my first Vow stood in need of a much greater Vow to bind and confirm it* (4).

XI. Lastly, That Oaths do not alter the Nature and Substance of those Promises or Pacts to which they are join'd, is sufficiently evident. Thus an Oath about a thing absolutely impossible, is not obligatory; though the party is guilty of a very heinous Sin, in thus rashly abusing the Divine Name. So an

(a) See the Passages collected out of the *Fathers* by *Gratian*, *Caus. 22. Quæst. 4.* See *Grotius*, B. II. c. 13. f. 6.

(1) 1 *Sam. 25.* (2) See *Grot. B. II. c. 13. f. 7.* (b) *Paul Warnefrid. de Gest. Longobard. 1. 2. c. 27. Add. 1. 5. c. 40.* in fin. *Æn. Sylv. Hist. Bohem. c. 18.* (c) *Dionys. Halicarn. 1. 11. p. 694. Ed. Lips.* The Gods would have us make use of Covenants for Just and Honest Designs, not for those that are Vicious and Unreasonable. (d) *Cap. de Disputat.* (e) *Ann. III. c. 70.* In *Gunther. Ligurin. 1. 8. ubi Supra.* Frederick makes the following Ordinance.

*Juramenta metu mortisve dolore coacta,  
Præcipue, ne quis multis nocitura loquendo  
Publicæ, aut in se crudeliter acta queratur,  
Nullius meriti vel ponderis esse jubeamus.*

Oaths took on Force, or fear of Threatned Fate; And chiefly those forbidding to relate Designs of Publick Harm, or to complain Of Cruel Wrongs, we here revoke, as vain.

(f) Vid. *Matth. XXV. 27.* (g) Such an Oath we find in *Lucian* [*Tragopodag.*] *Tom. 2. p. 118.* in fin. *Ed. Amst.* The Sacred Oath of Silence which I have taken, suffers me not to declare what you desire. To which is added the Command of my Dying Father, enjoining me never to disclose the force of this Composition. *Plin. N. H. 1. 25. c. 1.* It adds some kind of strength and Authority to our Knowledge when we refuse to communicate it to others. (h) Vid. *Grot. 1. 2. c. 13. f. 7. & notas suas ad Matth. XV. 4. &c. Selden. de J. N. & G. secund. Hebr. 1. 7. c. 2. Constantin. Impercur in Babakam, c. 9. f. 20. Gratian. c. 22. Caus. 22. Quæst. 5.* (i) *L. 18. Add. Gratian. c. 2. Distinct. 13.* (3) Vid. *Plutarch. Apophtheg. Lacon.* in fin. (4) See the passage of *Guntherus* above-mention'd.

Oath added to a Promise which was before Conditional, doth by no means render it absolute. For the Oath which supposeth such a Condition, doth no less stand and fall with that Condition, than the bare Promise would have done without this Confirmation. Thus too an Oath, as well as any other Promise, ceaseth and expires upon Failure of the Quality which the Person held when he swore, and with regard to which alone the Oath was made. For Instance, a Magistrate, when he leaves his Office, is no longer bound by the Oath which he took at his Admission. And on the other side, the Subjects owe no farther Obedience to a Magistrate, who hath either quitted his Dignity, or been fairly depriv'd of it; though no such Release be expressly, and in formal manner granted them. For thus much is implied in the very Nature of the Affair (a). So likewise, it is no less requisite to Promises confirm'd by Oath, than to others which are not so confirm'd, that they be accepted by the other Party. And he who obtains a Right by any Covenant, may equally release the Performance of it, whether it was sworn to or not. In the same manner we are to judge from the Nature of Covenants, whether an Act undertaken contrary to Oath, be only unlawful, or whether it be likewise void and ineffectual (1). For unless the Swearer did by his Promise divest himself of his Right, and confer it on another, though he afterwards give the thing to a third Person, yet the Act shall be valid. If a Man, for Instance, hath sworn that he will leave such a thing in Legacy to any Party, and afterwards sells it to another Party, the Sale shall not be void, though the Seller is perjurd. Thus, if a Person who in the Life-time of his Parents, hath promis'd them upon Oath, that he will never marry such a particular Woman, shall nevertheless after their Decease, take her for his Wife; the Man indeed will be guilty of Perjury, but the Marriage shall stand good and firm, unless the Municipal Laws ordain the contrary. Farther, an Oath added to a Promise or Pact, shall derive its Force and Efficacy either from Natural, or from Civil Law, according to the Nature of that Promise or Pact. For the Oath hath not in it self a Power of causing that which otherwise produced only a Natural Obligation, to produce likewise a Civil; unless the Municipal Laws interpose particularly in the matter. As neither can it change the Species of an Act: A bare Donation, for Instance, cannot by the Addition of an Oath, be turn'd into a *Chargeable Contract*, nor *vice versa*. And here we fall in with the common Question, Whether a Contract confirm'd by Oath, in which the Swearing Party is remarkably prejudiced, may be revers'd, and the Party restor'd in full to what he lost?

*Grotius* (b) takes the negative part, adding for a Reason, *That although, in this Case, we may perhaps owe the Man nothing, or however less than is required, yet we are bound to perform our Oath to God*: Which Argument we just now consider'd and reject'd. The Expounders of the *Roman Law* handle the same Question at large, in their Observations upon *Lib. 2. Tit. 27. C. si adversus vendit*: and the *Authentick* subjoin'd; which many *Civilians*; and especially those of the *French Nation*, censure as unjust. To the Rescript of *Alexander* they answer, *That it doth by no means contain a general Decision, but was directed wholly to a particular Case*. For the matter stood thus; The Emperor was petition'd here by a Soldier; who must consequently be a Man of ripe Judgment, being in his Eighteenth Year; and yet he alledg'd no extraordinary Loss or Damage; but only his Defect of Age. Now the Contract which this Person had made and confirm'd by an Oath, that Religious Prince would on no Account evacuate: and his Pious Caution had no less a Precedent than *Hercules* himself; who, as the Historian (c) reports, never swore but once in his Life. And then as for the *Authentick*, they say it was extorted by Force from the Emperor *Frederick*, by Pope *Honorius III.* who refus'd to grant him his Imperial Crown on any other Terms: and that *Frederick* had resolv'd to alter it; but was prevented by Death. The Reason why the Pope should insist on obtaining that Decree, is easy to be discover'd, by all those who are acquainted with the Policy of the *Roman Court* (d). We, for our Parts, must think it necessary to the clear Determination of the Point, first of all to observe, that those Pacts, in which there appears a very considerable Inequality, those which depend on any Deceit, Fraud, or unjust Fright; and those which are struck without Thought and Deliberation, have all of them a Natural and Intrinsic Defect, and are therefore such as the Law of Nature enjoins should be either revers'd or corrected. But that the Party's being under the Age of Five and Twenty, is not sufficient, of it self, to render the Covenant defective. Though thus much indeed may fairly be presum'd, that the Minor hath suffer'd some Damage in the Transaction, on account of his weak and unexperienc'd Judgment, which lays him open to the Circumvention and Treachery of others. But if there appears no such Damage, no Reason can be given why the Act should be disannull'd. This being premis'd, we affirm, that if a Covenant or Promise made under Oath be in no other Respect faulty, it cannot be revers'd on this bare Score, that it was made by a Minor, provided he was capable of understanding the Business in hand. But if the other Party was guilty of any Deceit;

(a) *Add. Grot. d. l. f. 18.*(1) *Vid. Grot. ubi supra, f. 19.*(b) *d. l.*(c) *Plutarch Quæst. Rom. 28.*(d) That this Law is not observ'd in *France*, we have the Testimony of *Mornay*, *ad d. l.* See likewise *August. B. v. ad d. l. Granewegen. de LL. abrogat.*

or if, without any such Deceit, the Minor happens to suffer any signal Prejudice, only through Infirmity of Age, the Oath shall not hinder him from petitioning either to have the Bargain revers'd, or at least amended to his Advantage. For in this Case, the Youth who swears to the Contract, supposes it to be free from all Defect, and the other Party pretends as much. This then is, as it were, the Condition on which his Oath is founded, and upon Failure of which it comes to nothing. The Case is different if a Youth, without any Deceit, in the Person with whom he deals, hath knowingly and deliberately given more than the Purchase was worth. For then the Business was a mix'd Act, made up partly of a Contract, and partly of a Donation. It is unnecessary to add, as a general Remark, that a Person subject to the Power and Authority of another, cannot oblige himself farther than he is, by that Authority, allow'd (r). If he exceed these Bounds, the Governor may, if he thinks fit, declare the Business to be Void, whether sworn to or not.

XII. Yet inasmuch as Oaths are made by the Invocation of the Divine Majesty, whom no Man can fraudulently deceive, and whom no Man can securely mock and deride; they ought to be allow'd this Effect; that, on their Account, all Tricks and Cavils shall be excluded from every Business which they are added to confirm. Hence the Roman Censors justly condemn'd the Subtlety of that Captive; who having obtain'd leave to depart from the Enemy's Camp, giving his Oath to return, when he was got a little way, slept back, on the Pretence of having left something behind him, and then fix'd himself at Rome, as if he had fulfill'd what he swore (a). The Fallacy of *Dercyllidas* deserves a Censure no less severe, who besieging the Tyrant of *Scepsis*, solemnly swore to him, *That if he would come out to a Parly, he should immediately return into the City.* The Tyrant coming out on his Promise, *Dercyllidas* commanded him on Pain of Death, to set open the Gates, and then told him, *Now I give you leave to return into the City, and I intend too with my Army, to bear you Company* (b). For Fraud, as *Tully* observes (c), *doth not loosen Perjury, but bind it stronger than before.* Thus *Harry Stephens*, in his Preliminary Treatise to his Apology for *Herodotus* (d), is very pleasant on the common Sophism of the Tradesmen, when they swear they cannot afford a Thing under such or such a Price, unless they design to lose by it; observing that in this Conduct they have always an Eye to the Proverb, *A Tradesman*

*loseth when he doth not get.* I know not whether we are to rank under this Head, the Act of the Count *de la Fountain*, who in the Battle at *Rocroy*, was carried in a Chair; having bound himself by Oath, *Never to fight against the French on Foot, or on Horse back* (e). Or that of Pope *Alexander* the Seventh, who having, at his Admission to the *Papal Dignity*, sworn that *He would never receive his Kinsmen in Rome, (di non ricevere i suoi parenti in Roma)* by the Advice of the *Jesuits*, made Use of this Evasion; he receiv'd his Relations first at the Castle of *Gaudolfi*, and then brought them with him into the City (f). Or what *Tavernier* reports (g) of the *Dutch Agents* of their *East-India Company*; who before they leave *Holland*, engage themselves by Oath, never to drive any Trade on their own private account, but to rest satisfy'd with the Salary allow'd them by the Publick. Yet when they once arrive at the *Indies*, many of them marry, and suffer their Wives to carry on that Forbidden and Clandestine Traffick. 'Tis a Barbarous Story, that which *Alian* (h) tells of *Cleomenes* the *Spartan*, That making *Archonides* privy to his Design on the Kingdom, he swore to him, *If his Enterprize succeeded, πύρα οὐκ ἔτι ἀντὶ κεφαλῆς ἀπέσειεν, that he would do nothing without his Head.* But having secured the Government, he cut off his Friend's Head, and kept it in a Vessel of Honey, and before he undertook any Business, turn'd towards the Vessel, and declar'd his Resolutions. *Aryandes*, in *Polyænus* (i), treating with the *Barcæans*, brought their Commissioners to a Trench, which he had contriv'd for that Purpose, lightly cover'd with Earth and Wood, and there swore to them, That he would observe the Articles of Agreement, *as long as the Earth continued.* And presently after throwing down the Trap, rush'd upon the City, when under no Suspicion of Violence (k). To the same Case belongs the common Instance of Two Rogues, one of which steals a thing, and the other hides it; the former swearing that he hath it not; the latter, that he did not take it; who are both to be judg'd guilty of Perjury. It was a most gross Evasion of the *Turkish* Emperor *Solyman*, when having sworn to *Ibrahim Bassa*, that *he would never hurt him while he liv'd*, he order'd him to be kill'd in his Sleep, as if he were not then to be reckon'd amongst the Living. On the other hand, the Ancients extol the Constancy of *Q. Metellus Numidicus* (l), for refusing to swear to the Law propos'd by *Saturnius*; tho' *Marius* the Consul and others, endeavour'd to persuade him to a Compliance, by telling him, *That the present Necessities of the Com-*

(r) See the last Section of this Chap. (a) *Cicero* Off. 1. 3. c. 32. *Gell.* 1. 7. c. 18. (b) *Polyæn.* Strät. g. 1. c. 6. The wicked Shuffling of the *Locrians* is likewise to be condemn'd, as we find it reported by *Polyb.* 1. 12. c. 4.

(c) Off. 3. ubi supra. Add. *Stobæ.* Serm. 28. of *Lydia.* *Tacitus* Ann. XII. *Rhadamistus*, as if he would pretend to be Mindful of his Oath, doth not use his Sword or his Poyson against his Uncle and Sister: but, as they lay upon the Ground, stifles them with a Load of heavy Garments. (d) C. 16. (e) *Benj. Prioli* Hist. Gall. 1. 2.

(f) *Il. Nepotism.* Rom. Part I. 1. 3. (g) *Voyages* Part II. c. 14. (h) *V. H.* 1. 12. c. 8. (i) L. 7. c. 34. Strät. g. p. 368. Edit. *H. Steph.* *Plutarch.* in *Mario.* (l) *Vid.* *Appian.* 1. 1. de *Bell. Civ.*

monwealth would justify him in taking the Oath, and that he might decline the Force of it by this Secret Reserve, That he swore to the Law, provided it were a Law; that is, if it were duly propos'd and enacted. Whereas it would be easy for him afterwards to shew that it was indeed no Law, being made in the time of *Thunder*, when by the Rites of their Religion, they were forbidden to transact any Business in the Assemblies of the People. Yet that good Man chose rather to go into Banishment, than to make use of this Shift; knowing that when Persons swore to a Law, they must, at least in Pretence and Appearance, acknowledge the manner of its Enactment to be Right and True. But we think *Lycurgus* to have been over Solicitous, when he order'd his Ashes to be thrown into the Sea, for fear if they should be brought to *Sparta*, the People should fancy their Oath to expire, by which they had bound themselves not to repeal his Laws till he should return Home. For the bringing back of a dead Body can with no Propriety be look'd on as the Return of the Person to whom it belongs (a).

XIII. Yet on the other side, the interpretation of Oaths is not always to be extended, but sometimes to be made in the closest and narrowest sense, if the Subject Matter seem to require it (1); as suppose we swore to the prejudice of another, and confirm'd in this solemn manner not Promises, but Threats, which are not in themselves capable of conferring any Right on another (2); the Common Instance of which Case is the Example of the *Israelites* in *Judg.* XXI; who having sworn not to give their Daughters to the *Benjamites*, afterwards perswaded them to steal themselves Wives, and interceded for them with the Virgins Fathers. For 'tis one thing to give, and another thing, not to resume, what hath been forcibly taken (3). And there was the more reason for insisting thus closely on the Words of the Oath, because it had been Cruelty to extinguish a whole Tribe, though for the most heinous Offence: and perhaps they had in their Oaths excepted this very Case (b). In *Ammianus Marcellinus* (c), *Athanasius* the *Gothick* Judge and Commissioner for the Treaty of Peace, alledging, that he was bound by a Dreadful Curse, and by the Commands of his Father, 'Never to tread upon the *Roman* Ground, and no Arguments proving sufficient to move him to the contrary; it being likewise dishonourable for the Emperour to pass over to Him; the Wise Heads found out this Expedient, to have the Emperour and the

'Judge meet in their Boats about the mid'd of the River, (the *Danube*,) and thence to settle the Articles of Agreement between their People on both sides. So when the *Romans*, in *Livy*, (d) requir'd the *Achaens* to repeal some Decrees which they had made, the latter urg'd in their own Excuse, That they were engaged by Oath not to do it. But *Appius* the *Roman* Commissioner in the Affair, telling them, He would by all means advise them to undertake that willingly, which otherwise they would be brought to by compulsion: They were so terrify'd, as only to request, That the *Romans* would give themselves the trouble of making what Alterations they thought fit, and not bring the *Achaens* under the Curse of Perjury. Here, we see, they look'd on the Case of not opposing a Formidable Superior in cancelling the Laws, to be different from that of repealing them by their own free Act. Thus *Agamemnon* in *Euripides*, (e) refuseth to punish *Polymnestor* of *Thrace*, in regard that he was the Friend and Allie of the *Grecians*; yet he promiseth *Hecuba* not to hinder her from taking any Revenge on him by her own Force, and on her own Account. (f) Thus the *Knaveish* Servant in *Terence* (g), begging the Maid to take the Child which he had in his Arms, and to lay it at his Master's Door, being demanded, Why he could not do't without assistance? answers, Because if my Master makes me swear that I did not lay it here myself, I may do it with a safe Conscience. But *Davus* was in our Opinion, but a very poor Casuist: it being in this respect the same, to perform a thing by oneself, or by another. The Emperour *Aurelian*, when He found the Gates of *Thyan* shut, swore in a rage, that He would not leave in it one Dog alive. (h) (4) *Alexander* the Great having resolv'd to destroy the City *Lampsacus*, when *Anaximenes* came to petition him in the behalf of the City, immediately swore, He would do nothing which *Anaximenes* should desire. *Anaximenes* took the advantage of the Oath, and desir'd him to destroy *Lampsacus*. (i) *Antigonus* on account of a strange Dream (5) which he had, fully designing to kill *Mithridates*; and discovering the Matter to his Son *Demetrius*, after he had forc'd him to swear that He would never speak of it; *Demetrius* being concern'd for the Life of the Young Prince, took him once aside from the Company, and saying nothing to him, only wrote with his Javelin in the Dust, so as to be observ'd by him, Fly *Mithridates* (k). To the same Head belongs that Instance which *Sueton* (l) gives of *Cesar's* great Clemency of Nature; That ha-

(a) Vid. *Plutarch. Lycurg. Justin.* 1. 3. c. 3. (1) Vid. *Titii* observ. 273, & *Thomasii* Institut. Jurisprudentiae divinae, 1. 2. c. 8. f. 50, &c. See Mr. *Barbeyrac's* First Note upon this Section. (2) See *Grot.* B. II. c. 13. f. 5. (3) See Mr. *Barbeyrac's* 2d Note on this Section. (b) Add. *Joseph. Archaeol.* V. 2. & *Ambros.* Off. 1. 3. c. 14. (c) *L.* 27. c. 4. (d) *L.* 39. c. 37. (e) *Hecub.* v. 869, &c. (f) Add. *Polyb.* Excerpt. leg. 8. circ. fin. (g) *Andr.* Act. 4. Scen. 3. (h) *Aurelian* was but just in interpreting his Threats according to the strictest Sense, when he commanded his Men to run up and down, and kill all the Dogs they met with, *Flav. Vopisc. Aurelian.* c. 22. Add. *Valer. Max.* 1. 7. c. 3. Sect. 4. inter. extern. (4) See Mr. *Barbeyrac's* 6th Note upon this Sect. (i) When *Etearchus*, in *Herodotus* (*Melpom.*) 171, 172. Ed. *H. Steph.* had oblig'd *Themison* by Oath to assist him in any service he should command, and afterwards ordered him to throw his Daughter into the Sea; *Themison*, tying the Young Lady to Ropes, let her down amongst the Waves, but presently pulled her up again without harm. (5) Vid. *Appian. de Bello Mithridat.* p. 176. Ed. *H. Steph.* (k) *Plutarch Demet.* (l) *Jul.* c. 74.

ving sworn to crucify the Pirates by whom he had been taken, he orders them first to be strangled, and then fastned to the Cross. Of the like kind was *David's* Oath of Safety to *Shimei*, 2 *Sam.* XIX. 23. notwithstanding which, on his Death-Bed, he commands *Solomon*, to take due care that such a wicked Rebel should not die a peaceable Death; 1 *Kings* II. 9. For *David's* Promise of Pardon was made only in his own Name. Nor did he here, properly, enjoin *Solomon* that he should drag the Man to punishment for his old Crime, but only that he should diligently watch so notorious a Villain, and by no means spare him, if taken in a second Fault. And *Solomon* acted with great Wisdom (1), in obliging so turbulent and so implacable an Offender to live in the Royal City under his Eye, for fear he should engage in new Treasons, threatening him with Death upon his Disobedience in this particular; which condition *Shimei* himself gladly approved of, and accepted. Nor did it fall out without the special direction of Providence, that being caught transgressing this Command, he suffer'd the just Reward of his former, as well as of his present Guilt (a). I know not whether we may put in the same Rank the Act of *Timoleon* recorded by *Polyanus*; (b) he was engaged in pursuit of *Milarchus* the Tyrant, an Impious Wretch, who had cheated many Persons out of their Lives, by swearing to preserve them, and afterwards despising his Oath, The Tyrant made an Overture of coming in Person to *Syracuse* to take his Tryal, provided *Timoleon* would not be his Accuser: *Timoleon* swore he would not; and on these Terms *Milarchus* came to *Syracuse*: *Timoleon* bringing him into the open Assembly, addressed him in the following manner, *I will not accuse you, for so I covenanted beforehand; but I'll command you instantly to be executed: For he who hath deceiv'd so many to their Ruine, may justly be thus deceiv'd himself.*

XIV. In like manner an Oath doth not exclude any tacit Conditions or Limitations properly arising from the Nature of the Subject. As suppose I have given a Person his Option to desire of me whatever he pleas'd; if his Request shall be either unjust, or absurd, I am not tied by my Engagement. For he that makes an indefinite Grant to another, before he knows what he will ask, presupposeth that the other party will petition for what is honest, what is Morally possible, what is not

ridiculous, and what is not mischievous either to himself, or to any besides. 'Twas a good Caution of *Phæbus* to his Rash Son,

—————*Dabitur*—————

*Quodcunque optaris; sed tu sapientius opta* (c) (2).

—————I'll not refuse [chuse.

The Choice you make; but then with Wisdom

Such a Case as this gave occasion to that noted Saying of *Hippolytus* in *Euripides* (d), which *Tully* so much commends, ἡ γλῶσσο' ὀμώμεχ' ἡ δ' ὀρκὴν ἀνὸρω?ε, *My Tongue hath sworn, my Mind unsworn remains.* For it seems he had sworn to the Nurse, that he would keep secret whatever she discover'd to him. But when she made a Proposal of Adultery and Incest with his Mother-in-Law *Phædra*, he denies that his Oath oblig'd him to conceal so foul a Villany. Though the *Poet* makes him so scrupulous as to recede from this Judgment, and to keep close the matter in regard to his Oath, *Nicomachus* in *Q. Curtius* (e) makes the same Exception, *resolutely denying, that he had given his Oath in confirmation of the Parricide, or that any tye of Religion should be able to hinder him from declaring so barbarous a Treason.* For it is indeed one part of the Duty and Obligation of a Subject, not to hide any Designs that he shall observe to be carrying on against the Person or the Government of his Prince (f). And thus too *Herod* ought not to have sold the Head of *John the Baptist* to his Daughter-in-Law, for a Dance; because, since there can lie no Obligation to what is unlawful; in such a General Promise, this Condition ought to have been understood, if she desir'd any Thing which he might lawfully perform (g). We find King *Solomon* not adhering to his indefinite Grant; when his Mother ask'd a Favour which was likely to turn to the prejudice of his Government, 1 *Kings* II. 20, &c. There is a very remarkable Story in *Diodorus Siculus* (h) which bears some relation to the Point now under debate: *Xerxes* being warmly engag'd in prosecuting a new Expedition against *Greece*, desired *Themistocles*, who was then in his Court, to be his Guide and Director in the War. *Themistocles* consented, upon condition the King would swear, *never to attack the Grecians without him.* A Bull being sacrific'd, and the Oath taken with the usual Solemnity, *Themistocles* took a Cup of the Blood, and drinking it off, immediately ex-

(1) Verf. 36, &c. (a) Add. *Montaign's* Ess. l. 1. c. 7. Perhaps we ought to allow a place under this favourable Head, to the Action of *Mary Queen of Hungary*, Wife to the Emperour *Sigismund*, who having promised Indemnity to *Herwartus*, Governor of *Croatia*, by whom she had been taken, and very hardly used; upon the recovery of her liberty, is said to have put her Husband upon revenging the Injury; alledging, *That she had no power to engage for Him, though she might for her self.* *Bonfin.* rer. Hungar. l. 3. c. 2. (b) *Stratag.* l. 5. c. 12. n. 3. (c) *Ovid* *Metamorph.* l. 2. v. 101, 102. (2) This passage of *Ovid* (as *Mr. Barbeyrac* in His 1<sup>st</sup> Note upon this Sect. observes) is so far from establishing, that it contradicts our Author's Principles. (d) *Hippolyt.* v. 6, 12. (e) L. 6. c. 7. n. 7. (f) So *Tully* (Off. 1.) *It may so happen, that the performance of a Promise or an Engagement should be prejudicial to the Party to whom it was made. For if Neptune, as we have it in the Story, had not made good what he Promised to Theseus upon Oath, Theseus had not lost his Son Hippolytus. The Death of his Son being one of the three Wishes, which, in his Passion, he put up to Neptune.* (Comp. *Euripid.* *Hippolyt.* *Coron.* v. 315.) Those Promises therefore are not to be kept, which would be hurtful to the Persons whom, in promising, You design'd to serve. Add. *Diod. Sic.* l. 4. c. 65. (g) *Matth.* XIV. 6, &c. (h) L. 11. c. 58. p. 48. A. Ed. *Rhodom.*

'pired. And by this means diverted *Xerxes* from his Resolution. But here if *Xerxes* had no other Reason to alter his Purpose, he need not have been deter'd by his Oath, in which *Themistocles's* Life was a Condition suppos'd; it being no more than if he had promis'd that *Grecian* Captain never to undertake any Thing against his Countrymen, whilst he liv'd, without his Counsel and Assistance. So that upon his Death, the force and virtue of the Oath died with him (a).

V. Although the Invocation of the Divine Name in Oaths, is to be adjust'd according to the Perswasion of the Person who swears, yet the whole Proposition shall bear that Sense which he who requires the Oath protesteth to understand it in (1). For 'tis on his account chiefly that the Oath is taken, and not on the Swearer's: And therefore it belongs to him too, to settle the Form of Words, and he ought to do this so plainly and clearly, as both to signify how he understands them himself, and to bring the Swearer to acknowledge that he apprehends his Meaning. And to conclude the Business, the Swearer is to pronounce the same Words openly and distinctly, so as to leave no possible Room for Cavil or Evasion. Therefore, those Wretches whom *Tacitus* speaks of (b), in vain declined to attempt the Guilt of Perjury, when being conscious to themselves of the Wickedness with which they were charg'd, they trembled and faulter'd in their Oath, changing the Words with much Artifice and Sleight. So *Ulysses* and *Diomedes* in *Diētis Cretenſis* (c), like true Masters of Sophistry and Guile, swear to the Trojans, That they would stand by the Agreement they had settled with *Antenor*: By which Agreement they meant the Articles for betraying the City, which *Antenor* and they had adjust'd. As for that Form us'd in administering Oaths amongst the Romans, *ex animi sui sententia, according to their Judgment and Opinion*, it is not so to be expounded, as if Oaths receiv'd all their Force and Validity from the Notion which Men form'd of them in their Mind; but to shew, those that swore ought to perform so Solemn an Act in the most serious manner, and with the most real Intentions, not in the way of Dissimulation, of Fiction, or of Sport (d). *Cicero* in his *Academical* (e) Questions, endeavouring to prove that Human Knowledge can reach no higher than Probabilities, in a very elegant manner alledgeth this and other the like Customs as Proofs of what he asserts. This is evident, says he, in the diligent Caution of our Ancestors, who first required Men to swear only according to the best of their Judg-

ment; and then told the Party who took the Oath, that he should be rendred guilty by it, only, if he knowingly deceiv'd. As likewise, when they order'd a Witness to say no more than that he thought, such or such a matter, tho' perhaps he had seen it with his Eyes; and pronounc'd a Fact which the sworn Judges had examin'd and determin'd, not to be, but only to seem, or to appear thus or thus. 'Tis a Remark of the same Author (f), That what is sworn agreeable to the Mind and Intention of him who requires the Oath, ought strictly to be perform'd; but what is not, may without Perjury be omitted. That is, if a Man happens to misunderstand the Party who puts him to his Oath, so as to swear in a different Sense from what the other conceives, he is not perjurd by Non-performance: For since the other Person had a contrary Meaning, he must be suppos'd not to have accepted of this Proposal made upon Oath by the Juror; and without Acceptance there ariseth no Obligation from a Promise. For it is not, as *Tully* goes on, always Perjury to swear what is false; that is, to assert by Oath thro' some Mistake what is really otherwise: But you are then perjurd, when you fail in making good what you swore, *ex animi tui sententia, (as the Form is in our common Practice,)* according to your real Sentiments and Perswasion.

XVI. It hath been a Dispute amongst some of our Modern Casuists, whether an Oath could be taken by Proxy; that is, whether one Man could in the Place and in the Name of another take an Oath which should bind the absent Party? on which Point our Judgment is this: As a Person may in his absence contract an Obligation, since Consent may as well be signify'd in Writing, as *viva voce*; so there seems no Reason why an Oath likewise may not be express'd in the same manner. Which, after it hath been once solemnly recited, shall as fully oblige, as if the Party were there present, and had taken it by word of Mouth. Yet before it hath been rehears'd in this Solemn manner, it seems allowable to revoke it; so that a Person who retracts an Attestation which he made upon Oath at a distance, before it be convey'd to the place for which it was design'd, ought not to be look'd on as perjurd. But in the common Proceedings of Courts on this Affair, there seems to be somewhat not very proper or convenient, as that the Proctors who read the Instrument, use such a Posture and Ceremony, as if they were to swear in their own Name, and that, for fear they should seem to be themselves obliged, they change the concluding Clause of the Oath after this manner, *So help him God.*

(a) Add. lib. 2. tit. 8. *D. qui satisfacere cogantur, &c.* And *Homer* was not strictly in the right, when he says of *Hector*, Il. l. 10. v. 332. *ἢ ἐπιόρκων ἀπώμοσε*, Thus swore he, and forswore himself: Because there was this tacit Contradiction to be understood in what he said, *If we take the Town, and if you return home in safety.* Unless, we interpret *ἐπιόρκων* an Oath which a Man doth not find Life or Means to accomplish. (1) See *Gror. B. 2. c. 13. f. 3. n. 2.*

(b) *Hist. 4. c. 41.* (c) *L. 5.* (d) This too was the usual Form of the Questions put by the Censors; as for Instance, *ex animi tui sententia habes uxorem?* Have you a Wife, answer me according to your real Mind? which a Roman Knight once answering with this Cavilling Jest, *I have a Wife, according to my Mind, not according to your Mind,* incur'd the Penalty of a Fine for his indiscreet Wit. (e) *L. 4. c. 47. sub. fin. & l. 3. c. 29. de Offic.*

(f) *Offic. III. d. 1.*

Whereas it might be sufficient barely to recite the Oath of the absent Party, as it lies in the Writing. However, since it hath been with good Reason, the receiv'd Custom of most Nations, to render Oaths more sacred and august by the Ceremonies of Religion, and by some Sign of Devotion, to set the Awe and Reverence of the Divine Majesty more sensibly before the Eyes of the Juror, as by Sacrifice, by approaching to the Altar, and the like Acts of Worship; therefore we are of Opinion, that if the Matter be of very important Concern, the absent Party ought to be put to his Oath, with the usual Solemnity, in the place where he lives; especially since the Case requires a *Corporal Oath*; which Name we cannot give to an Oath express'd and convey'd in the manner we before describ'd. For it is much more to invoke God as a Witness, in the midst of those Sacred Rites; which, not without some kind of Pious Horror, signify the Divine Presence; than to write so many Words on Paper, which never *blusheth*. And 'tis a Material Consideration, that Evidences thus given in Writing at a distance, are by the Lawyers themselves term'd *Testimonia cæca* (a), *Blind Testimonies*.

XVII. Lastly, It is a *Question* usually discuss'd on this Head, Whether or no, and how far an Heir is bound by the Oaths of the Person to whom he succeeds? In which Case this is certain, that if by such an Oath some other Party obtain'd a perfect Right, which ought to be satisfy'd either in whole or in part out of the Goods of the Deceas'd; then the Heir is oblig'd to see it fulfill'd: since this Burthen or Debt inhering in the Possession, passeth to him with it. But when the Oath hath given no one a perfect Right, and the Obligation it self was founded barely in the Piety, Fidelity or Constancy of the Juror, then it's plain that the Heir doth not stand bound, inasmuch as he doth not represent another, as to those Obligations which terminate ultimately and solely in the Person Deceas'd. Thus for Instance, if a Man hath sworn or vow'd with an *Oath*, That he will fast once every Week; That he will continue in Celibacy five Years; or, That he will undertake a Pilgrimage to the Holy Land; if he die before he hath fulfill'd his Engagement, his Heir shall by no means be tied to perform it. But the Case is different, if a Person hath been Heir expressly under such a Condition. So likewise if a Man hath sworn, to give an Hundred Pounds Yearly to the Poor for ten Years to come; and dies before the time is expir'd, his Heir shall be free from the Obligation; unless the former Grant conferr'd on certain Persons a Right of demanding the said Sum. For he who makes a Promise, and doth not withal give the Party a Right of challenging it as his Due, intends to engage his own word only, and not his Estate; and therefore upon his Decease, the Obligation shall not in the

least affect his Possessions or his Heir, unless an especial Injunction to their Purpose were added in the Will. *Grotius* (b) observes farther, That if such a Promise confirm'd by Oath was in some respect faulty, so as to produce a Right, not in regard of Man, but of God only, then the Heir shall not be charg'd with the Performance. Which we allow, if it be suppos'd that the Party who swore, resolv'd either out of a Point of Honour, or a Scruple of Conscience, to fulfil such a defective Oath, which he might, if he pleas'd, have utterly evacuated, by alledging some Deceit, or some Fear unlawfully caus'd. For otherwise the Question is insignificant; we having above shewn that the Juror himself is not in this Case effectually oblig'd. But what if the Heir neglects to perform a Promise or Covenant under Oath made by the Deceas'd, doth he hereby contract the Guilt of Perjury? It seems Reasonable to answer in the Negative. For that which in strict Speech we call an Oath, or the Invocation of the Divine Vengeance superadded to a Common Engagement, passeth no farther than the Person of him who swears. Since we cannot say that the Heir put a Slight on the Reverence due to the Divine Majesty, because it was not he who call'd God to Witness: And therefore he shall be Chargeable only with Breach of Trust. It alters the Matter, if the Oath were taken by a whole People: It being the Judgment of many, That a People whilst they remain such, are by their publick Oaths put under perpetual Obligation. Which Opinion nevertheless seems to us not altogether Clear and Decisive. For an Oath and the Breach of it affects only the Natural Will, or the Will of particular Men, and reacheth the Compound Body, or *Moral Person*, only by Communication from each Individual. The People therefore, as a *Moral Person*, cannot invoke the Wrath of God upon themselves; but this is done by those single Natural Persons, of whom the Community was made up. And consequently upon the Violation of a Promise or Pact made by Oath in the Name of the State, those Persons only shall be guilty of Perjury who Corporally swore to the Business, if they are now consenting to the Omission of it; but the rest shall be only branded with the Mark of ordinary Perfidiousness. And for this Reason we should be unwilling to accuse the *Spartans* of Perjury, in receding, after so many Ages, from *Lycurgus's* Institutions: or, the *Romans*, in case they had invested the *Cæsars* with the Title of Kings, notwithstanding the Oath which *Brutus*, of old, impos'd on the People to the contrary. Which will appear yet more evidently, if we consider, that this Oath conferr'd a Right on no Person; but the Design of the *Romans* in it was only to lay a Restraint on the Liberty of their Will, that they might not think of restoring that Form of Government which had prov'd so Unfor-

(a) Vid. Leg. Wisigoth. l. 2. tit. 4. c. 5.

(b) L. 2. c. 13. f. 17.

fortunate to them. By which means they might indeed bind *themselves*, never to set up a *Monarchy* in *Rome*; At least, so long as the publick Safety could be preserv'd without it. For in this Case the very Persons who took the Oath, must be suppos'd to be releas'd from it; because then the Necessities of the State, which is conceiv'd incapable of subsisting without a single Governor, render the Matter or Subject of the Oath Unlawful. But their Posterity, unless they repeated the Oath, could not be tied by it: as well because their Ancestors had no Authority thus to impose arbitrarily upon them; as because the Consent of Posterity was wanting, as at present we suppose. Nor is it any Argument to the contrary to urge, that a Nation is reckon'd the same, tho' the particular Members who compos'd it are all chang'd. And that therefore the Acts of pass'd Generations seem Justly enough to be attributed to the present. For the Acts of former Ages can then only be imputed to the latter, when some other Party obtain'd any Right as the necessary Consequence of those Acts. But in such things as result to the whole Body from the Actions of particular Members, the Descendants in a People do not always represent the Progenitors. As tho' a People have been heretofore eminent for Martial Glory, yet their lazy and degenerate Race can claim no Share in their Triumph, or in their Fame. Yet still the Case would be quite otherwise, if such an Oath as we are speaking of hath been solemnly renewed by Posterity, each particular Man engaging for himself. But in regard to these publick Obligations, *Sophocles's* Advice (a) might pass for a general Rule;

*Let nothing thus be sworn beyond recall;  
For Men are frail, and Human Thoughts will  
[change.]*

And 'tis no trivial Remark that which *Joan. Labardé* makes in his History of *France* (b), That the Leagues of Monarchs are more firm and sacred, than those made by Republicks, or Popular Governments: Because when one Person only engageth his Faith, he is struck with a more Religious Concern for the Observation of it, than can affect each Man in a Multitude, where every one considers that but a little of the Publick Faith, if any at all, comes to his share: By which Means all are easily induc'd to recede from the common Engagement.

XVIII. The Two Principal Eyes to which Oaths may be, and commonly are applied, are, either to strengthen and confirm a Promise by such a Solemn Act of Religion; or to open a way to the clearing some Fact, which is at present doubtful and cannot be conveniently made out any other way. And 'tis in this Sense we ought to interpret *Aristotle's* Defi-

nition of an Oath, when he styles it, an *undenonstrable Assertion made with an Appeal to the Divinity* (c); that is, an Affeuration, not demonstrated by any Arguments, but credited purely on Account of the Piety and Religion of the Swearer. For when the matter may be prov'd by Evident and Convincing Reasons, 'tis not fair or regular to have recourse to Oaths. On the other hand, when Oaths are to decide a Cause, no search is made after other Proofs. Why Oaths are admitted only in determining matters of Fact, not matters of Law or Right, is very obvious. For we cannot swear whether a Thing be done well or ill, but barely whether it were done or not done. Which being once known; the Court may proceed upon the Points of Right and Law, by infallible Evidences and Rules. As for the Oath which the Judges themselves take, it is not Assertory but Promissory; for they engage by it, *that they will give Sentence in the Case before them, as Justice and Equity shall direct.* And this Division of Oaths into Promissory and Assertory, may comprehend them all, with regard to the two Ends or Uses but now mention'd.

XIX. It hath been generally the Custom to make use of Promissory Oaths in publick as well as in private Causes, and perhaps more frequently than was necessary (1). Concerning which, Authors have observ'd, that some of them are taken to introduce an Obligation, and are call'd *Promissory in Specie*: others are added to confirm some Act already in Being. Which Distinction is not to be understood as if every Oath were not accessory to another Obligation; but because some Promises include an Oath in the Compass of the same Proposition; as when one says, *I swear to do so or so on your account*: Whereas many times the principal Business is express'd in a different Sentence from the Oath which confirms it. Now 'tis rightly observ'd by the Expositors of the *Roman Law*, and 'tis no more than we have already prov'd, That all Oaths are void which Men apply to strengthen any Business in it self unlawful or vicious, and which tends either to the impairing of the publick Good, or to the Prejudice of a Third Person, though at the same time there are some sort of Transactions which are, of themselves, in Civil Cognisance, Invalid, and yet are rendred good and effectual by the Addition of an Oath. The Reason of which is, because they are not defective in their own Nature, but only capable of being Easily turn'd to the Harm of the Party, who thus by swearing to them shews his full Consent and Approbation. For since any Man may waive a Privilege or Favour not design'd for his Benefit, he who thus refuseth to lay hold on the Invalidity of the Affair, and peremptorily proceeds to the confirming it by an Oath, is presum'd to have consider'd

(a) *Antigon.* p. 230. Edit. H. Steph. (b) L. 6. p. 329. Comp. *Anton. Matth. de Crimin. tit. de Perjurio, n. 15.*  
(c) *Rhetor. ad Alexand. c. 18.* (1) See Mr. La Plagette in the Extract *des Nouvelles de la Rep. des Lettres* Juin. 1701. pag. 644

very seriously whether it make for his Interest, or not.

XX. Assertory Oaths or such as are applied to the Decision of Controversies, not to be terminated by other Proofs, are taken either by the Party concern'd in the Business, or by a Third Man: Those who swear to the Facts of others, are term'd Witnesses (1); whose Honesty and Fidelity, unless by some probable Token render'd suspicious, are with Justice allow'd a very great Weight and Sway; it being well suppos'd, that no Man of any Religion or Goodness will expose himself to the Divine Vengeance, for the Affair of another Person: Yet is it a wise Constitution in most Civil Governments, not lightly to admit Persons to give Evidence in the Cause of others, engag'd to them by nearness of Birth; which is so strong a Motive to Affection and Love: It being consider'd that such Persons might easily suffer their Passion to gain the Ascendent of their Religion (a). Nor was it altogether without reason, that the Romans of old requir'd Witnesses of Wealth and Substance, especially in difficult and important causes.

XXI. But a Man may likewise in his own Business, when 'tis his Interest to do so, solve the Dispute by Oath, and this either by Agreement of the Parties, or by order of the Judge (b): For when a Controversy ariseth concerning some Due demanded by one Man, and denied by another, the Claimant may challenge the other Party to his Oath, promising to let fall the Suit, if he swears the Thing not to be owing which is requir'd (c): And if the Person thus challeng'd be doubtful whether he can swear clearly and peremptorily to the Matter, as suppose the Debt was transferr'd to him from another, then he may return the Oath to the Claimant, engaging to pay if he shall swear it is his Due (2): And this giving and returning of the Oath between the Parties, may be made either in Court, or out of Court; yet with this difference, that out of Court I am not necessarily oblig'd to take the Oath when offer'd me, because it implies a Contract; by means of which I shall, upon my refusing, become a Debtor: But now no Person, who is not invest'd with an Authority over me, can compel me to a Contract or Agreement which shall be Burthensome to me. Whereas, in Court, when the Oath is offer'd by one Party, the other shall not decline it, unless upon very weighty Reasons; but shall either take it himself, or return it to his Adversary. That is when the Judge conceives the Claim not to be Groundless, and yet there is no full Evidence of the Matter ready at hand; then if one of the Parties thinks fit to refer the Business to the Conscience of the other,

the Judge may fairly look on him as Convict; who neither dares in this Religious manner to deny the Debt, nor yet, in Return, challenge the other to affirm it with the like Solemnity. For this starting and boggling can be attributed to nothing but to his inward Consciousness of the Debt; because if he pretend to fear that Men should think he swears only on the account of Gain, 'tis easy for him to avoid this Suspicion, by returning the Oath to the Claimant. If he is afraid that the other will be perjurd, why doth not he swear himself? Yet Plato in his Laws (d) admits of an Oath, only in such Cases where, according to the Judgment of Men, no Advantage can be got by forswearing; but where any Profit may be reap'd from the Perjury, there he orders that the Process shall be manag'd without Oaths.

XXII. And lastly, In some Cases, when other Proofs are not sufficient (3), the Judge may put the Party to his Oath, though he do not desire it; and this either that he may possess himself of some Right, or clear himself from the suspicion of some Fact. But here it must be observ'd, that 'tis never the Custom to offer these Oaths, when either Capital Punishment, or any grievous Inconvenience, must be the consequence of confessing the Truth. For, besides, that it looks very hard to bring a Man into so dangerous a Necessity, on the account of an uncertain Fact, as that he must either deeply wound his Conscience, or incur some very considerable Damage; little trust is to be given to an Oath thus exacted, the Minds of Men being always ready to entertain this Hope, That God Almighty may again be appeas'd, whose Mercy even the Perjur'd Sinner is not forbidden to implore! 'Tis a good Remark of Libanius (e), He who despairs of all other Means, and hath but one Remedy left, which is not to be obtain'd otherwise than by Lying; will certainly dare to change one Danger for another; knowing the present Mischief which is before his Eyes to be unavoidable; but, as for the Future Evil, often flattering himself, that he shall be able, by Worship, Sacrifices, Gifts and Oblations, to bribe Heaven into a Pardon. But for an account of these several kinds of Oaths, the Writers on the Civil Law are to be consulted at large (f).

XXIII. In relation to the Breach of Oaths, this Question still remains to be resolv'd, since it is usual in Civil Governments to bind Men by Oaths to the faithful discharge of their respective Trusts and Employments, whether he is always to be deem'd guilty of Perjury, who hath neglected any one part of his Duty? Where the Controversy is not about those Oaths which regard some peculiar Act; as, when a Man gives his Evidence, denies a Trust, forsakes a particular Promise, and the like:

(1) See B. 5. c. 13. f. 9. (a) Vid. l. 22. tit. 5. l. 3 & 4. D. de testibus. (b) L. 12. tit. 2. D. de jurejur. &c.  
 (c) Vid. Diodor. Sic. l. 1. c. 79. (2) Vid. leg. 34. f. 6, 7. & leg. 38. (d) L. 12. p. 987. C. Ed. Wech. Ficini.  
 (3) In bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopia probationum, per Judicem jurejurando causa cognita res decidi oportet. C. Lib. 4. l. 1. De rebus creditis & jurejurando, Leg. 3. (e) Declam. 3. p. 249. A. Ed. Paris.  
 Marcell. (f) Ad. l. 12. tit. 2. D. de Jurejur.

(For he who violates these, ought, no doubt, to be branded as forsworn) But about such in which the party binds himself to many Things together: as when Persons are admitted to any Office, to be discharg'd by different Performances. And here there seems to be no reason why we should scruple to take the Affirmative side, in case the Breach was made against Knowledge, and with deliberate Wickedness. Only, that there are different degrees of Perjury, as well as of other Crimes. For as he is reckon'd less guilty, who hath transgress'd a Law or two, than he who hath at once renounc'd all Civil Government, or hath committed Treason against his Prince; so he who hath violated the whole sum of his Duty, contracts a more heinous and aggravating Perjury, than he who hath broken only a part (a). Nor ought we to give any heed to those Authors, who are of opinion, that Persons in these Circumstances, may be absolv'd from the Sin of Perjury, by submitting to the Penalty of the Law. For unless when the Obligation was first entred upon, it was expressly left to the choice of the Person, either to perform what he promis'd, or at a certain price to purchase the liberty of doing the contrary (b), the punishment shall by no means render him clear from the Crime; as we shall make out more at large hereafter. Thus he who hath suffer'd a Whipping for Thievery, is no less a Rogue, than if he had never felt the Lash.

XXIV. What is usually canvass'd amongst Authors about the dispensations, and relaxations of Oaths and of Vows, may be wholly determin'd by the fixing two Principles or Rules. The first, that a Person, who in regard both to his Actions and his Possessions, is under the Government of another, can dispose of nothing to his Governor's prejudice; and if any such disposal be made, it shall be lawful for the Governor to revoke it. The other is, that he who is invest'd with such Authority over any Person, may, as he shall think convenient, retrench and confine any Rights, which the Party under his direction hath already obtain'd; and much more those which he shall obtain hereafter. Whence it appears, that the Acts of Superiors are not of sufficient force to hinder the performance of an Oath, so far as it was truly obligatory: That is, an Oath not defective in it self, and made about a Thing which the Juror may dispose of at his pleasure, cannot be disannull'd by a Superior. (1) Thus the Roman Senate could not revoke the Oath which *Regulus* made to the *Carthaginians*, engaging him to return: Though indeed in this Particular Case, there was another Reason; inasmuch as *Regulus* was now in the condition of Slavery under his Conquerors, and therefore the *Romans* had lost all their Power and Authority over him. But when the Subject of the Oath is any Thing or Action falling

under the Direction of the Superior, it shall then borrow all its force from the Superior's consent, either Tacit or Express; and he may, if it displease him, declare it Null and Void. Nor is there the least danger of Perjury to be fear'd, when an Oath is thus revers'd. Since the Person under Government ought to have presupposed his Governor's approbation as a necessary Condition. Nor doth the Superior sin in thus cancelling what the other hath sworn; because he only exerciseth his Right in hindring the Inferior from acting in prejudice of his Just Prerogative. And 'tis the same thing as to the nullity of the Oath, whether the Superior prohibits all Oaths on such certain Subjects beforehand, or whether when they have been already made, he forbids their performance. Though, in the former Case the Inferior incurs a very heinous Guilt, in thus rashly presuming to swear against the Prohibition. The Father, by the *Jewish Law*, *Num. XXX. 4, &c.* was allow'd to revoke the Sworn Vows of his Daughter, whilst under his Direction; the Husband of his Wife, the Master of his Servant, if they thought convenient: For otherwise, the Parties here who were to live in obedience, might by swearing and vowing have rendred the power of their Governors wholly useles. Nay, *Leo Mutinensis* (c) reports, That if any person had entred on an Oath or Vow of what kind soever, and afterwards upon good Reasons repented of it, and if it did not lead to the prejudice of a third party, the reason of his retracting having been produc'd and approv'd, he might by one Rabbin, or three other Men, be absolv'd. Another way there is by which the effect of an Inferior's Oath may be made depend on the pleasure of his Superior; namely, if the Superior so constitute and ordain, that what the Inferior shall swear in such a particular case, shall not be valid till it hath receiv'd his Approbation. And thus in the *Civil Law*, under the Head of Oaths, (d) it is insert'd as a necessary Caution, That the Right of Superiors is always excepted in the Case of Swearing: or, that all Oaths are to be construed with a Salvo to that Right. Now it is evident in all these Instances, that the relaxation of an Oath can only be made by him who is invest'd with Authority over the Swearer, and with such Authority, as implies in it this degree of Power. And therefore it was of old very properly claim'd and executed by the *Roman Emperors*: As appears from *l. ult. D. ad municipalem*, where *Antoninus* and *Verus* dispense with a certain Person's Oath, who having sworn never to come into the Assemblies of his Order, was afterwards created *Duumvir*: Because a Subject cannot by any Oath of his, withhold his Service, when requir'd by the Commonwealth. And so *Tiberius*, in *Sueton* (e), granted a *Roman Knight* the power of being divorced from his Lady, whom he had taken

(a) Yet add *Sanderfon de Oblig. Jurament. prælect. 3. f. 18.* (b) See the Articles of Marriage between *Charles* Prince of *Wales*, and *Henrietta*, in *Gramond, Hist. France. B. XVI. Artic. 23.* (1) See *Grøt. B. II. c. 13. f. 20. n. 1, 2.*

(c) *De ritibus Hebræorum*, par. 2. c. 4. f. 4. (d) *Vid. Jus. Can. c. 19. Add. tit. 55. l. 2. feudorum.* (e) *Tiber. XXXV.*

in Adultery with his Son-in-Law, though he had before sworn never to put her away. The Emperor declaring, *That the Oath could not be so far extended, as to reach the present Case, where the Wife by so Infamous a Crime had rendred her self unworthy of cohabiting any longer with her Husband.* Afterwards the Christian Emperors very frequently delegated the Bishops to preside and to determine in the Affair of Dispensations; that if any Scruple should happen to arise, the opinion of their Sanctity and Goodness might satisfy the Minds of less Intelligent Judges. Yet it is too notorious how extravagantly some Ecclesiasticks, and especially he who pretends to be the Chief of that Order, the Bishop of *Rome*, have stretch'd this Privilege, and what a Flood of Mischiefs hath overspread the Christian World, from its Abuse. And indeed, since we are to proceed by the Principles of Law in determining what kinds of *Oaths* may be releas'd, and for what reasons, I know not why the Clergy should assume more Authority in this Point, than the Men of the other Profession.

And farther, sometimes when an *Oath* cannot be made void on the side of the Swearer,

the force and efficacy of it may yet be stop'd by the Superior of the party towards whom the *Oath* is directed, and who obtains a Right upon it; either by taking this Right from him, or by forbidding him to make use of it in receiving what the other hath sworn to pay. And this may be done either in the way of Punishment, or on account of the Publick Advantage, by virtue of the Superior's Prerogative. In which Case the Swearer is free from all danger of Perjury, because he is not the occasion of the non-performance; and he is releas'd from all necessity of fulfilling his *Oath* by the Party, who either in a direct, or in a more eminent and extraordinary manner acquir'd a Right by Virtue of it (a). To conclude, a Prince, who upon just Reasons dispenseth with an *Oath*, doth not commit the least Sin, in thus hindring an Act which was solemnly undertaken with the Invocation of the Divine Majesty, from producing its Regular Effect: tho' the Subject may sometimes incur a Guilt, by rashly using the Name of God to confirm an Act, which he ought to have known was prejudicial to the Right of his Superior.

(a) Comp. *Grot. loc. cit. Sect. 20. n. 3. & ad Matth. Chap. V. vers. 37.*

### C H A P. III.

#### *Of the Power of Mankind over Things.*

SUCH is the Constitution of Man, that it cannot be preserved by its own Internal Substance, but needs continually to take in the assistance of certain Things from without, as well for its nourishment and support, as for its defence against those many Enemies which seek to ruin and dissolve its Frame. Again, a great part of what the World affords, turns another way to the Service of Mankind, in rendering Life more commodious and more easy (a). (1) Now with regard to these Matters, a multitude of Business and Transactions pass betwixt Men, and large Occasion is administered to Controversies and Strifes: And lest the Common Peace of Mankind should be disturb'd by such Disputes, as the Law of Nature hath with due caution provided, so the Civil Ordinances of most Nations are in this respect found most careful and solicitous. For the full illustration of which Subject, we ought first of all to enquire, by what Right it is that Human Race claim the disposal of other Creatures, whether Animate or Inanimate; for their Use, their Conveniency, or their Pleasure; as likewise on what Principle this power is founded, in respect both of the Creator, and of the Crea-

tures themselves, which Man not only useth, but very often perverts, embezils, and destroys.

II. It is therefore beyond dispute, that Almighty God, inasmuch as he is the Maker and the Preserver of all Things, doth likewise hold, as it were, an Originary and Super-eminent Property over all, and they belong so strictly to Him, as that no one can pretend to the least Right in them, without his permission or consent (b). Yet because he himself stands in need of no Foreign Succour, and because it is not possible for any thing besides to make an Addition to his Happiness; therefore this Goodness inclin'd him to be bountiful and gracious to his Creatures, and to give them the privilege of using each other for their mutual Benefit. But Man especially hath in so extraordinary a manner tasted of the Divine Favour, that all other Creatures are by a Common Strain of Speech, said to have been at first made for his Use and Service. Though this Right of God over all Things is very different from the Right of Men to the same Possessions. So that the Reasoning of *Diogenes* the *Cynick* (c) was false and vain, when he thus argued, *All*

(a) *Hesiod. Op. & Dier. l. 2. 304. For Riches are the Soul of feeble Men.* (1) See *Gronovius's* 1st Note upon *Grot. B. II. c. 1. f. 11.* (b) Concerning which dominion or property of Almighty God, *Philo the Jew* (*lib. de Cherubim*) p. 97. Ed. *Genev.* treats at large, and with regard to that Superior Right, call'd the Right which Men hold over Things, *Usufructuary* only. (c) *Apud Diogen. Laert. l. 6. f. 37. ubi vid. Menag.*

*Things belong to the Gods ; Wise Men are the Friends of the Gods ; all Things are common amongst Friends ; therefore all Things belong to Wise Men.* Yet it is too bold and arrogant a Pretension in some Authors, whilst they tell us, That should any thing fail of turning to the advantage of Mankind, it must follow, that such a Thing was created in vain ; and that 'tis hence apparent, that the whole World is the Common Possession of Human Race, and what they may (if thus taken as a General Body.) not unjustly term *their own*. This was *Aristotle's* Mistake ; If then, says he, (a) *Nature makes nothing imperfectly, and nothing in vain, she must, of necessity, have made all these Things for the sake of Men.* *Lucian* (b) delivers himself to the same purpose ; *Had not Men been created, the consequence of the Omission had been no less than this, That all the Grace and Beauty of the rest of the World, had shone without a Witness or Beholder ; and that the Gods themselves had despis'd their own Wealth, as not worth the enjoying.* But certainly the great Frame of the Universe might, in all appearance, have been more compendiously erected and adorn'd, had it been the Intention of its Author, to make nothing but what should in some respect or other serve the Occasions of Men (1). And it was not ill said of *Seneca*, (c) *Nimis nos suspicimus si digni nobis videmur, propter quos tanta moveantur : We are too much taken with the admiration of our own Nature, if we fancy our selves worthy to have all these Glorious Works move only on our account.* Yet let this be as it will, thus much is evident ; That Man makes his advantage of other Creatures, by the Grant and Licence of Heaven : As we may apprehend from this easy Argument, That without the use of those Things, Human Life could not be preserv'd ; for which Service, some of them do, as it were, freely deliver themselves up into our Hands. Since then God Almighty hath conferr'd on Man the Priviledge of Life, he is at the same time suppos'd to have allow'd him the use of every thing necessary for the keeping and maintaining of that his Gift. (d) The same Truth is confirm'd by the Authority of the Holy Scriptures, which expressly mention God's investing Man with Power and Dominion, not only over Vegetables, but over every Living Thing, produced either in the Air, in the Earth, or in the Sea (e) (2). Yet this Concession hath not the force of a Command, but only the Allowance or Indulgence of a Priviledge ; which any Person may use so far as he thinks fit, but is not bound to exercise it at all times, and upon all occasions. For otherwise Man would offend against the Divine Law, should he let any Animal go free, or should he neg-

lect any opportunity of bringing the same Creature again under his Subjection ; which no Man in his Wits will affirm. But still this Power of Man over Brute Creatures is of a different Nature from that Dominion or Sovereignty which is exercis'd over Men : Because Brutes are not capable of any Correspondent Obedience, arising from the Obligation ; and because this is a much more absolute Sway, than that with which Men govern each other. The Divine Prohibition to the *Jews* from feeding on some certain Animals, doth by no means retrench or impair the Right of Men over Beasts ; the Reason of that Injunction seeming to have been taken from Physick (3). *Mr. Selden* (f) reports it, as the Opinion of the Ancient *Rabbins*, That *Adam* was forbidden to eat any manner of Flesh, (God having commanded him to feed on the Herbs of the Field (4) ; but that *Noah* afterwards was dispens'd with in this Particular, by the Grant in *Gen. IX. 3.* yet so as to be still under an Obligation to abstain from Blood, and from any Joint or Limb of any Creature taken from it whilst alive (g). The same Author adds, That the Blood of Fishes was excepted from the Prohibition ; nay, that they might eat these Creatures alive, as Oysters, &c. or such of them as died by Chance ; neither of which it was lawful for them to do, with regard to Terrestrial Animals.

III. If in the next place, we consider this Power of Mankind, with respect to the Things themselves, whether Animate or Inanimate, which Men use, and waste, and destroy, that no Injury is hereby offer'd to those Creatures, may clearly be evinc'd, as well from the Nature of Man, as from the Grant and Allowance of God. For it can on no account seem probable, that a Maker of Infinite Goodness, and of Infinite Wisdom, would impose such a Necessity on Man, the Principal of Earthly Creatures, or that he should not be able to preserve himself without injuring others, and consequently without the perpetual Commission of Sin. To which, if we add the express License of God, that must remove all Doubt and Scruple which might otherwise have risen, especially about the Slaughter of Animals. And if there appear any Cruelty or Barbarity in such a Practice, it is sufficiently taken off, by this one Consideration, That their Divine Author hath appointed these his Creatures to such a Condition, and to such a Service in the World ; and hath granted to Men such an Authority over them, which if they exercise (whether by the Deputation, or only by the Permission of God,) they certainly do no Injury. Now as for Vegetables, and

(a) *Politic. I. 1. c. 8. p. 304. C. Ed. Paris.* (b) *Prometh. p. 181. tit. 1. Ed. Amst.* (1) See the Honourable *Mr. Boyle's Dissertation concerning the Final Causes of Natural Things.* See *Arch-Bp. King's Treatise de Origine Mali, c. 4. l. 2. f. 5.* (c) *De Ira, l. 2. c. 27. Add. Charron de la Sageffe, l. 1. c. 40. n. 3, 4, 5.* (d) *Add. Arrian. Epietet. l. 1. c. 16. ab initio.* (e) *Gen. I. 28, 29.* (2) See *Psalms the 115. 16.* (3) See *Mr. Barbeyrac's 4th Note upon this Sect.* (f) *De J. N. & G. Sec. Heb. l. 7. c. 1.* (4) See *Gen. I. 29. (g) Add. Deuteron. 12. 20.*

other things destitute of Sense, there seems with regard to them, to be no manner of Difficulty in this Point; it being impossible to discover that they suffer any hard Treatment, or unjust Hurt, when they are consum'd by Men; especially, since they must necessarily perish, and be destroy'd, either by Beasts or by the speedy Turn of the Year, and the Change of the Seasons; and farther, since many of them had never been produc'd without Human Pains and Endeavours. The Superstition of the *Egyptians* in abstaining from certain Pot-herbs, is not of weight enough to give us any stop in the present Determination (a).

IV. But then, as to living Creatures, which are endued with a Sense of their own Being, and cannot leave it without Pain and Trouble, the Point appears in some measure dubious, to many who have consider'd the Liberty of Men against Brutes, only on the Principles of Reason. For, from God's allowing the first Man to have Dominion over other Animals, it doth not presently flow as an evident Consequence, that he was at the same time invest'd with so wide Commission, so infinite a License, as that he might slay them even for unnecessary Uses (b): For Man hath Dominion too over Man, and yet cannot in the least pretend to any such License as this against his Fellows. Nor could Men have complain'd, that the Divine Goodness was sparing towards them, or had made an ill Provision for their Necessities, though they should have been denied a Power over the Life of Animals; at least of such as did not threaten any Hurt or Danger to the Life of Men: inasmuch as the Work of those Creatures in cultivating the Earth, together with what comes from them otherwise, as Milk, Eggs, (such as are not Necessary for the Propagation of the Species,) Wool, and the like, might have been sufficient to sustain Men in a tolerable way of Living. Nor did God by commanding Men to sacrifice them, as a Token of Divine Worship, confer any Power or Privilege of turning them at pleasure into Food. For such things as are lawful to Mankind only by some peculiar Command of God, may still remain unlawful, except in that particular Case. Hence it was that many of the ancient Philosophers utterly disapprov'd of this Practice. For, why should Man on the bare account of superfluous Pleasure, rob an harmless Animal of that Life which it enjoys by the Gift of the same Common Creator? Especially, since even the Example of the fiercest Wild-beasts, of Lyons, Wolves, and other Devourers of Flesh, will do them no Service, if urg'd in their Excuse. For these are so fram'd by Nature, as not to

be able to support Life, without feasting on Blood, and to loath and reject that common Provision afforded by the Earth. Whereas Men are not under the like Case of Necessity; receiving very commodious Nourishment from other Food, and being oblig'd to prepare Flesh by dressing or seasoning it, before they can make it agreeable to their Digestion. We hear indeed of some Barbarous Nations, which make use of no Flesh or Fish but what is raw, and support themselves with that; as *Rocheport* (c) reports of the Coasts on *Davis's* Streights. But the same Author tells us (d) of the Inhabitants of the Province of *Pasto* in *Peru*, That they eat no manner of Flesh; and that if desired but only to taste any, their Answer is, They are not Dogs.

Others have observ'd, in relation to the present Enquiry, that whereas those Animals which Naturally feed on Flesh, have their Fore-teeth oblong, sharp, and divided from each other, that so by closing them with a deeper stroke, they may grind and separate the Prey; Man's Teeth are short, join'd one to the other, and spreading round, after the manner of those Animals which live on Herbs and Fruits: And that on this account we are necessitated to make use of Knives for dividing the Flesh we eat; whilst the Creatures which eat this as their Natural Food, stand in no need of such Assurances or Inventions: That thus we see Children by the bare impulse of Nature, loving Fruit beyond all other Provisions, and preferring Apples, Cherries, and Nuts, to the most exquisite Dainties of Flesh; because in them Nature is not yet corrupted, nor their Appetites debauch'd by ill Customs of Eating (e). It is farther evident, that the fierceness and cruelty of Men, having been first excited, encourag'd and harden'd by the Slaughters of Beasts, afterwards broke out against their own Kind; and those who had taken a delight in destroying the Harmless Race of Dumb Creatures, made it their next step to murder weak and defenceless Men. (f) *Diogenes Laertius* in his Life of *Pythagoras* (g) reports that Philosopher to have forbid the killing of Animals, *κοινὸν δίκαιον ἡμῖν ἐστὶν ἔσθαι ζῴων, As enjoying the same Common Right of Life and Soul with our selves. This indeed (as the Historian goes on,) was his Pretence: But the true reason of his commanding his Followers to abstain from all Living Creatures, was, that he might exercise and train Men up in a more easy method of Food, by means of which they might always have ready at hand a large provision of Meat, requiring no Fire to dress it; and as much Drink as they had plain Water. For this way of Sustainance he thought most proper to produce Health of*

(a) Vid. *Diodor. Sic.* l. 1. c. 89.

(b) Add. *Gen.* ad *Gen.* 9. 3. *Selden* de J. N. & G. Sec. Heb. l. 7. c. 1.

(c) *Descript. Antillar.* Par. 1. c. 18.

(d) Par. 2. c. 11.

(e) Vid. *Anton. le Grand. Instit. Philos. Cartes.* Par. 6. Art. 3.

(f) See *Pythagoras's* Speech in *Ovid's Metam.* 15. Fab. 2. v. 75, &c. *Gen.* ad *Gen.* 46. 34. *Plato Timæo* circ. fin.

(g) Lib. 8. Sect. 13.

*Body, and Quickness of Mind* (a). Porphyry (b) is very prolix in attempting to shew, that abstinence from Flesh is in the highest manner the Duty of Philosophers, who place all their Happiness in God, and in the Imitation of the Divine Nature. Amongst a great number of Arguments, the Substance of which hath been for the most part already deliver'd, he endeavours to demonstrate, That all Souls endued with Sense and Memory, are likewise partakers of Reason; and that since we may discover thus much in other Animals, we ought to extend our Justice to them, which consists principally in offering no hurt without due Cause: And that we have a convincing Evidence of the Reason of Brutes, in their being capable of Madness and Distraction. To this time, the *Benjans* in *Cambay*, believing the Souls of Men to remove, at Death, into the Bodies of Beasts, never harm any Living Creature, nor dare to turn them into Food: Nay, they have Hospitals erected on purpose, for the reception of diseas'd and maim'd Birds (c). *Phil. Baldaeus* in his description of the Island *Ceylon* (d),

reports, *That the Bramines, even when converted to Christianity, keep their old Method of living; and that if they be encounter'd with that Text of Scripture, To the Clean all things are clean; they reply in another, that, The Kingdom of God is not in Meat and Drink: that they have been ever accusom'd to their light and easy Diet, and find themselves very well upon it.* Thus the whole Nation of the *Apalchitæ*, of old, never tasted Flesh or Fish, 'til they learnt this Custom from the *Europeans* (e).

V. But, though in these Arguments and Authorities so much ought justly to be commended, as makes for the Encouragement of Temperance and Frugality, and for the hindering the Finer Spirits from being obstructed, and as it were mix'd up with too gross Feeding; yet, that the killing and the eating of Animate Creatures is really not Sinful, may be sufficiently made out on the bare strength of Reason: And the main Evidence seems to be this, That no mutual Right or Obligation passeth between Men and Brutes, nor ought to pass by the Direction of Nature (1). For we neither find

(a) Though *Lucian* (*in somnio seu Gallo*) p. 174. tit. 2. bringing him in under the Shape of a Cock, makes him give this Reason of his Opinion: I consider, says he, that if the Precepts I set on foot were common, and such as many had deliver'd before, I should not be able to prevail with the World, to look upon me as any extraordinary Person; but the more strange and unusual the Doctrine should be which I offer'd, the more new and surprizing I should appear, and gain the more Admiration. *Add. Jo. Scheffer. de Philosoph. Etal. c. 14.*

*Plutarch* in *Grill*. Man, with a craving Appetite, drawing all things to himself, trying all things, tasting all things, as being still ignorant of his own Nature, of what is agreeable to it, is the only Creature in the World that lives in general upon every thing which comes to his hands. *First*, He useth Flesh, without the Excuse of Want or Necessity, when he might at any time gather other Food from the Seeds and Plants, with an inexhaustible and never failing Store. But through Luxury and Disdain of his proper and necessary Provision, he follows strange and polluted Diet, in the Slaughter of Beasts, exceeding the most Savage Creatures in Fierceness and Cruelty: For Blood, and Slaughter, and Flesh are the proper Sustenance of the Kite, the Wolf, and the Dragon, as Fish and Spoon-meat are of Men. The same Author in his Second Oration *about the eating of Flesh*, among many other things, offers what follows: At first they fed, perhaps, on some wild or hurtful Animal; then on Birds and Fish; 'till their Appetite thus taught and accusom'd, proceeded to the Ox that labours in our Service; to the Sheep that cloaths and adorns us; to the watchful Cock that guards our House. Hence, by degrees, adding Strength and Force to their insatiable Desires, they broke out into the Murder of their Brethren, and the Miseries of Blood and War.

*Aratus Phenom.*

The faithful Ox, accusom'd to the Plough,  
Defil'd the Table. —————

*Add. Plin. l. 7. c. 45. & Val. Max. l. 8. c. 1. inter damnatos, n. 8.*

*Sueton. Domitian. cap. 9. Elian. V. H. lib. 5. cap. 14. Dio Chrysost. Orat. 64. pag. 592. Edit. Morell. Cicero de Nat. Deor. lib. 2.*

*Nicol. Damascenus* reports of the *Phrygians*, That it was a Capital Crime amongst them to kill a labouring Ox, or to steal any Instrument of Agriculture. So *Aloys Cadamust* in His Voyages, C. 57. 60. tells us, That the People of the Kingdom of *Calecut* shew the like sacred Veneration to Oxen. And the *Nomades*, as *Diodor. Sic.* relates, lib. 3. cap. 32. pag. 165. Ed. *Rhodom.* gave the Bull and the Cow, as likewise the Ram and the Ewe, the Name of *Parents*, as affording the daily Support of Life. *Strabo* l. 15. p. 490. observes of the *Brachmans*, that they eat the Flesh of those Creatures only, which do not assist Mankind in their Works. *Varenius*, *Descript. Japon.* c. 23. reports much the same of the *Japones*; who are said likewise to profess an Aversion to Blood, and no less to Milk, which they take to be nothing else but white Blood.

We may here likewise by the way, remark, what is urg'd in *Plutarch's Symposiac.* l. 4. c. 4. to prove that Fish are the most proper Diet. For, says he, as to the Creatures which live with us upon the Earth, supposing them to have no other Common Rights with Mankind, yet at least they receive the same Nourishment, they breath, and wash, and drink as we do; and when we kill them, their piteous Cries make us blush for our Cruelty: Besides that the greatest part of them are made familiar to us, by dwelling and feeding so near. Whereas on the contrary, the Race of Sea-Animals is utterly strange to us, is born, and bred, and lives as 'twere in another World; nor are we restrain'd from killing those Creatures by their Cry, by their Aspect, or by any Service that they can do us. For they can indeed be no way useful in our Business, not being able so much as to live in our Element. Our Earth is a kind of Hell to them; they die almost as soon as they touch it. On the other side, the *Pythagoreans*, were more averse to eating Fish than any other Animals; the Grounds of which Opinion are examin'd at large by the same Author, *Sympos. l. 8. c. 8.* So likewise *Xiphilin* reports, That the *Caledonians* never tasted Fish; nay, though they had them in great plenty, *Epit. Dion. Sever.* One of the Reasons there given is this, That other Animals deserve their Death at our hands, by some way or other doing us Mischief; whereas the Fish neither hurt us, nor are able to hurt us. That amongst other Animals, some ought Necessarily to be kill'd, lest by multiplying too fast, they should rob Men of their Sustenance, as *Cunnies* and *Hens*. Whereas (again) the Fish, being born, as it were, in another World, give us no Occasion to hurt them: But we are set against them only because our extravagant Greediness and Luxury is supplied by their Destruction. (b) Lib. 4.

*Aratus Phenom.* (c) *Add. Abrab. Roger. de Bramin. par. 1. c. 1. & 18.* (d) C. 47. (e) *Rochesfort descript. Artilian. par. 2. c. 8.* (1) *Cicero de Finib. bonorum & malorum. l. 3. c. 20. & de Legib. l. 1. c. 8*

that

that the Law of Nature by Virtue of its absolute Authority, commands us to maintain Friendship and Society with Brutes; nor are they capable of sustaining any Obligation towards Men arising from Covenant. From which Defect of all Common Right, there follows, as it were, a State of War, betwixt those, who both are able to hurt each other, and are upon very probable Grounds suppos'd to be willing. And in this State each Party hath Liberty to do to the other, with whom he thus engag'd in Hostility, whatsoever he thinks conducive to his own Interest and Convenience. Yet such a state of War, in which Men stand towards Brutes is very different from that which sometimes ariseth from Men's Clashing amongst themselves: Inasmuch that the Latter is neither universal, nor perpetual, nor extends it self promiscuously to all manner of License against each other. As for the Fiercer Animals, they give evident Proofs of their being plac'd in this Hostile State, whilst upon every Advantage and Opportunity they are ready to exercise their Violence against Men; and he that would have us spare these, doth at the same time require us to put them under fiercer Circumstances, and a more secure Condition than our selves. And then the more mild and gentle Creatures do not offer themselves to the Service of Men, by Virtue of any Obligation, but as they are either bribed by Food, or constrain'd by Force; upon Removal of which Inducements, they will return to their Natural Liberty, and some of them will be so hardy as to assault and encounter Man. Again, others increase so prodigiously, that 'tis necessary for us to retrench their Number, lest we should be our selves reduc'd to a narrow and inconvenient Dwelling (a). 'Tis to no purpose denied by some, that the Lawfulness of hurting and of eating Brute Creatures, may be inferr'd from this Defect of common Right between them and Men: *Because* (say these Authors) *though no Injury be done to the Brutes, yet we injure the Creator of them, (unless we are sure of his Consent) as likewise their Owners or Proprietors.* But this Objection is vain and idle: For that very Consideration, that the Divine Creator hath not establish'd a Right common to Men with Brutes, is a sufficient Evidence that He sustains no Injury, when they are hurt by Men; because he himself was pleas'd to ordain this State and Condition between the former and the latter. And, as to

the other part of the Objection, 'tis a different Question, Whether Man can do any Injury to a Brute? and whether by the Intervention or Occasion of a Brute, he may injure another Man? The first is only denied by what we are now asserting, and not the second: nor will it be impertinent to the Argument in hand, to add this farther Remark, That since the Tame and Harmless Beasts would be otherwise expos'd an easy Prey to the Violence and to the Hunger of the Wild and Ravenous, their Condition is rather better'd than impair'd by that high degree of Power, which Men exercise over them; which in affording them a constant Provision of Food, doth, as it were, pay them the price of their Life, and likewise protects them against the Assaults of their Savage Enemies (1). Now, what hath been here suppos'd, That there is no Common Right uniting and equally affecting Men and Brutes, others have long since demonstrated (2). Which too is the Reason, (as we may here add by the way,) why Property obtains its Force and Effect only against other Men, and not in like manner against Brutes; inasmuch as they, when they devour what we possess, cannot be said to do us an *Injury*. Thus God, in the Language of Scripture, (b) *Feeds the Birds*, even when they consume the Corn produc'd by our Toil and Labour. Yet the Owner of Beasts may sometimes do us Injury or Damage, when they break in and destroy our Harvest; for not keeping them with a stricter care. In one respect indeed, and in a very wide sense, the Beasts themselves may be said to have the same Right with us; when, by the same Right (as it were) by which they invade our Possessions, by the same we drive them from thence.

VII. Yet that the Abuse of this Power, and especially such as is attended with foolish Cruelty and Barbarity, deserves to come under censure is beyond dispute. For, as it is the Interest of particular States, that no Person squander away, or waste and spoil his Possessions; so it turns to the prejudice of the Universal Society of Mankind, and to the Dishonour of GOD, the Giver of so great Gifts, to consume them idly and wantonly, without promoting any Benefit or Advantage of Life. Thus GOD was pleas'd especially to command the *Jews*, To allow their Cattle a Rest from all Work, on the Seventh-Day (c). *Plutarch* (d) tells us, *The Athenians inflicted a Penalty on a certain Person who had strip'd a Ram of his*

(a) See *Exod.* XXIII. 29. *Deut.* VII. 22. Add. *Gassend.* Syntagm. *Epicuri*, par. 3. c. 2, & 7.

(1) See Mr. *Le Clerk's* *Physicks*, B. IV. c. 12. f. 15. See *Arch-Bishop King de Origine Mali*, c. 2. f. 5.

(2) See B. II. c. 3. f. 2. & *Grot.* B. I. c. 1. f. 11.

(b) *Matth.* VI. 26.

(c) *Exod.* XX. 10. 23. 12. *Deuterom.* V. 14. 25. 4. 1 *Corinth.* IX. 9. *Numb.* XXII. 28. 32. *Prov.* XII. 10. *Comp.* *Deut.* XX. 19. *Rom.* VIII. 19. &c.

(d) *Orat.* 1. de *Ufu Carn.*

*Skin whilst alive.* And the Followers of Pythagoras, as Porphyry (a) observes, made Gentleness and Mercy towards Beasts, the Introduction to Love and Pity towards Men. (1).

(a) L. 3. c. 20. p. 125. Ed. Cantab. de Abſtinentia. Nor was the Advice of the Chinese Philosopher, Mentius, altogether amifs, That the King ſhould give no Perſons leave to uſe Nets with ſmall Maſhes; that by this means the greater Fiſh only ſhould be taken, and the leſſer have power to eſcape; which ſufficiently growing up in the following Years, would afford a ſupply at all times, and for all Perſons. As likewiſe, that none ſhould be allow'd to kill Hens, Porkers, or other Animals, before they were come to their full growth; that they might the more eaſily give a full and conſtant Proviſion of Fleſh. Whence it became a Cuſtom amongſt the Chineſe, never to kill any Living Creatures, till they had attain'd that pitch and maturity, which Nature had aſſigned them. Comp. Deut. XXII. 6, 7. agreeable to which is that of Phocylides,

The Nests whole Family you muſt not ſeize,  
But leave the Dam a future Brood to raiſe.

The Action of Alexander Severus (recorded by Lampridius) is likewiſe worthy to be mention'd on this occaſion. When the People of Rome, complain'd to him of a great Dearth and Scarcity, he ask'd them, by a Publick Officer, what kind of Meat was dear; and finding by the Common Cry that Beef and Pork were the Subject of the Complaint, he did not low'r the Price, but order'd that none ſhould kill a Cow, or Heifer, a Sow, or Sucking Pig: and by this means within a Year, or leſs than two Years, there was ſuch Plenty of both Sorts, that from Eight-pence the Pound, they came to Three-pence. (1) See Mr. Le Clerk's Comment upon Genes. IX. 4.

## CHAP. IV.

### Of the Origin of Dominion or Property.

THAT this Power of Mankind over Things ever began to take effect in relation to other Men; (for no Human Property ought to be oppos'd to the Transcendent Right of GOD;) (a) (1) or, that this Indefinite Right was converted into *Dominion*, by virtue of which ſuch or ſuch a Thing belongs to one Perſon, and to none elſe, is all owing to another Principle: (2) Of which, before we proceed to treat, it ſeems neceſſary to premiſe, that *Property* and *Communio*n are Moral Qualities, which do not affect the Things themſelves, as to their intrinſick Nature, but only produce a Moral Effect with regard to other perſons: and that theſe Qualities, as all others of the ſame Kind, derive their Birth from Impoſition. And therefore 'tis an idle Queſtion, Whether the Property of Things ariſe from Nature or from Inſtitution? Since we have plain evidence that it proceeds from the Impoſition of Men; and that the Natural Substance of Things ſuffers no alteration, whether Property be added to them, or taken from them.

II. In the next place we ought with due accuracy to weigh and examine what *Communio*n is, and what *Property* or *Dominio*n. The Term *Communio*n is taken either negatively or poſitively. In the former manner Things are ſaid to be Common, as conſider'd before any Human Act or Agreement had declared them to belong to one rather than to another. In the ſame ſenſe, Things thus conſider'd, are ſaid to be *No Body's*, rather negatively than privative-ly, i. e. that they are not yet aſſign'd to any particular perſon, not that they are incapable of being ſo aſſign'd. They are likewiſe term'd *res in medio quibusvis expoſitæ*, Things that lie free for any Taker. But in the poſitive Signification of

the Word, Common Things differ from Appropriated only in this reſpect, That the latter belong to one perſon only, the former to many Perſons together, though in the very ſame manner. To proceed, *Property* or *Dominio*n, is a Right by which the very Substance, as it were of a Thing, ſo belongs to one Perſon, that it doth not, in whole, belong, after the ſame manner, to any other. For we take *Dominio*n and *Property* to be the very ſame. Though ſome affirm the Right as ſeparated from the Uſe and Profit to be *Property*, and as join'd with the Uſe and Profit to be *Dominio*n; which nevertheleſs is a difference that doth not perpetually hold. Some again are over-nice, whiſt by *Property* they underſtand the Thing it ſelf under that Quality by which it belongs to me, and to none beſides; and by *Dominio*n a Right to diſpoſe of the ſaid Thing as I pleaſe, which flows from *Property* in the manner of an Effect; ſo that the *Dominio*n ſhall be lodg'd in the Perſon, but the *Property* ſhall ſeem rather to inhere in the Thing (b). In which Diſtinction it is falſly ſuppos'd, that *Dominio*n is as it were the Effect of *Property*; whereas if a Man thinks it at all neceſſary thus to divide them, the reverſe of this is rather true. For the Right, ſtrictly ſpeaking, inheres in the Perſon, from which the Things themſelves derive ſome kind of Extrinsic Denomination. And this appears ſufficiently evident from hence; that the Right dying with the Perſon, the Things ceaſe to be appropriated, without any change in their Substance, or in other Natural Qualities and Affections.

Now the force of *Property* is ſuch, that we may at our pleaſure diſpoſe of the Things which we hold by this Right, and may keep

(a) Vid. Europ. Phœniſſ. N. 558, &c. Add Levit. 25. 23. (1) See Pſalm XXIV. 1. (2) See Mr. Barbeyrac's ad Note upon this Sect (b) Vid. Ziegler ad Grot. l. 2. c. 2. f. 1.

any other Person from the use of them; unless he hath obtain'd from us, by Covenant, a particular Right to this purpose: and that therefore whilst they continue ours, they cannot after the same manner, and in whole, be others. I say, *after the same manner*; for, neither as there is no reason to the contrary, so Custom informs us, that the same Thing may belong to several Persons at once, according to their different ways of holding or owning it. Thus the Commonwealth, the Landlord and the Tenant, by Copy or Lease, may be said each of them to have the Property of the same piece of Ground; the first an *Eminent Property* (1); the second a *Direct* (2); and the last an *Useful* (3). It was added likewise, *in whole* (4); for many Persons may even in the same way, hold the same thing, yet not in whole, but each according to his determinate share. As is the Case in those Goods which are, without division, possess'd by many together, who all happen to have the same kind of *Property* with regard to the same thing.

Sometimes we conceive *Property* to be divided into several parts; or, (if any one likes this Expression better) to admit of several Degrees. For thus 'tis frequently distinguish'd into *Plenary* and *Diminutive*. The former is either join'd with what they call *Eminent Property*, in which manner Civil States, or the Heads and Governors of them possess their Goods; or else disjoin'd from it, and term'd *Vulgar*; by which a private Man enjoys a full Power of disposing of his Goods, except so far that the Use of them be not under the Direction of the Municipal Laws. *Diminution of Property* may be made several ways, as that the bare Exercise or Administration of it shall be restrain'd; or that the Profit and Advantage of it shall be lessen'd: Or lastly, that somewhat shall be cut off from the very Property it self. The first happens, when by Covenant, or by Testament, or by the Command and Authority of Law, on account either of the Condition of the Persons, or of the Quality of the Things, or for some other Just Causes, the Alienation of Possessions is either prohibited, or confin'd within certain Limits, yet so as that no Right to the said Possessions, is hereby deriv'd upon others (a). The Advantage of Property is lessen'd, if either the full Use and Enjoyment of my Goods is in the Hands of another, without Loan or Hire; or otherwise if I am bound to allow another some particular Use of them, by way of *Service*. Lastly, the Property it

self is then retrench'd, when we grant to another, besides the full Right of using and enjoying what is ours, a Right likewise of alienating it after a certain manner; and such a right too as is in some sort perpetual. In which Case, he who retains the Property, tho' thus abridg'd and holds a superior Power over the Possession, is said to have a *Direct Property*; and he who, together with the Right of using and enjoying, partakes likewise of the Property in the manner before describ'd, is said to have an *Useful Property* in the Possession thus granted to him (b). Where we may observe, by the way, what Limitation ought to be added to that common Rule with the Lawyers, *What is already a Man's own, can't become more his own* (c). Whence they conclude, that (6) no Pawn, no Charge, no Bargain of Buying, or of letting to Hire can possibly stand, when made to him who is already the Proprietor of the thing thus dispos'd of. As likewise if a Testator happens to bequeath to the *Legatee* what was his own before, the Act is void and fruitless (7). And so too, that no one (8) can, to any purpose, stipulate or bargain for a thing that will be his own without any such Conditions; with other the like Cases. All which are true, unless it so happen, that a *Diminutive Property* should, by any of these means, be advanc'd to a greater degree of *Plenitude* (c).

Farther, since the same Thing may be possess'd either in whole by one, or else by many, without falling under a Division; so that each Person according to his Determinate Share, shall have an equal Right in it; hence it comes to pass that things are, in this respect, distinguish'd into *Proper* and *Common*, as the Word *Common* is taken in its latter Signification; implying that the same thing is by the same kind of *Dominion* held by several Men, without being divided, or parcell'd out amongst them. And this *Communio* differs from *Property*, strictly so called, only with regard to the Subject in which it is terminated and lodg'd, a *proper* or appropriated thing belonging to one Person alone, a *common* thing to several, but not with regard to the manner or the vertue of the *Dominion*; for many Persons have the same Right over a *common* thing, as a single Person hath over a *proper* thing; and as the Propriety of a thing appertaining to One only, excludes all others from an equal Right in the same thing, so a *common* thing excludes all others but those to whom it is

(1) See B. VIII. c. 5. f. 7. (2) Which Property is explain'd in this Sect. (3) See c. 8. f. 3. (4) *Plures eandem rem in solidum possidere non possunt*, D. I. 4. tit. 2. *De acquirenda vel admittenda possessione*, leg. 3. f. 5. (a) Add Theophrastus's Will in *Diog. Laert.* l. 5. f. 51. (b) *Comp. Struui. Syntagm. Exerc. XI. 55, &c. Seneca de Beneficiis*, l. 7. c. 12. It's no Argument that a thing is not your own because you cannot sell or spend it, because you cannot change it for better or for worse. For that likewise may be truly call'd your own which is your own under certain Terms and Conditions. (5) *Quod proprium est ipsius [Legatarii] amplius ejus fieri non potest*, *Instit.* l. 2. tit. 20. *de Legatis*, f. 10. (6) *Neque pignus, neque depositum, neque precarium, neque emptio, neque locatio rei sue consistere potest*, D. I. 50. tit. 17. *De divers. Reg. Juris*, l. 45. (7) *Sed si quis rem Legatarii ei legaverit, inutile est legatum*, *Instit.* l. 2. tit. 20. f. 10. (8) *Nemo rem suam futuram, in eum casum, quo sua sit, utiliter stipulatur*, *Instit.* l. 3. tit. 20. *De inutilib. Stipular.* f. 22. (c) As *Lucilius*, in the *Anthologia*, l. 2. jests smartly on the Old Miser *Hermocrates*, in feigning that he had set down himself in his Will as Heir to his own Goods.

said to be *common*. Now since neither of these Commoners hath a Right extending it self to the whole Thing, but only to a part of it, tho' suppos'd to remain undivided; it is manifest that no one Person can, by his own Right, dispose of the thing entirely, but only according to his fixt Proportion: and that if any Resolution is to be taken, any Bargain to be made about the whole, the Consent and Act of each Commoner is necessarily required. *Ziegler* (a), *Felden* (b), and *Bœcler* (c), in their Observations on *Grotius*, have all confounded Negative Communion with Positive: on account of which Mistake, many Arguments have been thrown away to no purpose, in discussing this Point; as will appear hereafter. What *Seneca* hath deliver'd about the several kinds of Communion, may not be impertinent to our present Subject (d). *I hold all things*, says he, *in common with a Friend, not as I do with a Sharer, so that one part should be mine, and another part his; but as Children are common to their Father and Mother, who, supposing the Children to be two, are not said to have each one, but each both. The Knight's Seats belong to all that Order, yet in them, by taking Possession of a place, I appropriate it to my self. And if I resign this place to another Person, though he had an equal Right to it, yet it seems to be my Gift. Some things belong to some Men under a certain Condition. Thus, again, I have a place in the Knight's Seats, not to sell, not to let out, not to make my Home, but barely to sit in whilst I am a Spectator. It will be no Falsity then, if I should say, I have a place in the Knight's Seats; yet if they happen to be full when I come into the Theatre, I both have a place there by Right, because I am allow'd to use them; and I have not a place, because it is already possess'd by those who had a common Right to it with my self.*

III. From what hath been offer'd, 'tis Evident that as well positive Communion, as Propriety, doth imply the Exclusion of others from the Thing thus said to be either *common* or *proper*, and consequently doth presuppose more Persons in the World than one. As then, if there were but a single Man upon Earth, it could by no means be said, that things were appropriated to him: so those things, from the use of which no Person is excluded, or which belong no more to any one, than to another, are to be stiled *common*, in the former, not in the latter sense of the Word. And thus it appears in what respect we may attribute the Dominion of things to *Adam*, whilst he yet stood alone in the World. Namely, although by reason of the vast Extent of the

Earth, and his small Occasions, he needed to apply to his Service but a very inconsiderable Portion of things; yet supposing him to have had Inclination, and likewise Ability and Convenience, to turn all that God had given him to his own use, there was no Right of others to oppose or hinder him. Therefore the Right of *Adam* over things, was of a different kind from that Dominion which is now settled amongst Men: We may call it an indefinite Dominion, not formally possess'd, but absolutely allow'd; not Actual, but Potential (1). It had indeed the same Effect which Dominion now obtains; that is, the using things at pleasure; yet was it not Dominion, strictly speaking, by reason that there was no other Person against whom this Effect might prevail; but 'twas capable of passing into Dominion, when the Number of Mankind should afterwards increase. And thus on the whole, whilst *Adam* was the only Man, things in respect of him were neither *proper* nor *common*. For Community suppoeth a Partner in the Possession; and Propriety denotes an Exclusion of the Right of others to the thing enjoy'd: so that neither of them can be understood, 'till the World was furnish'd with more than one Inhabitant.

IV. But farther, it ought no less carefully to be observ'd, that the Grant of Almighty God, by which he gave Mankind the use of Earthly Provisions, was not the immediate Cause of Dominion, as this is directed towards other Men, and with relation to them takes Effect: (which is evident likewise from hence, that even Brutes, by the Divine Permission, use and consume the Fruits of the Earth, and yet they are certainly incapable of Dominion:) But that Dominion necessarily presupposeth some Human Act, and some Covenant either Tacit or Express. GOD indeed authoriz'd Mankind to apply to their Service and Convenience the Earth, with the Product of it, and the Living Creatures upon it; or, he gave Man an indefinite Right to all these Possessions: But still it was left to their own Choice and Disposal what Manner, what Degree, what Extent they would fix to this Power: That is, whether they would circumscribe it with certain Bounds, or leave it unconfind; as likewise whether they would allow each Person a Right to all things, or only to one and the same determinate part of things; or whether they would assign to every particular Man his own Portion, with which he should rest contented, and pretend no Right or Claim to any thing besides (e). 'Tis in vain therefore to dispute whether God conferr'd the Dominion

(a) *Add. Grot. l. 2. c. 2. f. 1. ab init.*

(b) *d. l. f. 2.*

(c) *d. l. p. 47.*

(d) *De Benef. l. 7. c. 12.*

(1) Mr. *Barbeyrac* in his Translation expresses himself more clearly, by saying *Adam's* Right over things was rather the Foundation of Property, than actually Property it self. (e) *Ambros. Off. l. 1. c. 28.* Nature pour'd out all things in common to all Men: For so God commanded the whole Stock of Things to be produced, that Men should have a general Supply of Sustenance, and should hold the Earth as a general Seat. Common Right therefore was the Work of Nature; Private and Peculiar Right, the Work of long Use and Possession. *Add. Selden. de J. N. & G. Sec. Heb. l. 6. c. 1.*

over things on our first Parents, as the Representatives of all Human Race (1); or whether he gave it them as their own Peculiar, and so as to terminate in their single Persons; that they by their own proper Right, should hold the Lordship of the whole World, and that all other Mortals should owe their private Dominion to their Bounty and Favour. For that Divine Grant only confirm'd Men in a fuller Assurance of the Goodness of their Maker towards them, and satisfy'd them that 'twas his pleasure, they should dispose of other Creatures for their own Use and Service. But it was left to the Reason of Men to determine what Measures should be taken to prevent any Discord that might arise amongst them from the Exercise of this Right. But we can by no means say, That there was any universal Rule and Manner of Possessing prescrib'd by God himself, which all Men should be oblig'd to observe. Therefore things were rendred neither *proper* nor *common* (that is, in a *positive* Communion,) by the express Command of God: but this Matter was afterwards adjusted by the Disposal of Men, according as the Peace of Human Society seem'd to require. Whence, those Authors must needs be under a Mistake, who deliver themselves in so gross Terms as these: *The Division of things belongs to the Law of Nature; that is, it doth not only receive its Rise and Foundation from Nature, so as afterwards to be turn'd into Law by the Consent of Mankind; but Nature herself frames and compleats this Law by her own Act and Authority.* And again, *The Division of things is one Command of the Decalogue; that is, one Head of the Law of Nature. For he that said, Thou shalt not steal, in effect said, Let there be a Property and Distinction of things; let every one hold what is his own, and not covet what is anothers* (a). For there is no Precept of Natural Law to be discover'd, by which Men are enjoin'd to make such an Appropriation of things, as that each Man should be allotted his particular Portion, divided from the Shares of others. Though the Law of Nature doth indeed sufficiently advise the introducing of separate Assignments, as Men should appoint, according to the Use and Exigencies of Human Society; yet so as to refer it to their Judgment, whether they would appropriate only some particular things, or whether they would possess some things without bringing them to a Division, and leave the rest as they found them, only forbidding any particular Man to challenge them to himself alone. Hence too, the Law of Nature is suppos'd to approve and confirm all Agreements made by Men about the Possession of things, provided they neither imply a Contradiction, nor tend

to the Disturbance of Society. Therefore the *Property* of things flow'd immediately from the Compact of Men, whether *tacit* or *express*. For although after the Donation of God, nothing was wanting but for Men to take Possession; yet that one Man's seizing on a thing should be understood to exclude the Right of all others to the same thing, could not proceed but from Mutual Agreement (2). And though Right Reason mov'd and perswaded Men to introduce distinct Properties, yet this doth not hinder, but that they might derive their Rise and Original from Human Covenant.

V. Thus much being premis'd, it is manifest, that antecedently to any Act or Agreement of Men, there was a Communion of all Things in the World; not such as we have before term'd *Positive*, but a *Negative* Communion: that is, all Things lay free to any that would use them, and did not belong to one more than to another. But since Things could afford no Service to Men, were we not allow'd to lay hands at least on Fruits and Products of them, and since this would be to no purpose if others might lawfully take from us, what we had before actually mark'd out for our own Use: Hence we apprehend the first Agreement that Men made about this Point, to have been, that what any Person had seiz'd out of the Common Store of Things, or out of the Fruits of them, with design to apply to his Private Occasions, none else should rob him of. (b) This may be illustrated by the Case of Beasts, amongst which none can claim a peculiar Right to any thing above others; but each satisfies his Appetite with what he first meets with in his way: And if any of them hath been so provident as to lay up a Stock for future use, the rest are under no obligation to forbear invading and plundering it: inasmuch as no Agreement can have pass'd amongst them, which might lodge the Chief Right to any Thing in the first Taker.

The Author of the Treatise *de Principiis justitiae & decori* (c) hath advanc'd somewhat on this Subject, which may serve to set it in a fuller Light. *He supposeth beforehand, that Man may lawfully possess and use Creatures void of Reason; and thence infers, that since Men are by Nature Equal, all must have an Equal Right to the Creatures* (3); *there being in respect of the Creatures themselves no Rule assigning one part to me, and another to my Neighbour: What remains then, but that the distinction and division of Goods must be deduc'd from Compact? But forasmuch as all Human Institutions and Ordinances are made with the exception of extreme Necessity, therefore when so desperate a Case happens, the Primitive Right to all things*

(1) Sr. Robert Filmer maintains this with some Warmth, and makes use of it to prove the absolute Power of Sovereigns, which, as he says, comes by Succession from the Sovereign Authority of Adam. See Mr. Barbeyrac's First Note upon this Sect. (a) Vid. Bæcler. ad Grov. in præfat. p. 9. (2) Mr. Barbeyrac in his Second Note upon this Sect. confutes at large this our Author's Notion. (b) To this belongs l. 41. t. 2. D. de acquir. vel admittenda poss. l. 1. (c) Veltbuisen, p. 100, &c. (3) Men have an Equal Right to their service, but not to Engross 'em to 'emselfes, that there may be none remaining for others.

revives : because in the Common Agreement for the Division of Things, every one is suppos'd to have renounc'd his Right to those Things which were allotted to others with this reserve and restriction, Unless I am unable otherwise to compass my own preservation. My Calamity doth not give me a Right to those Things to which I had none before ; but the extremity of my danger makes that Condition cease, under which I gave up my first Right. For the same Reason, it is lawful in War to seize the Goods of the Enemy : because all Compacts being dissolv'd, the Original Right returns. He adds, p. 110. That before the settling of Covenants, first Occupancy did not by its own force confer any Right. Because first, in whatever Neccessitous Condition I was plac'd, I could then have no Right to recall these Goods to my own use ; this privilege taking place only in Goods which I voluntarily resign'd to my Neighbour : but there are not many persons to be met with, who would allow such a Prerogative to things thus acquired.

Which Reason might be thus propos'd in clearer Terms.

If First Occupancy of it self conferr'd a Right exclusive of all others, it would follow, that even in a Case of necessity, Goods thus attain'd, could not be made use of by any other Person than the Possessor : Because the Right of Necessity follows from an Exception added to the first Compact about the division of Goods ; but we before suppos'd that no such Compact had pass'd about Things which came into Mens possession by these means. It being then absurd and unreasonable, that a Person reduc'd to Extremity, should not be allowed to use what another hath by Occupancy made his own ; it follows, that the Right by virtue of which Occupancy fixeth a Property, is likewise owing to Covenant. Though this Argument is at the best but very feeble (1).

He proceeds Secondly to affirm, That there is in Nature no more reason why Men should desire a Right from the first Occupancy of Things, than from the first discovery of them with the Eye. Therefore the difference must arise from the Institution of Men, ordaining, that the Right to a piece of Land, for instance, should be in him who first took possession of it, not in him who saw it before others. Thirdly, he says, Let us suppose Two Men, one swift, and one slow of Foot, 'tis evident what an ill match'd Couple we have here, as to the Business of acquiring Property ; and, by consequence, that the Right by which he who first seizeth the Thing, in this Case, should be the true Owner of it, is not borrow'd from Nature, but from Implicit Covenant or Agreement. He might have said more briefly, upon supposition that all Men had originally an equal power over Things, we cannot apprehend how a bare Corporal Act, such as Seizure is, should be able to prejudice the Right and Power of others (2), unless their Consent be added to confirm it : that is, unless a Covenant intervene. What the same Author disputes farther, (a)

That in the Primitive State one Man might have brought the whole World under his subjection ; is vain and idle, and is confuted by Mr. Hobbes himself ( b ).

VI. To proceed, Men left this Original Negative Communion, and by Covenant settled distinct Properties, not at the same time, and by one single Act, but by successive degrees, according as either the Condition of Things, or the Number and the Genius of Men seem'd to require. Thus the Scythians of old appropriated only their Cattle, and the Furniture of their Houses ; leaving their Land in its Primitive Communion ( c ). Indeed the Peace and Tranquillity of Mankind, for which the Law of Nature appears especially concern'd, gave no obscure Intimation, what would be most convenient for Men to appoint in this Affair. For that each Man should retain an equal power over all Things, or that the Universal Provision should be laid in Common, ready for the promiscuous use of every Person, was not consistent with the safety and quiet of Human Race ; especially after they were multiplied into considerable Numbers, and had cultivated and improv'd the Method of Living. (3) Because there could not but arise almost Infinite Clashings, (4) from the desire of many Persons to the same Thing, which was not able to satisfy them all at once ; it being the Nature of the greatest part of what the World affords, to be incapable of serving more than one Man at the same time. As for the precise Order, and the particular Causes of Things passing into Properties, I conceive we may thus come to an apprehension of them. Most Things of immediate use to Men, and which are applied to the ends of Nourishment and Cloathing, are not by bare unassisted Nature produc'd every where in so great abundance, as to yield a plentiful supply to All. As often therefore as two or more should want the same Thing which could not content them all together ; and should endeavour to seize and secure it for themselves, so often there must arise a most probable occasion of Quarrels and Hostilities. Again, many Things stand in need of Human Labour and Culture, either for their Production, or to fit and prepare them for Use. But here, it was very inconvenient that a Person who had taken no pains about a Thing should have an equal Right to it with another, by whose Industry it was either first rais'd, or exactly wrought and fram'd, to render it of farther service. It was highly conducive then to the Common Peace, that immediately upon the multiplication of Mankind, Properties should be appointed in Movable Things, especially such as require the Labour and Improvement of Men ; and in those Immoveables which are of immediate and necessary use, as Houses, for Instance ; so that the Substance of them should belong

( 1 ) See His 2<sup>d</sup> B. c. 7. f. 6. See Mr. Barbeyrac's 3<sup>d</sup> Note upon this Sect. (2) See Mr. Barbeyrac's 4<sup>th</sup> Note upon this Sect. (a) *Ibid.* § 103. 166. (b) *De Civ.* c. 1. f. 11. (c) *Justin.* l. 2. c. 2. (3) *Vid. D. l. 8. tit. 2. De servitut. prædior. urbanor. leg. 26.* (4) *Vid. Hobbes de Civ.* c. 1. f. 6.

either separately to particular Persons, or to such a number of Men as had by peculiar Covenant agreed to hold them in the way of *Positive Communion*. Farther, although there appears some reason in these Things, why they should rather belong to some than to others, yet the Dominion or Property of them, such as implies the exclusion of all Persons besides, was to be confirm'd at least by tacit Compact (1): and this tacit Compact involv'd a tacit Cession of the rest of Mankind; intimating, that whatever had been assign'd for any ones private share, they would never challenge any Right or Title to, upon pretence of its receiving its matter, or its nourishment from the Earth, the Common Habitation of Men. As for those Immoveables which Nature produc'd, without the concurrence of Human Industry, that is, Lands, since they were so widely extended, as abundantly to satisfy the small number of the first Men; so much of them was from the Beginning taken into Possession, as Men thought convenient for their present Occasions; the rest being left in its Natural and Negative Communion, to be possess'd by any Person that should afterwards think fit to use it. Here therefore we must conceive a Covenant to have pass'd to this Effect; that those Lands which had been assign'd to particular Men by the express Agreement of the rest, or such as the rest were suppos'd to have resign'd all their Title to, by permitting a single Person quietly to enjoy, and by taking to themselves other Lands in the same manner, should belong to the Manurers and Improvers of them: and that what remain'd should pass into the Property of those who would afterwards fix upon it (a).

VII. That the settling distinct Properties turn'd to the real Benefit and Advantage of Men, when grown more numerous, may be illustrated from the same Arguments which *Aristotle* (b) brings to overthrow the *Platonick* Communion of Goods. Though indeed his Design was to refute a *positive* Communion; whereas our Enquiry proceeds about the Reasons inclining Men to quit that Communion which we have already shewn to be Negative (c). If, says he, *Men labour'd in common, and laid up all they got in one Heap, out of which they were freely to take for their Support, 'tis*

*impossible but that Heats and Quarrels should arise from the Inequality which must be observ'd between some Men's Getting and Spending. In general (as he well remarks) the living together, and upon the same Stock and Maintenance, is grievous and uneasy. Which is the Reason that we are never so highly displeas'd with other Persons, as with our Servants and family Dependants, who are continually under our Eye. But now upon the introducing of Property, all these Complaints are silenc'd; every one grows more Industrious in improving his peculiar Portion; and Matter and Occasion is supplied for the Exercise of Liberality and Beneficence towards others. It were better therefore that Goods should be made proper as to the Possession, and should be Common only in the Use. Again, To consider a thing as our own, raiseth the Pleasure we take in enjoying it (d). To gratify and assist a Friend, a Guest, or a Companion, fills us with sensible Satisfaction and Delight; and this we cannot do, unless we have a separate Share of Good things to our selves. Besides, since there are few things which can be made use of by all Men at once, when many Persons should happen to set their Mind on the same Object, which could not suffice them together, they must of Necessity fall out; were not the desired Object already assign'd to a particular Owner. It must be confess'd, these Reasons did not weigh so much with Sir Tho. Moor and Campanella, as to hinder them from setting up a Communion of Goods, the former in his *Utopia*; the latter in his *Realm of the Sun*: It being much more easy to fancy perfect Men than to find them (2). But farther, we may hence too discover the Falsity of that Vulgar Saying, *Meum and Tuum are the Cause of all the Wars and Quarrels in the World*. For on the contrary the Distinction of *Meum* and *Tuum* was rather introduc'd to prevent all Contention (e). But that infinite Field of Hostilities and Strifes, ariseth only from hence, That the Avarice of Men is ever aiming to break through those Bounds of *Meum* and *Tuum*, which have been by Law or Covenant establish'd (f).*

VIII. Though what hath been here deliver'd seems plain and evident, yet we think it not impertinent to examine more largely the Opinions of some Ancient and some Modern Writers on this Subject. Amongst the

(1) See Mr. Barbeyrac's Note upon this Sect.

(a) Add. Ziegler ad Grot. l. 2. c. 2. f. 20. p. 224.

We may here observe, by the way, that when *Josephus* (*Antiqu. l. 1. c. 3. Ed. Genev.*) reports *Cain* to have set bounds to the Land, in those early Times; he, is in this respect, no more to be credited, than when he tells us, in the same place, That *Cain* exercis'd his Lusts and Cruelties to the Injury of his Neighbours: that he increased his House with those vast Sums of Money which he had heaped together by Rapine and Violence; that he solicited his Dependants to engage with him in open Robberies. For how such Actions as these should be possible in the Eldest Son of the first Created Pair, I am yet at a loss to conceive. (b) *Polit. l. 2. c. 5. p. 316. Ed. Paris.* (c) To which add *Aristophan. Concionatr. p. 716. (d) Juvenal. Sat. 3.*

*Est aliquid quocunque loco, quocunque recessu, Unius sese Dominum fecisse lacertæ.*

'Tis somewhat to be Lord of some small Ground, In which a Lizard may at least turn round.

Mr. Dryden.

(2) See Mr. Barbeyrac's Fourth Note upon this Section: (e) Hence *Plato, LL. l. 8. p. 214. Ed. Wech.* calls the Meer-stone, the Boundary of Friendship and Enmity, confirm'd by Oath, and approv'd of by the Gods. Of the Sacredness of the Landmark, see likewise *Deut. XIX. 14. Job XXIV. 2. L. 27. t. 21. D. de Termino moto. Collat. leg. Mosaicarum cum Rom. tit. 13. Paul. Sentent. II. 16. V. 22. Frontinus de re agrar. Let every one keep his own Bounds and not disturb those of other Men: for therefore was the Mark-stone set up, litem ut discerneret agris, — to end the Quarrels of the Field. (f) *Lyfias Orat. 17. The main Causes of Dissentions amongst Subjects are, that some covet other Men's Possessions, whilst some, again, are robbed of their own.**

former, *Diodorus Siculus* (a) reports, That the first Earth-born Men led a wild and irregular Life, went out in Herds to seek their Food, which consisted of the most juicy Herbs, together with such Fruits as the Trees spontaneously produc'd: But not knowing how to bring their Provision together, and to lay up a Store for future use, many perish'd during the Winter, purely through the Inclemency of the Air, and partly through want of Sustenance; 'till by degrees gaining Instruction from Experience, they began to retire into Caves in the Cold Season, and to reserve a sufficient Stock of such Fruits as were fit for keeping: Some new Advantage or Improvement being every day added to Life (b). This Hypothesis concerning the Origin of Mankind, tho' false, being taken for granted, it follows, that Men in the Beginning liv'd upon the Supplies of Nature, in common; afterwards settling by Covenant the Property of Houses, and of Fruits treasur'd up for future Service, till by slow Advances the Appropriation of Land was likewise introduc'd. To the same purpose is frequently alledg'd what *Justin* (c) relates of *Saturn*, King of the *Aborigines*, who, he tells us, was so remarkable for exact Justice, As that no Person under his Reign, liv'd in a Condition of Slavery, or held any private Possession; but all things, like one universal Patrimony, lay undivided, and in common to all. The Authorities of the Poets are likewise produc'd in great Numbers, where they describe the happy state of their Golden Age. *Virgil*. *Georg.* 1. 125, &c.

*Ante Jovem nulli subigebant arva coloni;  
Nec signare quidem, aut partiri limite campum  
Fas erat: in medium querebant; ipsaque tellus  
Omnia liberius, nullo poscente, ferebat* (d).

Before *Jove's* Reign none vex'd the peaceful Ground,  
Which only Turfs and Greens for Altars found.  
No Fences, parted Fields, nor Marks, nor Bounds,  
Distinguish'd Acres of litigious Grounds:  
But all was Common, and the Fruitful Earth  
Was free to give her unexpected Birth.

Mr. Dryden.

*Tibull.* *Eleg.* 3. B. 1. 41, &c.  
*Illo non validus subiit iuga tempore taurus;  
Non domito frænos ore momordit equus.  
Non domus ulla fores habuit; non fixus in agris  
Qui regeret certis finibus arva lapis.*

No sturdy Ox did to the Yoke submit,  
No broken Courser champ'd the galling Bit.  
No Door the fearless Cottager conceal'd,  
And the wide Earth was but a common Field.

*Senec. Octav.* V. 402, &c. Act. 2.  
——— *Cingere assuerant suas  
Muris nec urbes, pervium cunctis iter.  
Communis usus omnium rerum fuit:  
Et ipsa tellus læta fecundos sinus  
Pandebat ultro.*

——— Nor had they yet begun [Scene  
To fence their Towns with Walls, but Nature's  
Lay a free Road: The Universal Store  
Supply'd Mankind; at large they liv'd and fed.  
The willing Earth her fruitful Bosom shook,  
Rich with diffusive Plenty——

Again in his *Hippolytus*, Act. 2. V. 525, &c.  
——— *Prima quos mixtos deis  
Profudit ætas, nullus his auri fuit  
Cæcus cupido; nullus in campo sacer  
Divisit agros arbiter populis lapis.*

——— The first good Race of Men,  
Companions of the Gods and mixt with Heaven,  
Not blindly led by Avarice and Gold,  
Forbore to fix the Consecrated Stone  
To bound the Fields, and judge between the  
[Swains.

Thus 'tis one of the *Alterations* which *Ovid*,  
*Met.* 1. v. 135, &c. describes in the Iron Age,  
*Communemq; prius, seu lumina solis & auras,  
Cautus humum longo signavit limite messor* (e).

Then first the wary Swain inclos'd his own;  
All common was before, as Air or Sun.

These, and the like Poetical Relations,  
*Lactantius* (f) interprets in the following  
manner:

*"Nec signare quidem aut partiri limite campum  
Fas erat; in medium querebant.*

That is, God Almighty gave the World in common to Men, that they should live freely together, not that furious Avarice should claim the whole Store to it self, or that any one should want what was produc'd for the sake of all. This Saying of the Poet we ought not to take so strictly, as to imagine that in those Times there was no private Possession; but in a Figurative Sense, so usual in those Compositions; giving us to understand, that Men were so generous and liberal, as not to shut up to themselves the Fruits of the Earth, or to lie hovering over a conceal'd and separate Store; but that they admitted their poorer Neighbours to the common Enjoyment of what

(a) Lib. 1. (b) *Plin.* N. H. 1. 23. *Procem. de Arborib.* *Pomona* urgeth this in her own Honour and Defence, That the first Food of Men, was owing to Trees; and that this taught them to look upright towards Heaven: nay, that they might still find a Sustenance from the same Stores, without Corn and other Products of the Earth. (c) L. 43. c. 1.

(d) See this place illustrated by *Senec. Epist.* 90. (e) *Macrob. Saturn.* 1. c. 8. The Romans appointed the Temple of *Saturn* to be their Treasury, for this Reason, Because during the Time of his Reign in Italy, no Robbery was committed: Or, because under him there were no distinct Possessions or private Estates,

*Nec signare quidem aut partiri limite campum  
Fas erat; in medium querebant.*

therefore it was thought convenient to lodge the Common Treasure under his Protection, in whose Reign all Things had been Common to all Men. (f) *Institut.* 1. 5. c. 5.

they had gotten by their own Pains. But indeed as no sensible Person will let the Poet persuade him, that these primitive Mortals had *omnia in medium quaesita*, or a positive Communion of Goods; so the Reason which *Lactantius* assigns to those Expressions, doth not in our Judgment appear satisfactory: For as on the one side, Men were not then perhaps greatly inclin'd to Covetousness, being yet ignorant of Wealth, and finding an easy Supply of Food from Nature's Store, whilst they remain'd Strangers to Delicacies and Excess; so, on the other side, we do not see what matter they could have for Bounty, when there was no Occasion to scrape up Treasure. 'Tis a good Consideration that some recommend to us, in order to a right Understanding of the whole Fable of the Golden Age; that the Dispositions of Rustick and Barbarous People make them almost Natural Friends to Ease and Laziness, and Enemies to Labour. That the more rude and simple way of Life any Persons are engag'd in, the less inclinable they would be to Plenty and Luxury, to Magnificence and Splendor; which commonly require much Industry and Pains (a). And that lastly, 'tis the general Vice of Old Persons, to commend the Times of their Young and Flourishing Days, to despise, for the most part, present things, and what they see before them; extolling whatever comes mark'd with the Advantages of Age: And that therefore it seems very probable, those rude and ignorant Men, when the Legislators compell'd them to a Life of Manners and of Industry (1), might be very uneasy under the Change, and frequently send out a Wish for their Acorns and their Idleness. From which Complaints of their Old Sires, Posterity might frame their Dreams about the Golden Age. This Conjecture is strengthen'd by the Character which *Salust* (b) gives of the *Aborigines*, the People of those primitive Times; *They were*, says he, *a Clownish Race of Men, without Laws or Government, tied up to no Order or Rule.* And *Ovid* himself placeth the Happiness of the Golden Days chiefly in this; That Men obey'd Faith and Honesty *without Law*; and fear'd no Punishment, because no Civil Societies were yet establish'd.

*Contentique cibus nullo cogente creatis,  
Arbuteos fetus, montanaque fraga legebant,  
Cornaque & in duris haerentia mora rubetis,  
Et quae deciderant patulâ Jovis arbore glandes* (c).

(a) Add *Montaigne's* Ess. l. i. c. 30. (1) Mr. *Le Clerk* has prov'd that those Ages which were call'd *Golden* and *Silver*, were not a jot better than after Ages. See his Notes on *Hesiod's* Theogony, V. 211.

(b) *Catilinæ*. Bell. ab init. Add the Character given of the same People by *Dion. Halicarn.* l. i. p. 8. &c. Ed. *Lips.*

(c) *Met.* l. v. 103, &c. As for what follows, about the Perpetual Spring, the Spontaneous production of the choicest Fruits, and the Rivers overflowing with Milk and Nectar, 'tis no truer than that extravagant Rant of *Pherecrates*,

The Rivers run with Oatmeal and Black Broath,  
Murmuring, when new-bak'd Biskets stopp'd their Speed.  
Links and Hot Saufages in Fish-pools flood,  
And Fatted Oysters skimm'd the wealthy Stream.  
Fowls nicely dress'd, serv'd up themselves, and flew  
About Mens Mouths, still courting them to feast.

(2) See *Grævin's* Note upon it.

Content with Food which Nature freely bred,  
On Wildings and on Strawberries they fed;  
Cornels and Bramble-Berries gave the rest,  
And falling Acorns furnish'd out a Feast.

Mr. *Dryden*.

There's a Famous place produc'd on this Head  
from *Tully's* First Book of Offices, c. 7. (2)  
'Tis the part of Justice to distinguish between  
Things Common and Particular, and to use them  
accordingly. Now nothing is private by Nature,  
but as it becomes so, either by Ancient Possession,  
as appropriated by the first Occupant, or by Con-  
quest, upon the Right of Arms; or else by Law,  
Agreement, Condition, or Lot. Hence come the  
Names of the *Arpinate* and the *Tusculan* Lands.  
And in like manner are Private Possessions settled  
and describ'd. Since therefore the Things which  
Nature made common, have by this means been  
turn'd into Property, let every Man quietly enjoy  
his Lot: Whoever covets more than this, shall  
be deem'd to have violated the Law of Human  
Society.

*Horace* is sometimes brought in, giving his  
Judgment amongst the rest.

*Nam propriae telluris herum natura neque illum,  
Nec me, nec quenuquam statuit: nos expulit ille;  
Illum aut nequities, aut vafri inscitia juris;  
Postremum expellet certè vivacior hæres.  
Nunc ager Umbreni sub nomine, nuper Ofelli  
Dicitus erat; nulli proprius; sed cedit in usum  
Nunc mihi, nunc aliis, L. 2. Sat. 2. v. 129, &c.*

Nature, nor him, nor me, nor any made  
The Proper Master of the Stage we tread.  
He turns out me; and him some Vile Deceit,  
Or a Dull Head at Law shall send to share my Fate.  
At least he, one day, must, with all his care,  
Yield to the stronger Vitals of his Heir.  
*Ofellus* lately gave the Farm its Name,  
And now *Umbrenus*: None of Right may claim  
The Property; the Use is passing still;  
And all are Fortune's Tenants at her Will.

—*Tanquam*

*Sit proprium cuiquam, puncto quod mobilis horæ  
Nunc prece nunc pretio, nunc sorte supremâ  
Permutet dominos, & cedat in altera jura.  
Sic quia perpetuus nulli datur usus, & hæres  
Hæredem alterius, velut unda supervenit undam,  
Quid vici profunt aut horrea? L. 2. Ep. 2.  
v. 171, &c.*

As if the Treacherous World had ever shown  
A thing we might presume to call *our own!*  
Since in one fleeting point of Time, convey'd  
By Grant or Sale, to Force or Fate betray'd,  
New Lords it may enrich, new Titles wear:  
And thus, since none are fix'd, but Heir to Heir  
Succeeds, as Wave to Wave; in vain we learn  
To lengthen out a Street, or croud a uselefs Barn.

We have an Epigram of *Lucian* in the *Anthologia*, Tom. 2. p. 838. much to the same purpose: 'tis a Farm that speaks.

'Αγὸς Ἀχαμενίδε, &c.

Once *Achemenides* I serv'd, and now  
*Menippus*, and to thousands more shall go:  
Each vain Possessor cheats himself a while,  
But Fortune is the *Mistress* of the Soil.

The same Author hath told us as much in Prose: *Nature*, saith he, *hath made us Lords and Proprietors of nothing; but obtaining by Law and Succession the use of Things, for an uncertain Period, we pass for the ἀνεργόνοιο δαωόται, the Temporary Masters or Possessors of them; and when the appointed Term is over, then another receives them from our Hands, and enjoys the same Name and Title.* But indeed these kind of Speeches refer rather to the Instability of Fortune and of Human Possessions, than to the Original of Property (a).

IX. We proceed to examine *Grotius's* Opinion; (b) in which we shall pass over what he delivers contrary to the receiv'd Doctrine of the Church, as sufficiently refuted by other Hands. He tells us then, *That God conferr'd on Mankind a Right in General to Things of this inferior Nature, both immediately upon Creation of the World, and again upon the repairing of it after the Flood.* This we allow in the following Sense, that God empower'd Mankind to use these Earthly Things, *in a General Manner*; that is, without determining whether they ought to possess, either under Division, or in Common, all, or only some Things; but leaving this whole Matter to the Judgment and the Choice of Men, to settle it according as they should think most convenient for the publick peace and welfare. But we ought by no means to suppose, that any positive Communion was at the beginning instituted by Divine Appointment; from which Men afterwards departed by their own Decree; for, on the contrary, with regard to Almighty God, Things were rather laid, as a Free Stock, to be us'd in any Service that Men should apply them to. Amongst whom, so long as the very Substances of Things were not assign'd to particular Persons, we must conceive this Tacit Compact to have prevailed, that every Man should take for his Occasions whatever he

pleas'd, especially of the Fruits, and should consume what was in its Nature consumable. And such a Universal Use of Things supplied, in some sort, the room of Property; and what any Person had thus taken for himself, none could deprive him of, without Injustice. Now as the Simile borrow'd from the Theatre, which *Grotius* produceth, fitly enough illustrates this Matter (c), (1) so his other Instance of the *Aborigines* is not applicable, as *Justin* describes them (2). For the Historian's Words represent some positive Communion, quite different from the Primitive; as if that whole Country was indeed the possession of the People, but not yet divided into private Estates; whilst Men rested satisfied with the Fruits produced without their Assistance, such as the vast extent of the Lands and Woods afforded them in great abundance, their Number being as yet inconsiderable: But that they gathered these Fruits into a Common Store doth not seem probable. Thus far *Grotius* (3) is in the right, that were the first Negative Communion to continue, without disturbing the general peace, Men must live with great plainness and simplicity, contented to feed on what they found, to dwell in Caves, and either to go naked, or to cover their Bodies with the Barks of Trees, and the Skins of Beasts: Whereas, if they grew more inclined to a Life of Elegance and Refinement, the Conveniencies of which must be acquir'd by Diligence; there was a necessity of introducing distinct Properties. But when he adds, *That this Communion might have lasted, had Men liv'd under the Influence of an Eminent Charity and Friendship towards each other*; He confounds Negative Communion with Positive; such as was observed by the *Essenes* of old, (d) by the Primitive Christians inhabiting *Jerusalem*, and by those who now follow an Ascetick Life (e): For this can neither be constituted nor kept up, except amongst a few Persons, and those endued with singular Modesty and Goodness. When Men are scattered into different places, and fixed at a distance from each other, 'twould be a foolish Labour to gather all the Provision into one heap, and to distribute it out of the Common Mass. And where-ever there is a great multitude of People, many must of necessity be found, who through Injustice and Avarice, will refuse to maintain a due Equality, either in the Labour required for the getting of the Fruit, or afterwards in the Consumption of them. *Plato* insinuates as much as this (f), when he makes only Deities, and the Sons of Deities, Members of the Republick where he would have this Communion absolutely obtain. But 'tis idle to believe, that when Men were divided into numerous Families, they either actually established, or had any design to

(a) As *Tully*, for the same reason, affirms; *praediorum nullam esse gentem*, That Estates are not ensured to Families and Kindred, pro *Balb.* c. 25. in. fin. (b) L. 2. c. 2. f. 2. (c) Vid. *Arrian. Epictet.* l. 2. c. 4. (1) Vid. *Ciceron. de Fin. bonor. & malor.* l. 3. c. 20. (2) L. 43. c. 1. (3) B. II. c. 2. f. 1. n. 4. (d) Of whom amongst other Authors, See *Phil. Jud.* in his Book inscrib'd, *that every Good Man is free* (e) Add. *Martin Hist. Sin.* l. 5. c. 34. (f) LL. l. 5. p. 847. Ed. *Wech.*

establish such a Communion (a). Lastly, It's a true Remark of *Grotius*, (1) *That Things were at first turn'd into Property, not by the bare Act of the Mind, or by Thought and Inward Inclination.* For neither could others know what any Person intended to keep for his own, to direct them in abstaining from it; and besides, 'twas very possible that many should be Competitors for the same Thing. There was need therefore of some External Act, or of formal *Seisin*, which that it might be capable of producing a Moral Effect, or an Obligation in others to forbear what each Man had thus taken for his peculiar, must necessarily have depended on the force of some precedent Covenant: When Things which lay together in Common were to be parted amongst many, then the Business was transacted by *Express* Covenant. But a *Tacit* Covenant was sufficient, when Men fix'd a property in Things which the first Dividers had left for waste. For we must suppose them to have agreed, that whatever in the Primary Partition had not been assigned to any particular Owner, should belong to him who first took possession of it.

X. Amongst the other Moderns, many, as to the Origin of *Property*, establish a quite contrary Notion. Let us take the pains to see what strength their Arguments afford. They acknowledge then a double Sense of the Term *Communion*, so as to import either that which being undivided, and having its Property fix'd in many together, affords a Common Service to each Person; or that which being in no manner appropriated, lies free for the promiscuous Use of all. But then they exclude from the Primitive State of Things, not only the former *Communion*, (which is no more than we have done,) but likewise the latter; and so deny that Things were in the beginning expos'd as a general Store, void of Property in every kind; and therefore (which is the consequence of this) that Properties sprung originally from Division, and from first Possession. The Reason they lay down is to this purpose; *Whatever Right that was, which either in Kind or Degree the first Man enjoy'd over other Creatures, he receiv'd it all in that very manner from his Creator. If therefore he receiv'd a bare Power of using, without any settled Property, his Descendants could not afterwards usurp a Property, without incurring the Guilt of unlawful and covetous Desire, and of arrogating that to themselves, which their Maker had forbid them to assume.* The Answer to this is easy, from what hath been formerly advanced: Man receiv'd indeed, by the Divine Donation, a Right to Things; but such a Right as was Indefinite, General, and Indifferent, neither restrain'd to Property, nor to *Communion*; and such as Men might reduce, as it were, into any particular Form, according as Reason or Necessity should advise. Whence it is also clear, that the Primitive

*Communion* did not denote a bare *Usus fructus*, but Men were at their liberty to quit it by Agreement, and to establish either Property or Positive *Communion* in its stead. Nor is this any consequence; the First Man did not receive or assume a Right to Things in the Formal Nature of Property, therefore his Posterity could not exercise it, under that Formality. Neither doth that Divine Grant express'd in Holy Scripture, describe any determinate manner of Property, but only an indefinite Right of applying Things to such Uses as should be agreeable to the Wisdom, and to the Occasions of Men; which Right may be exercis'd full as well in a Negative *Communion*, as in a Positive. Besides, 'tis not fair thus to conclude; *Men receiv'd a Right to Things from the Donation of God, therefore Property did not first arise from Occupancy and Division.* For this Donation of God only gave Men full security and satisfaction that 'twas consistent with the Divine Will they should consume on their Necessities, the Works of their Common Maker. But Property, strictly so called, ought to have produc'd this Effect, in relation to other Men, that none else should invade what had been adjudg'd to one particular Possessor. And here certainly there was need of some Human Act and Agreement, that others might know what belong'd to every distinct Person, so as to quit all Pretensions to it, when thus appropriated before. A Theatre is erected by the State for the Common Use of the Subjects: But that in the time of the Show, this or that Person should obtain a particular Seat, of which others ought not to deprive him, is owing to some Corporal Act, that is, to his first seizing upon it. Nay, each Person, may with the consent of the Publick, acquire a Seat which he shall hold by a perpetual Right. Thus, before any Human Act had pass'd capable of introducing Property, every Thing must be conceiv'd to have lain free and *Common* (in a Negative Sense) to all; that is, not to have appertained to one rather than to another. But when Divisions were establish'd by Express, or Possessions confirm'd by *Tacit* Covenant, then Things pass'd out of this Negative *Communion*, into settled Properties.

If any will come so low as to assert, *That by the Dominion which God conferr'd on Men antecedently to any Acts of theirs, is meant only a Potential Dominion, or a Power of taking and possessing; and consequently no more than a Dominion, in actu primo; from which they pass'd on to Possession, and from Possession to Dominion, in actu secundo:* These Men differ from our Opinion in Words only, not in Sense. Yet in this respect they are not sufficiently accurate, that call the Power of entring upon Things, *Dominion in actu primo*; and the Right which follows Possession, *Dominion in actu secundo*. For the Power of acquiring any Right, and the Right it self now habitually

(a) Add. Jo. Strauch. dissert. de Imper. Maris. c. 1. f. 8.

(1) *Ubi Supra*, n. 5.

inhering, yet without Operation or Exercise, are different things. As 'tis quite another case to be a Musician *Potentially*, and not to use the Art, when the Habit of it hath been fully attain'd. Nor is their Potential Dominion very aptly illustrated by the Example they bring of Inheritances; *the Dominion of which, upon the Testator's Death, passeth out of the Habit, or Power, directly and immediately upon the Heir, without the Formality of taking possession.* For, besides that to pass, *out of a Habit, or, out of Power,* is by no means the same thing; there is always a Fiction of Civil Law conceiv'd to interpose in the Case which they alledge. 'Tis the Rule of Nature, that in the transferring of Dominion from one to another, it shall be requisite for the former Person to tender what is thus convey'd, and for the latter to accept and receive it. But inasmuch as the Laws have consented, that the Will of the Testator shall remain uncertain and changeable 'till his last Breath, and shall be accounted secret 'till after his decease; they therefore hold, as 'twere in suspense, the Will of the Deceas'd Person importing the conveyance of Goods on his Heir, 'till such time as the Heir shall have signified his *Acceptance*; or, (as some may chuse to express it) they bring back the Heir's Acceptance to the Moment in which the Testator expired, his Will being then properly fix'd and settled; so that from that time the Goods are conceiv'd to pass immediately to the Heir, as deliver'd to Him. This Fiction produceth so far the Effect of Dominion in the Heir, as that he may challenge the Inheritance, even before he is actually possess'd of it ( 1 ). And without such a *Fiction*, the Dominion would no more be long to a Man in an Inheritance before Actual *Entrance*, than it doth in a Donation before *Acceptance*. And hence too, amongst Persons who live only under the direction of the Law of Nature, which is for the most part unacquainted with these *Fictions* introduced by Civil Constitutions, there will be no admittance given to any *Potestative Possession* as oppos'd to *Actual*; nor will the bare Right and Power of acquiring Possession, obtain the Name of Possession it self ( 2 ).

XI. Many have thought fit to appeal to the Authority of Scripture in this Point; whence they have suppos'd that it may be made evident, that there never was any such *Communion* as we have asserted, in the World. They tell us, *That the Universal Mass of Things pass'd immediately to Adam, by virtue of the Divine Donation, so that he held it as his own proper and entire Possession. The force of which Propriety was such, that it not only excluded all others from the Universal Possession which he enjoy'd, but likewise from the Right of taking to themselves any one particular thing. Insomuch that even his Children could claim no Property, so long as they continued in the Family of their Father, unless he convey'd somewhat to them in the manner of a*

*peculium, or Separate Stock: That they became Proprietors, first, by possessing that share which he assigned them, when dismis'd from under his Tuition; and afterwards, upon his Death, by dividing his Store amongst themselves (a).* They explain their Notion in this manner: *The Form of God's Grant conferr'd a Right only on the Primitive Pair, before they had Children. Therefore either the Property of Things was given to Adam and Eve originally, so that their Descendants were to derive from them all their Title to any Possession; or else the whole World was, in the Person of Adam, bestow'd in common on all Mankind. The latter of these as it implies several difficulties, so it is particularly repugnant to the Right of Occupancy, which obtains only in Things void of a Possessor. For if the Entire Mass was given to all Mankind, it doth not appear, how a particular person could by seizing any thing to himself, convert it into his distinct Property, exclusive of Human Race in general, or, so as to hinder Men from making any Pretensions to it by vertue of their Common Right. For such is the Nature of Things which lie in Common, and which admit only of undivided shares, that every single Atom of their Substance is no less common, and no less undivided, than the whole; so that if any private Man apply it to himself alone, he is an Injurious Robber of the Community. But now, they who defend a Primitive Communion, confess that the first Occupants of Things did by that Act acquire such a distinct Right over those Things, as excluded the Right of all others to the same. What Reply may be made to all this, is evident from the Assertions already confirm'd. The Divine Donation confer'd on Man a Right of applying other Creatures to his use; which Right was indifferent to Positive Communion, or to Property; being of necessity to be turn'd into one of these before it could take any Effect with relation to other Men. And therefore when others add further, *That the Common or Publick Dominion of Mankind over Things was given by God, under Condition, that they should parcel it out, and constitute it private; for which reason, it neither can, nor ought to be conceiv'd without a respect and tendency towards Private Dominion, so to be established as was agreeable to a Rational and a Social Nature:* This we may without any inconvenience interpret on our side. That is, God by his first Grant plac'd Things in a Negative Communion: But since that was unable to procure the safety and peace of Society, when Human Race was multiplied, and Life began, by the Arts of Industry, to be polish'd and improved, Men easily apprehended that 'twas the Divine Pleasure they should introduce Distinct Properties. In order to the Actual settlement of which, it was requisite that some Transactions and Agreements of Men should precede. For that a Thing should be appointed by the Will of God, and yet should not be introduced but by some antecedent Compact of*

( 1 ) *Omnis hereditas, quamvis postea adeatur, tamen cum tempore mortis continuatur.* D. lib. 50. c. 18. de div. Res. Jus. l. 138. ( 2 ) Vid. *Strauch, de imp. mar. c. 1.* (a) *Comp. Ziegler. ad Grof. l. 2. c. 2. f. 2.*

Men, ought not to be look'd on as an inconsistency: As it is certainly none, that God would have Mankind propagated by Marriage, not by uncertain Lust; and yet Marriage is not actually contracted between particular Persons without some Covenant passing before. Farther, since positive Communion and Property both imply a relation to other Men, it can with no manner of accuracy be said, That all created Things were proper to *Adam*; but only thus, That he held the Dominion of all Things, not *Formally*, but *Permissively*; inasmuch as there was then no Right of any Person else to interfere with his, and to hinder him from converting every thing to his own Use, had there been occasion. When God was pleas'd to give him a Dear Partner and Companion, they agreed to hold this Indefinite Right over Things without dividing it; as being united to each other in the strictest Band of Society: For which Reason, many Nations at this Day observe a Communion of Goods between the Husband and the Wife. Nor was there any need of separate Properties, so long as *Adam's* Children being yet in their Minority, were to be maintained by their Father, and made but one House. For though in the use of things, they were at that time obliged to conform to their Father's pleasure, yet this proceeded not from his *Dominion* (strictly speaking) over the *Things*, but from his *Paternal Power* and *Authority* over the *Persons*. Therefore the *Property* of things came then to be distinct, when by Consent of the Father the Sons fell into separate Families; which Separation was undoubtedly owing to the Emulation between Brothers; and to another good Reason, that every one's own Industry might be his own Advantage; as the Idleness of others might be a Punishment only to themselves. Nor must we believe that the whole World was presently shar'd out amongst that small Number of Persons; or that all things were turn'd into *Property* by one Act, and at one time. But it was sufficient at first to fix a *Property* in those things, which either afford an immediate use, not capable of being divided amongst many; as Cloaths, Cottages, and Stores of Provision already gather'd by particular Men; or which require Industry and Improvement to make them fit for Service; as Household-Goods and Instruments, Cattle, and Fields (1). By degrees, what remain'd was brought under the same Condition; according as either the Inclination, or the number of Men directed and advis'd. Thus the Pasturage continued a great while in its First and Common state; till upon the abundant Increase of Cattle, Quarrels arising, the Division of this likewise was made necessary to Peace and Concord. As for that part of the Argument, *That the Right of Occupancy cannot be admitted, where Possession belongs to a General Body*; this will hold good against those who pretend any positive Communion to have been the primitive

State of things; in which indeed no private Person can take any thing to himself, exclusive of the whole Society. But the primitive Condition in which we have plac'd things, is equally distant from positive Communion, and from Propriety in the strict sense of the word: and we assert, that before Occupancy can produce Dominion, it is necessary that some Compact, (a tacit one at least) should have been first settled to that Effect.

XII. Others form their Scripture Account of the Origin of Dominion in this manner: *That God gave our first Parents that Common Dominion which he design'd for all Men in general, to be held undivided; inasmuch as the Primitive Pair represented the Person of all human Race: In which sense it may still rightly enough be said, That the Dominion of the World, or of the Things in the World, as they are capable of passing into Property, belongs to Mankind. But this Common Dominion doth not exclude Private; since we neither can nor ought to conceive it without a respect and tendency to private Dominion, so to be constituted as should be agreeable to a Rational and a Social Nature. But in Adam the latter of these Dominions met in Conjunction with the former, excluding his Children without any previous Cession or Surrendry* (a). Now, as to this Account, we will make no Quarrel about words; that is, we allow the Name of *common* Dominion to what we ourselves have rather chose to call a Right of using the Creatures, inherent in Men by virtue of the Divine Concession; provided this *common* Dominion consider'd by it self, be suppos'd to obtain no Effect between Man and Man. On which Point we have before affirm'd, that Men might have rested satisfy'd with that Right of using things as they lay in common; and that 'twas not necessary separate Dominions should immediately be introduc'd, so long as Men were yet few in number, and follow'd a simple unimprov'd way of living; but when their Race was considerably multiplied, and when Industry had advanc'd the Conveniencies of Life, then the necessary Regard to the Preservation of Society recommended the Distinction of Properties; yet so as that things did not pass all at once into this Condition, but successively, according as the Occasional Methods of Peace and Agreement seem'd to demand. But that *Adam* held a *private* Dominion over all Things, before his Sons had left him, to set up Families of their own, is a very negligent Assertion.

For First, *Private* Dominion always takes its Rise from some Human Act; therefore, *Adam* could not have such a Dominion over those things, which he was so far from having taken Possession of, that they did not so much as fall under his Knowledge.

That place of the *Civil-Law*, L. 3. §. 1. *D. de adquir. possess.* (2), is very unfitly applied to the present Business; as if *Adam* by

(1) See Mr. Barbeyrac's Note upon this Section.

(2) *Vid. l. 41. tit. 2. D. de acquirend. vel amittend. possess.*

(a) *Vid. Bæcler. ad Grot. d. 1.*

setting his Feet on one part of the Earth, should be suppos'd to have taken Possession of the whole World. If any one persists in giving the Name of Property to that Right of using things which Men receiv'd by the Grant of their Creator, then we might admit what these Authors lay down, *That Property was the Cause of Occupancy and Division*; or that it was therefore Lawful for Men to challenge things to themselves by laying hands upon them, and by parting them into separate Shares, because God had given them a general Commission to apply other Creatures to their own Use. But if we take the word *Property* in its strict and general Sense, as it denotes the Exclusion of all Others from a particular thing already assign'd to One; then 'tis altogether true, that *Division* and *Occupancy* are the Causes of *Property*. Farther, *Adam's* Children, whilst they yet continued part of their Father's Family, were bound indeed to obey his Pleasure in regard to their Use of things; yet this, as was before observ'd, proceeded not from the Force of any private Dominion in *Adam*, but from the force of his paternal Power. For whilst they were young and helpless, he was oblig'd to maintain them. And when they were Capable of doing some Service, still the same paternal Authority required both that in using the common Store they should be guided by their Father's Directions, lest they should incur any Mischief by Intemperance; and likewise that such things as they had either gather'd from a spontaneous Growth, or had produc'd by their own Industry, they should deliver into the hands of their Father, to be given out as he should think fit: And he, so long as he enjoy'd this Right, was bound to provide Necessaries for his Children, even after they were arriv'd at Maturity, as time and occasion should require. And hence, if any one of his Sons should, for instance, contrary to his Prohibition have privately feasted with too much Greediness on some particular Fruit, the Youth had been by no means guilty of Theft, but of Disobedience to his Father's Command. Or, if *Adam* had order'd one that was grown up to gather Provision for the Sustainance of a young Brother, and the Party thus employ'd had either devour'd it himself, or laid it up secretly for his future use, he deserv'd Correction, not for Theft, but for violating the Charge which his Father laid upon him. During this Period therefore, neither *Adam* nor his Children had any *private* Dominion: The Right of *primitive* Communion was sufficient for *his* turn; and as for *them*, they in the Exercise of the same Right, depended on his Care and Guidance. So that *Adam's* private Dominion then began when he dismissed his Sons from under his Tuition, and gave them leave to erect separate Families for themselves.

XIII. Let us consider too the Arguments of those who maintain that this *primitive Communion* was impossible (a). They say, That *such a Communion neither could have been, nor ought to have been, in the State of Innocence; because as every Order and Method, conformable to right Reason; so the most comely Order of possessing those things, the Dominion of which God had granted to Mankind, agreed in an especial manner to that state in which the Vertue of abstaining from what was anothers, deserv'd to bear an honourable Name. Whence the Decalogue as it establisheth the Duty of forbearing the Goods of others, so it secures every one in the Enjoyment of a certain and separate Possession.* To this we answer,

*First*, That we can have no such clear Evidence what kind of Life (with respect to these External things,) Men would have led, had they continued in their first Sinless Condition; and consequently whether the Community, or the Propriety, of things would have been most suitable to that state.

But farther; We may venture to make it a Question, Whether it be not a higher Degree, a greater Perfection of Vertue to enjoy quietly a common Provision, and to desire no particular Advantage above the rest who have the same Title to it, than to abstain from the distinct Portion of others?

Lastly, Whatever we are to say as to the Eternity of the Law of Nature, thus much is certain; That there's no Necessity every Object of that Law should have always existed; many of them proceeding, in the course of time, from the Agreements and Institution of Men: Thus the Law against Murder had no Object, whilst *Adam* was the only Person in the World; nor the Law against Adultery, whilst none of his Sons were arriv'd to Man's Estate; nor the Law against Theft, before the Division of things; nor the Law against bearing False-witness, before the Judicial Processes were introduc'd; nor the Law against coveting the House, the Man-servant, or Maid-servant of others, whilst they lodg'd in Caves, and e'er Servitude was establish'd; nor lastly, the Law of honouring Parents, before *Eve* was a Mother (b). They proceed to tell us, That *neither was such a Community possible in the state of Men after the Fall: First, Because we can't so much as form any Notion of it in our Mind: For Grotius so describes its Laws and Rules, as that every Person might immediately seize for his use what he pleas'd, and might consume any thing that was consumable. But such an Exercise of the General Right serv'd then instead of Property: For what any one had thus seized, none else could take from him without Injury. Therefore this Notion establisheth a Property in Community, and consequently implies a Contradiction; the only End and Effect of Property being this, that one Person should not rob and*

(a) *Vid. Bœcler. ubi supra.*

(b) See above, 1. 2. c. 3. f. 22.

plunder another. But here they vainly pretend a Difficulty where there is none: For antecedently to any Human Act, and to the Use of any thing in the World, when the bare Case is thus, That each thing belongs no more to one Man than to another, and consequently belongs alike to neither; the Primitive Communion bears a different Aspect from what it hath after Men begin to lay hands upon the General Store, and to employ it in their Service: Since in the latter Case, by virtue of a previous Covenant, whatever any Man hath seized for his private use, becomes his Property. Otherwise Men must altogether abstain from the use of things. Hence in this *Qualified Communion*, as we may call it, the Substances of things belong to none, but their Fruits become matter of *Property*, when gather'd. This Notion of *Community* temper'd with such a degree of *Property*, may we think be easily apprehended by Persons of no very Nice or Philosophical Heads. To give a plain Instance: the Acorns were his that took the Pains of getting them, but the Oak had no particular Owner. Thus much being laid down, the way is the better clear'd towards answering what they farther object. They pretend that *such a Communion could not possibly last one Moment of time, that it was contrary to the Human or Rational Nature, Savage and Unsociable; and consequently is capable of affording no other use than that from it, as a feign'd Hypothesis, may be shewn the Necessity of a distinct or private Dominion in a Civil State.*

It's true, this *Communion* consider'd, precisely in it self, and before any Application and Exercise of it, could not subsist, unless Men could have always walk'd naked, and liv'd without eating. Yet why it should not subsist when thus qualified with a mixture of *Property*, there was nothing to hinder; whilst the number of Men was yet few, and their Life plain and unrefined. It is certain however, that the more Mankind was multiplied, and the more Life was improv'd, the greater Necessity there was of appropriating more things than before. Hence those People lead but a rude and barbarous life, who make the nearest Approach to the Primitive Communion; those, suppose, who live on Herbs, Roots, Fruits of chance growth, and what they take in hunting and in fishing, and who claim no other Estate and Wealth than a Cave with its wretched Furniture. Farther, when we assert that all things were, by Nature, negatively Common, we don't mean that the Law of Nature commands Men perpetually to preserve such a State; but that things if consider'd antecedently to any Act of Men, were so dispos'd, as that no one Person could claim them rather than another. On the other side, in affirming that Men left this Communion upon the Advice and Direction of Reason, we

pretend not that it was necessary all things should be appropriated in the same Moment; but according as the Temper or Condition of Men, the Nature of the things themselves, and the Difference of place required; and as was judg'd most convenient for the cutting off all manner of Quarrel or Dissention. And therefore, neither are we who are utterly banished the primitive Communion, nor those Barbarous Nations which still retain many Foot-steps of it, guilty, in this respect, of a Breach of the Law of Nature. Thus too, what they add hath little Difficulty: *After the Fall, say they, Men could not live without Law, and yet maintain a Social Life; therefore, neither without the Distinction of Properties; since the Communion of things is Inconsistent with Law, which is wont to assign and distribute particular Possessions.* But since all Laws do not presuppose separate Dominion, why might not those others be observ'd so as to keep up a Life of Society under that *qualified Communion*? Tho' it must be confess'd, that before the Division of Properties, a very few Heads of Law might have been sufficient for the Government of Mankind. Therefore when *Servius* in his Observations on *Virgil* (1), reports it as the Reason why *Ceres* was by the Ancients call'd *Legifera*, and her Rites *Theismophoria*, *Because she is said to have been the Foundress of Laws; inasmuch before the Invention of Corn, Men wandred about without Law or Government; which wild Condition was taken off after Corn came into use, and after Laws had been instituted upon the Division of Land* (2): This Account ought not to be admitted without some Limitation. Indeed a more pompous Train of Laws became needful after Proprieties were fixed, Men being ruled before by a small number of Ordinances; yet Communion consider'd by it self, doth not render Life altogether lawless and unsociable, but only more simple and unpolish'd; and as it were, not well settled and compacted. As for *platonical Community*, it hath nothing to do with the Case before us; it being profess'dly positive, and extended not only to Goods, but to Wives and Children.

XIV. We may hence discover in what sense we are to take that Assertion laid down by some Authors, *That Property and Dominion belongs to the Law of Nature, strictly so called, and which is written in the Minds of Men.* Where 'tis to be observ'd, that this Expression, *such or such a thing belongs to, or is of, the Law of Nature*, hath a different Meaning, according as it's spoke either of any express or immediate Command, or else of some Custom or Institution establish'd in Human Life. In the first sense it imports, that the Law of Nature enjoins the doing, or the not doing of such a matter: in the second, That sound Reason adviseth the Reception and Settlement

(1) *Æn.* 4. 58.  
*Univ'erselle.*

(2) See the Historical Explication of the Fable of *Ceres* in the Sixth Tome of *Biblioth.*

of such a thing amongst Men, from the general Consideration of a social Life. For as for those Customs or Regulations which are introduc'd for the particular Advantage of separate Commonwealths, such are said to proceed from *Civil* or *Positive* Law. When therefore 'tis demanded whether or no *Property* owes its Original to the Law of Nature, the latter Sense of the Word is to be regarded, and not the former. That is, inasmuch as a social Life is the very Foundation of Natural Law, and since it is at the same time sufficiently evident from the Temper and Genius of Mankind, that in a great Multitude, where all join their Endeavours towards improving Life with various Inventions, the Peace and Beauty of Society could not be kept up without distinct Dominions of things; such Dominions were therefore settled; and this very rightly and agreeable to the Aim of Nature's Laws, Human Affairs plainly requiring it to be done. And after this Establishment, the same Law commands the Observance of every thing that may conduce to the End for which these private Dominions were erected: Yet was there no express and determinate Command of the Law of Nature, by virtue of which all things ought to be brought under *Property*, immediately upon the Origin of Mankind, or in all places alike; but *Property* was gradually introduced, according as it appear'd requisite to the Common Peace. But the Precept of Nature about abstaining from what is another's, then first began to exert its Force; when at length, Men by mutual Agreement had mark'd out, and appointed what should belong to others, and what each Person should claim as his own. Before this time it lay conceal'd, (as it were virtually or potentially,) in that general Precept which enjoins us to stand to our Covenants, and not to injure the Right of our Neighbour. Nor is it any Absurdity to affirm, that the Obligation we lie under, not to invade the Goods of others, is Coeval with Human Race; and yet that Distinction of *meum* and *tuum* was afterwards ordained. Thus we are often bound to yield Obedience before we know what will be enjoin'd: As when we have an Obligation in general to follow the Directions of some certain Person in all things that he shall hereafter require us to perform; or when we may suppose several particular Commands to be implied in some general Rule.

XV. 'Tis needful in this place to add a word or two concerning the Subject of Property; on which Head the principal Question is, Whether those are Capable of being Pro-

prietors, who have not the use of Reason, as Infants and delirious Persons? Now here it is certain, that neither of these can originally acquire the Property of any thing, or make it their own by taking immediate Possession of it. The Reason is, because in this Method of acquiring Property, the Intention of the Acquisitor is necessary, signifying that he will for the future hold such a thing as his own; and he should at the same time be able to understand, that such an Act is effectual towards the creating a Right in him. But this cannot be supposed in the Persons of whom we speak. Yet as to the obtaining the Property of such things as are derived upon them from others, the Case is different. For though here likewise, to make a thing pass to me from another, 'tis in the common and regular course requir'd, that I have an Understanding able to judge of what is done, and to shew by Signs proceeding from Real Intention, that I am willing to receive such a thing, and to keep it to my self; yet 'tis the receiv'd Practice of all Civiliz'd Nations, to permit Children in their most tender Age, and even before their Birth (a), to receive and to retain a Property descending to them. And this is no more than what Natural Reason and Equity advis'd; inasmuch as the things which Men usually appropriate, belong to the Use and Service of Life, and are no less necessary for Infants than for grown Persons; nay indeed somewhat more necessary for the former; who by reason of their Weakness in Body and Mind, cannot so well provide for their own Occasions. In Infants therefore a presumed Consent is judg'd equivalent to a formal Acceptance, it being taken for granted, that no one will refuse what conduceth to his Benefit: Yet on Account of their Immaturity of Judgment, the Possession only, and not the Exercise, of this Right could be conferr'd upon them. The general Customs of Nations in their Favour, might allow them to hold, but not to use any thing by their own Disposal (b). However lest their Right should by this means come to nothing, Humanity farther required, that Persons of Years and Discretion should act as their Representatives, in the Management of their Goods, till they are Capable of understanding it themselves. This Management is either committed to a certain Person by him who transfers the Goods upon them; or, in Civil States, the Matter is settled by Direction of the Laws, and of the Magistrates; or, where both these Provisions are wanting, nearness of Blood, or of Habitation, or the bare Law of general Kindness, recommends the good Office to fit Hands (c). But all

(a) *Vid.* l. 7. c. 26. *D. de Statu hominum*, l. 3. *D. si pars hered. petatur.* (b) *Gal.* 4. 1. (c) On this Occasion we may mention the Law of *Charondas*, (recorded by *Diodor. Sic.* l. 12. c. 15. p. 81. Edit. *Robinson.*) which assigns the Goods of Minors to the Care of the Kindred by the Father's side, but their Persons and the Business of their Education, to the Kindred by the Mother. Judging it probable, that the latter, to whom the Inheritance could not descend, would make no Attempt on the Life and Safety of their Wards; and that the former would have no Opportunity for any Design against their Persons; and yet at the same time would be very diligent in managing their Fortunes, because after their Death, whether Natural or Casual, the Estate would fall to themselves.

all Persons who have engag'd themselves in this Case, by what means soever they came to be intrusted with it, are oblig'd to discharge it with the utmost Fidelity; in regard to that tender Age, insufficient for its own Guidance and Defence. Therefore *Hesiod* ranks in the same Class of Sinners, him that hath hurt a Stranger, or one that sued to him for Protection; him that hath defil'd his Brother's Bed; him that hath us'd rigorous Treatment toward an Ancient Parent;

Ὅς τε πύ ὀρφανῶν ἀλιταίνετα ὀρφανὸ πίνα.

*Op. & Dier.* l. 1. v. 330. Edit. *Cleric.*

And him whose Fraud the Orphan's Hope be-  
[guiles;

*Plato* in his Books of Laws (1) calls Orphans, *The greatest and most sacred Charge*: Where he likewise offers many Considerations about the Duty of Guardians. Yet that a Man should sustain this Office and Trust without reward, or with expence, Humanity and Equity do not always require. *Bæler*, *Ziegler*, and *Felden* may be consulted farther on this Subject, in their Observations upon *Grotius*, B. II. l. 3. s. 6. where they shew that *Property* even in the *Actus Secundus*, rests in the Person of the Infants or Minors; The Guardians having no more than the bare management of another's Right and Possession.

*Publius Syrus.*

*Male secum agit æger medicum qui heredem facit.*

He that makes his Heir his Physician,

Is a good Patient, but a bad Politician.

*Diogenes Laert.* (in *Solon*) gives us a Law of *Solon's*, much to the same purpose; ordaining, That no Guardian should cohabit with the Mother of his Ward, and that he should be incapable of the Guardianship, to whom the Estate fell, upon the Minor's Decease. (1) *L.* 11. p. 972. Edit. *Wech.*

## CHAP. V.

### Of the Object of Property.

WE are in the next place to enquire into the Object of *Property*, or to examine what Things are capable of coming under that condition. Now to give a Thing this Capacity, we judge these two Qualifications to be necessary. *First*, That it be able to afford some Use to Men, mediately or immediately; by it self, or by its connexion with somewhat else: And *Secondly*, That it be some way or other so far under the power of Men, as that they may fasten on it, and keep it for their Occasions. And farther, since *Property* implies a Right of excluding others from your Possession, which Right would be altogether insignificant, if it could not be effectually exercised; 'twould be in vain for you to claim that as your own, which you can by no means hinder others from sharing with you.

II. Yet some Things there are, which tho' very beneficial to Mankind, yet by reason of their vast Extent, are inexhaustible, so that all may enjoy them together, and yet no Man suffer in his particular use. To appropriate Things of this Nature, would be malicious and inhuman: And on this account 'tis usual to attribute an exemption from Property, to the Light and Heat of the Sun, to the Air, to the running Water, and the like (a) (1). Although since Nature by denying Men Wings, hath made

the use of the Earth necessary to their using the Light; hence it comes to pass that some Persons may be utterly debarr'd from the latter; as Criminals, for instance, in their Dungeon. In like manner, since the Air is in some places more clear and pure than in others, in this respect the value of a place may be inanced. As we see Men who allow pleasure any share in their choice, very highly regard the prospect of Buildings, or of Lands, and especially of the former: For which reason those *Services* have been introduc'd, (2) of not raising a Building higher; of Lights, and of not hindring Lights; of Prospects, and of not hindring Prospects. So though on other accounts no one will pretend to fix a Property in the Wind, yet we may appoint a *Service* or Duty of not intercepting the Wind to the prejudice of our Mills.

III. We are likewise to observe, that as the Substances of those Things which Men have Dominion over are compos'd of different kinds of matter, so each Thing is taken and possess'd in that way which the condition of its Nature admits: For the more closely any thing can be confin'd, and as it were shut up, the more easily will it produce the effects of *Property* against the Claims of others. And consequently the more capable a thing is of being guarded

(a) *Petron.* Is there any one of the most excellent Works of Nature, which she hath not made common to all the World? The Sun shines with an Universal Influence. The Moon, attended with her numberless train of Stars, lights the very Beasts to their Food. What is there in Nature more bright and beautiful than the Waters? Yet they flow for publick use. *Latoana* thus pleads in *Ovid*: (*Metam.* l. 6. 349.)

*Quid prohibetis aquas? usus communis aquarum est;  
Nec solem proprium natura, nec aera fecit.  
Nec terras undas; ad publica munera veni.*

What *Rudeness* Water for my Use denies,  
Whose endless Store the Common World supplies?  
Nor Light nor Air did Heaven create for One,  
Nor Gentle Streams: I crave a Publick Boon.

(1) *Vid. Instit.* l. 2. t. 1. *De rerum divis.* &c. f. 1. See *Barbeyrac's* 2d Note upon this Sect. (2) See hereafter, c. 8. f. 6 from

from Unjust Invaders, the greater Security we promise our selves in the Property of it. Yet, as we are not immediately to conclude a Thing exempt from Property, because it cannot without some trouble be kept from other Hands; so in case a thing be in so wide a manner spread and diffus'd, as that either 'tis morally impossible it should fall under any method of keeping, or that it cannot be kept without much greater charges than the Fruits and Advantages of it would countervail, it is not to be supposed that any Person desires to fix a Property which can bring him nothing but burthen and expence in defending it. Though to render a Thing capable of being appropriated, it is not strictly necessary that we should inclose it, or be able to inclose it within artificial Bounds, or such as are different from its own Substance; 'tis sufficient if the compass and extent of it can be any way determin'd. And therefore *Grotius* hath given himself a needless Trouble, when to prove Rivers capable of Property, he useth this Argument, (a) *That although they are bounded by the Land at neither end, but united to other Rivers, or the Sea, yet 'tis enough that the greater part of them, that is, their Sides are inclosed.*

IV. Lastly, we farther discover, that the use of some Things is confin'd, as it were, within narrow limits, and cannot admit of Shares; the appropriation of which was highly expedient to the peace of Mankind.

Again, There are Things, which as they afford us different Uses, may in regard to some Uses be spent and exhausted, and yet in regard to other Uses yield a neverfailing Abundance. Now, as on the one side, there is no reason why such Things as those should not be brought under Property; so on the other side, the Law of Kindness and Humanity forbids us to deny the inexhaustible Use of them to any Person that in a friendly and peaceable manner desires it. But if any thing could be found inexhaustible in all its Uses, 'twould be absurd not to leave that in its Primitive Community. Indeed in a positive Communion, if the Object be sufficient to serve all, when divided, nothing hinders but that we may divide it; if it would not be thus sufficient, 'tis best to possess it still without division: But that a Thing lying in common to Mankind, and sufficient for the promiscuous Use of all, should be shared out into distinct parts, is certainly repugnant to Reason. The Earth is of such a magnitude as to serve the Occasions of all People in all Uses to which they can apply it, yet it would not thus serve them, were it possess'd without Division, by so vast Bodies of Inhabitants as it now contains: Because it could never afford them Sustenance, unless manur'd and improv'd. Therefore there is plainly this particular Reason why the Extent of the Earth should not hinder its being divided; and yet

the same reason would make the division of the Ocean appear a ridiculous absurdity (b).

V. Indeed all other Things have little difficulty in this point; but as to the Sea, whether or no that be capable of Property, hath been disputed by the greatest Genius's of the present Age. On which Controversy 'tis easy to remark, that many of the *Writers* engaged in it, were more guided by their Affection to their Country, than by their regard to Truth. Yet by these, and by others who have shewn themselves more dis-interested and impartial, the whole Subject hath been so fully discuss'd, that 'tis hard to say any thing that others have not already offer'd. We may therefore be allow'd to use more brevity on the Question before us; the *Authors* (1) who have thoroughly canvass'd it, being so universally read. This then is manifest, that the same Divine Grant which first gave Man a Right of assuming the Sovereignty of the Earth, included likewise the Sea. The Commission as well runs, *have Dominion over the Fishes of the Sea, as over the Beasts of the Land* (2). And we cannot conceive any Supremacy and Rule over Animals, without a Right of using the Element which they inhabit, according as the Nature of it will allow. Indeed mention is likewise made of the Fowls of the Air, yet since we cannot move and support our selves in that Element alone, therefore we are unable to exercise Dominion over the Air any farther than we can reach while we stand upon the Earth. But on the Sea we stretch our Empire much farther, by the means of Ships, now brought to their highest perfection; which are not only serviceable in transporting Burthens, but likewise carry *Mars* through the Kingdoms of *Neptune* in a far more dreadful Array than he is attended with when he rageth by Land. No one is now so superstitious as to join in the *Poet's* Scruple:

*Nequicquam Deus abscedit  
Prudens Oceano dissociabili  
Terras, si tamen impie  
Non tangenda rates transfiliunt vada.*

In vain did Nature's Wife Command,  
Divide the Waters from the Land,  
If daring Ships, and Men profane,  
Invade th' inviolable Main. *L. 1. Od. 3. 21. &c.*  
Mr. Dryden.

Nor doth the Sea appear to have any privilege above the Earth, by virtue of which Men ought less to apply it to their Occasions and Use. However, since the Donation of God doth not immediately constitute such Dominion as shall take effect against the Claims of others; therefore it was left to the choice of Men, whether they would appropriate the Sea likewise, as they had done the greatest part of the

(a) L. 2. c. 3. f. 7. (b) Comp. Ziegler ad Grot. l. 2. c. 2. f. 3. (1) The most considerable are *Grotius* in His Book intitled *Mare Clausum*, and *Selden* in His Book intitled *Mare Liberum*. (2) *Genes. I. 28.*

Land; or whether they would let it remain in its Primitive State, belonging no more to one Person than to any besides.

VI. The Question is, therefore, Whether any thing particular may be discover'd in the Sea, which should hinder it from being an Object of Property? This some have undertaken to affirm, partly upon Natural, and partly upon Moral Reasons. Amongst the former they have alledg'd the Fluidity of the Sea; that, according to the Common Nature of all Liquid Bodies, the parts of it are held together by no proper Bands; whereas Possession can take place only in things that are fix'd and terminated. To which others make answer, That Fluidity consider'd in it self is no Bar against Property: And besides, that the Sea is not without its Limits, being surrounded by the Shore; and that it is a Work of no such great difficulty to confine the several parts and tracts of it within stricter Bounds. It may be added, that as Rivers are not the less capable of Property, because they pass away in a perpetual Stream; so neither is the Sea, on account of its being driven about by the force of the Winds and Tide. The River is one thing, and the Stream or Current another: And in the same manner the Sea is consider'd distinctly from the Waters which it contains. The vast extent of the Sea doth by no means render it impossible to be kept, and therefore doth not altogether hinder it from coming under Property. For we may abridge others of the use of the Sea, either by Forts upon the Shore, where it toucheth our Territories in narrow Creeks, and Streights; or by Ships of War, which are able to perform the same Service on the Water, as Castles and Forts on the Land. Though it cannot be denied, but that for one People to keep the whole Ocean, is morally impossible: Nor would it be worth their while to maintain Fleets in all parts, for the defence of it against all others who should desire to share with them in the use. Now 'tis great folly to covet what one can't keep; especially when by such a pursuit we do not aim at the Necessities of Life, but at the Gratification of vain Ambition, and of needless Avarice. For though otherwise the Defect of Natural Ability doth not presently extinguish a Moral Capacity, yet inasmuch as the latter, by reason of the Corruption of Mankind, is almost insignificant, Prudence adviseth us, to grasp at no more than we can well secure our selves in the enjoyment of. *Grotius's* limitation on this point seems superfluous, when he remarks (a). *That Rivers or part of the Sea may be appropriated upon supposition that either the former or the latter are but inconsiderable in respect of the Land; or however, are not so large, but that when compared with the Land, they may only seem to have the proportion of a part to the whole.* For let us consider a People feating themselves

on the side of a vast River, on a long and narrow slip of Land; here the River will by no means be inconsiderable in comparison with the Land; and yet we don't imagine that this would hinder it from a capacity of Appropriation. Thus there are Kingdoms, which in extent are far exceeded by their Provinces and Appendages.

The Moral Reason which these Authors urge to prove the Sea incapable of becoming Property, is taken from this consideration, that the use of it is inexhaustible, and therefore sufficient for the promiscuous service of all. So that 'twould be vain and impertinent to attempt the division of it into separate portions and shares. Which Argument we would indeed acknowledge to be the strongest that can be produced in the present Case, were it once made appear that the Sea, is with respect to all its Uses, sufficient for all Men in all parts. Because the appropriation of Things was introduced on no other account but to preserve the Peace of Human Society. And since one effect of it is this, That he who against his will invades and usurps my Peculiar, really doth an Injury to me, which I might justly revenge in a hostile manner; therefore those who should have desired to turn a thing into Property, which whilst expos'd to Common Use, was not likely to breed any Quarrel amongst Men, ought to have been look'd upon not as promoters of the Peace of Mankind, but as Persons who brought in new occasions of breaking and disturbing it. But whether the Sea be thus inexhaustible in all its parts, with respect to every Use, will be made more evident, if we examine more distinctly the particular Services which it affords.

VII. The use of Washing and of drawing Water is indeed inexhaustible; but then this is of no great consequence, and extends no farther than to the Inhabitants of the Shore. The Sea-water is likewise serviceable for the making of Salt: But this advantage as well as the former is confin'd to those who dwell on the Coasts. Farther, as to the convenience of Navigation, the Sea is inexhaustible, and suffers no damage from being thus employ'd (b) (1). But then besides these, there are other Uses, part of which are not altogether inexhaustible; and part may prove an occasion of damage to Maritime Countries, whose Interest will not admit that the Sea should every where lie promiscuously free to all. Of the former kind is Fishing, as likewise the gathering of any thing which grows in the Water. As for Fishing, though it hath much more abundant Subject in the Sea, than in Lakes or Rivers; yet 'tis manifest that it may in part be exhausted; and that if all Nations should desire such a Right and Liberty near the Coasts of any particular Country, that Country must be very much prejudic'd in this

(a) L. 2 c. 3. f. 7, 8. (b) Vid. l. 23. f. 1. D. de Servitut; præd. rustic. (1) Vid. lib. 8. c. 3. D. de Servit. præd. rustic.

respect; especially since 'tis very usual that some particular kind of Fish, or perhaps some more precious Commodity; as Pearls, Coral, Amber, or the like, are to be found only in one part of the Sea, and that of no considerable extent. In this Case there is no reason why the Borderers should not rather challenge to themselves this Happiness of a wealthy Shore or Sea, than those who are seated at a distance from it: And other Nations can with no more Justice grudge or envy them such an Advantage, than they can be angry that,

*Non omnis fert omnia tellus.*

*India mittit ebur, molles sua thura Sabæi,* (a)  
 &c. (1)

All sorts of Goods their several Countries know,  
 Black Ebon only will in India grow, [Bough.]  
 And Od'rous Frankincense on the Sabæan

Mr. Dryden.

An Use of the latter kind it is, that the Maritime Countries are guarded and defended by their Situation. Hence the Duke of Somerset, Protector of England, under Edward the Sixth, in an Epistle to the Scots, which we find in Sleidan's Commentaries, (b) tells them, *Oceano claudimur undique tanquam mœnibus & vallo firmissimo: We are on all sides enclosed with the Ocean, as with the strongest Wall and Bulwark.* And we may with much more Justice bestow on the Sea that Name of ἀθάνατος τείχος, an Immortal Wall, with which Isocrates (c) complemented the River Nile. Yet this Defence is not altogether certain and secure. It hinders indeed any Expedition on Foot, but lies open to the approach of Vessels. For which Reason it must needs be a disadvantage to any People, thus seated, that other Nations should have free access to their Shore with Ships of War, without asking their leave, or without giving security for their peaceful and inoffensive Passage. But we cannot, with any Accuracy, determine in general how large a space of the Sea ought to be allow'd for such a defence, in respect of which it may be for the Safety and Interest of the Borderers to claim a distinct Dominion over it. Yet certainly it would urge a very unreasonable Fear and Jealousie, should any Kingdom barely on this account desire to extend their Sovereignty over the Sea for some hundreds of Leagues together (d). However we see by what hath been offer'd, that there may be very weighty Reasons for a People so far to appropriate to themselves some part of the Sea, as to oblige all others to acknowledge the use of the same part, as a permission from them, and an Act of Bounty and Favour.

VIII. But since all Dominion capable of producing any Effect against the Claims of others, takes its rise from some Act of Men; therefore how far the Bounds of any People ought to reach on the Sea, is to be discover'd either from their own Right of Possession, or from their Treaties with their Neighbours (e). Yet supposing the Matter to be dubious, and that there are no clear Memorials to be found of such Acts as might prove the Occupancy to be real which is alledg'd; what presumptions are to be made in this Case we may understand from the following Remarks. In the Beginning then whilst we were yet ignorant of Navigation, it is not probable that the People which had taken possession of any Territories, extended their Dominion farther than to the Neighbouring Shore. For inasmuch as the Fishing Trade was yet but poor and barren, for want of Boats, and the utmost advantage they could make was to pick up the Shell-Fish which were left by the Tide, or to Angle from the Rocks; there was no fear that they should in this respect suffer from their Neighbours; who being necessitated to make their approaches by Land, might be repuls'd with little difficulty. Nay, after the Invention of Shipping, most Nations for a considerable time, left each other at full liberty to fish where they pleas'd: because they imagin'd that an Employment of so great labour and hardship would not engage such a numerous Train of Followers, as that any publick Disturbance should be apprehended from their Disputes and Contentions. And whilst Hostile Heats were yet unknown, the Sea was a sufficient Defence without other assistances. And afterwards when they began to build Ships of War, Men were contented a long while to appropriate only the Havens and Bays, leaving the other parts of the Sea in their Primitive Community. This moderation embolden'd the Pirates to carry on their Profession with greater liberty; whilst they were of Opinion, That 'twas a less heinous breach of the General Peace, to commit these Outrages in places subject to no Jurisdiction. At length, when they had found out the benefit of Merchandise, and the conveniency of so short a passage by Water for Goods and Traffick, some Governments seated near the Streights or Narrow Seas, challeng'd to themselves a Property in them, that by requiring Toll and Custom, they might come in for a share in the Gain, or that their Towns might be frequented by the Trading part of the World. After this, other parts of the Sea were likewise brought under subjection, either on account of their great plenty of Fish, or because this was a necessary

(a) See Pliny (l. 9. c. 15.) of the happy Shore about Byzantium. (1) Vid. Virgil. Georg. l. 1. v. 57. &c. (b) L. 20.

(c) Encom. Busir. (d) What Cæsar reports of the Germans may serve to illustrate this: *The particular Communities look on it as the highest Honour to make a vast extent of Desert round about them, wasting all the Confines of their Neighbours: this they reckon the surest mark of an extraordinary Valour, that the former Borderers have retired, and been driven to a greater distance, and that none dare fear themselves in so formidable a Neighbourhood. And then besides, they thought themselves the safer by this Policy, having taken away all fear of sudden Incurfions,* de B. G. l. 6.

(e) Thus Isocrates (in His Panegy. p. 111. Ed. Paris.) boasts that the Athenians by their Articles of Peace with the King of Persia, had obliged him not to come beyond Phaselis with his Ships of War.

Expedient for the security of the bordering Provinces.

Yet in these times they scarce exercised any other Right of Sovereignty, besides the giving out Injunctions, that all who pass'd within such Bounds should abstain from all Harm and Violence, that no Piracies should be there committed, and no Vessels of War enter without Permission. Thus when the *Lacedemonians*, in *Thucydides* (a), had convey'd Forces to *Epidaurus*, by Sea, the *Argives* in an Embassy to the *Athenians* complain'd, that they having promis'd by League not to grant the Enemies of *Argos* Passage through their Dominions, had nevertheless suffer'd them to sail by unmolested. And accordingly the *Athenians* interpreted this Act of the *Lacedemonians* as a Breach of Peace. We see it is now the receiv'd Custom, in order to the Acknowledgment of this Sovereignty, that Foreign Vessels, as they pass by any Fort on the Shore, or any Ship of War belonging to the Prince, who at present carries himself as Lord of the Sea, shall pay some Mark of Respect.

It doth not seem necessary that particular Nations should make out the precise time when they obtain'd the Dominions of such or such parts of the Sea, by taking Possession of it: but, inasmuch as the Exercise of this Dominion may not at all times be of Use and Advantage, 'tis enough if they then perform'd any Act of Sovereignty, when the Interest of the Commonwealth seem'd to require it: nay, in our Judgment, it might be no Absurdity to affirm, that when Naval Forces are once brought into common use, the parts of the Sea, so far as they serve only for a Defence or an Appendage, do without any special corporal Act, pass immediately under the Dominion of that People whose Shores they wash. (b) For in this respect the Sea is to be look'd on as an Increment of the Land, as the adjoining Moors and Fens are reckon'd the Increment of a City. Now, as in the Occupancy, or the taking Possession of Immovables, it is not necessary that our Body should touch each part, but the touching of one Part only is conceiv'd to create a Property over the whole; so when a People have seiz'd on one particular Region inclosed within settled Bounds, still under the Notion of taking all the void space about that they shall afterwards have Occasion for, though at first they have no Design to enlarge, or exercise their Dominion farther than those Bounds, as not thinking what lies beyond to be of use or service to them; yet when they come at length to find, that there

is a Necessity of adding such a void space to their present Possessions, their bare Intention and Resolution should seem sufficient to extend their Sovereignty over it, as a Part or Appendage of their Empire. Especially when it once appear'd that other Nations had thus stretch'd their Command over the Void Sea: Whence 'tis a fair Presumption, that the rest of the World pretend not that they should be behind with them in this Advantage (1). From which Considerations it is manifest, that in these times, when Shipping is brought to its highest Perfection, it is presum'd, that every Maritime People at all acquainted with Navigation, are Lords of the Sea, where it toucheth their own Shore, so far as it may be counted a Defence, especially in Ports and other places where there is Convenience of Landing (c). In like manner the Gulphs and Channels, or Arms of the Sea, are, according to the regular course, supposed to belong to the People with whose Lands they are encompassed. But in case different Nations border on the same Channel, the Sovereignty of each shall be conceiv'd to reach into the middle of the Water, from every part of their respective Shore: unless either all the States have agreed by Covenant to use the whole Water promiscuously amongst themselves, and to exercise a general undivided Sovereignty over it, against Foreigners: Or else, if one particular People have obtain'd a Dominion over the whole by Pact, or by the Tacit Concession of the rest, or by the Right of Conquest, or because they first fix'd their Station near it, and immediately took it into full Possession, exercising Acts of Sovereignty against the People of the opposite Shore. In which latter Case, nevertheless, the other Neighbouring States, their Fellow-Borderers shall be supposed to be Lords of each of their particular Ports, and of so much of the Sea, as the convenient Access to the Shore requires (d).

IX. But what shall we say of the main Ocean, which spreads it self between those vast Continents of *Europe*, *Africa*, *America*, and the unknown Southern Coasts? Was this ever brought under *Property*, or doth it still remain in its primitive State, free and common to all the World? As for the prodigious extent of it, this however doth not absolutely render it incapable of being appropriated. Yet we must confess, the Dominion of it would not be only unprofitable, but unjust; should either any one Nation challenge it all to themselves, or several States divide it into so many Shares, excluding all the rest of Mankind. Navigation, or the Convenience of Water-passage, is a

(a) L. 5. c. 56. Ed. Oxon. (b) Comp. Ziegler. ad Grot. l. 2. c. 3. f. 11. (1) In all the Editions of the Original, the word *etiam* is wanting, which makes our Author very difficult to be understood. (c) Bodinus, de Repub. l. 1. c. ult. on the Authority of Baldus affirms, that by a kind of common Right, enjoy'd by all Princes of Maritime Countries, the particular Sovereign may command and controul those who approach within Sixty Miles of his Shore.

(d) Of the Effects of the Sovereignty (if it may be so term'd) over the Sea, Vid. Alberic. Gentil. Advocat. Hispan. l. 1. c. 8 & 14. and Selden mar. claus. l. 2. c. 20, 21, 22. To which we may add, by the way, what Dr. Chamberlain takes notice of in his Present State of England, pag. 1. c. 4. That Persons born under Shipboard upon Seas which are subject to the English Dominion, are accounted Natives of England, and have no need of Naturalization, as others born without the Realm.

thing which suffers no Damage by being enjoy'd; on the bare Account of which, the Appropriation of the Sea is needless and superfluous, since Men may sail no less commodiously, were the Sea common to all Nations, than if it were peculiarly subject to one. The Fishing Trade is of no very great Consequence in the main Ocean; and since you do but vainly call a thing, Your own, when 'tis morally impossible to hinder others from using it promiscuously with your self; we cannot think any State would find it tantamount, to maintain Fleets in all parts of the Sea, only to secure the Fishing against Interlopers. But what if a particular Nation, either through Ambition and the Vanity of being stiled Lords of the Ocean; or prompted by Avarice, and the hopes of drawing to themselves all the Advantages of Navigation and Trade, should claim the Ocean as their peculiar Possession? Especially if they urged by way of Title, That they were the first who entred upon the use of it with Sails and Shipping, and that they possess Lands in every Continent round it: And that, since the Sea was originally a void space, he who before the rest attempted to fix a Use and Occupancy in it, might thereby acquire a *Property* exclusive of all others. To this we answer, That Men have indeed a Privilege of making Wastepieces their own, by first seizing upon them: But then they are always to remember, that God gave the World not to this nor to that Man, but to human Race in general; as likewise that all Men are by Nature equal. Wherefore, that Tacit Covenant between the first Introducers of *Property*, assigning the Right of those things which did not fall under their prime Division, to the Persons who should first take Possession of them, can by no means be extended to such an Object, which if one should hold alone, he might oppress all others with most unjust Slavery, or might intercept some most Important Advantages, which would otherwise accrue to all Nations in common. Inasmuch as such a Case as this could not enter into the Imagination of those primitive Divisors. As then no one would deserve Censure for taking out of a common Store whatever is Necessary for his own Occasions, though in order to future use; So he is not to be endur'd, who out of a vain and senseless Greediness, should lay Claim to more than he could ever spend; and should desire infinitely to enlarge his own Dominion, for no other Reason, but to debar others from the use of those good things which Nature affords. There can then no probable Ground or Colour be alledged why any one People should pretend to the Dominion of the whole Ocean, so as by virtue of this Right to aim at excluding all others from sailing there. Not one of those Reasons which first moved Men to the Settlement of *Property*, doth affect the

main Sea. To make it fit for Navigation, there is no need (in regard to the Sea it self,) of the Pains and Industry of Men. The Winds labour no more to drive all the Fleets in the World, than a single Vessel. Nor do those Tracts which the Keels plough up, make the way rougher to those that follow them. As for the Passage to the other Continent, this is not rendered less convenient to one Nation, though another useth the same Road. And to have been the first Travellers thro' any place, doth by no means give a People the Dominion of it, or prohibit others from turning it to the same Advantage. It is a most imprudent Plea to urge, *That any one State by intercepting the Naval Affairs of all others, may be able to draw to it self the whole Profit of a Sea trade, which Interest all Persons ought industriously to pursue.* As if all the rest of Mankind ought to be oppress'd by a most unjust Monopoly, to gratify the insatiable Avarice of a single Government: or, as if all others must voluntarily turn Slaves, because the wicked Ambition of one Prince or State lusts after the Sovereignty of the whole World. Such hath been the Bounty of Providence towards Mankind, as to give an abundant Supply of all things useful to their Necessities. But as to the manner of possessing these things, Reason enjoins Men to use such Moderation in it, as to rest contented with the Acquisition of so much as is likely to suffice for the Service of themselves and of their Dependants. Nor doth the same Principle forbid them to be concern'd for the future, provided they do not, either by Envy or Avarice hinder others from gaining a Needful Maintenance and Relief. If any one carries his Pursuits further, and scrapes up superfluous Stores, to the Injury and Oppression of others, it can be no Fault in the rest, if, when Opportunity serves, they engage in a timely Enterprize of reducing him to Reason.

X. From what we have observ'd, it is clear, that to sail the Ocean in a peaceful manner, both is and ought to be the free Privilege of all Nations: *It is*, because no one People have attain'd such a Right over the Ocean, as will justify them in shutting out all others from the same Benefit: *And it ought to be*, because the Law of general Kindness and Humanity requires it. Whence it follows, that no Sovereign can hinder the Nations which border on the main Sea, and are not under his Government, from maintaining a Trade with each other; unless he have by Covenant obtain'd such a Right, as either that some particular State is bound, on his account, to exclude some certain People from all Commerce with them; (of which kind was the Contract between the *Dutch East-India-Company*, and the Emperour of *Ceylon*) (a); or that some whole Nation have surrendred up to him their

(a) Vid. *Philipp. Balda. descript. oræ Malabar. & Coromand. c. 10 & 22.*

Right of Sailing to another. For since I may, at my pleasure, either retain or alienate my Goods, especially such as regard rather the Superfluities of Pleasure than the Necessities of Life, there is no reason but that I may on some certain Considerations oblige my self to dispose of them to one Person, and to none besides. And this indeed is one proper effect of Liberty, that Men may by Covenant give up their Rights between themselves; though no such Covenant shall be allowed, if really prejudicial to a Third Person. Hence likewise, as a Prince may justly ordain, that no Goods, of the Growth or the Manufacture of his Dominions, shall be exported by Foreigners, unless by such as have obtain'd this Privilege, either upon Covenant, or by free Grant; (tho' the Law of Nature doth not at all oblige him to strike such a Covenant, or to make

such a Grant, unless some Nation abroad be reduced to such Extremity, as that without this Liberty of Commerce, they must necessarily perish:) So if a People of *Europe*, for Instance, have appropriated any Country in *Africk*, or the *Indies*, by such means, and in such manner as the Custom of Nations makes Effectual towards the acquiring *Dominion*; they may with like Justice, if they think fit, cut off from others all Passage thither on account of Traffick, or not allow it, but under certain Conditions, or some settled Burthens and Duties. And this we now see in every Day's Practice: Nor doth it appear to be in any respect repugnant to Natural Reason. For that Liberty of Commerce, on which some ground such high Pretensions, doth not hinder but that a State may allow more Favour to its own Subjects, than to Strangers.

## CHAPTER VI.

### Of Occupancy.

IT follows in course, that we consider the several ways of acquiring *Dominion*, which, after *Grotius's* Judgment (a), may conveniently be divided into *Originary* and *Derivative*. The former are those by which the *Property* of any thing was first introduced: The latter those by which a *Property* already settled passeth from one Man to another.

Again, The *Originary* way of acquiring *Property* (1) is either simple and absolute, as when we obtain a *Dominion* over the Substance and Body of a thing: Or only primitive and with respect, as when we add to a thing already our own, some further Improvement and Increase.

II. We have sufficiently made it appear in our former Remarks (2), that after Men came to a Resolution of quitting the Primitive Communion (3), upon the Strength of a previous Contract, they assign'd to each Person his share out of the general Stock, either by the Authority of Parents, or by universal Consent, or by Lot, or sometimes by the free Choice and Opinion of the Party receiving. Now 'twas at the same time agreed, that whatever did not come under this grand Division, should pass to the first Occupant (4); that is, to him who, before others, took Bodily Possession of it (5), with Intention to keep it as his own.

Hence, when *Grotius* (6) affirms, That *Original Acquisition, anciently whilst 'twas possible for all Mankind to meet in one place, might be made by Division also, whereas now it can be made only by Occupancy*: The words ought to be explain'd in the following sense. When Mankind first began to separate into many Families, distinct *Dominions* were settled by Division: After this Division, he is said originally to acquire a thing lying void and without a Possessor, who happens to be the most early *Occupant* of it; *i. e.* he who lays hold on such a thing before others, or gets the start of them in putting in his Claim to it (b).

III. In Relation to the Occupancy of Immovables (7), especially of Lands, we are carefully to observe and distinguish, whether it be made by one Person only, or by many in Conjunction. One Man is then adjudg'd to be the Occupant of Land, when he tills and manures it, or when he encloseth it with settled Boundaries and Limits: Yet still with this Proviso, that he grasp at no more than what upon a fair account, seems tenable by one Family, however enlarg'd and multiplied. Should one Man (for Instance) be, with his Wife, cast upon a desert Island, sufficient to maintain Myriads of People; he could not

(a) L. 2. c. 3. f. 1. (1) This Division agrees likewise with *Derivative Acquisitions*. See the next Chap. f. 1. See Mr. *Barbeyrac's* Note upon this Section. (2) Ch. 5. f. 4. (3) See Mr. *Barbeyrac's* 1st Note upon this Sect. (4) *Quod enim Nullius est, id ratione Naturali Occupanti conceditur*. D. 1. 41. t. 1. leg. 3. princip. (5) Our Author will explain himself in Sect. 8, 9. See Mr. *Barbeyrac's* 2d Note upon this Section. (6) *Ubi supra*. (b) Thus the word is used in *Seneca, Thyest.* v. 202 & 203.

*In medio est scelus positum Occupanti.*

In *Tacitus*, H. 1. 5. 1. in fin. *Multi quos urbe atq; Italia sua quemq; spes acciverat occupandi principem adhuc vacuam.* In *Pliny*, l. 4. Epist. 15. *In ea civitate in qua omnia quasi ab occupantibus aguntur, qua legitimum tempus expectant, non matura sed sera sunt.* (7) See Mr. *Barbeyrac's* 1st Note upon this Section.

without intolerable Arrogance challenge the whole Island to himself upon the Right of Occupancy, and endeavour to repulse those who should land on a different part of the Shore.

But when any number of Men jointly possess themselves of a Tract of Land, this Occupancy is wont to be made either by the Whole, or by Parcels (1).

The former happens, when Men in an united Body seize on some desolate Region, encompass'd with certain Bounds, either by Nature or by human Appointment. The several Parcels of which Region are either granted to the particular Members of the Community, to take and to hold as each shall think fit; (a Method but rarely practis'd;) or what seems more convenient for the Prevention of Quarrels and Disputes, are allotted to every Person by publick Designation. For that a promiscuous Occupancy is apt to breed Confusion, we may observe from that Description which (a) *Livy* gives us of *Rome*, *Forma urbis erat occupata magis quam divisa similis; Such was the Appearance of the City, as if it had been first possess'd rather by Occupancy than by a regular Division.* *Tacitus* and *Cæsar* will furnish us with Instances. The former reports of the Ancient *Germans*, to this purpose (b); *Such a number of Men dwelling together, (for Grotius reads Vicos, not Vices) occupy or possess such a Portion of Land, which they afterwards parcel out into private Shares, according to the Worth and Esteem of particular Persons; the vast extent of the Country making these Partitions easy and practicable. They change their Arable Ground every Year, and are never at a loss on this account.* So likewise *Cæsar* tells us of the *Suevi* (c), *They have an hundred Cantons, from each of which they draw every Year a Thousand Men for the Camp-service; the rest keep at home, and till the Ground for themselves, and for their absent Friends. The next Year they relieve each other; those who serv'd in the Army return to take care of the Land; and those who tarried behind list themselves for the War. Thus, they never interrupt either the Business of Husbandry, or the use and Discipline of Arms. But there is no such thing as separate or private Fields known among them; nor are they allowed to inhabit any one place longer than the space of a year.* And again (d) speaking of the *German Nations* in common; *No Person, says he, hath any certain Quantity of Land, any settled or proper Boun-*

*daries. But the Princes and Magistrates every Year assign the several Tribes their Residents, in what place, and to what extent they judge convenient; and, the Year after, force them to remove to a new Seat.* The Design of which Institution was, no doubt, to preserve the Ancient Simplicity of Life, so unacquainted with Avarice and with Luxury. We find *Horace* alluding to this Custom. *Lib. 3. Od. 24. L. 9, &c.*

*Campeſtres melius Scythæ,  
(Quorum plauſtra vagas rite trahunt domos,) Vivunt, & rigidi Getæ:  
Immetata quibus jugera liberæ  
Fruges, & Cerecem ferunt,  
Nec cultura placet longior annua;  
Deſunctumque laboribus  
Æquali recreat ſorte vicarius (e).*

The Rovers of the *Scythian Plains*,  
Whom peaceful Want inur'd of old  
To wheel their Houſes in their Wains,  
And *Getans* ſtiff with Native Cold,  
In ſolid Happineſs outvie  
The Pomp and Pride of *Italy*.  
Unmeasur'd Lands free Plenty yield,  
And *Ceres* loves to ſhift the Scene,  
A ſingle Harveſt loads the Field,  
A ſingle Year confines her Reign:  
And if the Farmer weary grow,  
His honeſt Second takes the Plough.

IV. As for this Occupancy in general, or by the whole, we are farther to observe, that it confers on the Community, as such, a Dominion over all things contain'd within the Tract which they thus possess, not only Immoveable, but likewise Movable Goods and Animals; at least it gives them such a Right of taking the latter kind, as excludes all others from the same Privilege. And such an universal Dominion as is here describ'd, is so very different from the Dominion of private Men, that the latter may be transferr'd to a Stranger or Alien, whilst the former remains safe in the Hands of the Community (f) (2). Nor is it necessary that all things which are first occupied in this General way, should be afterwards divided amongst particular and distinct Proprietors. Therefore if in a Region thus possessed, anything should be found which is not ascertain'd to a private Owner, it must not presently be look'd on as void and waste, so that any one Person may seize it as his Peculiar;

(1) See *Grot. B. 2. c. 2. f. 4.* (a) *L. 5. in fin.* (b) *German. c. 26.* (c) *De B. G. l. 4. c. 1.* (d) *L. 6. c. 22.* (e) Of the Inhabitants of the Island *Lipare*, see *Diodor. Sic. l. 5. c. 9. p. 292. B. Ed. Rhodom.* The same Author, *l. 5. c. 34. p. 310, 311.* attributes to the *Vaccæans*, a more strict kind of Communion, *The Nation of the Vaccæans (says he) divide their Land yearly into so many Partitions in order to the tilling it: The Fruit and Product they bring into a Common Stock, out of which they assign every Man his Share. If the Country Men invade any part, it is a Capital Crime.* See likewise, *l. 5. c. 45. ibid. c. 45. p. 320. D.* Of the Commonwealth of the *Pancheans*.

So too the *Apalchite* labour for the common, and each Householder according to the number of his Family, receiv'd every Full Moon his Proportion out of the publick Store-house. *Vid. Rochefort. Descript. Antillar. par. 2. c. 7. n. 8. Comp. Grot. l. 11. c. 2. f. 4.* (f) *Dio Chryſoſtom, Orat. 31. in Rhodiac.* *The whole Country belongs to the Civil State; yet this doth not in the least hinder, but that every Man is Lord of his own Possessions.*

(2) *Vid. Grot. l. 2. c. 3. f. 4.*

but we must suppose it to belong to the whole People (1). And the same Rule may (in our Judgment) be extended to such desolate Islands as lie in any Sea under the Dominion of a particular Common-wealth (2); or such as though they do not now appear, yet happen to rise afterwards in the same place; of which we find several Examples recorded by *Pliny*. Now in the disposal of such things as these, the People take different Methods: Sometimes the profits of them are laid up in a publick Stock, to be taken out again for publick uses; sometimes all the Subjects, sometimes those only of a certain Order or Degree; and sometimes Foreigners too are allow'd to hold and enjoy them, as Tenants of the State. Yet in all Cases, whatever Right private Persons obtain over these things, depends on the Appointment of the whole Community. But there is some difference, as to this point, between Immovables and Movables. The former, in regard that they lie in open view, and cannot be forc'd out of their place, are by virtue of that Universal or General Occupancy immediately suppos'd to belong to the People, so far as concerns the Body and Substance of them. But now as to Movable things, some of these are so framed or dispos'd, as that the Region may indeed be the Seat of their production; and yet there is need either of labour in finding or gathering them, as Metals in the Bowels of the Earth, Jewels, Pearls and the like, scatter'd about the Shores and other places: Or else of particular care in taking and securing them, that they may not afterwards get out of our Hands; as Beasts, Fish, and Fowl. Men having no Power over these things, so as to use them at their pleasure, before they are found or taken; it follows, that a People by themselves in this General possessing manner of the Seat where they are to be met with, do not properly acquire a *Dominion* over them, but only a Right of obtaining such a *Dominion* hereafter, by particularly taking and securing them. Hence, for Instance, we cannot rightly say, That the Wild Beasts of any Country, which still remain in their Natural Freedom, are the Property of the Prince: But the Prince alone hath the Right of taking them, inasmuch as he is Lord of the Soil where they run; and he may communicate this Right to others in what degree and under what restraints he pleaseth. Therefore he who is Sovereign of the respective Lands or Waters, may grant a Right of taking and appropriating things of this Nature, either promiscuously to all Persons, or to none but his own Subjects; or still only to his Subjects of such a Quality: Or, lastly, he may, if he thinks fit, reserve the privilege wholly to himself. For though the

things themselves be not yet, in strict Speech, under Dominion, yet forasmuch as the Act of appropriating them cannot be accomplished without using some other things which are subject to Dominion; as suppose the Earth, or the Water; it follows, that he who hath the Sovereignty of the latter things, may by a Decree to this purpose, prohibit others from using them, as means of acquiring the former (a).

V. Hence it is apparent, that it depends on the Will of the Sovereign, and not on any Natural and Necessary Law, what Right the private Members of a State shall enjoy, as to the gathering of Movables not yet possess'd, as to Hunting, Hawking, Fishing, and the like. Nay, and as to the Occupancy of desolate Regions; which the Supreme Governors may hinder any of their Subjects from entering upon. Such a Prohibition cannot indeed prejudice Foreigners, who by taking possession of those Regions may make them their own: But it will be a stop to the Subjects of the respective Governors, so that none of them shall acquire the said things, but those only who have obtain'd a Grant and Commission so to do. For in some places private Men are allow'd more of these Advantages, and in some less, according as the Rulers in every State have judg'd convenient. By the *Jewish Custom*, as Mr. *Selden* (b) informs us, *Whatever was found in desolate places, or in such as were void of the Dominion and Culture of private Persons, became the Property of the Occupant; as Grass, Fruit, Wood, and the like. Also the Fish, whether in Salt or Fresh Water, and the Wild Beasts and Birds: Yet no one was permitted to Hunt or to Hawk in another Man's Ground: Though even there, if he had once taken any Game, it was his own. But to rob the Parks and Ponds was utterly unlawful.* The Roman Lawyers talk much to the same purpose. For thus *Gaius* (c), *All Animals taken on the Land, on the Sea, or in the Air, that is, Wild Beasts, Birds, and Fish, belong to those who take them: For what is yet no Body's, Natural Reason assigns to the first Occupant.* (d) On these and the like places the Expositors of the Civil-Law observe, that under the Term *Feræ*, are comprehended all Living Creatures, which Nature hath endued with an unlimited Power of straying up and down about their proper Elements; So as to take in those likewise which have been tamed by the Use and Company of Men. Though perhaps the distinction between Wild and Tame Creatures might be thus better express'd; that the former are more averse to Human Society, take greater delight in enjoying their boundless Liberty, and cannot, without great difficulty, be accustomed to live

(1) Vid. *Grot.* l. 2. c. 2. f. 4. (2) Vid. *Plin.* N. H. l. 4. c. 12. (a) *Comp. Grot.* l. 2. c. 2. f. 5. & c. 3. f. 5. & 19.

(b) *De J. N. & G. Sec. Heb.* l. 6. c. 4. (c) *Instit.* l. 2. t. 1. *De rer. divis. & acquirend. ipsarum dominio*, f. 12.

(d) Concerning Fish there is an elegant passage in *Plautus Ruden*, Act. 4. Scen. 3. v. 32, &c. *Ecquem esse dices, &c. Can you say that any one of the Fish belongs to me, whilst in its own Element? Yet those which I catch are my own, and I reckon them amongst my proper Goods: No one lays hands on them to challenge them from me; no one claims a share in the Booty. I sell them all fairly in the open Market as my Honest Store.* Though the Fisherman was somewhat out when he applied this Argument to the Bag of Money.

with us; nor may we, after all, depend very safely on their Fidelity: Whereas the latter are quite different in each of these respects. Yet 'tis a Saying of *Grotius* (a), *That the Reason why some Creatures fly and avoid us, is not the want of Mildness and Gentleness on their side, but on ours*: Which he grounds on the observation of Travellers; that in the most remote parts, where Men had scarce ever, or very rarely came before, Birds have been found, which offer'd themselves freely to be taken. Some may rather chuse to form the distinction by saying, That Wild Creatures have Naturally a more intractable, a more rough and stubborn disposition than the Tame.

We may here remark by the way, that in one place of the *Institutions*, (b) and another of the *Digests*, (c) Pigeons and Peacocks are falsely reckon'd amongst those Fowls which we term Wild. The Mistake about the Peacocks hath been already noted by *Godofredus*, on that Passage of the *Institutions*: And as for Pigeons, the reason which in the very next Section is there given to prove Hens and Geese to be tame (r), will reach them likewise, there being other Pigeons expressly denominated wild. And therefore, by the *Jewish* Customs, none might take them, unless at thirty Furlongs distance from the Dove-House (d).

Yet Bees (2) are no doubt wild by Nature, since their Custom of returning to their Hive, doth not proceed from their familiarity with Mankind, but from their own secret Instinct: they being in all other respects utterly unteachable. It is nevertheless one of *Plato's* Laws, (e) *Whoever shall pursue the Swarms which belong to others, and by striking on the Brass shall draw them with the delightful Sound to fix near himself, let him make Restitution for the Damage*. Where he seems to presuppose, that the Owner of the Bees did not follow them when they left his Hives (f). *Pliny* (g) will have the Bees to be neither Wild nor Tame: Others divide them into both those kinds. (h) But that, so long as they return to our Hives they are properly our own, and cannot be hurt without our loss and damage, is very laboriously proved in that Declamation of *Quintilian*, entituled, *The Poor Man's Bees* (i).

According to the *Roman* Laws, (3) 'tis the same thing whether a Man takes Game in his own Land, or in those of others: Because Wild Creatures in whatsoever place they are found, are no Body's Property whilst they retain their Natural Freedom. Yet the Owner of Land may hinder (4) others from coming

there to follow their Sport. But still what another hath taken with his Dogs or his Hawks, though against the express prohibition of the Lord of the Soil, he thereby makes his own. Indeed, as to this last particular, *Cujacius* (k) is of a different Opinion; grounding his Exception on a Law of the *Digests* (l).

VI. But in most places, the privilege of Hunting is left wholly to the Governors of the Commonwealths; who in some Countries admit their principal Subjects to be Shareers with them: Only Beasts of Prey are almost every where allow'd to be killed by all Persons without distinction. Many Reasons may be assign'd for this General Custom. It did not seem convenient that Country-Men and Labourers should be permitted to quit their Work, that they might ramble about the Woods; which Indulgence might have drawn them on by degrees to the practice of Robbery and Plunder (m). Sometimes too, it is reckon'd unsafe, to trust the Common People with Arms. *Tully* (n) mentions one *Lucius Domitius*, who executed a Slave only for striking a large Boar with a Hunting-Spear, when after the *Servile War* in *Sicily*, an Order had pass'd, forbidding any Slave to appear with a Weapon. On the other side, for the Princes and Nobles, on whose Arms the safety of the Commonwealth was to depend, Hunting was esteem'd a most agreeable Exercise, as a Representation of War, and very proper to inure them in bearing the Hardships and Labours of the Field. On which account what a high value the *Parthians*, *Medes* and *Persians* set on this Manly Sport, we may learn from *Xenophon* (5) and other Authors (o). *Bajazet* the *Turk* is said to have maintain'd seven thousand Men only for the care and management of his Hawks; and to have had six thousand Dogs for the Chase. When he was taken Prisoner by *Tamerlane*, and upbraided with this Fancy by a Present of Hawks and Dogs from the Conqueror, he fiercely replied, *For me who owe my Birth and Education to Amurath the Son of Orchan, both Sovereign Princes, Hounds and Hawks are proper Diversion: Not for you a rambling Free-booter of Scythia, bred up to Thieving and Rapine*: (p) And indeed it was but equitable to allow this Manly Recreation to Princes and Chief Men, by whose Toys and Cares the Publick Welfare is secur'd. But should the same Favour in great and flourishing Countries, be granted promiscuously to all Persons, it would be of very little benefit and advantage to any one in particular (q).—

(a) Hist. Belg. l. 5. (b) Sect. 15. De rer. divis. (c) L. 41. t. 1. l. 5. f. 5. D. de A. R. D. (1) Vid. d. t. D. f. 16. (d) Vid. Constantin. l'Empereur Baba Kama. c. 7. f. 7. Add. Selden de J. N. & G. Sec. Heb. l. 6. c. 11. (2) Vid. d. t. D. f. 14. (e) De L. L. l. 8. p. 915. C. Ed. Wech. (f) Comp. f. 14. Instit. dict. Tit. (g) L. 11. c. 5. (h) Vid. l. 47. t. 2. D. de Furtis. l. 26. & Lib. 40. t. 1. l. 5. f. 3. (i) L. 8. f. 1. D. Famil. eriscunda. (3) Vid. D. Lib. 41. t. 1. l. 5. f. 12. (4) Plane qui alienum fundum ingreditur venandi aut aucupandi gratia, potest a Domino, si is praeviderit, prohiberi ne ingreditur. ib. (k) Obser. 4. 2. (l) Leg. 55. t. 1. Lib. 41. D. de A. R. D. (m) Vid. Constitut. Frederic. 2di. l. 2. feud. t. 27. f. 5. si quis rusticus. (n) L. 5. c. 3. in Verr. (5) Cyropæd. l. 1. initio. (o) Cornel. Nep. Alcibiad. c. 11. Justin. l. 41. c. 3. Tacit. Annal. l. 2. c. 2. Sueton. Caligul. 5. (p) Laonick Chalcondyl. l. 3. (q) Plin. Panegy. These were the Arts and Exercises in which their future Generals were train'd for their Country's Service: to contend with the swifter Beasts in Speed, with the boldest in Strength, with the more cunning in Policy and Craft: Nor was it look'd on as an inconsiderable Ornament and Triumph of Peace, to remove from the Field the Inroads of the Savage Herd, and to deliver, as it were, from a Siege the Labours of the Countrymen.

For these, therefore; and the like Reasons, a Sovereign, if he thinks it for the Interest of the Kingdom, may against the consent of the Common People abridge them of the liberty of Hunting, without any Injustice. For he doth not hereby take from them what was their own, but barely forbids them to use a certain means of acquiring things, which the meer Law of Nature, if it obtain'd without any Civil Constitutions, would allow them. For as to what some ignorant Persons have urged, that the prohibition of Hunting is therefore unlawful, because God Almighty invested Men in general with the Dominion over Beasts, the poorest Subjects being no less Men than their Superiors: or, as to that common Assertion of the *Roman* Lawyers, that Hunting is free to all by the Law of Nature and of Nations; Learned Men have long since put an end to these Doubts, by distinguishing between the Preceptive and the Permissive Law of Nature, and by explaining the different acceptations of those Terms *Jus Gentium*, or the *Law of Nations* (a).

But further, it is very probable, that in many places this Right was conferr'd on Princes by the Voluntary Motion and Act of the People. (1) For since there was a necessity of affigning them some advantages for the supporting their Dignity with a sufficient Train and Splendor; it was wisely consider'd, that 'twould be most convenient to allot them such things as might be given without the damage or prejudice of any Man: and of this kind are all those in which no other Person can yet claim a Property (b).

VII. But such Laws as these, did not, strictly speaking, confer on Princes the Dominion over Wild-beasts, (2) but only a Right, by virtue of which they alone should afterwards make them their Property, by seizing and possessing them. Which Right, nevertheless, had this effect in common with Dominion, that in case any other Person had illegally taken the said Beasts, they might be challeng'd at his hands. For it doth not seem reasonable to admit the Opinion of some, who tell us, that even before Actual Occupancy, the Law might fix the Dominion of these things, nothing more being required towards the producing of Dominion than a Legal Appointment. Thus much indeed the Law of any Country may effect, that a Dominion already established over things shall pass from one Subject to another, without any antecedent Act of the Parties. But the Law alone is not sufficient

to introduce originally a Dominion over such things as have not yet been actually brought under the power of Men: but there is requir'd farther some Corporal Action; especially as to the possession of Living Creatures. But now the first constituting Dominion, and the preserving it after it hath been once constituted, are different things.

Some again there are who assert, that Prohibitions of this Nature by Civil Ordinances, only stop the Right of taking Game, not of keeping what hath been already taken. For two things, they say, there were which the Law of Nations allowed with reference to Wild Beasts. First, That all Men should enjoy the liberty of Hunting: And Secondly, That the Dominion of these Beasts should be acquired by the way of Occupancy. The former of which Privileges seems in this case to be restrain'd, but by no means the latter. Whence if a Person who was forbidden to Hunt, shall nevertheless have follow'd the Chase, and succeeded in it, any Game found upon him may be forced away; not because he had not made it his own, but in way of Punishment he was unworthy to possess it. In the same manner altogether, as Nets, Spears, and other Hunting Instruments are seized in such Mens Hands; though none can deny these to be their real Property. For which Reason, if Game thus taken contrary to Law, be given in charge to another as a matter of Honest Trust, it may not be forcibly challeng'd from him by the Magistrate: as it might be, were it indeed stolen, some other Person being the just Owner of it. But the Prince cannot be call'd the Owner of these Beasts before he hath actually caught them; and therefore he who Hunts contrary to the Royal Prohibition, doth not commit Theft, nor take away the Goods of another; but only acquires a thing which another had a Privative or Exclusive Right of acquiring; and therefore he may be punished; but as for the thing which he thus got into his possession, it ought not to be look'd on as a matter of Theft, or to be challeng'd accordingly (c) (3). But indeed 'tis very simple to imagine, that a Man is by any Natural Necessity made Proprietor of the things which he first lays his Hands on; we having already shewn that this Right is grounded on the strength of a Previous Covenant. (4) Therefore if a Prince shall forbid his Subjects to use this Method of Acquisition, in regard to some particular things; their being the first Takers shall avail them nothing in order to the obtaining of Dominion over them. And that Law of the Prince hath so far the

(a) Vid. Grot. l. 2. c. 3. f. 5. (1) Vid. Grot. l. 2. c. 8. f. 5. (b) Of the Hunting allowed the Peruvians under their Incas, consult at your pleasure Garcilass. de la Vega Comm. Reg. l. 6. c. 6. (2) See Mr. Barbeyrac's 1st Note upon the preceding Sect. (c) Vid. Gudelin. de jure novissimo, l. 2. c. 2. and from him Arnold. Vinn. ad Sect. 13. Institut. de rer. divis. Ziegler upon Grotius, (l. 2. c. 2. f. 5. speaks much to the same purpose: That a Law may indeed hinder the taking of Game, but that no Law can hinder it, when taken, from immediately passing into Property, as acquired. For that the Right of prohibiting is consistent enough with this Right of Acquisition. That, whether a Man by taking Game acquires it as his Property, and whether a Man ought to make use of this way of acquiring, are two different Questions. That, as to the former, the Sovereign hath no Authority to interpose: Because, as he cannot make those things become some Body's which are no Body's, or these to be possessed which are not possess'd (l. 3. f. 14. D. de acquif. poss.) so neither can he hinder these Questions, the Sovereign is free to enact what he pleaseth. (3) Vid. D. Lib. 41. t. 2. De acquif. vel amittend. poss. ff. (4) C. 4. l. 4. See Mr. Barbeyrac's 2d Note upon this Section.

effect of Property, as that after it, the Subject ought not to lay hands on the said Beasts; or if he doth so, he cannot thereby make them his own. Nor doth it follow, that because 'tis not usual in these Cases to challenge the Flesh, especially from a third Person, when perhaps it is ready to corrupt; therefore the Unlawful Hunter was the Just Proprietor of it. Again, *Taking* must not presently be construed *Acquiring*: the former being a bare Natural Action, whereas the latter includes a Moral Effect. It may rather be said, that the Position of these Men is a plain Contradiction; for thus it runs, *The Right of Hunting belongs to Princes alone, and if any Private Person takes Game, he thereby acquires the Dominion of it.* That is, Princes alone may use that means by which the Lawful Dominion over Wild Beasts is gain'd and establish'd; and yet another Person may acquire the same Dominion, whilst he cannot lawfully apply the same means.

But what if it should be demanded, Who then is the Proprietor of Game thus taken contrary to Law? We have absolutely denied the Taker himself to be so; and as for the Prince, how could he fix a Property in the Game, when he was not concern'd in the Sport? It seems reasonable in this Case to affirm, that here the Hunter, tho' in a very unacceptable way of Service, labours for the Prince; and consequently, by taking the Game, he makes it the Prince's, in the same manner as other Huntsmen, who act by a Royal Commission and Deputation (1).

It is, moreover, certain, that a Stranger likewise is bound by such Constitutions as these; though perhaps in his own Country, the Liberty of Hunting may be universally allow'd. Forasmuch as this is a necessary Law of all States, without which their Inward Peace and Tranquillity cannot be secured, that he who enters upon the Territories of another Prince, though only for a time, ought so long to conform to the Customs and Orders of the Place; at least to all those the Reason of which will hold good against him as well as against others, and from which the Legislator hath not peculiarly exempted Foreigners (a). But, on the whole, 'tis the Admonition of Wise Men, that Statutes of this kind ought with great Moderation to be put in force; unless some particular aggravation in the Offender, deserves a greater severity of proceedings (b).

VIII. We are then said to have *occupied* any thing, when we actually take possession of it; and this commenceth at our joining body to body, either immediately, or by a Proper Instrument. The Regular Course therefore is, that the Occupancy of Movable be made with the Hands; the Occupancy of Soil with

the Feet, together with an Intention of manuring it, and the Action of setting Boundaries to it, whether exactly, or with a wider Liberty. But the bare seeing a thing, or the knowing where it is, is not judg'd a sufficient Title of Possession (c).

Whether Possession of an Immovable thing may be taken by an Instrument, we may understand from the famous Story which *Plutarch* (d) relates to this purpose. *The People of Andros and Chalcis made a Progress together into Thrace, to find out new Seats where they might fix and inhabit; and soon after their arrival, the City Sana was by Treachery put into their Hands: After this, being informed that the Barbarians had deserted the City Acanthus, they sent two Spies to discover the Truth of the Intelligence. These, as they drew near, and saw the place to be really forsaken, the Chalcidian Spy ran with all his force to take possession of it in the Name of his People; but the Andrian seeing himself outrun, threw the Spear which he had in his Hand, at the City Gate, and as it stuck there, cried out, That by this cast of his Spear he had taken the prior Possession in behalf of his Countrymen. A Dispute arising hereupon, the Eretrians, the Samians, and the Parians were chosen Umpires; of whom the two former gave judgment for those of Chalcis, and the last for those of Andros. The disappointed Party were so enraged at the Arbitrators, as to engage themselves by Oath, never to make or to allow any Marriages with them.* Indeed a Spear seems a very Improper Instrument for the Occupancy of Immovables, since we may strike many things with such a Weapon which we can never approach so near as to touch with our Body (2).

IX. It is the general Opinion, that moving Things cannot be made our own but by bodily Seizure; and this we are to use in such manner, as to take them from the place where they were found, into our Lordship, or at least into our safe Custody (3). Thus a Nest of Birds, though I lay my hands upon them, yet are not my own unless I carry them home. If I find a Litter of young Beasts of Prey, I then fix a Property in them, when I either remove them, as Prisoners, to my own Quarters; or for some time set a Guard over them where they lie, to hinder their Escape. Now this Seizure is made not only with our Hands, but with Instruments; as suppose, Snares, Gins, Traps, Nets, Wheels, Hooks, and the like (4): provided the Instruments be, as they term it, *in nostra potestate*, under our power: That is, set in a place where we have a Right of following the Game; and not yet broken by the Prey, but holding them fast, at least till such time as we might probably

(1) See Mr. Barbeyrac's 3d Note upon this Sect. (a) Vid. *Grot.* l. 2. c. 2. f. 5. (b) Vid. *Bæcler.* ad *Grot.* *ibid.* Sect. 4. (c) Thus *Ceres* speaks in *Ovid* (*Metamorph.* l. 5. v. 518, 519.)  
*En quaesita diu tandem mihi nata reperta est.*

*Scire ubi sit, reperisse vocas.*

(d) *Quæst. Græc.* 30. p. 298. (2) See Mr. Barbeyrac's 2d Note upon this Sect. (3) See Mr. Barbeyrac's 1st Note upon this Section. (4) See *Grotius*, B. II. c. 8. f. 14.

come up. And hence we may decide the noted Case of *the Boar in the Toil*, proposed in the *Digests* (a). For, if the Beast were so entangled that he could not possibly break thro', and the Snare were laid either in your peculiar Lordship, or in a publick place where you had a Right of Hunting, then he was certainly your own; and I, if I had loos'd him, and restor'd him to his natural Liberty, should have been bound to make full Satisfaction, whatever name such an Action at Law might bear, or under what Head soever it might be ranked. But if the Snare were set on my Ground, as I might at first have hindred your Entrance thither, so if I afterwards break what you placed there without my Leave, you have no Reason to think your self injured.

X. It hath likewise been disputed, Whether by giving a Beast a Wound in Hunting, we presently make him our own (b)? *Trebatius* long since declar'd on the Affirmative side; but then he supposeth us to pursue the Beast, which if we omit to do, he says, *We lose our Property, and the Right passeth to the first Occupant*. Others are of the contrary Opinion, maintaining, That we can by no other means appropriate the Beast, but by actually taking him, because many Casualties may hinder him from ever coming into our Hands. The Emperor *Frederick* made this Distinction in the Case (c): *If the Beast were followed with the larger Dogs or Hounds, then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or a Sword. But if he were followed with Beagles only, then he pass'd to the Occupant, not to the first Pursuer. If he was slain with a Dart, a Sling, or a Bow, he fell to the Hunter, provided he was still in Chase, after him, and not to the Person who afterwards found or seized him.* According to the Constitution of the *Lombards* (d), he who found or kill'd a Beast, wounded before by another, was to carry off a Shoulder and the Ribs, and to leave the Residue as the Hunter's Right: though this Right to the Remainder continued no longer than the space of 24 Hours. We judge it may in general be affirm'd, That if the Beast be mortally wounded, or very greatly maim'd, he cannot fairly be intercepted by another Person whilst we are in Pursuit of him, provided we had a Right of passing through such a place: But the contrary is to be held, in Case the Wound were not mortal, nor such as would considerably retard the Beast in his Flight (1). Therefore when *Meleager* in *Ovid* (e), admits *Atalanta* to a share in the Glory of killing the *Calcedonian Boar*, it was not so much an Act of

Justice, as of Love. But the Game which my Dogs kill when I did not set them on, doth not become my Property, till I have actually taken hold of it (f).

XI. The *Jewish Customs*, as Mr. *Selden* informs us (g), decided these and the like Points in the manner following: *Fish or Beasts were not to be taken from the Repositories or Places of Store; Yet it was lawful to take Fish out of another Man's Net, whilst yet in the Sea, and Beasts out of another Man's Snare, if it were laid in a desert place. He that spread a Net in another's Ground might possess the Game he had caught, unless it were found by the Lord of the Soil, and challeng'd as his Right, by virtue of that Propriety. Fish that leapt into a Ship belong'd to the Master: Inasmuch as a Ship may be esteemed a place of firm and secure Custody, not of such as is passing and uncertain; the motion it hath, not proceeding from its Nature, but from the force of the Waters.* It is worth while to examine that Law of *Nerva* (h) (2) on the same Subject, which determines, *That we are properly the Possessors of the Fish in our Pond, not of those in our Lake: And so of the Beasts in our Close Park, not of those in our Woods and Forests, though surrounded with a Fence.* Which Distinction *Grotius* (i) dislikes, because Fish and Beasts are no less secured in the larger Prisons of private Lakes, and well fenced Woods, than in the Closer, of Ponds and Parks. Yet *Nerva's* Assertion is indeed founded on very good Reason. For the Propriety both of wild Beasts and Fishes commenceth upon their being taken (3). Now the Fish preserv'd in our Pond, and the Beasts in our Park, were once actually taken by us, but not the Fish which swims in our Lake, nor the Beasts which run in our Woods, enjoying thus far their Natural Liberty, though perchance they are so encompass'd, as not to be able to wander without end. For to take these Creatures, and to beset them with an Inclosure for the more easy taking them hereafter, are different things; yet inasmuch as I alone have a Right to take them, I may therefore both hinder others from doing the like, and may challenge what I find in their Hands; so that as to this effect, it is all one as if I were strictly the Proprietor. And the Beasts thus surrounded at large, may so far only be said to enjoy their Natural Liberty, as that they never yet were caught by any Person; not as that all Persons without Distinction have a Right to catch them.

XII. We likewise acquire by Occupancy Things in which the *Dominion* they before lay under is extinct (4): And this happens if a Person either openly throws aside a certain Thing, with sufficient Indications, that he de-

(a) Lib. 41. tit. 1. leg. 55. de A. R. D. (b) Ibid. l. 5. f. 1. (c) Godofred ad istam leg. ex *Raderico* de gest. *Frederic.* l. 1. c. 26. (d) L. 1. tit. 27. l. 4 & 6. (e) *Metam.* l. 8. v. 427. (f) *Add. Alberic. Gentil. Advoc. Hispan.* l. 1. c. 4. (g) *De J. N. & G. Sec. Heb.* l. 6. c. 4. (h) See Mr. *Barbeyrac's* 2d Note upon this Sect. (i) L. 3. f. 14. D. de *acquir. possess.* (2) *Vid. D.* l. 41. tit. 2. De *acquirend. vel amittend. possess.* (1) L. 2. c. 8. f. 2. (3) Mr. *Barbeyrac* in his Notes has refuted this, and thinks that *Grotius's* Remark is well founded. (4) *Vid. Instit.* l. 2. tit. 1. de *rer. divis.* &c. f. 47. *Vid. totum titulum septimum, pro derelicto.* D. l. 41.

fires it should no longer be his own, but should lie free for the first Taker, without designing hereby to gratify any Man else: Or, if having at first lost the Possession against his Will, he afterwards gives the Thing over; either as despairing to recover it (i), or because the Recovery of it is not tantamount. For otherwise, a Man though he loseth the actual Possession, yet never forfeits the Dominion and Property of a Thing, (unless it be taken from him in way of Punishment, or by the chance of War;) but he still keeps a Right of regaining it, till such time as his Inclinations to that purpose have ceased, or may be presum'd to have ceas'd. Wherefore the *Dominion* of such Things as these cannot be acquir'd by Occupancy, so long as the Right of the former Owner still subsists (a). But since to make a Thing compleatly *abandon'd* or forsaken, Two Points are necessary; First, That the Person refuse to own it for the future; and Secondly, That he divest himself of the Possession, by leaving the Thing, or casting it away: If either of these Conditions be wanting, the Property is not evacuated. Thus if I throw a Thing by, yet without Intention to quit my *Right* in it, I do not prejudice my self by that Action. And on the other hand, though I am resolv'd utterly to quit my Title to a Thing, yet unless I actually cast it off, I am still the Proprietor (b).

Amongst the Things which by this means are brought under *Dominion*, we may reckon Wild Beasts, or any sort of Game, when escap'd out of our Hands, and repossess'd of their Natural Liberty (c). *Grotius* is not pleas'd with this Position of the *Roman Laws*, Because, says he, (d) *the losing our Dominion over Wild Beasts, doth not immediately follow upon their Escape from us, but ariseth from this probable Conjecture; That by reason of the great difficulty of pursuing and recovering them, we may be presumed to have given them over.* But the same Laws hint as much as this; for they tell us (e), *A wild Beast is then suppos'd to recover his Natural Liberty, either when he is quite out of our sight; or when though he is within view, yet it would be very difficult to follow him.* And again they determine (f), *That what the Wolf takes from us, is so long our Property, as there is a possibility of recovering it* (g).

By these Restrictions we must qualify the Argument laid down by *Ziegler* in his Remarks on *Grotius* (h); That *since Wild Beasts are*

*made ours by losing their Liberty, therefore by regaining their Liberty they cease to be ours; and, by consequence, the Dominion of them is judg'd to consist in Actual Possession.* For a wild Beast is not suppos'd to have recover'd its freedom, so long as any Person pursues, with probable hopes of retaking it. As a Prisoner, though he be got out of hold, yet hath not clearly made his Escape, so long as the Officers are in search of him, and he remain in a place where 'tis possible for them to find him. As for what *Grotius* conjectures, that by means of some *γρῶνίσματα*, some Badges or Marks we may retain the Property of Wild Beasts after they have broke from our Custody, so that they shall not pass to the first taker: We are of Opinion, that this ought to be confin'd to those only, which by the Application of Men have been divested of their Native Ferity, and are therefore deservedly admitted to the same *Rights* as Tame Creatures. Hence if *Tyrribus's* Deer in *Virgil* (i), was thus distinguished by any proper Mark, *Ascanius* offer'd a fair occasion for the Commotions that follow'd. But those which are only kept in Parks, though they should happen to wear any such Note of Distinction, yet when they get loose into their Natural Liberty, it seems more agreeable that they should pass to him who first lays hold on them. For there is need of a most strict Guard, or a kind of perpetual Occupancy, for the retaining a Creature, which is by Nature impower'd to wander without Bounds, and which always struggles, and is uneasy under the Confinement of a Possessor; no Mark or Badge being in the least, Effectual towards the bridling this Natural Disposition (k). Therefore *Juvenal* makes the Informers about the Turbot argue very wrong, though very Ornamentally to his Design:

*Non dubitaturi fugitivum dicere piscem,  
Depastumque diu vivaria Caesaris, inde  
Elapsum veterem ad Dominum debere reverti.*  
Sat. IV. 50, &c.

They'd swear,  
The Fish had long in *Caesar's* Ponds been fed,  
And from its Lord undutifully fled;  
So, justly ought to be again restor'd.

As to the Case of Fugitive Slaves, the *Roman Laws* particularly ordain'd, That their

(i) See hereafter, Chap. 12. s. 8. (a) See 1 Sam. IX. 3. D. l. 41. t. 2. l. 13 & Lib. 14. tit. 2. princip. D. de acquir. poss. l. 2. de jactu. Sect. 8. l. 8. D. ad leg. Rhodiam. (b) Vid. l. 41. tit. 2. l. 17. f. 1. D. de acquir. poss. Add. Becler ad Grot. l. 2. c. 4. s. 4. where the Case proposed by *Tully*, de Invent. l. 2. c. 51. is discuss'd. (c) Vid. Instit. L. 2. t. 1. l. 3. f. 2. D. de A.R.D. (d) L. 2. c. 8. f. 3. (e) D. ib. & l. 5. Princip. D. de A.R.D. (f) D. ib. l. 44. (g) Vid. l. 8. f. 2. D. Famil. eriscund. (h) Dist. loc. (i) Æn. 7. 483, &c. Add. L. Salic. t. 35. Under this Head we may take notice of what *Pliny*, N. H. l. 9. c. 59. reports of the Fish *Antias*, whom the Fishers make use of, to betray the rest of his Kind. There is this Advantage, says he, in knowing the Leader, that he may not be caught with the rest; the Fisherman spares him, that he may deceive and mislead another Company. It is upon Record, that a certain Fisher, to do his Partner an ill turn, against whom he had some Grudge and Quarrel, took this Captain of the Shoal, whom he might easily distinguish from others: His Partner spying the Fish in the Market, brought an Action against the Taker, and, as *Mucianus* adds, recover'd Ten Pounds for Damage.

(k) Vid. *Ziegler* in *Grot. ubi supra*.

Masters should still retain such a Possession of them as is term'd *Civil* (1), (a Possession in *Right* though not in *Act*;) in Opposition to the *Natural* or *Corporal*; that it might not be in the power of the Slaves to deprive the Masters of so great an Advantage (a) (2).

This is certain, that if we lose the Possession of any thing else, against our Will; as suppose we drop a thing by the way, the Property doth not pass from us, or accrue to the Finder (3), 'till it appears we absolutely give it over for lost; which is usually understood by our forbearing to search or enquire after it. Hence, if a Man find somewhat which 'tis not probable the Owner should voluntarily reject, he ought to give fair notice, that upon a just Claim it may be reassumed. But if the Owner can't be discover'd, then 'tis but right the thing should be kept by him that found it. Yet *Ælian* (b) reports it as a Law of the *Stagirites*, ἀ μὴ κερτεθῆ μὴ λήμματα; *Take not up what you did not lay down.* And elsewhere (c) he tells us of the *Biblicians*, *That if they light upon any thing in their way, they never touch it, unless they laid it there themselves: To do otherwise, they say, is not to find, but to steal.* Amongst *Solon's* Laws there was one to the same purpose; ἀ μὴ ἔθῃ μὴ ἀνέλλῃ (d). And the *Chinese*, in Obedience to the Doctrine of *Confucius*, exactly observe the like scrupulous Nicety (e). The ancient *Jews*, as Mr. *Selden* informs us (f), held that the Law of *Deut. 22. 1.* belong'd to those of their own Religion, not to a *Gentile*; yet so as if such a Beast were utterly relinquish'd by the Owner, it became his who found it and took it into his Possession. They distinguish'd likewise between those things which were mark'd, and those which were unmark'd. The latter they presumed to be given over by the Proprietor, but not the former; unless he made express and open Declaration to that purpose. So again, they thought it unlawful to keep the former, till they had been twice or thrice publicly cried, but not the latter. For which use there was a Scaffold erected in the Suburbs of *Jerusalem*, from which the Cryer made Proclamation of lost Goods. But in case they belong'd to an Apostate, they did not look on themselves as bound to restore them. As for things lost by *Gentiles*, they judg'd it reasonable to deliver them again to their Owners, only on this Consideration, that by so kind and friendly a Treatment, they might purchase a like return of Humanity and Favour. Wherefore they concluded, that the Dominion of the *Gentiles* Goods did, by the Law of Nature, immediately expire, upon the Loss of them; but that the Restitution of the same Goods depended wholly upon the force of Civil Con-

stitutions. Which false Opinion, as many others, flow'd from the Covetous Temper of that Nation, and from their extreme Hatred and Aversion to all the rest of the World.

XIII. Amongst the Things in which the Dominion or Property is extinct, the *Civilians* likewise reckon what they term *Thesaurus*, *Treasure-Trove*, or Money found, the Owner of which is not known (g). If therefore a Man either on the account of Fear, or for the better Defence and Security, shall have hid his Money in the Earth, it doth not fall under this Name of a Chance Treasure; and he that takes it, is guilty of Theft. As the Slave in *Plautus's Aulularia*, that carried off *Buclion's* Pot of Gold. But such Casual Treasure as we first mention'd, doth naturally and without the particular Interposition of Civil Ordinances pass to the Finder; that is, to him who first lays hands on it and removes it out of its place. Because a thing, the Proprietor of which is undiscover'd, is in Moral Estimation judg'd the same as if it were under no Property, or belonging to no Body, and consequently is the Right of the first Occupant. On which Point, nevertheless this Question will arise, whether a Person living in a place where the Laws adjudge such things to him that finds them, is bound, for the making his Title good in Conscience, to give publick notice of what he hath found, though it should appear to have lain hid a very considerable time? (For if it proves to have been lately hid, we doubt not but such a publick Discovery is always necessary.) In the Case proposed, it seems most reasonable thus to determine. If a Man dig up Money in his own Ground, he is not in Conscience obliged to discover his good Fortune, but may enjoy it in silence, till such time as another of his own accord makes Enquiry, and withal produceth probable Reasons, both of his hiding his Money at first, and of his omitting to speak about it till now. For here the former Owner from whom the Land or Tenement pass'd to the present, (the Finder of the Treasure,) cannot be presumed to have knowingly left a secret Store in a place, which he alienated and convey'd from himself. Again, he who hath hid any such Treasure in another's Ground without acquainting the Lord of the Soil, is judg'd to have slipt his Opportunity, and neglected his means of claiming and securing it; since there was at first good Reason for him to fear lest it should fall into other hands, which he ought to have provided against. But if the Ground belong to another, then the Finder seems engag'd by his Conscience, to enquire, at least indirectly, of him concerning the Matter: Because without

(1) We shall hereafter explain this in Chap. 9. §. 7. (a) L. 1. c. 14. *D. de acquir. poss.* (2) Vid. *D. l. 41. tit. 2. De acquir. vel omit. poss.* leg. 3. princip. (3) See Mr. *Barbeyrac's* 8th Note upon this Section.  
 (b) *V. H. l. 3. c. 45.* (c) *L. 4. c. 1. p. 302. Edit. Perizon.* (d) *Diog. Laert. l. 1. f. 57. Add. Platon de LL. l. 11. sub init.* (e) *Martin Hist. Sin. l. 4. c. 21. Add. Edist. Theodor. c. 58.* (f) *De J. N. & G. Sec. Heb. l. 6. c. 4.* (g) *Vid. l. 41. tit. 1. l. 31. & l. 6. t. 1. D. de A. R. D. l. 67. D. de rei vindic. & lib. 41. tit. 2. l. 3. f. 3. D. de acquir. poss.*

this, it cannot certainly be known, but that the Money was laid there by the Master of the place, only for the greater Security, or by some Persons else with his Privy and Consent.

But as for *Positive Laws*, we find them in different Countries, very various on this Point. (a) *Plato* orders, (b) *That neither Treasure, nor any kind of Lost Goods shall belong to the Finder, but that the Oracle shall be consulted in order to the disposal of them.* Which, without doubt, was too scrupulous a Superstition; somewhat like the Humour of *Chiungai* the *Chinese* Philosopher, who, as *Martinus* observes, (c) *Held it unlawful to touch any thing that was suspected, either to be in it self evil, or to have proceeded from evil, and unjust Men: For which Reason he refus'd to dwell in his Father's House, believing the Builders to have been wicked Persons; nor would take his Meat from the hands of his Parents or Brethren, fearing it might be ill gotten.* It seems to have been the Law of the *Jews*, That Treasure found should pass to the Owner of the Land, as is gather'd from *Matt. XIII. 44.* (d) *Spartian* mentions a Decree of the Emperor *Adrian* to this purpose; *That if a Man found Money in his own Land, he should enjoy it all himself; if in another's, he should restore it to the Owner of the Soil; if in a Place that belong'd to the Publick, one Moiety should go to himself, and the other to the Treasury.* We read a Story of *Atticus*, *Herod's* Father, That lighting upon a vast Treasure in his House, he wrote to *Nerva*, desiring to know his Pleasure about disposing of it; the Emperor return'd no other Direction than this, *Utere quæ invenisti, Use what you have found.* And when *Atticus* in a second Letter complain'd, *That the Sum was too great for his Occasions, and quite overloaded him,* *Nerva* answered, *Abutere invento, quando tuum est; Why e'en abuse it, and since Fortune hath made it your own, get rid of it how you can.* (e) *Philostratus Apollonius*, (f) in a Contention about this Point between the Buyer and the Seller of a Field, orders Enquiry to be made, Which was the best Man of the Two? An Expedient which can never pass into a General Rule.

XIV. The *Roman* Lawyers, to the Class of Things acquired by Occupancy, add farther, the Goods of Enemies (g). For the right understanding of which, we are to know, that by a State of War, as all other Peaceful Rights are interrupted, so Dominion thus far loseth its Effect, with regard to the Adverse Party, as that we are no longer obliged 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 render'd, as 'twere, void of Domini-

on: Not that Men do by virtue of the *Right* of War, cease to be Proprietors of what was before their own, but because their Propriety is no Bar against the Enemies Claim, who may seize and carry away all for his own use. As the bare taking hold of a Thing which lays void, is a sufficient ground for Dominion. Though indeed in the Case of War, those who come to make use of this Claim, and to take a violent possession, may very justly be resisted and repuls'd with equal Violence; as we see in dayly practice. We may therefore observe, That the Dominion of Things taken in War doth then at length gain its full strength and validity, when the Person from whom they were taken, renounceth his Pretensions to them, by consenting to a Peace.

Farther, And what is very particular, this Violent Seizure, in a Hostile Method, may likewise entitle us to a Sovereignty over Men: (1) Whereas otherwise, Men do not come under the Object of Occupancy, whether subject to a Lord, or enjoying their Natural Freedom; excepting only that one Ancient Case of *Exposed Infants* (h), who belong'd to those that found and preserv'd them. For Liberty, as well as all other Rights, is attended with this Effect, that it cannot pass without my consent, into the power of any other Man besides an Enemy. But now Occupancy in those Things which are capable of it, supposeth no consent; but to the completion of it, these Two Points only are required; *First*, The Act of the Occupant, in seizing on such Things; and *Secondly*, The absence of all Right on the part of the Objects, which might else hinder them from being acquired by this means. Hence when upon the decease of a Man who hath no Heir to succeed him, either by Testament, or by Law, all those Rights die with him which he held over Things, or Persons, the Things pass to the next Occupant, but the Persons recover their Natural Liberty. For we can hardly imagine, that there was ever one Instance of a Wretch so basely low-spirited, as that he would voluntarily desert his Freedom, and as it were, give it up to any one that would accept of the Resignation. Should Men in this Case, be never so much inclin'd to continue in a Servile Condition, yet, at least, they will reserve to themselves the power of chusing their own Master.

Indeed *Grotius* (i) seems to reckon Sovereignty amongst the Objects of Occupancy; whilst he tells us, *That in Things which belong to no Body, there are two Rights which may be in this manner acquired, Sovereignty, and Dominion, as distinguish'd from Sovereignty.* But this Assertion must be explain'd with great caution and dexterity. For Sovereignty in

(a) Vid. *Grot.* l. 2. c. 8. f. 7. (b) *L. II. de LL.* (c) *Hist. Sin.* l. 5. (d) *Add. Plaut. Trinumm.* Act. 1. Scen. 2. v. 14. 1. & *Philostat. Apollon.* l. 2. c. 15. (e) *Add. Constitut. Sicul.* l. 3. tit. 3. (f) *L. 2. c. 15.* (g) *Vid. Instit.* l. 2. tit. 1. f. 17. *D. de acquir. possess.* (1) *Adeo quidem ut & liberi homines in Servitutem nostram deducantur; qui tamen, si consenserint nostram potestatem, & ad suos reversi fuerint, pristinum statum recipiunt.* *Vid. Instit.* ubi Supra.

(h) *Vid. Hobbes de Cive,* c. 9. f. 4. (i) *L. 2. c. 3. f. 4.*

Proper Speech is applied only to Men; which except in War, and in the Case but now mention'd, cannot be obtain'd by Occupancy: Because he who is not *Another's*, is not therefore *No Body's* but *His Own*. But we improperly use the Term of Sovereignty, in speaking of Places or Territories; for then the Effect of it is only this, That no one can fix in such a place without the Sovereign's Consent; and they who come to sojourn there only for a time, are during that space obliged to acknowledge his Jurisdiction.

But now this Sovereignty is really nothing else but the Effect of that Dominion or Property which was before establish'd over the Place, and includes a Power and Command over *Men*, indirectly, and by consequence. Because what is *Mine*, none can take to his own Use, without my leave: And he that enters a Place belonging to me, is so far at least under my Rule and Guidance, as that I may hinder him from endamaging my Dominion, or may provide that my *Right* over the Place shall not suffer on his account.

## C H A P. VII.

### *Of Accessions, or Additional Improvements, and how they are acquired.*

**M**OST of those Things which are subject to the Dominion of Men, have this Common Affection, That they do not always continue in the same State, but abound with great variety of Increase. Some of them swell their Inward Substance to larger Dimensions, some receive External Improvements; others are attended with several Fruits and Advantages of a different kind from themselves; many rise very considerably in value, from the Fashion and Figure which Human Industry hath put upon them. All these additional Profits may be comprised under the General Term of *Accessions*, (1) and will, for the most part, fall under one of these Two Classes: Those which proceed purely from the Nature of the Things, without the assistance of any Human Act; and those which the Labour and Diligence of Men, doth either wholly or in part procure.

II. 'Tis a General Rule in this Case, that whoever is Owner of a Thing, to him likewise belong the *Accessions* of it: (2) Which evidently flows from the very Nature of Property, and from the End for which it was first introduc'd; inasmuch as the possession of many Things would be vain and useless, should the Fruits of them accrue to others; and the Common Peace of Mankind would be very little promoted, if other Persons might challenge these Improvements with the same *Right* and *Title* as the Proprietor of the Substance to which they adhere. It is needless therefore to derive the Dominion of *Accessions* from the Title of a *Feigned Occupancy*, by which we should seem through the intervention of a Thing belonging to us, to take possession of any after-improvement; or by virtue of which,

a Thing already our own, should be supposed, on account of its pre-eminence, to make some other Inferior Thing cleave to it, as an Appendage.

III. The Increments, Multiplication, and Profits of any kind of Things are usually filed *Fruits* (3); except that the increase of Animals hath the peculiar Name of *Fœtus*, or the *Breed*. *Fruits* are most commonly divided into those of which the Thing it self is the proper Cause and Original, and those of which it is only the Occasion. The former are called *Natural*: the latter *Legal* or *Civil*. Amongst the *Natural*, (4) some arise from the bare Operation of Nature, without the Culture or Labour of Men: In others, we assist Nature's Strength, and render her more kind and fertile by our own pains, whether in a greater or a lesser proportion: On which account these are wont likewise to be term'd, *The Fruits of Industry*. As for *Civil Fruits*, we see Instances of them in *Usury*, *Hire*, *Carriages*, and the like (5). 'Tis observable, that *Fruits* of the former kind, so long as they are not separated from the Thing whence they proceed, are look'd on as Parts of it; (a) but when separated, they are consider'd as distinct Beings: But both kinds agree in this; That they belong to him who is Master of the Thing from which they flow.

IV. As for the Breed of Animals, it hath been generally determin'd, That they should follow the Venter, and so should belong to the Owner of the Female, not of the Male; (b) not only for this Reason, because the Male is for the most part unknown, but likewise, because the Young was once a part of the Female, as it never was of the Male; and because

(1) Vid. D. Lib. 6. t. 1. *De rei vindic. leg. 23. f. 5*, See Mr. Barbeyrac's 1st Note upon this Section. (2) Mr. Barbeyrac in His Note upon this Section, shews this Rule to be uncertain and incomplete, to which He subjoins two things to perfect it. See His Note. (3) Vid. D. Lib. 5. t. 3. *heredit. petitione*, Leg. 36. f. 5. Vid. C. Lib. 7. t. 51. *De fructibus, &c.* Leg. 1. (4) See Mr. Barbeyrac's 4, 5, and 6th Notes upon this Section. (5) Vid. D. Lib. 22. t. 1. *De Usuris & Fructibus, &c.* Leg. 36. & Lib. 5. t. 3. *de hered. petitione*, Leg. 29. (a) D. Lib. 6. t. 1. & Leg. 44. *D. de rei vindic.* (b) Vid. D. Lib. 6. t. 1. l. 5. f. 2. *de rei vindic.*

what the former contributes to the Birth, is much more considerable, than what proceeds from the latter; though we should allow them to be equal, when look'd on barely as Natural Causes: For the Question here is not whether the Existence of the Calf is to be ascribed more to the Cow, or to the Bull, but whether the Calf belongs rather to the Proprietor of one than of the other. Now the Male is obliged to little trouble, so that his Service in this respect brings very little or no damage to the Owner: But the Female whilst she carries her Burthen, is almost useless to all other purposes, and besides requires, at this time, more than ordinary Care and Charge in the keeping: Therefore, at least, the Owner of the Male cannot pretend to so much Merit as the Owner of the Female. Especially, since one Sire is sufficient for a great number of Breeders. Yet in case a Man keeps Males purely for this Use, 'tis but just he should receive some Consideration from others who shall desire to employ them (a).

V. It is likewise a Common Rule, that Things planted or sown shall go with the Soil; because they are not only nourish'd by it, but growing into a most strict Union, are made, as it were, parts of the same Body. For which Reason it is farther required, that they shall have taken root; they belonging till then to their first Owner. Yet *Grotius* (1) is of opinion, *That this Appointment proceeds only from Positive, and not from Natural Law; since the nourishment of a Thing already existent being no more than a part of that Thing, the Lord of the Soil can only pretend to a part in the Right over it; which naturally speaking, cannot take away the Right of him who own'd the Seed, the Plant, or the Tree: And therefore in this Case the Thing must be held in Common by them both.* But notwithstanding what is thus objected, the *Roman* Laws in giving the former Judgment, went on very good Reason. For they did not hereby design that the Owner of the Seed, the Plant, or the Tree, provided he acted with Honest Intention, should suffer an utter loss; nor do they forbid but that the Two Proprietors may, if they please, hold the Thing henceforth in common, according as the Use and Benefit of the Ground on the one side, and the Worth and Excellency of the Plant on the other side, shall assign them their fix'd proportions. But because they would compel no Man to hold on in a Common Possession against his Will, and because such Things as these are incapable of Division, therefore they take the Question to be, Whether it will not be more equitable to assign the whole Thing to one of the Two Proprietors,

with this Burthen, That he shall be oblig'd to pay the other the value of what he receives from him? Now here, since it happens most frequently, that the Things we speak of being closely knit and fasten'd to the Earth about them, cannot conveniently be transplanted, or be any way preserv'd out of their place, it was thought fit to ordain in general, that Things set or sown should go with the Soil; yet so, as that the Lord of the Soil shall satisfy the other Party for his Seed, or his Plant, in case he acted like an Honest Man. Yet if a Person sows my Field with a meaner Grain, when I design'd it for one more generous, here I don't seem oblig'd so much as to pay him for the Seed; it being really a damage to me, that my Ground is like to afford so ignoble a Crop. But should the Plants admit of being removed, especially if they be more in value than the use of the Soil amounts to, it would, no doubt, be equitable that the Owner of the Plants should be allow'd to take them away, only paying the other for the use of his Ground (b).

VI. Most of what hath been here offer'd may likewise be applied to the Case of Buildings, raised either on the Ground, or out of the Materials of other Men. Indeed if the Structure be movable, 'tis certain the Lord of the Soil can claim no *Right* to it; provided it be remov'd, and satisfaction made him to the value of what his Ground suffer'd by it (c). If another builds a House with my Materials, it is commonly best for me to receive the Value rather than the Things themselves; since what is thus fitted to one Building, will not serve again for the like Use. But if the Materials are not prejudic'd by being thus applied, and I have occasion for them, and cannot conveniently furnish my self with other of the same kind, then I ought in Equity to be allow'd the privilege of seizing them for my own Service. And though this is forbidden by the Laws of the Twelve Tables, yet they relieve the Owner of the Materials another way, by granting him an *Action* for double their Value. (2) In Case a Man builds with his own Materials upon Another's Ground, if he knew what he did (3), it seems hardly possible but that he must have had a Dishonest Design; and it being presum'd that he purposed to steal the Ground, the Owner of it doth not seem oblig'd to pay the Price of the Materials, or the Hire of the Workmen; or to permit the other Party to pull down, and carry off what he brought thither. (d) If there was no Knavery in the Design, and the Building cannot be removed without being utterly demolish'd, the *Roman* Laws Enact, (4) *That it shall go along with*

(a) Add. *Ziegler ad Grot. l. 2. c. 8. f. 18. & Felden ibid.* (1) *L. 2. c. 8. f. 22.* (b) On which Point the Law of *Solon* is remarkable; He commanded (says *Plutarch*, in *Sol. p. 91. Ed. Wech.*) that every Person who planted the common kinds of Trees in his own Ground, should set them at five Foot distance from his Neighbours. But that he who set a Fig-Tree, or an Olive-Tree, should enlarge the distance to Nine Feet; because these not only cast a longer Root, but are very mischievous when they stand too near some others; either by drawing away the Nourishment from them, or by sending out a Steam offensive and hurtful to them. (c) *Vid. l. 41. t. 1. D. rei vindic. l. 60. D. de A. R. D.* (2) *Vid. Instit. Lib. 2. t. 1. f. 29. Vid. D. Lib. 47. t. 3.* (3) *Vid. Instit. Lib. 2. t. 1. f. 30.* (d) *Lex Longobard. l. 1. Tit. 27. Sect. 1.* (4) *Vid. D. Lib. 41. t. 1. De A. R. D.*

the Soil; yet so, as that in case the Builder be in Actual Possession, the Lord of the Soil shall pay the Price of the Materials, and the Expence of the Work (a). For though the Pile which is raised be for the most part of greater Value than the Soil and Surface on which it stands, yet they judg'd it inconvenient, that an Immoveable Thing should cleave as an Appendage to another, which, at least, if taken to pieces, is movable. Yet still, if the Owner of the Ground can conveniently be without the Spot on which the Building is erected, and cannot so well purchase the Building it self, it seems most reasonable that upon receiving the Worth of his Ground, he should leave the Building to be enjoyed by the other (b).

VII. But when the Roman Lawyers extend this Rule, That Things built and sown shall go with the Soil to Papers and Parchments (1), we cannot subscribe to their Opinion. As if when I with a good and honest Intention have wrote somewhat on another Man's Paper, I must be oblig'd immediately to resign it to him, only receiving some Consideration for my Pains in writing. But rather, since commonly, the Writing is of more worth than the Paper, 'tis much the fairest Method, that the other shall rest satisfy'd with being paid for his Paper: Especially, if we reflect on what some have added, not without Reason; That Paper being used, doth, as it were, die and perish; and that therefore Writing is of a quite different nature from Building. For the true and proper Essence of Paper seems to remain no longer than it continues clean and fair, capable of admitting any Characters. When 'tis once fill'd, it passeth in the Name of a Book, a Letter, a Roll, or the like. Therefore written Paper, is in this respect, lost and dead to me, that I have no longer the power of committing to it what I please. And hence, if I do but receive the Value of it, I have no cause to complain, since I can furnish myself with new, which will serve my Occasions as well.

VIII. They are more in the Right, when they determine (2), that the Table shall go along with the Picture; the latter being usually of far greater Value than the former; and it being easy for a Man to part with so common a thing, upon receiving its Price. Yet this very reason shews, that in some cases Equity will direct a contrary Decision. As suppose a Vulgar Dawber, whose Skill never carried him beyond a Sign-post, should have laid his vile Colouring upon some precious Wood, which we should gladly rescue as soon as possible from the Injury it suffer'd: Or if some awkward Figures should be cut in Plates of Gold or Silver, or in Pearls and Gems. As

it would be an unparallel'd Impudence for a Rascal that rubs his Brush upon my Walls, on that account to claim my House. Nay farther, since this Labour was perform'd purely for his own Humour, he can hardly require to be paid for the Work, unless perchance the Owner of the House be in so good Circumstances, as that we may think he would willingly have put himself to such an Expence (c) (3).

IX. The same Lawyers declare (4), that Purple applied to, or engrafted on another's Garment, shall go with the Garment, however the former may exceed the Value of the latter. Now this may be understood two ways; either that a Person shall interweave among his own viler Thread some purple Yarn belonging to another, or that he shall fit another's Purple Cloth to his own Garment. In the former Case there is scarce the least doubt, but that the Cloth thus made ought to be adjudg'd to the Owner of the Purple. For that without which another thing cannot exist, and which is, as it were, the Natural Ground to support and uphold it, is not always to be look'd on as an Accession to that other thing (5); but we ought by all means to take the Value of each thing into the Account; so that if they are equal in all other respects, that which is more precious shall draw to it that which is less. Indeed if we speak of the Physical Concomitancy or Adherence of things, it is necessary that Thing should go along with another which cannot be without the other; or that the Adjunct shall follow the Subject. But in assigning the Property of things, where we are chiefly to consider the Price, and the Use of them, and how easily a Person may bear the Want of such or such a part of his Possessions; this Reason cannot always prevail.

As for what Grotius (d) affirms in this matter, That for the greater part to swallow up the less, is natural only in Fact, not in Right; we allow it under the following Sense. In Fact what is stronger may draw to it self what is weaker; but 'tis not always Rightful or Just, that a strong Man should carry off the Goods of his weaker Neighbours; or that a Person should lose a thing of his own which is less, if it happen to be join'd with somewhat of another's which is greater. For he who hath but the Twentieth part in a Field, is as much a Lord and Proprietor, as he who hath the other Nineteen. But indeed the Question we are now upon is not strictly, whether he who hath the greater part in a thing, ought on that Score to gain the less; but what Expedient may be found out to decide the Business, in case Two Persons happen to be Joint Proprietors of a thing, which they are unable or

(a) *Edict. Reg. Theodoric. c. 137.* (b) *Comp. l. 7. f. 10, 11, 12. D. de A. R. D.* (1) *Vid. Instit. l. 2. t. 1. f. 33.*  
 (2) *Siquis in aliena tabula pinxerit . . . nobis videtur melius esse tabulam picturæ cedere. Ridiculum est enim picturam Apellis vel Parrhafii, in accessionem vilissimæ tabulæ cedere. Instit. lib. 2. tit. 1. sect. 34.* (c) *L. 38. D. de rei vindic.*  
 (3) *Vid. lib. 6. tit. 1. D. de rei vindic.* (4) *Ibid. f. 26.* (5) The Text says the quite contrary, as Mr. Barbeyrac observes in His 2d Note upon this Section. (d) *Diff. loc. f. 21.*

unwilling to hold in Common, or to divide. Now here certainly the entire thing ought to be adjudg'd to one of the Parties, upon Condition that he satisfy the other to the Value of his Share. And which of the Two Persons ought, in this case, to carry the whole thing, is to be determin'd from the Price and Excellency of one Share above the other, and from considering which of the Men is in the greatest want of that for which they contest. Thus suppose a Man to have us'd my Purple in a Garment for himself, though possibly the Purple be of much the greater value, yet 'twill be my best way to leave him his Garment safe and whole, upon receiving Satisfaction: For should the Garment be taken to pieces, the other Party must needs be endamaged; and where's my Advantage in receiving my Cloth when reduced to Rags? And as for the whole Garment, this being already fitted to the Body of another, is commonly disproportion'd and unserviceable for mine. So indeed in all the Compass of this Subject, it is more easy to judge what's fit and equitable from the Consideration of particular Cases, than from any general Decision.

X. As for *Specification* (1), or the turning a thing into such a Form or Shape, we are first of all to observe, that it cannot strictly and properly be ranked amongst the Originary Ways of Acquisition: For since in the Course of Nature nothing can be made but out of some Matter before existing, we ought to enquire whose that Matter is. If it were our own, then upon the introducing of a new Shape, our Dominion still continues. If it were no Body's, then we should obtain the Dominion of it by the present Act of Occupancy. But if it were another's, then the Question lies, Whether 'tis now to be adjudged to the Owner of the Matter, or to the Author of the Form? On which Point the old Masters of the *Roman Law* being divided (2), at length they came to this middle Resolution; That if the Form could be reduc'd to the first Rude Mass, then the thing should go to the Owner of the Matter; if not, to him who gave it the new Shape and Figure. Some have thought this Distinction to be founded on most evident Reason; *Because*, say they, *when the Shape cannot be thus un-made, the thing seems to have utterly perished, and some new Being to have risen in its place: Wherefore it ought, in this Case, to be adjudged to him who caused it to exist under this new Form: Whereas, when the Figure may be reduced to the first Lump, then the thing is suppos'd still to exist, and not to have perish'd at the Arrival of the new Form, and consequently not to have chang'd its Owner.* Others, on the contrary, are of Opinion, That the whole Business turns on this Issue, which of the Two, the Matter or the Form, is highest in Value. (a). In our

Judgment, neither of these Determinations can with Equity be apply'd to all Cases; but the other particular Circumstances ought likewise to come under Consideration and Regard. Thus suppose a Man hath made Wine, Oyl, or Bread out of my Grapes, Olives and Corn, or hath taken my Honey and Wine to mix in a Compound Liquor, why should he have a Right to the Forms thus produced rather than I, only because they cannot be restor'd to their Original Matter? Therefore, if the things of which we are speaking, will admit of Division, they ought to be parted according to the Value of the Matter, or the Labour in working out the Form. Yet in case the Owner of the Matter hath Occasion to enjoy the Thing entire, we think that his Claim ought on all Accounts to be preferr'd to that of the Fashioner. Thus, if a Man casts or shapes a Work out of another's Metal, where the Form is much more precious than the Matter, 'tis but fair that however capable the Thing is of being brought back to its Principles, yet it should be left in the Possession of the Fashioner; provided he either restore the like Metal in Quantity and Kind, or pay the Just Value of it. But a contrary Decision seems most reasonable, if I had design'd that Metal for the very same Work, of which I stand in great Necessity, and cannot procure new Metal for that Purpose. For here Equity will favour the Owner of the Matter, tho' the Form or Make should, perchance, far excel in Value.

Others conceive, that in the case before us, we ought farther to enquire, whether the *Power* which the Matter had to receive a particular Form was *near* or *remote*: If the former, they think the Owner of the Matter ought to be preferr'd; if the latter, the Fashioner. For Instance, That if a Ship be thus made out of the rough Wood belonging to another, then it shall go to the Builder; but if the Timber were before fitted and prepared for the building a Ship, then the Ship shall go to him who own'd the Timber. That, if a Man works my *Wool* into a Garment for himself, he shall keep it when he hath done; but if he cuts a Coat out of my Cloth, I have a Right to challenge the Coat, and to refuse any Equivalent: That, a Medicinal Composition, if the Ingredients were before perfected and prepared, shall go to the Owner of those Ingredients; if not, to the Author of the Composition. But neither will this Distinction alone be always agreeable to the Rule of Equity: For if I hold any such *Matter* in my Possession, whether rude and unwrought, or whether fitted or disposed to receive a *Form*, which I either keep for sale, or else have in such abundance, as to be still furnish'd for my own Occasions, there's no reason why I should not leave such a Thing

(1) Mr. De Courtin defines *Specification* to be the Introduction of a new Form in a Matter belonging to another.

(2) Vid. *Instit.* l. 2. c. 1. f. 25.

(a) Vid. *Connan. Comm. Jur. Civ. lib. 3. cap. 6.*

to the Fashioner of it, upon his refunding the Price of the said *Matter*. But if I have design'd any Quantity of *Matter* to my own particular Use, and have no Convenience of procuring the like, then the Want which I am in, turns the Favour of my Sentence on my side, though perhaps the *Matter* was only in *potentia remota*, had only a distant Capacity, not an immediate Fitness for this Work (a). Nay, though a Man should frame a Thing partly out of his own *Matter*, and partly out of another's, yet even this doth not in all Cases, make it indubitably certain, that the Thing ought to be assign'd to him that made it, on this Reason; Because the Shape and Figure is not only owing to his Pains, but he likewise contributed part of the *Matter*: For, it may be, his Pains were of little worth, and likewise his part of the *Matter* inconsiderable, so that the *Matter* belonging to the other Person exceeds both. And again, there are some things which take up a certain Quantity of *Matter*; so that in any degree to lessen it, renders it unserviceable, if not absolutely, yet however to that particular Design. In this case Judgment is to be given for him who stands most in need of the Thing thus framed.

As for what remains, *Grotius's* Assertion (b) is universally true, *That since things consist of Matter and Form, as their Constituent Parts, if the Matter belong to one, and the Form to another, there naturally follows a Community to each, according to their respective Proportions: Just as a whole Body composed by the mixture of two Parcels of Matter of the same kind, is common to the two Owners* (c). *But when a thing can neither conveniently be held in Common, nor divided, then either positive Laws or Equity must determine which Party shall resign the Whole to the other, upon receiving the Value of his Share* (d). It is still in all Cases to be enquired, Whether the Person who bestows a Shape on another's *Matter*, doth it with an Honest or with a Dishonest Design? For he who acts thus out of a Knaveish Principle, can by no means pretend that the Thing belongs to him rather than to the Owner of the *Matter*, though all the former Reasons should concur; that is, though the Figure should be most Valuable, though the *Matter* should, as it were, be lost and swallow'd up in the Work, and though he should be in very great want of what he had thus compacted. For the greater part of the Two doth not draw to it self the less, barely by its own Virtue, or on its own Account; but there is required farther some probable Ground and Plea in the Owner of that part which exceeds, on which he may build his Claim. Hence, if a Man out of wilful and design'd Fraud, puts a new Shape on my *Matter* that he may by this means rob me of

it, he neither gains any *Right* over the *Matter* by this Act, nor can demand of me a Reward for his Labour, any more than a Thief who digs through my Walls can desire to be paid for his great Trouble in making a new Door into my House; or than one can desire a Fee, who breaks an Imposthume otherwise Incurable, with a Blow that he design'd for my Death; or than *Autolycus* could have ask'd a price for painting the Horses he first stole. And all this doth not proceed from any positive Constitutions, but from the very Dictate and Appointment of Natural Reason (e), though Nature doth not determine any particular Penalty in the Case. For, to have exercised such a Villany *gratis*, is not properly a Punishment: And, on the other hand, 'tis most just and reasonable, that I should not be oblig'd to pay a Man Wages for endeavouring to do me a Mischief.

XI. What the Ancient and Modern Lawyers have so laboriously deliver'd concerning Increment by Rivers, depends, for the most part, not so much on any Constant and Natural Reason, as on the positive Ordinances of particular Nations: And therefore, we may be allow'd to use more Brevity on this Subject.

The Two Chief Enquiries made in the Case before us are, First, *Whether the Rivers by thus secretly forsaking their Banks, do add to the Dominion of whole Territories?* And Secondly, *Whether they improve in the like manner, private Estates?*

The former Question is of greater Moment, inasmuch as it may often prove the Occasion of great Controversies between Nations; it being usual for Rivers to lie as the Common Boundaries of different States. Now when such a River hath any way alter'd its Course, the Point in Dispute is, *Whether the Limits of the Seignories are likewise chang'd, and whether the Additional Land goes to them whose Banks it augments?* Here we are first of all to suppose a Distinction between such States as are limited (1), or encompass'd with Artificial Bounds, (with which we may reckon those that are parcel'd out by Measure, as by the number of Acres, being as to the present Business, the same,) and *arcifinian*, such as are naturally fenced against Invaders, with the Boundaries of Rivers and Mountains. After this we are to enquire, Whether the Neighbouring People of the Two Opposite States left the River between them, void of particular Dominion, and common to the Use of both; or whether they agreed to fix their respective Limits in the midst of it, so that half should belong to one People, and half to the other? And Lastly, 'Tis to be consider'd, Whether the whole River belongs to one People, so that the Limits of their Dominions

(a) *Vid.* l. 6. tit. 1. & l. 61. *D. de rei vindic.* (b) *Diff. loc.* f. 19. (c) *Ibid.* f. 27. *Vid.* l. 6. tit. 1. l. 3. f. 2. l. 5. *D. de rei vindic.* (d) *Vid.* l. 6. t. 1. l. 23. f. 2, 3. *D. de rei vindic.* (e) *Add. Leg. Wäfigoth.* l. 10. t. 1. c. 7.

(1) See Mr. Barbeyrac's First Note upon this Section.

reach to the Bank of their Neighbours? If then both the States are bounded in the manner first described, by Artificial Enclosures or by Measure, which immediately touch each other, without any void Space between, tho' the River should change its Course, yet the Territories will remain of the same Extent: Nor can there here be any room for the Case before us, since whatever Space should thus happen to be left, already belongs to one or to the other State. If the River in the middle were left void and common, then the Ground added to the Bank or the little Islets which start up, shall go to those who first take them into Possession: Yet 'tis most convenient, that both the former and the latter should be occupied by that People to whose Banks they are most nearly seated. If the whole River belong to a single State, the Islets rising in it shall belong to the same State only; but as for what is gotten from the River by the Opposite Banks, it seems most reasonable that it should belong entirely to the other People. But it most commonly happens, as 'tis most agreeable that the Lands reaching to the Stream on each side, are suppos'd to be fenc'd only with these Natural Bounds; and that consequently, the End of each Dominion is to be conceiv'd in the midst of the Channel: For here the Water, as it plainly separates and distinguisheth the respective Lordships, so it affords to each County a kind of Natural Bulwark. Yet still it is requisite in this Case, that the River do not, as it were, make a common Custom of drowning its Banks, and of cutting it self out a new Channel every Year. When therefore two Neighbouring Nations possess Lands thus bounded by Nature, (which in a doubtful Case is always presumed) the River by gradually changing its Current, changeth likewise the Limits of the Dominions, and whatever Addition it makes to either side, belongs to those on whose Banks it falls; provided, that this Alteration be made by small degrees, and that the River do not, at one sudden Rupture, forsake its Channel, and force a new way (1). For the gaining or losing of Insensible Parts, or any such Change as entirely leaves the old Shape and Figure, suffers a thing to remain in all Appearance the same as it was. And the Conveniency of a Natural Boundary, is too great to be slighted and forsaken upon a small Damage. But if a River, deserting the Channel it once fill'd, shall have broke up another Passage for its whole Current; and the People through whose Lands it now runs, do not think the Advantage of a Natural Boundary to be of so great Consequence, as that for the sake of it they should resign so considerable a part of their Territory, then the Borders shall continue as before, in the middle of the forsaken Channel. For as a Stone is used for a Boundary, not on the

account of its Nature, but of its particular Position; so a River concludes and separates different Countries, not in its vulgar Notion, as 'tis a Bulk of Water gather'd from certain Fountains and Rivulets, and from other Streams of note and size, and then distinguish'd by a particular Name; but as it runs in such a Channel, and hath such Banks to encompass and confine it (a).

XII. As to the Lands of private Persons in this Case, we are of Opinion it ought first to be consider'd, whether the River on which such a particular Estate happens to lie, divides the Territories of two distinct Governments; or whether it only passeth through the Dominions of one: And then, whether the River be publick or private. In the former Case it depends absolutely on the Pleasure of the Government, either to leave such Increments in private Hands, or to challenge them for the common. For at first it generally happen'd, that such or such a People seiz'd on this or that Tract of Land by the *Great*, and afterwards parcel'd out to each Man a particular Possession in it, usually contain'd under a certain and definite Measure. As therefore what remain'd of the Territory after this Allotment to private Persons, was still the publick Possession of the State; so whatever happens to be added to any particular Share, is likewise suppos'd to accrue to the Publick. Yet inasmuch as the adjoining Fields frequently suffer great Damages from the Rivers by Floods, and because the Increments we are speaking of, advancing by slow degrees, seem to be of little Consequence to the publick Revenue; therefore many Governments have thought it a reasonable Favour and Bounty, to grant these Improvements to the Persons on whose Lands they happen to fall. And there is the more Equity in this Constitution, in case the respective Persons were wont to keep up the Banks at their own Charge. This *Right* is presum'd to accompany any piece of Land assign'd to a private Person, not by any determinate Measure, but in gross; though perchance in the formal Delivery of it some kind of Measure might be express'd (b): And 'tis the same Case, when in assigning the Bounds of any Land, the Neighbouring River is mention'd at large. But if this Increment be very considerable, and far exceeding the Measure of the private Possession, then it shall be adjudg'd to belong to the Community. As for the Islets which arise, these no private Man can claim to himself, without the express Grant of the State; because being plainly separated from the particular Demefn, they can on no account be esteem'd a Part or Increment of it. And their being seated next to such a Possession, is no more an Argument that they ought to pass to the particular Proprietor of it, than that any other Man should challenge

(1) Vid. *Instit.* l. 2. c. 1. f. 20. Vid. *D.* l. 41. tit. 1. *De A. R. D.* leg. 7. f. 1. (2) *Comp. Gros.* l. 2. c. 3. f. 16. & *ad eum loc.* Bœcler. & Ziegler. (b) *Vid.* l. 19. tit. 1. l. 13. f. 14. *D. de acq. empt. & vendit.*

a part of a Street, or a publick Place, only because it lies just by his Door.

If a River separates the Particular Lands of Persons subject to the same State, then, since it can add nothing on one side, but what it took from the other, 'tis by all means reasonable, that the Increment shall go to him on whose Land the Damage is committed. Thus the *Roman Laws* (1) rightly ordain'd, That in case the violence of the Current adds a piece to my Land which it hath torn from yours, it shall remain your Property as before. (Which Judgment will more especially hold good in floating Lands, such as *Strabo* (a) mentions in the Fens of *Euphrates*, built upon Hurdles of Reeds, and moved with Boat-Poles into their former Seat, when the Water had carried them off.) But if it hath stuck long upon my Banks, and the Trees which it brought with it have there taken Root, from that time forward it shall be deem'd an Acquisition to my Estate. Whence 'tis clear, that the Owner of the lost Fragment ought to have brought it back again to its former place, before it was incorporated with my Land, if he intend to resume the Property of it. When 'tis uncertain what and how much hath been wasted from another's Soil, the sufferer is hereby hindred from putting in his Claim to the Increment; which yet (according to Natural Law) doth not accrue to him who owns the Ground where it fastens, but to the People who are Sovereigns of the River. For 'tis in the highest manner agreeable to Reason, that not only the Water of a Common River, and the Things contained in it should be publick, but likewise the Channel, and the Banks, and whatever Improvement either that or these happen to gain. For it seems very improper to say, That the Channel, consider'd in it self, is a part of the adjacent Land, but that it is look'd on as Publick, so long as it's cover'd with the Publick River; which being once removed, it becomes Private according to its Primitive Nature: As if 'twas only a Burthen or Service laid on the Grounds of particular Men, that they should grant the River a passage through them.

If a River forsakes its Channel, or any part of it, and cuts out a new way, since the latter is taken from the opposite Land, the former deserted Channel ought in Equity to be adjudg'd to the Owner of the Land which now suffers, to comfort him for his Loss: And in case the River forsake likewise this new

Passage, the Ground shall then return to the Ancient Proprietor, and not to those who possess the Country about it. But whatever is determin'd in those Cases, of the Increments left by the Current, and of the alteration of Channels; this, no doubt, is but just, that the Burthens which before lay on any Ground, should be less'n'd, in proportion to what it loseth by such an Accident. Which Point, as (b) *Herodotus* informs us, was settled amongst the *Egyptians* by a particular Law.

It is no less equitable, that Land drown'd by a Flood should belong to the former Owner, either when the Water is gone off without trouble, by one violent outlet, or by slow degrees, or when his Pains and Labour have cut out a passage for it. But 'twill be ask'd, *To whom shall the new Bulk of Water belong, till such time as the Land by draining shall be recover'd?* Here we judge it necessary to enquire, Whether the drown'd Land hath pass'd into the Form of a Lake or a Fen, or whether it is added to the Channel of a Publick River? In the former Case, the Lake or the Fen shall for ever appertain to the Owner of the Ground; and in like manner in the latter Case, for so long time as he shall entertain any design of reducing the Current to its former Banks. As for Private Rivers, which give me in one place as much as they rob me of in another, the Matter is clear beyond dispute. But what if a River belonging to my Private Estate shall make it self a new Channel through the Ground of another Man, shall that part of it which covers my Neighbour's Ground belong to me, or to him? In our Opinion, Judgment ought to be given for the latter. Yet still I retain a *Right* of turning the Current to its proper Place. But if I refuse thus to bring back the Current to my own Demesns, I cannot oblige the other Party to pay for the Water, nor so much as pretend that it ought to be Common to us both in that Part. For those Things which are our own barely on account of their being contain'd within our Limits or Space, and which therefore seem Accessions to the said Space, when they once happen to get out of it, are either to be recall'd by our Care and Diligence, or else to pass out of our Propriety, and to be reckon'd henceforward the Natural Increments of the New Space to which they are removed. But in all these Cases, the Positive Laws of different Governments may variously determine, as shall appear convenient (c) (2).

(1) Vid. *Instit.* Lib. 2. c. 1. f. 21. & *D.* Lib. 41. Leg. 7. f. 2. Lib. 39. t. 2. *De Damno infecto*, &c. Leg. 9. f. 2.

(a) L. 16. p. 528. Ed. *Genev. Casaub.* (b) *Euterpe*, p. 81. Ed. *H. Steph.* (c) In *Aggenus Urbicus's* Comment, we find the following Rules laid down, *If this be done in Lands taken by Occupancy, whatever the force of the Water hath stolen away, no one may have the privilege of recovering: Which Consideration lays a necessity on Men to keep up their Banks, yet so as not to endamage their Neighbour. But if it be done in Lands that have been meted out, and assign'd in Portions to distinct Owners, then the Possessor shall lose nothing; because every one knows the exact form and dimensions of what was allotted for his share in the Hundred to which he belongs.*

Concerning the Lands which border on the Po, *Cassius* thus determines; *Whatever the Water washeth away in its ordinary Channel the Possessor shall lose: Because he ought to defend his own Bank, without prejudicing other Mens Property. But if the Flood fall down with a greater force, so as to alter its Channel, every Man shall regain his own measure: because 'tis manifest the damage happen'd not through the neglect of the Possessor, but through the violence of the Torrent. If, in this Case, the Water form an Islet, it shall be his Property from whose Land it was taken: But if it was borrowed from out of several Estates together, each Person shall receive his own.* *Comp. Gros.* l. 2. c. 8. f. 8, &c. & *Ziegler ad dict. loc.*

(2) Vid. *Instit.* Lib. 2. c. 1. f. 22, 23, 24. *D.* Lib. 41. t. 1. Leg. 7. f. 3, &c. Leg. 12. & Lib. 43. t. 12, 13, 14.

## CHAP. VIII.

## Of Right over other Mens Possessions.

I. Such is the force of Property or Dominion, that the *Proprietor* alone hath power to dispose of his own Goods; and all others are bound to abstain from them. Yet inasmuch as the Division of Things amongst Men was not introduc'd with this Design, that all Communication of Goods should thereupon cease; it hence comes to pass, not only that we are often by the Law of Humanity engag'd to grant others the Substance or the Use of our own Possessions, but likewise that others may acquire a *Right* to them either Perfect or Imperfect, and consequently may procure by a good and just Title some Benefit or Advantage from our Peculiar.

We shall here observe in short, how many ways this may happen; the whole Subject being so largely explain'd by the Expositors of the *Civil Law* (a).

II. The chief *Rights* over the Things of others, accruing to Persons who are not the Proprietors, are, by some, reduc'd to these five: The *Right* of holding in *Fee*; the *Right* of *Ground-Plots*; the *Right* of *Possession upon an Honest Presumption*; *Pledges*, or *Mortgages*, and *Services*.

III. The *Right* of holding in *Fee* (1), which is granted to another by the owner of an Immovable Thing, upon condition of paying such a reserv'd Acknowledgment, impowers the Tenant in *Fee*, not only to use and enjoy the said Thing after the fullest manner, but likewise to dispose of it; though not without some little restraint as to the Point of Alienation. The particular Contract by virtue of which this sort of *Right* is immediately settled, can be rank'd neither under *Buying and Selling*, nor under *Letting and Hiring*; since it doth not confer an Absolute Property on the other Party, and yet a much greater degree than in ordinary Leases; but especially since the Reserv'd Acknowledgment is (commonly speaking) far less considerable than the Rent of Vulgar Tenants. As, the Rules observ'd, either by Common Law, or by particular Agreement in the *renewing* of this Contract, in the paying of the settled Rent, in the Alienation of the *Fee*, and in the continuance of it, the Civilians afford us large Information.

IV. He that either upon paying such a Fine, or engaging for such a certain Rent, hath obtain'd the *Right* of a *Ground-Plot*, (2) may enjoy the same, and make any disposal or conveyance of it, as much as if he were the first Proprietor; and consequently may claim the Lord-

ship, tho' not of the Soil it self, yet, of all that is built upon it. It was otherwise in the former Case; where even *Profitable Dominion* of the Soil belongs to the Tenant of the *Fee*: The Reason of introducing such a *Right* was this; That Persons were willing to admit Strangers upon their Land, yet so as not to lose any thing in the Bulk and Dimensions of it. Therefore they made a Grant of the Surface, reserving the main Soil to themselves, and requiring a moderate Annual Rent to be paid on this Consideration (b). If the Surface be lost, as suppose, if the Buildings fall, or are consum'd by Fire, the *Right* of the *Ground-Tenant* expires, so that the Lord of the Ground may again dispose of it as he thinks fit.

V. The *Right* of *Possession upon an Honest Presumption*, (belonging to those who with a good and sincere Intention receive a Thing of Another's from a false Proprietor, yet upon a Just Title, and such as would otherwise be sufficient to convey the *Real Dominion* to them,) is thus far equivalent to *Strict Property*, that such a *Possessor* may challenge all the *Fruits* and *Profits* as his Own, may dispose of the Thing as he pleaseth, and defend his Possession (nay, and ought to be maintain'd in it by the Laws (c),) against all Claimants, except the Just Lord. And this Possession, after a certain Term of Years, will give the Possessor an Irrevocable Dominion, and such as shall hold good even against him who was at first the Lawful Proprietor. On which Point we shall hereafter enlarge (3).

Now this *Right* was first set on foot for the benefit of Human Commerce, and the peace of Society and Government; to the intent that he who endeavours to obtain a Thing upon a good Title, and with an Honest Mind, should not afterwards be unreasonably oppress'd, or incommoded; as he must needs be, were all other Persons, for such a space, allow'd to disturb him in his Hold; or were he bound upon the True Proprietor's challenging the Thing, to refund likewise the *Fruits* and *Profits* which he had consumed: Or, *Lastly*, If his Possession were always to hang in an uncertain fluctuating Condition. As indeed it is a Rule not only enacted by *Civil Constitutions*, but likewise founded on Natural Reason, that every Man shall be left to enjoy what he hath got with Honest Intention, till such time as the Claimant shall have demonstrated a stronger *Right* than *Possession* (4). For what Trouble

(a) To whom add Selden, de J. N. & G. l. 6. c. 2. (1) Vid. Instit. Lib. 3. t. 25. De Locatione & Conduzione, f. 3. D. Lib. 6. t. 3. Si ager vectigalis, id est, Emphyteuticarius peratur, Cod. Lib. 4. t. 66. De Jure Emphyteutico. (2) See Chap. 4. f. 2. See Mr. Barbeyrac's 2d and 3d Notes upon this Sect. (b) Vid. Justin. l. 18. c. 5. n. 14. Ed. Grav. (c) Vid. Lib. 41. t. 1. l. 48. D. de A. R. D. (3) Chap. 12. (4) See the Text cited upon this account in B. II. c. 6. f. 6. towards the End. See Mr. Daumat's Loix Civiles, 1 Par. L. 3. t. 6. f. 4.

and Disquiets might be every Day brought on any Person, if upon Suit of every Petitioner, he should be oblig'd to relinquish what he fairly holds, and to prosecute the other Party in order to a Recovery (a)? The Case of *Pledges* or *Mortgages* will hereafter be explain'd (1).

VI. *Services*, in respect of the Person to whom they are due, are so many *Rights* of receiving certain Profits or Advantages from Things which belong to others, or of abridging the right Owner in the use of what he possesseth, so that he shall not be able to apply it to all Purposes. But in respect of the Person who is to pay them, they are so many Obligations to grant another somewhat out of a Man's own Possession; or, for the Benefit of another, to forbear using his own Property in such a particular manner (2). *Services* in respect of the Object towards which the Payment of them is directed, are divided into *Personal* and *Real* (3): Not as if the Benefit of each did not ultimately terminate in the Person, but because some Profits of this kind accrue to a Man, only on Account of his possessing some certain Estate (b). Which Distinction others express in this manner: *Advantage arising from other Mens things, either come to a Person directly and immediately, on the score of his being such a Person, or else mediately, by the Intervention of somewhat which he holds as his Property, and to which this Service is owing.*

VII. In the *List of Personal Services* are commonly reckon'd those which follow, *Use and Profits, Use, Dwelling, and the Works of Servants.* *Use and Profits* is a *Right* of enjoying freely what belongs to another, yet so as not to impair the main Substance (4); or, a *Right* of receiving all such Advantages from another's *Property*, as can arise from it without injuring the Principal. For, though in the ordinary Course of Nature, he who is Lord of the Thing is also Lord of *Fruits*, yet there is nothing to hinder, but that these Two may be separated, and the *Dominion* or *Property* lodg'd in one Person, whilst another hath a *Right* to all the Benefits. And this may be ordain'd and appointed, either by the Standing Laws of any Government, or by the Occasional Sentence of the Judge, as when a Thing held before in Common, cannot conveniently be divided any other way (5): Or by the Act of private Men, as by Testament, or by Compact (6). Only there is one Case which seems to require Service by the bare Notion of Nature and Reason; and that is, That the Father shall have the *Use and Profits*

of all Goods which fall to the Son in his Minority (7). It is evident that *Use and Profits* can be appointed properly in those things alone which afford some outward use of themselves distinct from their Substances, or which are not consum'd by being enjoy'd; provided they are really Capable of yielding any Service, Ornament or Delight. But there can be no proper room for the like Tenure in Things which are no way serviceable but in being spent: Inasmuch as the very Body and Substance, and consequently the Propriety of any Thing is presumed to belong to him, who hath a *Right* to waste or consume it at his pleasure. Yet 'tis a Rule in the *Civil Law*, That Money and other Consumable Things may be turn'd by *Will* (c) into this kind of Tenure, and be given in Legacy; In which Case the Money or Things are so made over to the Legatee, as to be his own; but under this necessary Condition, That he give Security to the Heir to restore the like Sum, and the like Things, or the Value of the Things, when the Term of his Grant is expired. So that the Security here given to the Proprietor, doth as it were supply the place of the real Substance.

He that holds the *Use and Profits* of a Thing hath a *Right* to claim all the Advantages proceeding from it, as well Natural as Civil. Yet the *Roman Laws* excepted (8) the Issue of a Maid-servant; probably on this Reason, That the design of granting another the use of our Servants, respected their Work only, and not their Offspring. As for the other *Natural Fruits*, they become the *Tenants of Use and Profit*, by taking or gathering them: That is when he hath separated them from the Body or Substance, and laid them by themselves. Whence it follows, that the *Fruits* or *Profits*, if not yet separated, belong to the Proprietor; and in case the *Tenant for Use and Profit* dies before he hath gather'd them, they cannot be challeng'd by his Heir: Though, if it appear that any Pains were spent, or any Industry imploy'd (9), in bringing the *Fruits* to Perfection, it will then be equitable to admit the Heir to a Participation of them; so far, at least, as to compensate the Pains of the Deceas'd, and to hinder him from labouring in vain. *Civil Fruits* belong to the *Tenant for Use and Profit*, till the time is laps'd (10), for which the Grant was first made.

Farther, As he who holds a Thing in this manner, ought to use it like an honest Man (11), or as becomes a good Husband, and so apply it to that particular kind of Advantage,

• (a) See the Expositors of the *Civil Law*, ad. t. 6. l. 2. *D. de Publiciana in rem actione.* (1) B. 5. c. 10. f. 13, &c.  
 (2) *Vid.* D. l. 8. t. 1. *De Servitutib.* leg. 15. f. 1. (3) *D. lb.* leg. 1. (b) *Vid.* *Grot.* l. 1. c. 1. f. 4. *Add.*  
 l. 8. t. 2. leg. 32. f. 1. *in fin.* *D. de servit. præd. urb.* (4) D. l. 7. t. 1. *De Usufructu, &c.* leg. 1. & *Instit.* l. 2. t. 4.  
*princip.* (5) D. l. 7. t. 1. leg. 6. f. 1. (6) *Vid.* *Instit.* l. 2. t. 1. f. 1. & *D. ubi sup.* leg. 3. *princip.*  
 (7) See hereafter, B. 6. c. 2. f. 8. (c) *Vid.* l. 7. t. 5. *D. de usufr. earum rerum quæ usu consumuntur.*  
 (8) See the Text upon this Account cited in Chap. 7. f. 4. (9) This is not a *Roman* but a *Saxon Law.*  
*Vid.* *Balth. Wherner. Elem. Jur. N. & G.* c. 14. f. 42. (10) *Vid.* *D. ubi supra,* leg. 26. & leg. 18. *princip.*  
 (11) *Vid.* D. l. 7. t. 9. leg. 1. f. 3.

which either the Nature of the Thing, or the Will of the Proprietor requires; so is he likewise bound to guard, maintain, and keep it safe and whole; (1) as also to pay Taxes, Dues, and other Burthens, ordinary and extraordinary, at least such as do not exceed the main Profits (2). For all these Troubles, as well as that of Culture and Improvement, necessarily fall on him, who desires to reap the Benefit and Gain: Nor is it presum'd that any Person would lay so grievous a hardship on himself, as not only to grant another the Profits of his Goods or Estate, but likewise to reserve the Burthens to be discharg'd at his own Expence.

This way of holding is said to expire at the decease of the Tenant; (3) because, commonly speaking, at the first making such a Grant, the Merit of the party was consider'd, which cannot descend to others. And inasmuch as 'tis a great Burthen upon a Man to have the Fruits of his Property pass still into other Hands, therefore the Words in these Grants are to be interpreted in the straightest manner; so that if the Form ran thus, *to Him and his Heirs*, it shall not be extended to the Heirs in a second Descent (4); since the Property of a Thing, if for ever excluded from the Use, is utterly insignificant: (5) In which Sense we are to take *Cicero's* Definition, *Id cuiusque proprium est, quo quisque fruatur atque utitur* (a). *That's truly the Property of every Man, which he useth and enjoys.* Hence, if a Legacy only for the Use and Profits was left to a Publick Community, which in other respects may be perpetual, yet the *Roman Laws* (b) order'd, *That the Grant should expire at the end of a Hundred Years*: As it must cease before, if the State or City be dissolv'd or raz'd by the Violence of an Enemy. (c) From the same grounds it proceeds, that a Tenure of this kind cannot be alienated; (6) because at that rate the Proprietor's Claim might be for ever shifted off, and the Thing might pass to one whom he would look upon as an Intruder into his Rights and Possessions. A Grant of Use and Profits was likewise, according to the *Roman Laws*, made extinct by the Two higher degrees of the *Capitis diminutio*, or Disfranchisement of a Citizen. (7) For as they were unwilling to let this Burthen lie on the Proprietor, after the party in whose favour it was at first appointed could receive no benefit from it; so they judg'd it by no means convenient, that a Person who had forfeited the Privilege of a Free Subject, should be still capable of holding such a Right over the Goods of those who were true and Lawful Members of the State.

To proceed; this Right, by virtue of some Publick Law, or of some Private Covenant, may in a certain period of Time, be lost by disuse, (8) (which alters many Things for the worse;) or by using it in a different manner from the Rules prescrib'd; (9) or by impairing the Thing, either through design'd Wickedness, or gross Neglect. The Right is likewise extinct, if the Thing happen to perish (d); nor doth it revive, tho' the Thing be renewed or repair'd; by reason of that strict Interpretation which this Affair demands. For Instance; *If I build a House in the same place with another which I lost by Fire, it is not judg'd to be the same as the former.* And indeed, since the Work must have put me to considerable Charges, it would be very hard if I must raise a Building which on my side will turn to no account.

Lastly, If either the Proprietor make over his Right to the Tenant, or the Tenant resign to him, (10) the Use and Profit expires; since a Man cannot receive Service from what's his own (e); or, because this, and all other Services do properly denote a Right over somewhat that belongs to another. But when a Person useth his own Possession, and receives advantages from it; this he does by virtue of his Dominion, and wants not a new Title or Commission (f).

VIII. Use, as they term it, is when a Man receives from a Thing belonging to another, only the daily and necessary Service, the Substance remaining as before. And this is of less extent than Use and Profits, the Person to whom it is granted being only allow'd to take so much Advantage from the Thing, as is sufficient for himself and his Dependants; which allotment is measur'd according to his Dignity and Condition. Thus for Instance; *As he who hath obtain'd the Use of another's House may dwell in it with his own Family; so he cannot fairly receive either a Guest of long continuance, or an Inmate who shall lodge there without being a Member of the same Domestical Society; in case the Proprietor himself dwells likewise under the same Common Roof:* (but 'tis otherwise if the Grant runs for the sole Use of the Entire Tenement (g). *Nor can he, according to the Regular Course, transfer the Use to another; it being a matter of very weighty consideration, and of great difference, who a Man takes to cohabit with him* (11). As to the preservation and reparation of the Thing in which any Person hath thus obtain'd a Use, it seems most agreeable to Equity, that if such a Use be once granted, there remains no farther Fruit or Benefit to the Proprietor, then the User shall be obliged to keep the Thing

(1) *Cod. Lib. 3. t. 33. De Usufr. & habit. & Ministerio Serv. Leg. 7.* (2) *Vid. Leg. 27. f. 3. & Lib. 33. t. 2. De Usufr. & Usufr. &c. Leg. 28.* (3) *Vid. D. Lib. 7. t. 4. Leg. 3. f. 3. Vid. etiam C. Lib. 3. t. 33. Leg. 12.* (4) *Vid. C. Ubi sup. Leg. 14.* (5) *Vid. Instit. Lib. 2. t. 4. f. 1.* (a) *Epist. ad Famil. 1. 7. n. 30.* (b) *Vid. Lib. 7. t. 1. l. 56. D. de Usufr.* (c) *Vid. D. ubi sup. l. 21. quib. mod. Usufr. amitt.* (6) See Mr. Barbeyrac's 21st Note upon this Sect. (7) *Vid. Instit. Lib. 1. t. 16. De Capitis diminut. & D. Lib. 4. t. 5. De Capite diminuti.* (8) *Vid. D. Lib. 7. t. 1. Leg. 38.* (9) *Non Utendo per modum. Instit. ubi Supr.* (d) *Vid. L. 7. t. 4. Leg. 5. f. 2. D. quib. mod. usufr. amitt.* (10) *Instit. Lib. 2. t. 4. f. 3.* (e) *Vid. Lib. 8. t. 2. l. 5. Princip. si usufr. petatur.* (f) *Add. l. 26. D. de Servit. pred. urb. ubi supra.* (g) *Vid. Instit. Lib. 2. t. 5. f. 1. D. de usu & habit.* (11) See Mr. Barbeyrac's 3d Note upon this Section.

safe and sound. If the Profit accruing to both be equal, they shall maintain or repair the Thing at joint Charges (a). But if the Use be inconsiderable in comparison with the Profits which the Owner still reserves to himself, in this Case, 'tis easily presum'd, that he intended not to charge it with any Burthen.

IX. *Dwelling*, in the *Civil Law*, is a *Right* by which a Man receives all the Advantages commonly proceeding from the letting out the Houses of others. (1) This is of a narrower compass than the *Use and Profits* of the same Houses; the latter taking in likewise the Benefit arising from the reception of Goods, and many the like Causes. And yet it is of a wider extent than the bare *Use*; inasmuch as the Person who hath obtain'd it, may let out the respective Buildings to other Tenants, instead of inhabiting them himself.

X. By the *Right of Servants Works*, is receiv'd all the Benefit arising from the Labour of Another's Servant. (2) Which *Right* the *Roman Laws* make more contracted than the *Use and Profits* of the same Servant; because he is capable of bringing in Advantage by other Means besides his Work.

XI. *Real Services*, due to any Person on account of some Estate or Possession, are, in general, so many Rights, by virtue of which my Neighbour's Estate is charg'd with yielding some certain Advantage to mine. The *Civil Law* divides them into *Services of City Estates* (3), and *Services of Country Estates*. By *Country Estates*, are meant Lands, and Inferior Buildings, erected only for the convenience of Agriculture, and preservation of Cattle. Under the Term of *City Estates* (4) are comprehended all Buildings design'd for the reception of Human Inhabitants, for the exercise of Commerce, and the like Uses, though seated at any distance from the City. The occasion of establishing all these Services was generally taken from *Neighbourhood*; a Relation which may justly be thought to border very near on that of Friendship (5). For, inasmuch as it contributed highly both to the Profit and the Pleasure of Men, that many of

them should join their Dwellings and Possessions, which Convenience could scarcely subsist, should each Person go about to exclude another from the Use of his Property in every degree; therefore Neighbours were wont to settle it amongst themselves, *That no Man should use his Own Things to all purposes, and in all respects, lest others should thereby be reduc'd, as it were, to Hardships and Straights; but that each Person should allow others such a moderate use of what he himself possess'd, as they could not want, without great prejudice to their Affairs* (b). On the other side, 'tis a General Rule to be observ'd in the challenging these Services, that they be not carried too far, and that they be us'd with Modesty, so as to cause no Trouble or Uneasiness to those that live about us (c).

The particular *Services of City Estates* are reckon'd (for the most part) as follows. *The Services of bearing a Burthen*, (6) by which any Neighbour is bound to let my House rest upon his Wall or Pillar. The Consequence of which is, That the Person who owns me this Service, shall be likewise engaged to repair the said Wall or Pillar, because otherwise, if the Support should fall, the *Service* comes to nothing (d). *The Service of letting in a Beam*, (7) by which I am allow'd to carry on a Rafter or Beam, or any other Piece which joins my Building together, till it enters into my Neighbour's House, and is there fasten'd.

*The Service of jutting or shooting out*, (8) which impowers me to extend any kind of Building over the House or Ground of Another Man, yet so as not to make it rest upon the said House or Ground: As in Balconies, Pent-Houses, and the like. *The Service of raising a Building higher*, (9) by which we are bound, though to our own Inconvenience, to give another leave, for his Benefit and Advantage to raise his House; which we might otherwise, forbid or prevent.

*The Service of not raising a Building higher*; by which a Man, for the Profit and Convenience of the adjoining Tenements, is constrain'd to keep his House low, or not to raise it beyond such a fixt Height.

(a) L. 18. D. d. t. (1) Vid. *Instit.* Lib. 2. t. 5. f. 5. & C. Lib. 3. t. 33. Leg. 13. (2) Vid. D. Lib. 35. t. 2. *Ad Leg. Falcid.* Leg. 1. f. 9. (3) D. Lib. 8. t. 1. *De Servit.* Leg. 1. (4) D. Lib. 50. t. 16. *De verborum Significationibus*, Leg. 198.

(5) ———— vel vicinitas,

Quod ego in propinqua parte amicitia puto. Terent. *Heautont.* Act. 1. Scen. 1. v. 4. 5.

(b) Vid. D. Lib. 11. t. 6. l. 1. f. 1, 2. D. *si usus-fr. petatur.* & Lib. 8. t. 1. l. 15. D. *de Servit.* l. 10. D. *de Servit. Urb. præd.* l. 20. f. 2. l. 31. d; t.

Hesiod. *Op. & dier.* l. 1. v. 343. &c.

Τὸν δὲ μάλιστα καλεῖν, &c.

Call Neighbours first, when Work is to be done;  
Your Kinsmen stay to dress, undress'd your Neighbours run,  
Ill Neighbours Heaven for Punishments design'd  
As Good for Blessings: If one Good you find,  
Think you have found a Treasure

Socrates (in *Xenophon* Ἄπομυ.) L. 2. p. 432. in *fn.* Ed H. Steph.) reckons up these Advantages of a Neighbour's Service; To light your Fire when you have occasion; to assist you in any Good Office; to be ready at hand for the affording you his kind Succour, if you happen to fall into any Misfortune, Add. *Plato de LL.* l. 8. p. 915. Edit. Francof. 1602.

(c) Vid. Lib. 8. t. 1. l. 8. D. *de Servitut.* (6) Vid. D. Lib. 8. t. 5. & leg. 6. f. 2. (d) Lib. 8. t. 2. l. 33. D. *de Serv. præd. urb.* (7) Vid. D. Lib. 8. t. 2. Leg. 2. (8) *Ibid.* & Lib. 50. t. 16. *De verbor. Significat.* Leg. 242.

(9) Lib. 8. t. 2. ubi *Supra.*

*The Service of Lights*, by which my Neighbour is obliged to admit my Lights, or my Windows for the Conveyance of *Light* (1).

*The Service of not hindring Lights*; by means of which my Neighbour can attempt nothing towards the lessening or obscuring the Lights of my House (a).

*The Service of Prospect* (2); by which my Neighbour is bound to let me look freely into his Estate, and cannot deprive me of that Benefit.

*The Service of not hindring Prospect*; by which a Man is tied up from doing any Thing in his Estate, which might interrupt a free Prospect on any side, especially towards any delightful place.

*The Service of receiving Dropping Water* (3), denotes an Obligation to suffer any such Conveyances, to empty themselves upon our Ground, tho' to our Burthen and Trouble.

*The Service of not receiving Dropping Water*; denotes an Obligation, not to turn the same little Spouts or Gutters, which are already useful to our Neighbour, into a new Course for our own Advantage.

*The Service of receiving the River* (4); by which my Neighbour is bound to grant passage to the larger Currents which flow (like a River) through my House in Pipes or Canals.

*The Service of not turning away the River*; restraining my Neighbour from diverting any such Channel or Stream which issues out of his House, so as to hinder it from passing through my Estate, to my great Benefit.

Lastly, We are to refer to the same Head; *The Service* (5) *of employing Sinks and Kennels; of pouring out any Thing upon a Neighbour's Ground*, and whatever there are besides of the same kind.

XII. *The Services of Country-Estates*; or which are due to Lands and Hereditaments employ'd in Rural Affairs, are commonly reckon'd in this Catalogue. *Passage* (6); the Right of a Path for Men to walk through my Neighbour's Ground into mine, for the

Benefit of the latter. *Carriage*; the Right of driving Beasts or Wains. *Road, or Way*; the Right of going, walking, driving; as likewise of carrying, leading, bearing and drawing any Thing which makes for the Advantage of my Estate. *Water-Course*; the Right of bringing *Water* through my Neighbour's Field, for the Benefit of my own; whether I use this *Water* for the Ground, or for the Beasts, or only to free my Land from an unnecessary Burthen and Flood. 'Tis the Nature of these *Services*, that they cannot be granted in part, being of no use unless Entire. For, as the *Civil Law* observes (b) in one of these Instances; *A Road, or Way is then wont to be finished, when it reacheth, either to a Town, or to some High and publick Way, or to a Ferry, or to some other Farm of the same Lord.* Therefore it would be vain and useles to obtain passage only thro' half another's Ground, if we were not allow'd to go farther. *Water-draught*; the Right of fetching *Water* from a Spring, or other place, for the necessary Occasions of our Ground: Which *Grant* is presum'd to include also another, of free passage to the Spring, or Well. *Waterage for Cattle*; a Right to drive the Beasts which feed in our Ground, to drink at our Neighbour's Pool (c). To the same Head belongs, *The Right of feeding our Cattle on another's Pasture*: Concerning which Right it hath been observ'd, That the Lord of the Ground which is charg'd with this Service, is not hereby hindred from feeding his own Cattle in the same place, provided he do not overstock it, so as to intercept the Right of the other Party. And so too, he who hath the Right of Pasturage, ought not to bring in Diseas'd or Scabby Beasts, which might communicate the Infection to others.

Lastly, To these are added, *The Right of burning Lime, of digging Sand, of cutting Stakes, of felling Wood, and of hewing Stone*; as they turn to the Advantage of Country Estates (d). All which have been by others explain'd more at large (7).

(1) *Ibid.* leg. 4. (a) Of the Claim to this *Service* rigorously insisted on, we have a famous Instance recorded by Zonaras, Tom. 3. in *Theophil.* and by Michael Glycas, *Annal.* Tom. 4. (2) *D. Ibid.* leg. 15. (3) *Ibid.* leg. 2. *Vid.* leg. 20. f. 2, 5, 6. (4) *Instit.* lib. 2. tit. 3. f. 1. (5) *D. lib.* 8. tit. 1. leg. 7. (6) *D. lib.* 8. tit. 3. leg. 1, 3. (b) *Ibid.* leg. ult. *D. de servit. præd. rust.* (c) *Ibid.* leg. 3. f. 3. *D. de Servit. præd. rust.* (d) *Add.* l. 9. *D. de Servit. præd. rust.* (7) See Mr. Barbeyrac's last Note upon this Section.

CHAP. IX.

*Of the Transferring of Property in General.*

WE are now to consider the *Derivative Ways of Acquisition*, by which Dominion or Property already establish'd, passeth from one to another: Which, before we proceed particularly to examine, it may be convenient to premise somewhat about the transferring of Property in general. The Power

and Privilege then, of alienating our own Possessions, or of conveying them to others, ariseth from the Nature of *full Property* (1): For since this enables a Man to dispose of his own how he pleaseth, it seems the very Principal part of that Ability, that he may, if he thinks convenient, transfer the Thing to an-

(1) *Vid. Instit.* lib. 2. tit. 1. *De rerum divis.* leg. 40.

other, by which means he may either procure to himself something more serviceable, or at least may have an Opportunity of obliging a Friend by his good Turn.

II. Now as the Conveyance of Rights and of Things is transacted between two Parties, the one from whom, and the other to whom they pass (1); so in those Methods of Acquisition which flow from the Force and Vertue of Property, the Concurrence of Two *Wills* is required, the Giver's and the Receiver's (2). For Alienation doth especially denote, that the Thing passeth from the Proprietor, with his free Consent, and is not taken from him by meer Violence against his Will. Again, To make a Thing change Masters, it is necessary likewise that the latter agree, as well as the former; it being inconvenient, that a Thing, which as to its Natural Substance, exists separately from me, should be, as it were, join'd and united to me, unless I embrace it with my own Consent and Choice. But in Cases where the Property is said, of Right, to pass to Men without their Knowledge, as in Inheritances, there the Law is presumed to make an Acceptance by way of *Fiction*, in favour of the Heir. Of which this is an Evidence, that the Heir may refuse the Inheritance; and unless, either in Person or by Proxy, he takes Actual Possession of it, he is not affected by those Obligations which arise from it, or are charg'd upon it.

III. Farther, since Alienations ought to be made with the Consent of both Parties, and since it is inconsistent with Human Society, that bare Internal Acts should be allow'd a Power of producing Rights to hold Valid and Effectual with regard to other Men; therefore 'tis required on both sides, as well on the Giver's as on the Receiver's, that they declare their Consent by sufficient Signs, that others may be fully assur'd of it: Such as are, Nods, Gestures, Words, Writings; to which, in some places are added, Solemn Profession before a Magistrate, Publick Registering, and the like.

IV. It is evident, moreover, that when a Translation or Alienation hath been perfectly and unconditionally made, the Alienator retains no manner of Right, or Title, to the Thing which was before his own. Which Consequence, though it be naturally implied in every Act of this kind, yet 'tis usual in Solemn Renunciations and Surrendries, expressly to declare, That neither we our selves, nor our Heirs will hereafter make any Pretention or Attempt upon what we have now given up; and that if any such Motion happens, it shall be null and void: Because when we have once made a Thing anothers, we

cannot, to any purpose, claim the disposal of it again. Yet frequently after a Thing hath been alienated, the former Owner reserves some kind of Claim, or a sort of Chance-Right, which in Case of some particular Event, now unknown, exerts its force. And this, either because in the Act of Alienation it was thus expressly covenanted; as is the Practice in Sales with Liberty of Refusal (3), in Things alienated under an Exception or Condition (4), and when only a useful (5) Diminutive or imperfect Property is transferr'd, as happens in the Grant of *Feuds*, and of *Copies* and *Leases*: Or because the Alienation includes a Tacit Condition, which Condition coming to pass, the Right of the former Owner to the Thing thus convey'd revives; whence arise those several Actions in Civil Law, of *Falſe Debt*; of Things given upon a certain Cause, which Cause did not follow (6); of the Recovery of Spousal Presents (7) upon not proceeding to Marriage; of Recovery of Dowry upon Divorce or Separation (8).

*Vulcan*, in *Homer* (a) upon his taking *Venus* in Adultery, challengeth the *Ææva*, the Presents he made his Father-in-Law, in prospect of the Match. 'Tis a Rule in the *Alcoran*, That if a Suiter put away his Spouse before Consummation, she shall retain half of what he gave her, unless she chuse to throw him back all.

V. But the chief Point usually controverted on this Subject is, *Whether or no in the transferring of Property the Law of Nature requires Delivery?* For others have already well observ'd, That *Delivery* cannot rightly be plac'd amongst the Ways of *acquiring*, since 'tis only an Act intervening in the *Conveyance* of it. *Grotius* (b) is of Opinion, That according to the Law of Nature, Property may be transferr'd by bare Covenant; and that Delivery is only requir'd by a Civil or Positive Ordinance, which being receiv'd by many States, is through mistake styled, The Law of Nations. On the other hand the Expositors of the Roman Laws declare, That the Dominion of Things cannot be bare Covenants, though thus much should be expressly intimated in the Transaction; but that Delivery is still requisite. The Reason of which Necessity they take to be this; That Dominions first took their rise from Natural Possession, and that therefore in passing them away, such an Act must intervene, by which the Natural Possession of the Thing may be immediately obtain'd. Some have further remark'd, That in Originary Acquisitions, as suppose in Occupancy, or first Seizure, the Title or Cause, and the manner of acquiring fall in with each other. But that in Derivative Acquisitions these Two are ever distinct: *Delivery* and *Acceptance* be-

(1) Vid. *Grot.* 1. 2. c. 6. f. 1, 2.

(2) See what has been said upon this, in B. 3. c. 6. f. 15.

(3) See hereafter, in B. 5. c. 5. f. 4.

(4) See the same place.

(5) See what we have said in C. 4. f. 2.

(6) Vid. *D.* lib. 12. tit. 4.

(7) Vid. *C.* lib. 5. tit. 1. de *Sponsalib. & arras Sponsalitiis*, & tit. 3. de *Donationib.*

*Ante Nuptias*, &c. (8) Vid. *D.* lib. 24. tit. 3. *Solutio Matrimon. dos quemadmodum petatur.* (a) *Odys.* l. 8. v. 318.

(b) *L.* 2. c. 6. f. 1, & c. 8. f. 25. and elsewhere.

ing the manner of transferring *Property*, or rather the Acts which occur in transferring it; whilst *Donation*, (1) *Buying*, and *Selling*, &c. are the Titles or Causes upon which the Conveyance is made. Though we have already shewn, that bare *Occupancy* is not a sufficient Title for *Dominion*, (2) but that it must in all Cases be grounded on some precedent Covenant. Others take a Middle Judgment in the Point; and as they deny that *Delivery* is by the Law of Nature *Necessary*, so they maintain, That 'tis, however, agreeable to *Reason*; Inasmuch as I cannot exercise *Dominion* over a Thing, unless I apply it, as it were *Corporally* to my self; which can be done only by *Delivery* on the one side; and by *Actual Seizure* on the other.

VI. In our Judgment, the Matter may be clearly resolv'd, by observing, that *Dominion* is capable of Two different Considerations; either as it denotes a bare *Moral Quality*, by virtue of which we understand that a Thing belongs to some Person, and that it ought to be subject to his Disposal; or as it implies farther, some degree of *Natural Power*; by which we are enabled to put immediately in Execution any purpose that we have made concerning the said Thing. Or what amounts to the same, *Dominion* is sometimes consider'd as abstracted from *Possession*, and sometimes is conceiv'd as united to it; this being, as it were, the final completion of *Property*; upon the arrival of which it fully exerts its direct Effects. For the better Illustration therefore, of the Point, it will not be inconvenient to say somewhat of *Possession* in General.

VII. By *Possession* then, we understand not the bare retention of a Thing; such as a *Keeper*, an *Administrator*, a *Borrower*, or a *Tenant for Use and Profit*, have with regard to the Goods of Others; but such as carries along with it an Affection and Desire of having the Thing to ones self. (3) This they divide into *Natural* and *Civil*: Which Division may again be consider'd in Two respects; either as to the outward manner of possessing or retaining; or as to the inward Form or Essence of Possession. In the Former Sense we are then said to have *Natural Possession*, when having once taken a Thing, we stick to it, not only by the Inclination of our Mind, but by *Actual*, and as it were, *Corporal Application*. *Civil Possession* may in this Sense be kept in the Mind only, when 'tis lost as to the Body. Inasmuch as National Laws, in some particular Cases, still allow the Advantages which follow Possession, to those who have quitted their *Actual* hold, or lost Things out of their Hands. In the latter respect *Natural Possession* is, when we have indeed a Mind and Inclination to keep a Thing as our own, yet without any just persuasion of *Property*, such as might arise from

a Lawful Title. But *Civil Possession* implies not only a Desire, but likewise a Reasonable Ground for that Desire; which according to the Common and Regular Course, is always understood in National Constitutions, when they allow any Favour to *Possession* (a).

Now the proper Subject of *Possession*, are Bodily Substances, (4) whether with or without Motion: The less proper or the Analogous Subject, are *Incorporeal Things*, as *Rights*, which we possess by using them, and by the power of so using them (5); as likewise *Deeds* and *Writings*, upon which an Action may be grounded towards some certain Claims. To the constituting and compleating the Nature of Possession it is requisite, that the Person to be put in to possession, shall either by himself, or by Proxy, (6) corporally take to him the Thing it self, or the Badge and Sign of it, or the Instrument of Custody, according as the Nature of the Thing permits; and consequently, that the Thing be after such a manner subjected to his power, as that he may be able actually to dispose of it. If many Bodies are united and connected to each other, then the taking any one part with a desire of possessing the whole, is construed for taking the whole, so far as it lies free and void of Owners. Thus, for instance, *He who would take possession of a Field, or of a House, is not obliged to walk over every Foot of Ground, or to creep into every Garret, but 'tis enough for him to enter on any part* (b). A Complex Body made up of particular separate Bodies, as a *Flock*, for Example; if all the Parts are present, is supposed to be taken all by laying hold on any one. But if the Parts are divided as to place, one part of the Flock, for Instance, in this Field, and another in that; here each part is to be taken by it self. *Incorporeal Things* when they adhere to a *Corporeal*, are presum'd to be taken together with it. But if they are to be acquired in the Goods of others, then they are taken either when we are introduced to a Thing, (7) over which (for Instance) we design to appoint a *Right* or *Service*, or when we exercise any Act which flows, as it were, from such a *Right* (c).

In *Negative Rights*, it is equivalent to *Possession*, if I forbid a Man any Thing, or oppose him in his Design upon it, and if he rests-satisfied after my forbidding or opposing him. To proceed; Such a Seizure, or the exercise of such an Act is necessarily required in the obtaining of every Possession: Though it may by *Civil Ordinances* be appointed, That the Property of a Thing shall otherwise by Right pass to a Man so effectually, as that he shall bring as strong an Action against one who detains the Thing from him, as if he had taken *Corporal Possession* of it (d).

(1) Vid. D. Lib. 41. t. 1. De A. R. D. Leg. 31. princip. (2) C. 4. f. 4. Mr. Barbeyrac has shewn the Contrary in his 2d Note upon this Sect. (3) Vid. D. Lib. 41. t. 2. De acquir. rerum possess. Leg. 3. f. 1. (a) Vid. Polyb. l. 12. c. 7. (4) Vid. Instit. Lib. 2. t. 2. f. 1, 2. (5) Vid. D. Lib. 8. t. 1. De Servitut. Leg. 20. (6) D. Lib. 41. t. 2. De acquir. vel amit. possess. Leg. 9. (b) Ibid. Vid. l. 3. f. 1. D. de acquir. possess. (7) Vid. D. Lib. 7. t. 1. De Usufr. &c. Leg. 3. princip. (c) Add. D. Lib. 9. t. 1. l. 3. f. 2. D. de act. empt. &c. (d) To which Point belongs what is alledg'd by Gratius, L. 2. c. 8. f. 25.

Farther; As to the acquiring a Thing by *Occupancy*, it is necessary, that the Thing lay free and vacant: So if a Thing is to pass from Another to me, with such force and virtue, as that I may be able hereafter actually to dispose of it, it is likewise necessary, that he abdicate and divest himself of the Possession, and remove it, as it were, out of his Custody, that I may have power immediately to seize on it. And this is enough to make it properly be said, that a Thing is deliver'd by another; there being no need that he should directly put it into my very Hands. As I may very well be said to feed a Man, though I do not chew his Meat for him, and then thrust it into his Mouth, but only lay it in such a place, whence he may conveniently reach it for his Use (a).

VIII. These Rules being laid down, it is evident, that *Dominion* consider'd merely as a *Moral Quality*, and as it abstracts from Possession, (1) may certainly be transfer'd by bare Covenants; but that as 'tis understood to include likewise some degree of Natural Power, by means of which it may immediately be put in Act, besides Covenants, *Delivery* is farther required: which doth not arise from the force of Positive Law, but from pure Natural Reason. Nor yet is it necessary to affirm, That before *Delivery* the Alienator retains some kind of Imperfect Dominion; unless we would, very unartificially ascribe the Name of Dominion to a bare Natural Ability, actually to dispose of a Thing, without a *Moral Power* or *Right*.

For after the Covenant is compleated, or after the *Right* is by Covenant transfer'd on another, the Thing immediately commenceth *his*, and regards purely his Interest and Advantage; and the Alienator can lawfully exercise no Act about it, but such as tends towards delivering up the Possession to the other Party. If, before Delivery, he make any other disposal of the said Thing, he doth this only *de facto*, and not *de jure*. And *Delivery* it self is not properly the final Act of Dominion, but the releasment and abdication of Corporal Custody. For that only is esteem'd an Act of Dominion, which by virtue of Dominion is *freely* perform'd. But *Delivery* is made not *freely*, but upon Necessity, or Obligation. As the Resignation of a Magistrate cannot be styl'd an Act of his Office, if we consider that Office, as denoting a Power to command Others.

But tho' a Thing can no longer be reckon'd my own, when I have made over the full *Right* of it to another Man, yet 'tis somewhat different whether I still corporally detain the said Thing, or whether the other Party hath already got possession of it. For in the former Case, he is both unable to apply it presently to his Actual Use; and besides, if I refuse to deliver it, he must compel me to grant him possession, in a forcible way. And if Matters stand thus,

besides the Inconvenience of wanting the Thing in the mean time, if you live under Civil Government, you must be at the trouble of making out your Right to the Judge; and if he either through Corruption or Neglect shall pronounce a False Sentence, you must sit down contented: But if you are in a State of Natural Liberty, you must try out the Matter by the Doubtful Fortune of War.

On this account it is that the *Roman Laws* affirm, That those Contracts which treat of the alienating of Things, do give only a *Right to the Thing* (2); as if before Delivery the Person were plac'd, as one may say, at a distance from the Thing, only with a Right of joining it to himself hereafter. But that when Dominion hath received its Final Completion from Corporal Seizure, then a *Right* is establish'd *in the Thing*. Yet the Law frequently supplies the former Deficiency: As for Instance, by reckoning amongst the *Rights in a Thing* the *Right* of Inheritance, (3) or that which the Heirs have to the Goods of the Deceas'd, although they have not yet got Possession. As for the other Distinction of the *Roman Laws*, in granting a *Real Action* (4) upon a *Right in a Thing*, and a *Personal Action* upon a *Right to a Thing*, the ground of it seems to be this; That when a Thing once perfectly belongs to me, I have nothing to do but to pursue and take it wheresoever I find it; and there is no new and Peculiar Obligation requir'd in the other Party to engage him to deliver it. But a Bare Right to a Thing, presupposeth that the Thing is not yet fully united to me, and that the other party is by a peculiar Obligation tied to procure that it shall be thus united: Therefore I am to urge him, That he would leave the Thing, as 'twere vacant, for me, so that I may take it into my own Possession.

As to what remains, though it be a common Saying, That *a Thing in Hand is better than an Action in the Court*; yet 'tis certain, that our Estate may be encreas'd by a bare *Right* to a Thing, and by *Personal Actions*. As on the contrary, what a Man by a perfect Obligation owes to another, he cannot, to any purpose, reckon amongst his Goods and Fortunes, tho' he retains, as yet, the Corporal Possession of it. Hence, he who possesseth a Thousand Pounds, and owes a Thousand, hath nothing; and he that owes more than he possesseth, hath less than nothing. For, in the Words of the *Civil Law*; *Id ei abesse videtur in quo est obligatus* (b), *So much seems wanting to him, as he is bound to make good.*

IX. We are to observe besides, that *Delivery* is either *true*, or *feigned* and *suppos'd*; the latter of which is done *manu brevi* (5), in short, and without Formality, to save Time and Trouble. Now this chiefly takes place, when I make over by Grant, the Property of my Goods

(a) *Vid.* lib. 41. t. 2. l. 1. f. 21. l. 51. D. *de acquir. possess.*

(2) See Mr. *Barbeyrac's* Third Note upon this Section.

(4) See Mr. *Barbeyrac's* Fourth Note upon this Section.

(5) See Mr. *Barbeyrac's* Remark upon this in his Note upon this Section.

(1) See Mr. *Barbeyrac's* First Note upon this Sect.

(3) D. lib. 1. t. 17. *de divers. reg. Jur. leg. 19.*

(b) L. 3. t. 5. leg. 28. D. *de negot. gest.*

to another, reserving, for a certain Term, the *Use* and *Profits* to my self (a). (Though in some Grants of this kind, it is now an usual Practice, for the Donor to deliver the Keys to the other Party, who immediately restores them again.) As likewise, when I resolve that a Thing of mine, which another now hath in his Possession, shall, for the future, be his Right and Property (b). Or when having first lent, or set out to hire, or given in trust, a certain Thing to you, I afterwards sell it you, or resign it in way of Profit or Portion (c). This *feign'd Delivery* is likewise of use between Three Persons, by Delegation (1); as if, for Instance, a Man out of Bounty or Debt, would give me somewhat, and I order him to give it a Third Person. For that's the same as if it had been first offer'd to me, and by me deliver'd into the other Party's Hands.

*Delivery* is then said to be made *manu longa*, or by a round-about way, when a Thing is not immediately brought to another Body, but only shewn or pointed out at a less or a greater distance. For I have, as far as in me lies, deliver'd that, of which I have quitted the Possession, and have put another in a Method of obtaining for himself (d). And to this Head they refer also those Cases, in which any Sign or Instrument of Custody (as Keys, for Instance;) is given up (e). As for the Case of throwing or scattering Largeesses among

the common People, the Design of it is not, that the Things thus dispers'd should be look'd on as *derelict*, or forsaken, and so be afterwards acquired, in the way of *Occupancy*, by the first Takers. But such a piece of Bounty is really a Species of *Donation*, reach'd out indefinitely to all the Members of the Crowd; so that the Thing thus thrown in common, is suppos'd to be deliver'd, as 'twere, to the first Man in the Multitude that lays hands on it (2). Yet *Cæsar* speaks otherwise in his Complement to the Soldiers, upon granting them the Liberty of Plunder :

—————  
*Neque enim donare vocabo,  
Quod sibi quisque dabit (f).*

I call it not my Gift what each Brave Man  
Shall give himself.

Sometimes only Tickets are scatter'd, upon producing of which the Bearers receive the Import and Contents of them. Thus *Titus* the Emperor, in some of the Shows which he presented, threw about little round Tablets of Wood, each with some kind of Prize inscribed, as Garments, Gold, Horses, Oxen, Sheep, and Slaves. Those who had the good Fortune to catch these Tables, upon carrying them to the Managers and Stewards, were gratified with the Purport of the Inscription (g).

(a) *Vid.* l. 8. t. 54. l. 28. C. de donat. (b) *Vid.* l. 41. t. 1. l. 21. D. de A. R. D. (c) L. 9. f. 5. D. dist. Tit. (1) See B. 5. c. 11. f. 13. (d) *Vid.* D. 1.46. t. 3. l. 79. D. de Solution. & Lib. 41. t. 2. l. 1. f. 21. l. 18. f. 2. l. 51. D. de acquir. possess. (e) *Vid.* l. 41. t. 1. l. 9. f. 6. D. de A. R. D. & l. 8. t. 54. Leg. 1. C. de donationibus, & l. 18. t. 1. l. 74. D. de contrah. empt. (2) *Vid.* Instit. l. 2. t. 1. f. 45. (f) *Lucan.* Pharsal. l. 7. v. 739, 740. (g) *Zonar.* Tom. 2. Comp. Bacler ad Grof. l. 2. c. 6. f. 2.

## CHAP. X.

### *Of Wills and Testaments.*

**A**Mongst the Derivative ways of *Acquisition*, some regard the Chance of Death, and some transfer Things whilst both Parties are alive (1). In both Cases the Things are convey'd from one Person to another, either by express Will of the former Proprietor, or by the Appointment of some Law interposing in the Affair (a).

II. On account of Death, 'tis the Common Practice of Mankind to transfer things by *Testament*: The Nature and Origine of which Act we ought with some Care to examine. According to *Grotius* (b) therefore a Testament is the *Alienation of a whole Estate in case of Death, and before that time revocable; in the mean while, the Right of Possessing and of Enjoying being reserv'd.* Whereas 'tis not altogether certain, whether a *Testament* can rightly be

call'd an Alienation, in that strict Sense under which it denotes such an Act by which a Man makes a thing that was his Own become Another's. For Alienation, being in this sense, a transferring of Right from one to another Person, consequently supposeth the Existence of the Two Parties at the time of its date; so that henceforward the Thing may be said, to be estrang'd from him who thus transferr'd it. But the Testator, so long as he draws Breath, retains a full and absolute Right to all his Goods, without the least Diminution. Therefore whilst he lives, he cannot properly be said to have alienated any Thing: And at the Moment of his Death he loseth immediately all the Right he held whilst alive, and is reckon'd as no Body, in Civil Consideration. Therefore an Alienation cannot be said to be

(1) Mr. *Barbeyrac* is more Exact in dividing *Derivative Acquisitions* into *Natural*, *Civil*, and *Mix'd*, which he explains in his First Note upon this Section. (a) *Varro de re rustica*, l. 2. Somewhat must necessarily intervene before what was another's can become mine. (b) L. 2. c. 6. f. 14.

made at that time, when in respect of the Party who should alienate, nothing can be call'd his own or another's. Nor is the Difficulty taken off, if we affirm, That the Alienation is indeed made when the *Will* is sign'd, but depends in the mean while upon the Casualty of Death, as upon a necessary Condition. For in every Act of Alienation Two Parties must join Consents, the one from whom, and the other to whom, the Thing is transferr'd; and these Consents must be united by conspiring, as it were, together at the same time. But now nothing happens more frequently, than that a Man shall not know himself to be Heir till the *Will* comes to be open'd upon the Testator's Decease. And likewise when the *Will* is thus open'd, 'tis at the Choice of the Heir appointed, whether he will enter upon the Inheritance, or wave and refuse it.

Again, Since all the Right of the Heir by *Will* commenceth at the Testator's Death; he hath not, before that Moment, any Right which can be said to depend on the Death of the Party as on a Condition. Besides, when any kind of Alienation is made, though such as may be recall'd, yet it ought to transfer such a Right on the Person towards whom it is directed, that it shall not be disannull'd at the bare pleasure of the Alienator. For otherwise, neither the Alienator can be suppos'd to have contracted any Obligation, nor the other Party to have acquired any Right, if the whole Transaction amounted to no more, (for Example) than this slight Promise, *You shall have, one time or other, somewhat which I now possess, provided you don't displease me in the mean while; but then you shall have no Right to hinder me from being displeas'd at any time when I think fit, or without any manner of Reason.* Such an Act as this cannot be stiled an Alienation, being a bare Declaration of a Man's present Design, without any Necessity of continuing the same Resolution; which is incapable of producing any Obligation on the one side or any Right on the other (a). But a Testament is really such a Declaration of a Man's Intentions, as doth not confer any Right on the other Party before the Testator's Death; such, at least, as may have the Effect of full and perfect Right against the Claim of the Testator himself. For after the Will is drawn up, the Testator doth not only retain the most absolute Right of possessing and enjoying, making over to the Heir only the bare Property; but indeed the Property it self is still, without the least Diminution, his own. Of which we have this evident Token, that after all this, he may alienate his Goods, or may strike out those who at present stand Heirs, without any Possibility of Redress. But now even revocable Alienations ever suppose some Casualty, or some Condition under which they

are to be revers'd, and which doth not depend merely on the Alienator's Pleasure or Humour.

III. We shall express the Nature of a Testament more plainly and more agreeably to the Sense of the Roman Lawyers, if we call it, *A Declaration (1) of our Will touching the Successors to our Goods, after our Decease, yet such as is mutable and revocable at our pleasure whilst we live, and which creates a Right in others to take place only when we are gone.* Concerning which Mutability, the Law of General Kindness commands thus much (2); *That no Man, unless on account of his Demerit, be wheedled and cajoled with false Hopes, or be ridicul'd and expos'd.* Whence, though we can hardly disapprove of what Pliny reports of Domitius Tullus, who had chous'd some hungry Rascals in the wicked Tribe of the *Heredipete*; *Others on the contrary, says he (b), commended this Humour; in that he frustrated the Evil Hopes of such Men, whom, considering the Practice of the Age, it is a part of Prudence thus to deceive (c):* Yet Valerius Maximus (d) had good reason to censure Q. Cæcilius and T. Barrulus, of whom the former put a Trick of this kind on L. Lucullus; the latter on Lentulus Spintber, their greatest Friends and Benefactors.

IV. Whether these Testaments owe their Original to Natural or to Positive Law, is disputed amongst the Learned. The Meaning of which Question, is not, Whether a Man be obliged by the Law of Nature to make a Will, (for that certainly is in every Man's Choice, unless so far as it proves necessary to prevent Quarrels amongst his Relations (e);) but, whether after Property hath been introduc'd, it necessarily follows from the Nature of that Establishment, that a Man may effectually dispose of his Goods by Will; or whether this Power is granted to Proprietors by positive Constitution. Grotius's Judgment (3) in the Case is, *That a Testament, as many other Acts, may indeed receive a particular Form from Civil Ordinances; yet the Essence and Substance of it is nearly allied to Property, and, upon Supposition of Property, belongs to the Law of Nature.* Or, that the Power of disposing effectually of what we possess, is deriv'd from the Law of Nations; which the *Civilians* term *Jus primarium*, the first or principal Law; but the Restraint which lies upon us to dispose of them only after such a certain manner, is owing to Civil Appointment. In regard to which Assertion, 'tis not improbable but that some Scruple may arise (4). For since the Things over which Property was first established are designed only to serve the Uses of Men in this Life, and since the Dead lose all their Title to Worldly Possessions, it seem'd not altogether so needful, that Property should contain in it a power of

(a) Vid. *supra*, Lib. 3. c. 5. f. 5. (1) Vid. D. 1. 28. t. 1. leg. 1. & l. 34. t. 4. leg. 4. (2) See Mr. Barbeyrac's Second Note upon this Section. (b) Lib. 8. Epist. 18. p. 275. Edit. Amst. (d) Lib. 7. c. 8. f. 5, 8.

(4) See Mr. Barbeyrac's First Note upon this Section.

(c) Add Lucian in Dialog. *Simyl. & Polystrat.* Tom. 1. (e) Comp. *Isaiah* 38. v. 1. (3) *Ubi supra.*

Ordering what should become of a Man's Things after his Decease. But it might have been sufficient to have allow'd every Person the Command of his Goods during Life, disabling him to extend it farther, and to have left to the Care of the Living the Management of what belong'd to the Dead, who are no longer Members of Human Society.

Farther, since Death removes Men from all Concerns below, it seem'd that the Disposals and Declarations made in their Lifetime, might be afterwards neglected with Impunity.

*Id cinerem & manes credis curare sepultos* (1)?

Think you Cold Dust and Shadows feel such  
[Cares?

An Evidence of this it seems to be, that the most Ancient Men we read of in Story, were wont to engage their Friends by Oaths to fulfil their last Commands, as if no Human Bond were strong enough to oblige them in this Case (a). Therefore 'twas at the pleasure of the Survivors, whether or no a Man's Will should take effect, even after he was dead. And consequently they were to determine by some Agreement amongst themselves, how far they should comply with the Desires of those who had now lost the common Rights of Men. Without such an Appointment, any precedent Disposal would have been vain and usefess, which the Author could not, and others who could, would not maintain and put in Execution.

But, on the contrary, it manifestly appears, that 'twas not sufficient in order to the Peace of Human Society, to introduce such a Property or Dominion of things, as should turn only to the present momentary Use; but 'twas needful to make it such as should hold good hereafter: Man, so far as Nature allows, having no less a Right to preserve Life for the future, and to provide Means towards obtaining that End, than for the present Moment. To which if we add, That we are enjoind to take

a particular Care of those who are allied to us in Blood, whose Race we wish may continue to an indefinite extent of Ages, it will on the whole appear to have been conducive to the Peace of Mankind, not to make the Force of Property depend on any fix'd Period of Time; since this would have created no less Confusion and Trouble than the Primitive Community: But to assign it, as 'twere, an Indefinite Duration, by means of which it might pass down and be continued to others. Now as to the preserving and the continuing this Property, those who live in a state of Natural Freedom, appoint Means according to their own Judgment. But in Civil Governments, as it is supported by the Publick Strength, so it hath been variously temper'd and retrench'd, as particular Nations have at any time thought it to be for their Interest.

As for the Notion invented by the Author of the *New Method of Law* (b) (2), I question whether it will meet with the Approbation of sound Judges. *Testaments*, says he, *by meer Right*, that is, *without the Confirmation of Civil Ordinances, would be of no force or weight, unless the Soul were Immortal, but because those who are taken out of this World do really still live, therefore they remain Proprietors of their Goods; and those whom they appoint their Heirs, are to be look'd on as their Stewards and Managers* (c).

V. But as no one will be forward to maintain, that for a Man to be able to dispose of his Goods at such a time as he is the true Proprietor, and to fix the Effect of his Disposal on a time when he shall not be Proprietor, is repugnant to the Law of Nature: So, on the other hand, it doth by no means appear that this flows by any necessary Reason from the Essence of Property.

Thus much indeed flows from thence, That a Man whilst alive may confer a Right to his Goods on another living Person, which shall not be extinct upon the Death of the Collator, being still kept alive in the other Party who survives. For inasmuch as the Efficient and the Effect are distinct and separate Beings,

(1) Vid. *Virgil. Æn. 4. 34.* (a) See *Gen. XXIV. 2, 3. XLVII. 29. L. 25. Diodor. Sic. l. 2. p. 119. Ed. Rhodom. c. 33. Speaking of Parsides's Death.*

Thus too in *Sophocles, (Trachin. vers. 1192, &c.) Hercules* requires an Oath from *Hyllus*, for the Performance of his last Commands.

So *Constantinus Ducas* obligeth his Wife *Eudocia* by Oath, never to enter on a second Marriage after his Decease. Yet by what Stratagem she recover'd her Writing from the *Patriarch* who had the keeping of it, and how, as if she had hereby been releas'd from her Engagement is very strange; she marry'd *Diogenes*, we read in *Zonar; Tom. 3. in Eudocia*, and in *Michael Glyc. Ann. Tom. 4.*

So in *Josephus, (Archæolog. Jud. XVII. 10.) Herod's* Commands for slaying the Chief of the *Jews*, are neglected by his Sister and her Husband. So,

*Jusserat hæc Rapidis aboleri carmina flammis  
Virgilius Phrygiùm quæ cecinerè Ducem.  
Tucca vetat, Variusque simul; tu maxime Cæsar,  
Non finis.*

*Virgil* those Strains which rais'd the *Trojans* Fame,  
Dying bequeath'd to feed th' injurious Flame.  
*Tucca* and *Varius* stop the rash Design,  
And You, Great *Cæsar*, save the Glories of Your Line.

*Dio Cassius, l. 59.* relating how *Tiberius's* Will was declar'd null by *Caligula* and the Senate, adds this Reflection, *That no Counsel or Foresight can prevail against the Ingratitude of Men, and the Power of Posterity.* To which may be applied that Saying of *Lucan*,

*Nulla fides rebus post terga relictis: l. 2.*  
In vain we trust to Things we leave behind.

(b) Pag. 56.  
*Sirac XI. 20.*

(2) See Mr. *Barbeyrac's* Second Note upon this Section.

(c) *Comp. Luke XII. 20.*

there's no Necessity, that the latter should always die with the former. And therefore, as a Man in his Life-time may fully transfer somewhat which he possesseth, on Another, who shall not lose the Property of it by the Death of him from whom it was receiv'd; so nothing hinders but that a Man may make over the Property of any Thing to some Person else, yet so as to reserve still to himself a certain Right over the said Thing during his Continuance in this World. Hence in the most Ancient Times we find the Fathers of Families disposing of their Goods at the Approach of Death; (for as to the Passage in *Gen. XX. 3.* *Abraham* seems not to have already made his Servant's Son his Heir, but only to have thought of making him, in case he happen'd himself to die without Issue;) yet so, as that they themselves open'd and publish'd their Will to their Children, that these by acquiescing in it, might seem to confirm it by mutual Covenant amongst themselves. By this means the Right immediately pass'd from the living Parents to the living Children; and the latter were admitted presently, as 'twere, into Possession of the Goods. And 'tis probable, that those primitive Men, who follow'd so plain and frugal a way of Life, commonly were not cut off by our sudden and violent Distempers, but decay'd leisurely by the gentle wasting of the Radical Moisture; so that they were Masters of their Reason to the last, and were never summon'd by Death unawares, and upon a surprize (a).

After the same manner, *Cyrus*, in *Xenophon* (b), allots his Sons, with his own Mouth the Division of their Father's Fortunes. And indeed these last Disposals ought to obtain great Favour and Allowance; it being thought no small Comfort under our Mortal Condition, that what a Man hath labour'd for in his Life, should afterwards fall to that Person rather than others, whom he particularly chuseth and desires. 'Tis establish'd, says *Quintilian* (c), by the Laws and Customs of the State, that as often as it can possibly be done, the Testaments of the Deceas'd should be strictly obeyed. And this upon no ordinary Grounds and Reasons. For there seems no greater Consolation in Death, than to have a Will which shall hold good after Death. Otherwise a Man might think an Estate a Burthen, if he had not the full Disposal of it; and if all the Right which we are allow'd to have

over it whilst we live, were to be taken from us when we die (d).

VI. But the Question under debate doth not proceed so much with regard to these actual Disposals during Life, as to those Testaments by which a Man so conveys his Possessions, as to retain the liberty of altering them to his last Breath, so that the Right of the Heir to the respective Goods shall not commence till the Testator's Decease: Which Method of Appointment many have, with very good reason, prefer'd to that other, but now mention'd, by which Men upon the brink of Death, distributed their Goods amongst their Heirs with their own Hands. For, some sudden unforeseen Fate frequently either hurries Men out of the World, or however removes them far from their Friends, so as they want Time or Opportunity to express by Mouth their last Resolution.

And again, Persons who seem'd to have had more than one Foot in the Grave, have often by some strange Turn, recover'd their Health, when they utterly despair'd of it. And it was likewise judg'd more convenient, that a Man should dispose of his Goods, rather whilst he was in Ease and Quiet, and Master of a sound and clear Reason, than when he was trembling at his last Hour, or when his Mind was shock'd and weakened by the force of his Distemper.

Besides, it was more advantageous for each Person to remain Lord of his own Possessions to his final Gasp, and to give no Man such a Right over them, as he might not, without Inconvenience at any time revoke, when either the Merit of the Party, or his own Inclination shall alter (e). (As the *French* tell us, 'Tis senseless to put off our Cloaths before we are near going to Bed.) For though the Conveyance of Right, in this Case, might be made reversible, or such as the Conveyer might disannul, upon Appearance of some Condition, either Casual or Voluntary (1), on the part of him to whom the Conveyance was made, yet the Doubts which must necessarily have arisen about the Proof of this Condition, and which each Person would have urg'd for his own Title, must have occasion'd endless Disputes. At least, he who had been once declar'd Heir, would have conceiv'd the highest and most Mortal Resentment against the Disposer, should he for any slight Reason, be depriv'd

(a) See *Gen. XXV. 5, 6.* *XLVIII. 22.* *Deut. XXI. 16, 17.* *1 Kings I. 35.* *Sirac XXXIII. 24.*

(b) *Cyropad. 1. 8.* (c) *Declam. 308. princip.*

(d) Nor is *Statius's* Reflection on Barrenness

unworthy Consideration:

*Orbitas omni fagienda nisu,  
Quam premit votis inimicus heres,  
Optimo poscens, (pudet heu!) propinquum  
Fumus amico.*

*Orbitas nullo tumultu fletu!  
Stat domo capta cupidus superstes  
Imminens leti spoliis, & ipsum  
Computat ignem.*

*Syl. Lib. IV.*

(e) See *Sirac XXXIII. 20, &c.*

(1) See *B. 3. c. 8. l. 4.*

From Barrenness, Good Providence defend!  
Which feeds the Wishes of th' Ungodly Heir,  
Begging the speedy Funeral of his Friend.  
Barrenness buried with no parting Tear!  
The eager Successor in th' empty Seat  
Stalks like a Victor in a Fortress won,  
Greedy to fasten on the Spoils of Fate;  
And counts, with Grudging Care, the Charges of a  
[Stone.

*Sylv. 7. v. 33, &c.*

of what he had already seiz'd upon in Hope and Expectation. Many likewise have expos'd themselves to very great Dangers, by openly naming their Heir too soon. Thus *Caligula*, when Persons who had put him down in their Wills amongst their Children, and had made open Profession of it, and yet still liv'd on, he gave them the Name of *Mockers*, and sent many of them a Poisonous Mefls to dispatch them (a).

When *Herod* had taken up a Design of dividing his Kingdom amongst his Sons, *Augustus* forbade him to proceed, ordering him, so long as he liv'd, to keep both his Kingdom and his Sons in due Subjection (b). As the Family of *Augustus* himself was afterwards distracted with a very fatal Emulation, upon his naming a Successor in his Life-time. It hath therefore been thought safe to take Care that Men's Wills should only be publish'd after their Death, that they may bring no Odium, and no Danger upon them whilst they live.

On the same Ground it hath been look'd on as a most detestable and barbarous Villany to unseal and divulge a Testament during the Life of the Testator. So when *Cæsar* upon the breaking out of the Civil War, caus'd *Antony's* Will, which he had deposited in the Hands of the *Vestal* Virgins, to be rehear'd in open Senate; many took very grievous Offence at the Act. For, as *Plutarch* observes (c), they judg'd it to be most monstrous and unreasonable, that a Man should be obliged to give an account whilst alive, of those things which he intended should be done after his Death. Especially since amongst the *Romans* 'twas a usual Custom to give Judgments and Characters of particular Persons in these last Instruments (d) (1).

Now though the Reasons here alledged, and others the like, highly recommend to most Nations this way of final Disposal, yet we cannot hence evince, that such Testaments do naturally flow from the *Propriety* of Things, and consequently are prescribed by the Law of Nature. For though we should suppose, that by the common Consent of Mankind such a Force was granted and affixed to *Property*, as that a Person might constitute whom he pleas'd to possess his Goods after his Decease, yet that this should be done in such a particular manner, whereby, both the Testator's Will should remain Ambulatory or Changable during his Life (e) (2), and the *Right* of the Heir not begin till the Testator's Death, and the Party who is Heir not know so much till then; all this is invented and establish'd by positive Ordinances. For, otherwise in transferring *Right* from one to another, according

to the regular Course, it had been necessary that the Consents of the Two Parties should exist together at the same time, and, as 'twere, meet and unite: From which Union the Translation of Right is conceiv'd to arise (3). But now in the Case before us, 'tis so far from being necessary, that the Consents of the Testator and of the Heir should be united; that there is allow'd an Interval of Time, even between the Death of the former, and the Entrance of the latter; the Law, in the meanwhile, supporting the Heir's *Right*, which might otherwise sink (f).

VII. It is wont likewise, with great Pains and Labour, to be disputed; Whether the Heir by Will, can with a safe Conscience enter upon the Inheritance, when the Will was defective in any Point or Form required by Civil Ordinances? As likewise, Whether the Heir at Law, or he who was to succeed, in case the Party had died Intestate, can honestly overthrow such a Will, upon Failure of these Formalities, though he is assur'd that the Testator seriously design'd to bequeath his Goods to the Person there specified? Those who take the Negative side of both Questions, rely chiefly on the Hypothesis formerly mention'd (4), that the making of Wills is a Precept of the Law of Nature. Whence they conceive, that he who overthrows a Will thus defective, may indeed defend his proceeding in outward Cognizance, or in Civil Courts, but not in the inward Judicature, or in the Court of Conscience.

For the thorough Understanding of these Matters, we ought beforehand to observe, That National Laws are scarce in any Point more careful, or more strictly exact in requiring certain Forms and Ceremonies, than in Testaments; as well to prevent the many Frauds and Juglings which might creep into those written Instruments, as to cut off those most grievous Contentions, which Avarice would have rais'd upon the Case; scarce any thing being gotten with less Pains than a rich and plentiful Inheritance. Hence, in as much as every Person of competent Years, and not stupidly rude and ignorant is presum'd either to have known himself, or to have been able to learn from more skilful Heads, after what manner the Laws of his Country command Testaments to be made; no one is supposed to have express'd his serious Resolution in such a way as he knew would not hold good against those who should oppose it in Court; especially considering that Men are allowed so vast a Time for the settling this Business. When therefore a Testament is found disagreeable to the Civil Constitutions, 'tis easily presum'd that there

(a) *Sueton. Calig. c. 38. Add. Sueton. Galb. c. 9. Liv. XL. c. 54.*

(b) *Josephus Antiq. Jud. XVI. c. 8.*

(c) In *Anton. 942. Dio Cass. l. 50. calls this Act of Cæsar, A most Unjust Proceeding.* (d) As appears from frequent Instances in *Tacitus. Add. leg. 1. f. 38. D. depositi, l. 1. f. 5. D. ad. L. Cornel. de Falsis.*

(1) *Vid. D. l. 16. t. 3. Depositum vel contra, & l. 48. t. 10. ad Leg. Cornel. de Falsis.* (e) *Vid. l. 4. D. de adimend. & transfor. legat.* (2) See Mr. *Barbeyrac's* Second Note upon this Section. (f) *Vid. lib. 41. t. 1. l. 61. D. de acquir. Dom.*

(3) See Section the Fourth, and Mr. *Barbeyrac's* First Note upon it.

(4) See Mr. *Barbeyrac's* First Note upon this Section.

both been some Fraudulent Contrivance, or that the Testator either was not well in his Wits, or else drew up the Instrument negligently and hastily, and more by the Instigation of others, than by his own free Motion: So that the only End and Design of those Forms was, that a Forged Testament should not be set a foot instead of a True one; or a sudden and unadvis'd Impulse be admitted for a deliberate Resolution: Especially since, without any such Act, the Law calls to the Inheritance the next of Kin, those who are, ordinarily, suppos'd to have stood fairest in the Opinion and Wishes of the Deceas'd. But though it may so happen, that one who goes about to declare his Mind in this matter, upon serious thoughts and mature deliberation, may mistake as to the usual Forms; yet Courts of Judicature have no other means to be inform'd what was the Intention of the Deceas'd, than by these Instruments. And since 'twas at first allowable for the Civil Authority to put this power of making Wills under such Rules as should render it more serviceable to the publick Good, there's no need to recede from the common Decrees, for the sake of one or two private Persons; since if such a Precedent were once admitted, endless Cheats and Quarrels would ever be starting up.

Again, He who is balk'd of an expected Inheritance upon a Failure in the Writings, cannot complain of hard Usage: For, neither can he plead the Prerogative of Blood and Birth, (because then he would have succeeded without Will;) nor can any Man by Testament acquire a *Right* which shall hold good, at least in case of Opposition, unless it be squar'd according to the Statute. Wherefore such a Person must attribute his Disappointment rather to his own Misfortune, than to any Injury of others. But, notwithstanding all this, if the Will be not call'd in question, then the nominated Heir may fairly enter upon the Possessions. For the Flaw which the Civil Ordinances supposed upon defect of Formalities, doth in this Case vanish; (it being taken for granted that the Testator seriously design'd this Person for his Heir;) and really the Goods belong to him rather than to any others, after those who according to the general Course of the Law, would have succeeded by Birth, acquiesce in his Claim, and tacitly wave their own *Right*. Because a serious Purpose not declared with due Solemnity is so far only adjudg'd by the Civil Laws insufficient to transfer *Right*, as it seems to require that others should be excluded, who might challenge a *Right* to the same thing upon another Bottom.

Therefore, if the Business be not brought into Court, the want of those Solemn Forms requir'd by positive Statutes, doth not in the least affect or impair it, provided it have all Conditions besides, which otherwise, and according to the General Law of Nature, are sufficient to constitute a *Right*. So that the Failure in point of Form, seems to prejudice the Heir by Will only, if he is oppos'd by those whom the Law would have advanc'd to the Succession, in case the Party had died without Will. But when these are silent, and forbear to plead their Title, then for the Testator to have any way signified in earnest whom he intended for his Heir, is judg'd sufficient to transfer the Property. And this some Nations which were either unacquainted, or disgusted with the scrupulous Exactness of the *Roman Law*, have thought enough to make a *Will* perfectly Valid. After all, 'tis certain beyond Dispute, that they who receive any thing by Virtue of a Will which they know to be forg'd, are really guilty of a Sin, though they were not themselves concern'd in the Cheat (a). For, in the first place, the Testator did not intend that his Goods should come to them; and then, the same Goods were already assign'd by the Laws to others, upon the not appearing of any Legal Testament of the Deceas'd.

VIII. Nor, (as to the Second *Question*;) doth the Heir at Law, by overthrowing such a defective Will, whatever assurance he may have that 'twas the serious Intention of the Deceas'd, properly do any Injury, either to the Testator himself, or to the Testamentary Heir. Not to the former, because he had no *Right* of bestowing his Goods by his last Disposal on any others than the Natural Heirs, unless he had observed the Form prescribed by the Laws of his Country. Not to the latter; because no *Right* which shall hold good against the Natural Heirs can be conferr'd on him in any other way than by a Testament fram'd as the Civil Constitutions direct. Nevertheless, Persons who have courted the Fame of extraordinary Humanity, have thought it more generous to stick close to the Will of the Deceas'd though not exactly express'd according to the Forms of Law; either to avoid the Imputation of Avarice, or because Tender and Compassionate Minds are so sensibly affected with the Thoughts of Death, as not to suffer that what a Man intended for his Last Appointment should be intended in vain (b). He that will follow this Example, ought certainly to be applauded for a Noble and Bountiful Spirit. For the same Reason, those who desire the Character of

(a) Hence Tully justly censures the Act of M. Crassus & Q. Hortensius, who in the Case of a Forged Will, because they were not conscious to themselves of any Share in the Cheat, did not refuse a Share in the Advantage. *De Offic.* l. 3. c. 18. *Add. Valer. Max.* l. 9. c. 4. f. 1. (b) *Plin. L.* 4. *Epist.* 10. You are wont most religiously to observe the Wills of the Deceas'd; the bare understanding of which (however it be express'd) is to a good Executor the same as the nicest Form of Law. *Idem* l. 2. *Epist.* 16. I have fix'd it as a kind of Private and peculiar Law to my self, to defend a Will as Perfect, though deficient in some Legal Point. *Idem* l. 5. *Epist.* 7. This Testament, if you regard the Law, is null; but if you consider the Intention of the Deceas'd, is firm and valid. As for my part (though I fear the Men of my own Profession will not relish very well such a Declaration) I am more sway'd by the Testator's Intention, than by any exactness of Law.

great Benevolence, are careful to perform the Last Commands or Requests of their Relations or Friends, though somewhat burthenfome to themselves. On which occasion we may take notice of that Irregular Will in *Lucian*, (a) *Where a poor Man bequeaths to one of his Rich Friends his Mother to keep, and to another his Daughter to match her off, and to give her a Portion.* Yet still on the other hand, he is not to be censur'd, who doth not refuse an Advantage allow'd him by the Laws of his Country.

The *Questions* which remain are to be determin'd by the Customs and Ordinances of particular States (1): As how far a Man may be authoriz'd to divide his Estate amongst many, either all Co-heirs, or some Heirs, and others Legatees. As likewise, Whether an Inheritance passeth down with a full conveyance of *Right*; or whether under the Nature and Burthen of a *Trust*? On which Points the Civilians discourse at large (2). But this the Law of Nature manifestly requires, *That the Burthens and Debts incumbring an Estate, shall lie on the Heir*, (3) *by whatever Means he succeeds*: Yet not beyond the Value of the Inheritance, nor so as that he should be bound to make up the Deficiency out of his own Separate Fortunes, unless he hath laid a particular Obligation on himself to that purpose.

IX. We usually distinguish from Testaments, *Donations in Case of Death*; (4) by which both Parties living and consenting, one transfers on the other a *Right* to his Goods, if he chance to die. Of these there seem to be Two kinds especially remarkable.

One, (5) When a Man conceiving himself to be under a probability of Mortal Danger, so grants a Thing to another as not to make it *his* immediately upon his acceptance, but only if the Danger really proves Mortal as he expects: Or, when a Man makes his own Death, which he apprehends to be near on account of the present Danger, the Condition of his Grant; so that if he escape the Danger, the Grant is void (b). The other, When any Person makes over

to another his Possessions after his Death, reserving to himself in the mean time, the Possession, and the full Use and Profits; but in such a manner, that the Donation shall, before his Death, be revocable on some particular Cause; as if the other party should afterwards offer him some signal Injury; or if he himself, being Childless when the Grant was made, shall afterwards have Issue of his own.

But, If the Donor made his Grant reversible, not on any External Condition, but meerly of his own Pleasure, then the Grantee shall acquire no *Right*, so long as the Donor retains a Natural Ability to change his Mind; that is, so long as he continues Master of his Reason. For, as on the one side, he is not under any *Obligation*, who may release himself when he plealeth, without any Payment or Performance; so on the other side, a bare Hope, which may be taken away purely at another's Fancy, cannot come under the Name of *Right*. The *Right* therefore of the Grantee shall commence only upon the Donor's Decease; and consequently this Act approacheth near to the Case of a Testament, strictly so call'd.

But, when a Person moved with the Thoughts of any Danger which threatens his Life, so grants a Thing, as to make it immediately upon acceptance, belong to the other Party, and doth not recall it, upon escaping the Danger, then the Promise shall be rather put in the Class of Ordinary Donation, or such as are made without any regard to Death. (6) Though in case the Grant was very large, and such as will weaken the Donor's Estate, much more if it comprehend the whole Possession, it shall be presum'd to have been made only upon his present Prospect of Death, and not to hold good unless he so miscarried.

That kind of Grant likewise, by which a Man transfers Property on Another, without the Power of retracting, yet so as to enjoy the Use and Property during his own Life, is to be reckon'd amongst the Ordinary Donations, or such as are made between Living Parties.

(a) In *Toxar*. p. 47. t. 2. Ed. *Amst.* (1) See Mr. *Daumat's* 2d part *des Loix Civiles dans leur Ordre Naturel*. See D. B. XXVIII. to the 39th, and the *Institutes* B. II. from Title the 10th, to the End. (2) Vid. *Instit.* Lib. 2. t. 23, 24. D. L. 36. t. 1. *Ad Senatus consult. Trebellian.* (3) See the next Chap. the last Section. (4) Vid. *Instit.* L. 2. t. 7. f. 1.

(5) Vid. D. Lib. 39. t. 6. *De Mortis Causa donation. &c.* Leg. 2. (b) See an Example in *Homere*, *Odyss.* Lib. 17. v. 78, &c. It may not be altogether improper to rank under the same Head the Act of King *Philip*, in *Livy* (l. 32. c. 38.) who finding himself under a necessity of engaging with the *Romans* in Battle, delivered the City *Argos* to *Nabis*, as 'twere to hold in trust; to be restored in case he got the Victory, but to be kept if he proved Unfortunate.

Add. *Diodor. Sic.* l. 15. c. 19. p. 341. C. Ed. *Rhodom.* Where he speaks of *Amyntas* his Gift to the *Olynthians*.

Thus *Hercules* speaks in *Euripides* (*Alcest.* v. 1020. &c.)

With you I leave the Dame, to be restor'd  
When I return and lead in Triumph home  
The *Thracian* Steeds, when first the Tyrant's Fate  
This Hand hath seal'd. But if my Wishes fail  
(Which Heaven avert!) then keep her as Your own:  
Add a new Honour to Your Family.

(6) In the *Roman* Laws this passes for a *Donation in Case of Death*. See the above-cited places in the *Digest*.

## CHAP. XI.

## Of Succession to Persons who Die Intestate.

According to the disposal of the Law of Nature, without any particular express Act of the former Lord, the Properties of things are said to pass in *Successions to Intestates*. For *Property* having been at first endued with such a Force and Power, as that by virtue of it, a Man was enabled not only to do what he pleas'd with his Goods during his own Life, but likewise effectually to transfer them upon others after his Death; it did not seem probable that if a Person was found to have made no settlement of his Goods whilst he lived, he was therefore willing they should after his Death become, as it were derelict, and lie free to any that would take possession of them (a). In this Case then, Natural Reason suggested, That Men ought to follow the *Presum'd Will* of the Deceas'd, or such a disposal as he might most probably be suppos'd to have design'd. Now in doubtful matters every one is suppos'd to have design'd that, which is most agreeable both to his *Natural Inclination*, and to the Engagements of his Duty (b).

II. The Regular Course of *Natural Inclination* is this, That we should labour to make the most plentiful Provision for those who descend from our own Body, and next to these for the rest who are allied to us in the degrees of Consanguinity: For nearness of Blood commonly unites and engageth Mens Minds in a particular Affection; and almost all Persons have this Desire implanted in them, that they especially wish well to their own Families, and would have them succeed and flourish as much as possible.

As to *Natural Duties*, one of the chief of them is, *That we take due care for the maintenance of those, whom Nature hath enjoin'd us to cherish with a peculiar concern and regard; as likewise, that we shew our selves grateful towards our Benefactors.*

Now although it might so happen that these *Presumptions* should often vary from the Real Intention of the Deceas'd, yet the Peace and Tranquillity of Mankind required, That no particular Conjectures should be easily admitted against these Common Rules; since by this means a Door would be opened to endless Contentions. And therefore the present Affair in the Intentions of the Deceas'd is considered, not so much according to what it was, as according to what it ought to have been, and agreeably to the Rules of *Duty*. Amongst which one of the first Rank is this; *That no Man give occasion to*

*Ruptures and Quarrels amongst others* Hence it is expedient for the Common Peace, that some General Method should be follow'd in this Business, though the Intention of some few should happen to be neglected, rather than that by endeavouring to satisfy the Desire of every private Person, we should involve our selves and others in endless Difficulties.

Besides, He who would have his own particular Purpose absolutely obey'd, ought to have expressly signified thus much. Thus nothing is more usual, than for a Father to love one of his Children with a more ardent Affection than the rest: And then who doubts but he is willing an extraordinary Provision should be made for his Darling's Subsistence? Yet if he die Intestate, they shall divide the Inheritance by equal shares; not as if 'twere repugnant to the Law of Nature, to allot one Child a larger Portion than another, but because there would arise infinite Disputes in Families, if the Father's Affection were to be the Measure of parcelling out Estates. The same Inconvenience would follow, if a Man dying Childless should leave several Brothers, to whom he express'd very different degrees of kindness in his Life time.

Again, 'Tis no uncommon Thing for a Man at his Decease to leave behind him a Kinsman in some remote degree, for whom he had never any particular Passion, and to whom he was never oblig'd for any Service or Favour; whereas, on the other side, he may have ow'd all his Fortunes to the Kindness of a Stranger. Who will not say, That the Deceas'd set a much greater Value on his Benefactor, in this Case, than on his Relation? yet because to enter into a Comparison between the Ties of Blood, and of Gratitude, must have occasion'd many Controversies difficult to be resolv'd, it hath been the Judgment of all Nations, that in the Case of Intestates, a Kinsman shall be prefer'd to a Patron, or Benefactor. Especially, since if a Person on account of a Kindness bestow'd, were to stand in the Roll of Inheritance, before the Relations of the Deceas'd, he might seem to have performed the former Act more as a Usurer, than as a Friend. But if the Benefactor were preferred in the Express Will of the Deceas'd, 'tis but Equity that the said Will should be obeyed.

From all which it appears, that Natural Reason in deciding the Case of Succession, upon default of Testamentary Disposals, re-

(a) Pindar Olymp. Od. 10.

ΠΑΥΤΕ ὁ λαχὼν ποιμένα, &c.

Those Riches grieve the Dying Man  
Which Strangers Hands must seize

(b) Comp. Grof. l. 2. c. 7. Sect. 3.

gards the Intention of the Deceas'd Party, not as it was strictly in it self, concerning which there is often very little assurance; but according as it agrees with the Common Inclinations of Mankind, and with the Measures of Duty, and so as that no Fuel may be administered to Controversies and Contentions (a).

This Judgment of Natural Reason is seconded in all States by Civil Ordinances; as well that the Avarice of some Persons might not stir up desperate Quarrels amongst those who seem'd to have equal Reason on their side; as that this whole Affair might be wisely accommodated to the publick Safety.

III. In the Succession, therefore to *Intestates*, by the guidance of Reason, and by the consent of all the known Kingdoms, Children have the preference of all others, even of Parents themselves (b). That which so highly favours the Childrens Claim is, not only the Obligation laid by Nature on their Parents, to provide for their Maintenance and good Institution, but likewise that strong and vehement Affection, which can only be extinguish'd, (and that very rarely) either by the Enormous Wickedness of the Children, or by the unusual Barbarity of the Parents.

IV. As to that Maintenance, which Parents owe their Children, it hath been doubted by Authors, whether the Obligation to pay it, were Perfect or Imperfect, or whether it belong'd to Expletive or to Attributive Justice (c). 'Tis the Opinion of some, *That Parents do indeed owe their Children Maintenance, but then 'tis by the latter kind of Justice only, and not by the former; so that Parents would act very inhumanly should they deny them this Assistance; yet Children have no Right to challenge it from them against their Wills, this being the proper Effect of Expletive Justice: though Civil Statutes may invest Children with a full and perfect Right in this Matter.* But we are rather inclined to think, *That Parents lie under a perfect Obligation to maintain their Children, so long as they are unable to maintain themselves; and this Duty seems to be laid upon them, not only by Nature it self, but by their own Proper Act, in bringing them into the World. For they would be in the highest manner injurious to*

their Issue, should they have given the Children Life, for no other Reason, but that they might afterwards see them perish. By the *Act of Generation* therefore they seem to have voluntarily bound themselves, to endeavour as far as in them lies, that the Life which they have bestow'd shall be supported and preserved. And thus the Children will have a *Perfect Right* of receiving Maintenance from their Parents. Yet this Right is hindred from producing all its Effects by the Natural Weakness of Children under that Age in which they cannot provide for their own Support. And consequently they do not so much want Right as Power and Strength to execute that Right; only in some Points the Civil Ordinances help them out, and compel their *Parents* to keep and feed them, upon refusal. Though through the Wise Ordering of the Creator, the Natural Affection of *Parents* is of so great force, as that commonly speaking, they joyfully undertake and discharge their *Duty*, without the compulsion of the Civil Government.

V. Not only those things which are necessary for the preservation of Natural Life fall under the Term of Maintenance or *Alimony*, but those likewise which fit and prepare a Man for a Social and Civil Life. And the former are due 'till such time as the Children are able to support themselves by their own Industry. As for the Measure of what ought to be spent on Education, in training up Children for a Civil Life, it is to be Stated according to the Fortunes of the Parents, and the Genius and Capacity of the Children. Thus much at least is required, *That they be enabled to become Honest and Useful Members of Human Society.* But this is a General Rule in the whole Affair; *That as Nature doth not command Parents to pinch and defraud their own Inclinations, and to make themselves miserable for the sake of their Issue; so a Parent plac'd in a high and wealthy Condition, is no doubt, in fault, if he do not take care that his Children be brought up after the most Exact and Accomplish'd Manner of Institution.*

VI. Under the General Name of *Children* (1) are comprehended not only those of the First degree, but those too of the Second, &c.

(a) Add. Bæcler, ad Grot. l. 2. c. 7. f. 13. (b) See 2 Corinth. XII. 14. Rom. VIII. 17. *If Children, then Heirs.* Aristot. Nicom. VIII. 14.

Parents have a more certain knowledge that such Persons are their Children, than Children can have that such are their Parents. And in this Case there seems to commence a stronger Relation from the Cause to the Effect, than from the Effect to the Cause.

Isæus, Orat. V.

The Law it self assigns over to the Son the Goods of the Father, and allows not him to make a contrary Will who hath Legitimate Issue. Idem Orat. II. *If a Man deceasing leave Daughters lawfully begotten, he can give away nothing, nor make any disposal without their Consent. And again, a little after, The Law says, a Man shall dispose of his Goods at his own pleasure, if he leave no Legitimate Sons; but if he leave Daughters, their pleasure is to determine his Disposal, and not his own. Therefore with their Daughters Consent, they may give and bequeath, or appoint any method of Succession. But without such Approbation, they cannot adopt an Heir, or put their Fortunes into other Hands.*

Add. Lib. 48. t. 20. Leg. 7. Princip. D. de bonis damnator.

Julian in *Cesarib.* *It is the Legal Custom to let the Sons succeed to what the Fathers possess; and this is a Rule which we all desire to see observed.*

Thus *Valerius Maximus* observes (L. 7. c. 7. Sect. 2.) that the *procreacionis vinculum*, the Band of Generation, is the strongest and closest Tye which can affect Mankind.

(c) Vid. Grot. dict. loc. Sect. 4.

(1) Vid. D. Lib. 50. t. 16. *De verbor. significat.* Leg. 220. & *Instit. Lib. 1. t. 14. Qui testamento tutores dari possunt;* Leg. 5.

whether descending from Sons or Daughters; in case their nearer and more Proper Parents are not able to maintain them (a).

Farther, Maintenance is due not to Legitimate Children alone; but to Natural, (1) and even to Incestuous Issue. For what reason is there that the Poor Innocent Infant should be suffer'd to famish for another's Sin? Yet if the latter be left together with the Legitimate Issue, they shall not easily challenge to be admitted to equal Shares, unless the Parents made express Declaration to this purpose (b).

In respect of these several parts of Maintenance, upon the Parent's Decease during the Minority of the Children, the Inheritance is not only theirs if he died Intestate, but farther, it cannot rightly be taken from them by his Express Will so far as is necessary for the obtaining this End. For it doth not seem probable that a Child of these Years should be capable of committing any such Offence as might render him unworthy of so needful a Support (c).

VII. Whatever exceeds this Proportion of Maintenance, is due to the Children when able to provide for themselves, not so much by any express Command of the Law of Nature, as upon this Principle, that commonly speaking, Parents desire that none should fare better than their own Descendants. Therefore 'twas a very singular Disposal, that of *Crates the Theban*, who lodg'd his Money in the Hands of the Bankers upon these Terms, *That if his Children proved Ignorant, it should be restored to them; but if they happen'd to be Philosophers, it should be distributed amongst the common People*; because Men of that Profession could be in want of nothing (d). As to what some have advanced, That Parents get all for the sake of their Children, and therefore the Children, even in the Parent's Life-time, have such a Right to their Goods, as shall be valued against them, in other Cases, beyond the Necessaries of Maintenance; this is absolutely false: For, every Man in his Gettings hath first of all an Eye to himself, and labours chiefly on his own Account (e); but what remains above his Private Necessaries, he is willing should pass to those who are dearest to him, as commonly, his Children are presum'd to be (f). And Children have thus far only a peculiar Title to hope for their Parent's Estate, as that in case of no express Will to the contrary, their Claim is pre-

ferr'd to all others; and because it very rarely happens, that Parents are induc'd to lay aside this Ordinary Affection (g).

It is well enacted by the Roman Laws, *That every Parent who dis-inherits his Child, shall be oblig'd expressly to give his Reason for so doing; and that some certain Causes only shall be sufficient to justify him in this Proceeding.* Nay farther, the same Laws gave the dis-inherited Children an Action, *de inofficiso Testamento*; Of a Will not made according to Natural Affection and Duty. The Design of which was not to bring into dispute, Whether or no the Testator had a Power of transmitting his Goods to others, rather than to his Children, upon just Causes; but to discuss and examine the Reasons which mov'd the Deceas'd to make a Settlement contrary to the common Inclinations of Mankind. And if, upon such a Hearing, it was discover'd that the Father thus neglected his Issue, either through his own absurd Fancy and Humour, or through the fraudulent Intrusion of others, the Inheritance was by publick Authority avowed to those to whom it would otherwise have descended, had the Father consulted with Reason and Conscience in his last Disposal. And therefore *Cicero* (h) well replies upon *Erucius*, who charg'd his Client *Roscius* with a Design to dis-inherit his own Son, *It ought to have been the Business of the Accuser, to lay open all the Sins and Vices of the Young Man, which might be suppos'd able to incense the Father to such a height, as that he should once entertain a Resolution of doing Violence to Nature it self, of banishing that Affection which was so deeply rooted in his Mind; and, in a word, of forgetting utterly that he was a Father* (i). 'Tis remarkable under what Colour the dis-inherited Children, by the same Laws, mov'd for Relief: For it being necessary that they should ground their Complaint on a Supposition that the Cause of their Dis-inheritance was unjust, they pretended in the Form of the Action, *That their Parents at the time of making such a Will had lost the use of their Reason* (k).

Still, as to other matters, a Father ought so to favour his Children as not to lay aside his just Regard to other Duties. Hence, when he may be judg'd to have made sufficient Provision for his own Family, he is not in the least hindered from employing his Goods in Acts of Gratitude and Liberality, tho' to the lessening of his Children's Fortunes. Thus, in case a Man

(a) Vid. lib. 6. t. 61. leg. 8. f. 5. C. de bonis quæ liberis adquir. Vid. D. de agnosc. & alend. liberis, lib. 25. t. 3. leg. 5. f. 8. (1) See Mr. Barbeyrac's Third Note upon this Section. (b) Vid. Gen. XXI. 10. XLIX. 19, 20. Judges IX. 18. XI. 1, 2. Add. Bœcler ad Grot. dist. loc. f. 4. (c) Add. lib. 5. t. 1. 27. f. 3. D. de inoffic. testam. (d) Diogen. Laert. l. 6. f. 88. Ed. Amst. (e) Horat. lib. 2. Epist. 2. v. 190, &c.

Utar, & ex modico, quantum res poscet, acervo  
Tollam, nec metuum quid de me judicet hæres,  
Quod non plura datis invenerit.

Juvenal. Sat. 14. ————— Manifesta phrenensis  
Ut locuples moriaris egenti vivere fato.

(f) Vid. Nicephor. Gregor. l. 5. sub fin. (g) Nor can we, farther than this, admit of Law, the 11th of B. 28. t. 2. D. de liberis & posth. (h) Pro Sext. Rosc. c. 19. (i) Add. l. 2. t. 18. Instit. & l. 5. t. 2. D. (k) Vid. Mornac. 3d. d. 1. 2 & 4, & Grot. in for. spars. ad d. 1.

hath either receiv'd extraordinary Kindnesses from another, or is able by a seasonable Beneficence to put some great Genius, now struggling with Poverty, into a way of doing great Service; what reason is there but that he should be allow'd to devise some part of his Goods to such excellent Uses? It's plain, Antiquity highly celebrated the Action of King *Attalus*, who having been oblig'd by his Brother *Eumenes* with very singular Favours, left his Kingdom to *Eumenes's* Son, tho' he abounded in Male Issue of his own (a).

VIII. Neither doth a Father lie under any Necessity of dividing his Goods amongst his Children in equal Shares; but he may assign to one or two somewhat above the rest, as an extraordinary Bounty; either on account of singular Merit, or of great and illustrious Hopes, or even of particular Affection (b). So likewise in distributing Portions, a just regard may be had to the Credit of the Family, that it may hereafter retain its Strength and Splendor. If this Interest cannot be secur'd upon an equal Division of the Patrimony between many Children, the Father may without any Breach of the Law of Nature, devise the chief part of his Goods to one, and command the rest to sit down contented with smaller Portions. Hence the Rights of Primogeniture obtain'd among many Nations, which according to the most ancient Institution, conferr'd on the Eldest Son the Regal Government of the Family, the Domestical Priesthood (1), and double Share of what his Father possessed. Which double Proportion was design'd to defray the Charge of Entertainments, and of Religious Ceremonies; as *Grotius* conceives (c) (2).

On the contrary there have not been wanting Nations, where the Younger Brother succeeded to the largest Share of the Inheritance, or at least have their Option, to chuse what part they like. Which Custom is built on this Principle, *That the Elder Brothers have for a long time enjoy'd the Benefit of Education from their Parents; of which the Younger being often depriv'd by too untimely a Loss, they deserve some Consideration to requite and comfort them under their Disadvantage.*

Tho' the latter of these Institutions seems more agreeable to low and mean Families, the former to the Great and Noble.

So again, When Daughters marry into other Families, 'tis not necessary that they should

receive Fortunes out of their Father's Estate equal to their Brother's Shares. For 'tis a very foolish Argument, to imagine, that a Father must needs act contrary to his Duty, in making an unequal Distribution of his Goods amongst those whom he hath equally begotten. Therefore *Pliny* (d) speaking of a Lady who had left Two Thirds of her Estate to a Nephew, and but One Third to a Niece, calls it *Honestissimum Testamentum, A most honest and worthy Testament.*

And hence too, it may be appointed not only by Statute, but by bare Covenant likewise, That Children born in Concubinage, or in such Marriage as is construed good and just only in a Natural Sense, not in the Eye of the Law, shall claim no more than necessary Maintenance, or at least shall be excluded from the main Inheritance (e).

And here, by the way, we cannot but wonder why *St. Austin* (f) should pass so severe a Censure on the *Voconian* Law, by which Female Issues were incapacitated to receive in Inheritance above such a certain Sum. It's plain the *Spartan* Law was far more grievous, which utterly forbid the giving Portions to Virgins; for this Reason, as *Plutarch* tells us; (g) *Lest some should remain unmarried for want of larger Fortunes; and others again be courted for their Riches; but that every Man in seeking out a Partner for himself, should look wholly into the Manners of the Woman, and make Virtue alone the Rule and Standard of his Choice.* Nevertheless, this is a Point which requires great Caution and Prudence, lest a Father should sow the Seeds of Envy and Hatred amongst his Children, if, without very weighty Cause, he should seem to have treated with unequal Favour those who were equal in Merit and Degree (h). And the Divine Law of *Deut. 21. 17.* is grounded on the strongest Reason; lest the Father charm'd with the Enticements of his now beloved Wife, should either frame a false Cause for discarding the First Born, the Son of a former hated one; or should catch at every little Failing to his disadvantage. 'Tis indeed altogether the safest course, not to recede in this Matter from the direction and disposal of the Laws of our Country (i). (3) Which made my Lord *Bacon* (k) observe, *That Younger Brothers, though otherwise commonly Fortunate, are seldom or never so, where the Elder are disinherited.*

Hence it is, that in Case the Father Die Intestate, and the Laws of the Land ordain no-

(a) As we find the Story in *Plutarch, de fratern. amor. & in Apothegm.* The like Instance we read in *Hieron Orosius de gest. reg. Emanuel. l. 4. p. 117.* (b) See *Gen. XLVIII. 22.* (1) It is not certain that Priesthood was a Right of Primogeniture. See *Mr. Le Clerc on Gen. XXV. 31.* (c) Add *Deut. XXI. 17.* Of the extraordinary Prerogative of the First-born amongst the *Japense.* See *Bern. Varen. Descript. Japon. c. 15.*  
 (2) In *locum Deut. cit.* (d) *L. 7. Ep. 24.* (e) *Vid. Grot. lib. 2. c. 7. f. 8. sub. fin. & Boecler ad d. l.*  
 (f) *De Civit. Dei. l. 3. c. 31.* His Words are, *ea lege quid iniquius dici aut cogitari possit, ignoro. I know not what could be said or thought of, more unjust than that Law.* The Law he speaks of was made at the motion of *Cato* the Censor, and Enacted, That none should leave a Daughter above five and twenty thousand Sesterces in Inheritance: as *Paulus Manutius (de L.L. Rom.)* shew'd from *Dio. Cass. l. 56.* Though *Asconius Padianus, (ad Orat. Cicer. in Verrem de prætura vrb.)* reports the Thing thus: *Voconius* prefer'd a Law, That no Census, i. e. no very Rich Person should make his Daughter his Heiress. He had said before, *the Ancients call'd those Persons Censu, who own'd themselves before the Censor to be worth an Hundred thousand Sesterces.* Add *Liv. Epit. l. 41. Quintil. Declam. 264. Gell. l. 7. 13. 17. 6.*  
 (g) *Apoth. Lacon. 227, 228. Ed. Wech.* (h) See *Gen. XXXVII. 4.* (i) *Vid. Charron de la Sageffe, l. 3. c. 14. n. 38. Montaigne's Ess. l. 2. c. 8.* (3) See *Mr. Barbeyrac's 3d Note upon this Sect.* (k) *Essay 7. towards the End.*

thing to the contrary, Children succeed to the Inheritance, with equal Shares: Because, when the Point is doubtful, those who stand related to the Deceas'd in an Equal Degree, are presum'd to have been equally beloved. Now those likewise are accounted *Equal Shares*, which though not strictly so, because inferior, perhaps, in value to the rest, yet have been taken by any one of the Co-heirs, either by his own choice, with the consent of his Fellows, or by their Assignation, or by the Decision of Lots (a).

IX. But we are obliged to add on this Subject, that not only the Laws of particular States, but Natural Reason it self allows more favour to Legitimate than to Natural Children; though the latter partake no less of the Father's Blood than the former. For they who owe their Birth to a Man's Irregular Lust, without any serious Intention, can on no account enter into comparison with those who were begotten for the increase and defence of his Family, and upon the desire of having Heirs to succeed him. But if any Person is inclined to advance a Natural Son to the Station and the *Rights* of Legitimate Issue, in a State of Nature he may fairly do it after he hath once taken care that no Injury shall thereby accrue to his Children who are properly Legitimate, or to any who have obtain'd the next *Right* after them: Under Civil Government he must proceed in the Affair as the Laws permit and direct (b). *Aristophanes* (c) reports, it was one of *Solon's* Laws, *That upon failure of Legitimate Offspring, the Inheritance shall be shared by the next of kin: But that a Bastard shall not be deem'd next of Kin, nor any Relation be supposed between him and the proper Sons* (1). On the contrary, amongst the *Mahometans*, as to the point of sharing the Father's Estate, there is no difference observed between the Sons of the Wife, the Concubine, or the Servant Maid.

When a Man is desirous to raise Issue rather by a Concubine who hath engag'd her self to be true to his Bed, than by a Proper Wife, for the benefit of his Children by a former Marriage, the Sons of the Concubine, shall, even without (2) any express Will of the Father, be postpon'd; and upon receiving moderate Portions, shall leave the main Inheritance to the others. Yet in Case a Man hath therefore taken a Concubine, that he might avoid the Pride or the Expences of a Wife, or will not admit her to his Name and Honour, or

for some other Political Reasons, or on account of some Covenant or Obligation which he lies under; then the Publick Ordinances of the Common-wealth are to determine, whether such Children shall be admitted to an equality with others born in Lawful Wedlock; or whether, upon failure of these, they shall exclude the next of Kin. For if the Man were absolutely free from the Restraint of Positive Laws, I see nothing that could be offer'd in prejudice of the Concubinary Issue, in this Case; since the Cohabiting of their Father and Mother amounted in Natural Consideration, to a True Marriage: Especially if the Father in the Business of their Education, and in his Actions and Expressions of Affection towards them, hath never made any distinction. Hence I should be of Opinion, that *Jacob's* Sons born of his Handmaids, should have succeeded to equal Shares with the rest, even upon supposition that their Father had made no such express Disposal; because we do not find that he ever treated them in a different manner. But still, if the Father shall particularly declare, That he refuseth to enter into solemn Marriage, for this Reason, *That what he hath may descend to the nearest of his Collateral Kindred*, (as some Political Considerations may now and then move a Man to do,) then even the Concubinary Children in the fairest Case shall be allow'd to claim no more out of the Estate, than a bare Maintenance, or whatever the Will of their Father, or the Laws of the Land assign them more (d).

As the bare Law of *Nature* knows no difference of Rank and Degree, so according to that, 'tis the same Thing whether a Man have Issue by a Wife of a more Illustrious, or of a more Obscure Condition, provided she is honestly betroth'd to him. If therefore in any Place the Children of a less Noble Mother are allow'd less Priviledge and Favour, this is wholly owing to Positive Constitutions. Which likewise as they may upon account of some Reasons of State postpone the Concubinary to the Legitimate Race, and not admit them with the *Ascending Line* upon failure of the *Descending*: So they can scarce in Equity, utterly exclude them, if there was no Original Fault in the Act of Generation. But then these are by all means to be distinguish'd from Children begotten in a way Naturally Sinful, as in Adultery or Incest: Who how clear soever they may be of any share in their *Parents* Guilt (e), yet shall on account of it be obliged to rest

(a) *Quintilian's* Observation (Declam. 5. p. 65, 66. Edit. Lugd. Bat.) is not unworthy our Remark. *We have the same Natural Affection towards all our Children, without any difference or degree; yet, taking any one of them by themselves, we commonly find some peculiar Reason for our fondness, and without breaking the equality of their Endearment to us, there is somewhat again which by a tacit Instinct of the Mind engageth us to set our Love deeply upon each in particular, as if he were the only Object of it. One is recommended by his precedency in Birth; another by the Innocence of Infancy; a third by a Sweet Aspect, and a Face that invites a Kiss: Some are especially valued for their Honest Gravity, and Severe Plainness of Temper: In some we love their very Misfortunes and Calamities, and embrace with a peculiar pity a Maim'd Limb, or a Weak and Distemper'd Body. But still the General Equality holds good; whilst whatsoever any of them seems to want to render him amiable in one respect, is made up to him by some other advantage above the rest.*

(b) Vid. lib. 5. t. 27. l. 6 & 7. C. de Natural. lib. (c) In *Avibus*. (1) See Dr. *Potter's* Antiquities of Greece, B. IV. c. 15. (2) In all the Editions of the Original 'tis quite contrary, the Word *Sine* being omitted.

(d) Add *Baclar* ad *Grat.* d. l. Sect. 8.

(e) Vid. *Gratian* c. 3. &c. Distinct. 56.

satisfy'd with Maintenance only, and shall not be admitted with the other Children, who were begotten on the hope and prospect of inheriting their Father's Possessions. But the Parties could entertain no such hope of raising Heirs, when they concurr'd in these Impurities; since they wish that their Sin may perpetually lay conceal'd rather than be the means of producing those who should, as it were, bear Publick Testimony to the Shame and the Wickedness of their Parents.

X. *Grotius* (a) farther remarks, that there are Two more Conditions still required in the Succession to *Intestate*, *That the Children appear to have been really begotten by him whose Estate they claim, and that there be no Tokens extant of a contrary Will.* For no Man shews a Fatherly Affection for Children begotten by others; and a Presum'd Will must always give place, when contradicted by an Express Declaration and Disposal. As to the first of these Conditions; That such a Person was the Father of another, cannot always be either demonstrated by indubitable Arguments, or so clearly made out by Testimony, as in the Mother's Case; especially, where Women live under no other Guard or Restraint besides their own Modesty and Conscience: The main Proof therefore in this Point is, the certainty of Marriage; by which Union the Wife both engageth her Faith, to be true to her Husband's Bed, and likewise is plac'd as it were under his Inspection, he at the same time receiving a Power over her Body. Now all Persons are presum'd both to observe the Faith they have engag'd, and to exercise the Power they have receiv'd, unless there be direct and manifest Evidence of the contrary. So that every one seems to be, as it were, in possession of this *Right*, that he shall be deem'd the Son of him who appears to be join'd in Marriage with his Mother (b). And no Man, unless he is out of his Wits, will disturb himself in this *Possession*, and accuse his Mother of Adultery, for the sake of finding a new Sire (c). If others attempt to bring this Matter into dispute, it shall be incumbent on them to prove their Charge: As, for Instance, *That the Pretended Father at the time of the Conception was disabled by Sickness, or was absent in a distant Country* (d).

XI. As to the Second Condition, it is judg'd another Exception against a Son's succeeding to an *Intestate* Father, if it appear that his Father hath expressly desired and declared the contrary: As, suppose, if he hath either aban-

don'd (as was usual amongst the Ancient *Greeks*;) or dis-inherited him, as 'twas a Custom among the *Romans* (1).

We have before intimated, that very great and weighty Causes are requir'd to justify either of these Proceedings (e). *Grotius* adds, *That Sustenance is Still to be allow'd to the Abandon'd or Dis-inherited Son, unless his Crime deserv'd Death.* Though I can hardly see how it is possible that a Son during those Years of Minority in which his Father Naturally owes him Sustenance, can be guilty of such an Offence, as shall deserve either Capital Punishment or *Dis-herison*.

XII. On the Proposition which we before advanced, *That Parents are oblig'd to afford Sustenance to their Children, not only of the first, but of farther Degrees, in case their Proper Parents who ought to perform this Office are extinct*, is chiefly founded the *Equity* of that *Right* term'd, *The Right of Representation*; by virtue of which, (f) Children are suppos'd to fill the Place of their Deceas'd Father, so as to be allow'd the same share in the Family Inheritance, as their Father, were he now living, would receive; and consequently to succeed on the level (2) with those who stand in their Father's Degree. And it would indeed be a lamentable Misfortune, if besides the untimely loss of their Father, they should farther be deprived of those *Possessions*, which either the Rule of the Law, or the Design of their *Progenitors* had given their *Parents* just hopes of enjoying (g). But if in any Place the *Civil Constitutions* will not admit of this *Representative Right*, the Children who have been so unhappily bereav'd of their Father and of their Hopes, must endeavour to bear the Calamity as an Affliction which Providence hath laid upon them.

XIII. Upon failure of Issue in the first, and the other descending Degrees, (3) Reason suggested that *Inheritance* ought to turn back into the Line of *Ascendants*; as well in consideration that, for the most part, either the *Possessions* themselves, or at least, the first Seeds and Principles of them which the Children afterwards increas'd, proceed from the *Parents*, as because their Extraordinary Benefits give them an especial Title to this Reward: Who since they would much rather have desired, *That their Children should inherit their Fortunes*, yet when they survived them, contrary to the ordinary course of *Nature*, 'twas but equitable they should receive, however, this Melancholy

(a) *Dist. loc. Sect. 8.* (b) *Lib. 2. t. 4. leg. 5. D. de in jus vocando.* (c) *Tacit. Hist. 4. 55. Julius Sabinus, with his Natural Vanity, was strangely exalted by ascribing to himself the Glory of a False Original; Pretending that his Great-Grandmother had been very nearly acquainted with Julius Cæsar in his Gallick Expedition.*

*Jupiter aut falsus pater est, aut crimine verus.*  
*Jove's a False Father, or in Sin a True.*

(d) In *Xenophon* (*Hist. Græc. l. 3 p. 289. Ed. H. Steph.*) *Agelaus* endeavours to prove *Leotychides* Illegitimate upon these Reasons; That his Father had some time disown'd him; that he exceeded his Father in Comeliness of Body; that he was born Ten Months after the parting of his Father and Mother; that his Father *Agis* had expelled his Mother from the Royal Bed. (1) See *Bæcler* upon *Grot.* in the place above cited, *Sect. 7.* (e) *Antenor* (in *Distys Græc. l. 3. c. 26.*) resolv'd to banish his Son *Glaucus* from his Family, for making one of *Paris's* Company, at the stealing of *Helen.* (f) *Vid. Lib. 1. t. 6. l. 7. D. de his qui sui vel alien. jur. sunt. l. 2. f. 7. D. de excus. tutor.* (2) See *Mr. Barbeyrac's 2d Note* on this *Sect.* (g) *Add. Bæcler ad Grot. d. l. Sect. 6.* (3) *Vid. Grot. L. 1. c. 7. f. 5. liq. Ziegler.*

Comfort, of succeeding to what the Children possess'd. 'Tis a Condition (as Pliny (a) observes) abundantly unhappy, for a Father to be the sole Heir of his own Son.

Philo the Jew, (b) reporting, That Moses establish'd 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; useth this as an Argument to prove, that Fathers likewise may inherit what their Sons leave behind; For 'twould be senseless (says he) to imagine, that the Uncle should be allow'd to succeed his Brother's Son, as a near Kinsman to the Father, and yet the Father himself be abridg'd of that Privilege. But inasmuch as the Law of Nature appoints, that Children should be Heirs to their Parents, and not Parents to their Children, Moses pass'd 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 afflicted 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.

Some Parents too have the Additional Title of an Infirm and Indigent Old Age; under which Sad Condition their Children were, otherwise, oblig'd to maintain them: As one of the Attic Laws Expressly enjoin'd (c). Yet in case a Father hath without Reason grievously hated and injur'd his Son, without any subsequent Reconciliation, the Son may justly exclude him from the Right of Inheritance (1). It's the same with him who expos'd his Son when an Infant, utterly neglecting his Support: For here no doubt the Claim of the Foster-Father who hath undertaken the Care and Burthen of the Child's Education, ought first to be admitted. Nay farther, it seems reasonable, That an Adoptive Father should, in this Point, be prefer'd to a Natural Parent; that he may recover what he hath expended on bringing up another's Child. We are likewise to observe, That the Lawyers do not admit of Representation in the Ascending Line as they do in the Descending. That is, If a Man die without Issue, leaving a Father, and a Grand-Father by his Mother's side, the latter of these shall not be allow'd to make Claim in the room of his Daughter. A Rule which seems to be grounded on this Consider-

ation, That naturally the Hopes of Succession do not ascend, but descend: Wherefore, the Son had indeed Hopes of succeeding his Father, and might transmit the same Hopes to his own Issue; but the Mother had never any Hope or Desire of inheriting after her Children; and so could not, contrary to the Order of Nature, convey back any such Hope to her own Parents: And consequently, the nearer Claimant (2) here excludes very Justly the more remote.

XIV. When the Descending and the Ascending Lines both fail, the Succession to Intestates devolves on the Collateral Kindred. As to the order in which they are to be admitted, where the Civil Statutes do not expressly settle it, 'tis to be determin'd by Natural Conjecture: which always favours that Person, whom we presume to have stood fairest in the Affection of the deceas'd: Yet so, as that we measure this Affection more by the common Inclination of wise and sober Men, and according as it tends to the Prevention of Quarrels, than by the morose Humour of some few particular Persons. Now according to the Judgment of wise Men, Natural Reason in this Case pays an especial Regard to Nearness of Blood, yet so as at the same time to consider from what Source the respective Possessions seem'd to flow to the deceas'd, or who formerly part'd with any Thing, or suffer'd any Loss upon account of his coming into the World. Thus Aristotle's first Rule (d) is, *The Affection between Parents and Children*; and his next, *The Love between Brethren, arising from their Relation to the same common Stock, and improv'd by the likeness of Years and Education*. After these follow Brother's Children, and other Relations join'd to us by Virtue of that Fraternal Union. And then (all these being first consider'd, whom Nature, as it were, necessitates us to love and esteem;) in the last place those are admitted, whom either past Kindnesses or Agreeableness of Temper and Manners, or peculiar Likeness of Inclinations, or known Fidelity, recommends and endears. Tully placeth (e) the Degrees of Kindred in the Order following: *The first Society is in Wedlock; the next in Children; it comes then to a Family, and a Community of all Things. The Relation of Brothers come next; and after that, of Brothers and Sisters Children; who when they are too many for one House, are transplanted into others, as into Colonies. And then follow Matches and Alliances, with Increase of Kindred, con-*

(a) Panegy. c. 38. Vid. L. 5. t. 2. l. 15. D. de inoffic. testam. Lib. 29. t. 4. D. si quis ommissa causa &c. Leg. 26. C. Lib. 3. t. 28. De inoffic. testam. & t. 25. de Institut. &c. Leg. 9. & L. 6. t. 56. ad SCtum Tertull. & Lib. 3. t. 3. de SCto Tertull. (b) De Vit. Mosi, l. 3. p. 533. Edit. Genev. (c) Iseus Orat. 7. The Law commands us to maintain our Parents, under which Name are comprehended not only our Father and Mother, but our Grandfather. For these are the first of our Kindred, and from these descend the Goods and Fortunes which their Posterity enjoy. These therefore we are necessarily bound to support, even though they should have nothing to leave us. Add. Grot. d. l. sect. 5. & Ziegler ad d. l.

(1) See the 15th of Justinian's Novels, Chap. 4.

(2) Novel 118. c. 2.

(d) Nicom. 8. c. 14.

(e) Off. 1. c. 16. Of the Relation between Brothers, See Plutarch de fratern. amor, & Xenophon l. 5. Cyrop. in Cyrus's last Speech; & l. 2. Socrat. memorab. Add. Bæcler. ad Grot. diſt. loc. f. 9, 10, 11. Towards illustrating the Obligation between those of the same Blood, it may not be improper to mention the Law receiv'd in the Kingdom of Tonguin, by which all Quarrels arising amongst Persons thus allied, are refer'd to the Decision of their Common Kindred, and not brought into the Ordinary Courts of Justice; as we are told by Alexander de Rhodes, Itiner. l. 2. c. 7.

*sequent upon them. Now the Relation of Blood and the Kindness that ariseth from it, necessarily endears Men to one another.*

XV. But the high Encomiums given to Friendship in Authors, may raise a Doubt, Whether Friends are not sometimes to be preferr'd to Relations? *Of all Societies, says Tully (a), none hath more of Excellency, or of Strength, than when Good Men, alike in Manners, are united by a Familiar Acquaintance.*

So Homer (b),  
A hearty Friend deserves a Brother's Love.

And Euripides (c),  
——— A Stranger to our Line,  
If once in Mind and Manners firmly tied,  
Is worth a Thousand Kinsmen. ———

And indeed it frequently happens, that we take more Satisfaction in the Company and Conversation of an indifferent Person, than of one related to us in Blood, and intrust many Things with the Secrecy and Fidelity of the former which we conceal from the latter. In fine, We address our selves more readily to serve the Friend, than the Relation; because he, on the other side, is the more ready of the Two to assist us in any Difficulty.

But it cannot hence be concluded, That by virtue of a general Custom, coming up almost to the force of Law, a Friend is to take place of Relations, though the deceased Party should chance to have expressed more Tokens of Affection towards him, than towards them. For in the Business of transmitting an Inheritance, we are not guided only by Kindness and Good-will, but we consider farther, on whom 'tis most proper and convenient that our Fortunes should descend. And since Men are carried on by a general Propension, to wish the Family in as good a Condition as possible, from which they derive their Original, therefore 'tis commonly most convenient that our Goods should continue in our own Line. Besides, 'tis no necessary Consequence to say, I was highly delighted with this Person's Familiarity and Converse; therefore 'twas my Inclination likewise to transfer my Possessions upon him. For this Friendship between Persons not allied in Race, generally extends no farther than to a mutual Signification of Good-will, a Communication of Designs, and the ordinary Services and Offices of Life. But before I can be conceiv'd, to have join'd Houses, as it were, with a Stranger, by conveying to him my Estate, 'twill be necessary to produce an Express and Legal Will to this purpose. Thus, although according to the Ancient Manners of the Romans, in the order of common Duties, *After Parents and Children,*

*the first Place was given to Pupils or Wards; the second to Clients or Dependents; the third to Guests; and the last to the Kindred by Blood and Marriage, according to the Degree of Nearness in which they stood (d): yet in transmitting Possessions this Method of proceeding was not in the least regarded. Farther, if Friends in the Case of Intestates, were at any time to have the Advantage of Kinsmen, this would open a wide Field for Quarrels and Contentions, as well amongst the Friends themselves, if they happen'd to be more than one, as between them and the Relations. For to take more pleasure in a Man's Company, or to communicate Affairs more freely with him, is not presently to be look'd on as an Infallible Token, that he stands highest in our Affection. Many times, a Jocular or Easy Temper, Equality of Years, or Sagacity of Judgment, render the Acquaintance of a Friend more pleasant or more profitable to us, than that of a Relation, who possibly may want the same Advantages. Yet when we are about to dispose of our Goods, we are seldom sway'd by this Consideration, to favour the former more than the latter. Hesiod's Advice will here be good,*

*Let not thy Friend thy Brother's Rights In-*  
*vade (e) (1).*

Lastly, The Degrees of Kindred are easily distinguish'd and reckon'd up; but who will undertake to settle the Degrees of Friendship in so exact an order, as to leave no room for Cavil and Dispute?

XVI. But still 'tis urg'd with better Pre- tence, That those Friends at least are to be preferr'd to Relations in the Case of Succession to Estates, by whose Bounty, Counsel, or Assistance the respective Estate was acquir'd, it being but Equitable, that the Goods should return to the place, whence they Originally flow'd. Yet here likewise, there will be most plentiful Matter for Contentions; the cutting off of which ought to be made the chief Aim and Design of all Laws. For a Friend putting in his Claim with such a Plea, might be well answer'd to this Purpose: That either what he takes for Merit was not the conferring, but the returning a Kindness; or, That if he was the first Benefactor, he hath since receiv'd a sufficient Requital: or, That he gave without any hope or prospect of Return; and desired, That his Bounty should reach not to the Person only, but to the Family of his Friend: or, That what he did was undertaken upon the Principle of Glory, or of present Advantage: That, in case we had not found his Assistance, we did not want Opportunity of being reliev'd in our Distress by other Means: That it cannot certainly be determin'd how much his Aid contributed to our acquiring those Goods

(a) *Dist. loco.* (b) *Odysf. versf. ult.* (c) *Orest. v. 806, 807. Add. Val. Max. l. 4. c. 7. princip.*  
(d) *Gell. l. 5. c. 13,* (e) *Op. & Dier. l. 2. v. 707* (1) See a Treatise of Friendship writ by M. de Sacy,

which he demands to inherit: And then again, That he who hath been only useful to us in getting a Thing, cannot presently require, That we should admit him to hold the Thing in common with us. Farther, That the good Offices of Friends would be turn'd into a Mercenary Service, or rather into perfect Usury, if they were to be advanc'd to the Estate of *Intestates*, before the Relations of the deceas'd: For then a Kindness to another could not be suppos'd to be conferr'd with any other Design, than that the Receiver should only for a little time, be the Steward and Keeper of what was bestow'd, or should restore it with large Increase at his Death. Therefore, when there is no express Disposal extant in favour of the Friend, the *Right* of the Kinsmen shall obtain: Yet so as that together with the Goods of the deceased, they shall likewise take upon themselves his Obligation towards this great Benefactor; and shall endeavour, as far as in them lies, to repay it in a most grateful manner, acknowledging by whose Assistance they arrive at so ample an Inheritance. Nor is it reasonable for any Man obstinately to urge against this Judgment, that Saying of *Aristotle* (a), *We ought rather to requite a Benefactor, than to oblige a Friend, if both cannot be done together*: Or that of *Cicero* (b); *There is no Duty more necessary, than that of repaying Kindnesses*. And again; *There being two Kinds of Liberality, one of bestowing, the other of returning a Benefit; whether or no we will bestow, depends on our own Choice; but not to return the Favours of a Good Man, is absolutely unlawful, provided it may be done without injuring any other Person* (c). Because indeed, the Business of Successions to *Intestates*, by no means can be, or ought to be exactly squar'd in all respects according to the Rules observ'd in conferring and in returning Benefits. For the latter are guided by the Virtues of Humanity and Bounty, and, properly speaking, are vouchsafed to those only, who had no ground to expect them from us, but what is owing to the Suggestions of these Virtues in our Mind. Whereas the former are built on other Foundations, on the Obligation we lie under of making Provision for some particular Persons, on Nearness of Blood, and on that Propension to advance, improve, and preserve our own Family, enjoin'd by the Dictate of Nature (d). And in this Affair, that which ought to be our principal Case, is, That we establish so clear a Method as shall be expos'd, as little as possible, to Controversy and Doubt. Now,

there can be no such Way or Method more ready than this, That in Default of an express Disposal by Will, the Inheritance shall pass down according to the different degrees in which the Relations of the deceased stood nearer to him one than the other.

Hence Authors have remark'd, That Successions to *Intestates* proceed in a contrary Course to the Rule of common Kindness; it being in the former the more necessary *Duty* to give, in the latter to repay: As, in the Case before us, our Children have the Preference of our *Parents*, to whom we are much more indebted and engaged (e). Yet in what hath been here offer'd, we would not be understood to insinuate, as if the *Duty* of Gratitude were to be allow'd no place in the last Disposal of our Fortunes; but only, that 'twould be inconvenient to go about to settle a General Method for the Estates of *Intestates* to be guided by, taken barely from the presum'd Will of the Party deceased, touching the Exercise of this Vertue.

XVII. From what hath been laid down, it appears, that of all the Collateral Line the Brothers stand nearest to the Inheritance; as well on the account of the most sweet and hearty Affection by which they commonly are engag'd to us, as because they on the score of raising their Brother's Fortunes, receiv'd smaller Portions out of their Father's Estate (f) (1). With whom the Sisters are likewise to be admitted, at least to those Goods which were either Brought by the Mother, or lately acquir'd; but they have not the same Title to the Father's Possessions, which are usually design'd to preserve the Splendor of the Family; whereas Women, for the most part, marry out of their own Line. Brothers by the Father's side, in the Paternal Inheritance exclude those by the Mother's side; as again, in the Fortunes left by the Mother, the latter have the Preference of the former. In Goods newly gotten since the time my Father married the Mother of my Half-Brother, 'tis convenient that I should carry off the largest Share; since toward the acquiring these Goods the Man usually contributes more than the Woman. Upon Default of Brothers, the Brother's Sons shall come in; tho' it should seem that these ought at the same time to let in the Great-Uncles, because they too had smaller Fortunes, on account of dividing the Estate with the Father of the deceased. The same is to be said of Sister's Sons, and their Great-Uncles by the Mother, with regard to the Mother's Goods. And this Order

(a) *Nicom.* l. 9. c. 2. (b) *Off.* l. 1. c. 16. (c) Or that of *Phocion*, (in *Plutarch's* Apothegms) who being several times called upon to give somewhat towards the Expence of a Sacrifice, whilst all the rest contributed that were about him, answer'd, *It would be a Shame to give You before I pay this Honest Man*: pointing to a Creditor of his that stood by. *Add.* lib. 39. t. 5. l. 12. *D. de donation.* (d) *Isæus* Orat. 6. *All Persons as they approach near to their End, are provident in disposing of what they possess, lest they should bring their Family to Ruin and Desolation.* (e) *Lucian* Abdicat. 'Tis the Ordinance and Appointment of Nature, that the Affection of Parents towards their Children should exceed that of Children towards their Parents. *Comp. Bæcler.* ad *Grot.* d. 1. (f) *Quintil.* Declam. 321. pag. 509. *init.* *Edit. Lugd. Bat.* *What Friendship can be so happy as that which imitates Brotherly Affection? Certainly, when we would complement those whom we take for our Friends, Flattery it self cannot invent a higher Endearment than the Name of Brothers.* (1) *Vid. Xenophon.* ubi *supr.* & *Val. Max.* l. 5. c. 5. *init.* & *Stobæum* Serm. 82.

and Method shall be continued down in all other Instances; but still with this Proviso, That where the Paternal Line fails, there the Mother's Kindred shall be admitted to the Father's Estate, and so the Kinsmen by the Father, to the Mother's Goods, upon Failure of her own Line.

XVIII. But we ought well to observe, That the Rules which we have propos'd for the determining this Matter are stiled *Natural*, not because they are so exactly prescrib'd by any Precept of the Law of *Nature*, as that they cannot be alter'd, but because they are in the highest Manner agreeable to the Law of *Nature*, and seem to be the most ready Means of cutting off all Dispute, in Cases where either the express Will of the deceased, or the National Laws are silent. Yet indeed in the whole Subject and Compass of the Civil Ordinances, there is scarce any thing about which they are found more careful and solicitous than about the Disposal of Inheritances, not only for the Prevention of Quarrels amongst Relations, but likewise because 'tis the Interest of the Publick, to have this Business settled and moderated according to the Ends and Reasons of particular Governments. Hence in some places, the power of making Wills is left very free and wide; in others it is more or less abridg'd and restrain'd. Amongst the *Romans* 'twas one of the Laws of the Twelve Tables (1), That *whatever a Master of a Family, settled or bequeath'd with regard to his Family, or to his Fortunes, should so stand.* Which was borrow'd from the *Attic* System of Law compos'd by *Solon*: For thus *Plutarch* (a) reports, That the Ordinances of his, by which he gave free Subjects the liberty of making Wills, which they never enjoy'd before, was most greedily embrac'd, and was esteem'd most just and right. Now the Reason which moved *Solon* to the passing this Act, was not that he intended to defraud the Nearest Relations of their Right of Kindred, but that by setting before Men's Eyes this common Advantage, he might engage them all to contend with each other in good Offices, and that Relations might keep the greater Affection and the stricter Ties amongst themselves, considering that they must exceed Strangers in Kindness and Good-will, if they desired to be admitted before them to the Wealth of the Family (b). Besides, it seems more suitable to Liberty, and to the full extent of Properties, That *no one should be forced to leave his Goods, but to those only whom he loved more than others.* To which we may add, That *we often conceive more probable Hopes that a Stranger to our Blood may better*

*employ our Possessions in the Service and Assistance of Virtue, than some near Kinsman, whom the Expectation of a Rich Inheritance frequently seduceth to Luxury and Idleness* (c). And lastly, That 'tis some Comfort, under the Necessity of a Mortal Condition, if a Man may consign over what he hath got by his own Labour, to those whom he looks upon as his dearest Friends (d). This Exception only there was in *Solon's* Law; That *those should not be permitted to make Wills who had Legitimate Male-Children living, to whom the Paternal Inheritance was beyond all Controversy due.* It cannot be denied, but that under this ample Power of disposing of Goods by *Testament*, there crept in, as well at *Athens* as at *Rome*, a prodigious Spawn of Cheats, like a Pestilential Infection; such as Parasitical Flattery and Inveigling, especially of Old and Childish Persons, Circumventions, Forgery of Writings, and the like.

*Bodinus* (e) chiefly objects against these Testamentary Constitutions of *Solon*, That *they allowed Men to bequeath by Will Real as well as Personal Estates.* By which means, as he observes, whilst many of those Estates might happen to fall on one Person, there arose a vast Inequality of Wealth between the Subjects, whence the Poor grew envious towards the Rich; the Rich proud and insolent towards the Poor; Mischiefs that have a peculiar Tendency to the disturbing and subverting of Government: Especially since the Proverb is often made good, That *the more a Man hath, the more he shall have.* But *Bodinus* observes, That 'tis the Interest of States, where the Supreme Power is lodg'd in the People, to take care that some few Persons do not exceed the rest by too vast a Disproportion. Which likewise was the Reason of that *Jewish* Law (2), forbidding the perpetual Alienation of Land; and of that other, by which Women who had receiv'd Land in Inheritance, were enjoind to Marry into their own Tribe, least otherwise the Land should pass from one Tribe to another (f).

*Aristotle* (g) amongst his Rules for preserving a Democratical Government, gives this as one, That *Inheritances should descend not by Testament, but by Kindred, because thus the Fortunes of Men will be kept more upon a Level.* What Mischiefs were introduced into the *Spartan* Commonwealth by that Liberty of Testaments which *Epitades Ephorus* set up in opposition to *Lycurgus's* Laws, may be read at large in *Plutarch's* Life of *Agis* (h). Amongst other Nations, Men were allow'd no Liberty in this Point; or if they had any such Privilege, it was very much abridg'd and restrain'd.

(1) See the Law cited upon this Account in B. I. c. 6. s. 6. (a) In *Solon*, p. 90. (b) *Demosthen.* adverb. *Leptin.* p. 374 Edit. *Genev.* When *Solon* enact'd by Law; That every Man who wanted Legitimate Issue, should appoint for his Heir, whom he pleas'd; he did it not to rob the next in Blood or Affinity of their Right of Kindred, but that by proposing this Common Advantage, he might engage Men to contend with each other in Good Offices.

(c) *Theocr.* Idyl. 10. The Living waste the Fortunes of the Dead. (d) *Isocrat.* *Aginer.* (e) L. 5. c. 2. *De Repub.*

(2) *Levit.* XXV. 10. Upon which see Mr. *Le Clerk's* Comments. (f) See *Numb.* XXXVI. 8.

(g) *Polit.* lib. 5. c. 8. in fin. (h) *Add. Aristot. Polit.* 11. 9.

Of the *Hebrew Laws* on this Particular, *Selden* (a) and *Grotius* (b) give a full account. Of the *Ancient Germans*, *Tacitus* (1) reports, *That, they had no such things as Wills or Testaments, but every Man's Children were his Heirs and Successors: and, in default of Children, those of the next Degree, as Brothers and Uncles by both Parents.* Which place of the Historian, why we should interpret with some in this manner, That the *Germans*, who had not yet learnt the use of Letters, did not make use of Formal and Written Wills after the *Roman Custom*, which *Tacitus* for the most part hath an Eye to in that Description, we cannot yet find sufficient Reason. For amongst the *Romans* themselves *Testaments* by Word of Mouth, and without Writing were also allow'd (2). And therefore if *Tacitus* had design'd to observe, *That only Written Wills were those with which the Germans were unacquainted;* he would have express'd himself more particularly and distinctly.

Besides, That the *Rights* of Kindred were honour'd with the highest Reverence, and most sacred Veneration amongst those People, appears from what the same Historian afterward remarks. *The greater number of Relations any Man hath, whether by Blood or by Marriage, the more Respect is paid him in his Old Age: Nor are any Rewards allow'd to comfort Persons under the Misfortune of being Childless. Every one looks on it as his necessary Obligation, to undertake the Quarrels of his Father or of any near Kinsman, as well as their Friendships and Alliances.* In many parts of *Germany* at this day, if a Man hath a Son born to him, 'tis an usual Expression to say, *He hath got an Heir.*

Again, It doth not appear why a Nation, such as the *Old Germans* then were, quite ignorant of the ways of heaping up Wealth, content with the poor accommodation of Household Conveniencies, and scarcely desiring any farther advantage from their Fields, their Cattle, and their Pains in Hunting, than a daily Subsistence; why such a Nation should have any reason to desire the privilege of *Testaments*. It being an idle and unnecessary care, for those who follow this way of Life, to covet to themselves any large extent of Land. Nor is the making of a Will so necessary a consequence of *Property*, but that a State or People may introduce some one uniform Method of Inheritance, without any such express Disposal. And this will especially hold good of that People, who as *Tacitus* informs us, *assigned such a Tract of Land to such a number of People; who afterwards parcell'd it out into private Shares, ac-*

*ording to the worth and esteem of particular Persons.* If it be said, That these Men were wont, however, at their Decease, to leave some sort of Orders and Injunctions to their Family, we deny that every Act of this kind comes up to the Nature of a *Testament* (c).

This Method of Succession, as 'tis the most plain and simple, and most agreeable to the Common Inclinations of Nature, so hath it an especial tendency to the keeping up an equal proportion in the Wealth of the Subjects, to the securing a supply of Natives in a just and proper number, and to the preserving the Estates and the perpetuity of Families (d).

It hath likewise been the Common Opinion, that this must prove a new Bond of Affection between Relations, and engage them more heartily to promote each others good, whilst they consider'd, that they were, of necessity, to succeed each other in their Possessions (e). And yet those Governments seem to have settled the Matter with most Prudence, which left Men the privilege of disposing by Will those Goods only which they acquired by their proper Industry; ordaining, *That whatever they received from their Parents or Ancestors, should pass down again to their nearest Relations.* For by this Method all the Reasons produc'd on both sides of the present Question, are most happily brought to a Temperament and Union.

It is altogether strange to the Manners and Customs of us *Europeans*, what we are told of the People of the Kingdom of *Siam*, *That those who are Men of Substance amongst them, are commonly oblig'd to parcel out their Wealth into Three Divisions, one of which goes to the King, another to the Priests, (whence likewise the Funeral Charges are defray'd) and the Third only to the Children.* And no less strange is the Practice of the *Ethiopians* on the Coasts of *Guinea*; where the Goods of either Parents do not descend to their Children, but to the nearest of their other Kindred (f).

XIX. The Heir by *Will*, and the Heir at *Law*, though they succeed in a different manner to their respective Estates, yet have this Obligation common to them both, *That they shall discharge the Debts of the Deceas'd.* And that not so much on account of any Tacit Engagement which they have entred into to this purpose (g), as because these Debts are a necessary Burthen affecting the Possessions in the manner of a Tacit Mortgage. For, as *Quintilian* (h) observes, *Such is the Nature and condition of an Inheritance, that the Creditors must first be satisfied before it can effectually take place.* And so much only is to be reckon'd a Man's

(a) *De Successionibus ad bona Hebraeorum*, especially in *Cap. 24.* (b) *Ad Num. 27. v. 8. &c.* (1) *C. 20.* (2) Provided the Testator declar'd his Will by Word of Mouth before 7 Witnesses. See *Instit. B. 2. t. 10. f. 14.*

(c) The *Arabian* Impostor hath likewise publish'd Laws to regulate Successions, in his *Alcoran* under the Chapter of Wives. (d) See *Bacon's Hen. VII. p. 127.* (e) To this Point belongs the Passage of *Plato* (1 *11. de LL.*) produc'd by *Grotius*, 1. 2. c. 7. Sect. 9. and explained by *Baeler ad dict. loc.* And hence *Pliny* in *Panegy. c. 37. n. 2.* Ed. *Cellar.* so highly commends it. (f) *Jodoc Schouten. in Descript. Regn. Siam.*

(g) On which Reason depends that Disposal of the *Old Roman Law* which we meet with in *B. 29. t. 2. l. 3. D. de acquir. vel omitt. hered.* (h) *Declam. 273. p. 389. Ed. Lugd. Bat.*

Estate, as remains when All are paid their own (a). Whence, likewise, 'tis most highly agreeable to Natural Equity, that the Heir be not charged with Debts above the Value of the Inheritance (b).

(a) Add. *Valer. Max.* l. 7. c. 2. f. 11. (b) Add. *Lib.* 3. t. 6. l. 5. init. *D. de calumniatoribus.* *Lib.* 11. t. 7. *de Religiosis,* &c. l. 14. f. 1. Vid. *Lib.* 16. t. 3. *Leg.* 7. f. 1. *D. de pign. vel contra,* l. 11. *Lib.* 49. t. 14. *D. de jure fisci. Leges Wisigoth.* l. 7. t. 2. c. 19. Nor should we omit what *Gabriel the Sionite* tells us in his Book of the Manners of the Eastern Nations, That the Mussulmanni when they make their last Will, are bound to restore all that they have taken by Robbery or Violence, to the proper Owner, from whom they receive a formal Discharge in Writing: And if they know not the Person to whom restitution should be made, they lay out the Sum in Publick Buildings, as Hospitals, Moschs, and Bagnios, or else bequeath it to the Poor, or to some Religious Order.

In *Ferdinand Pinto*, Cap. 21. the Chinese Hermit adviseth *Antony de Faria*, who had been guilty of Sacrilege, to do these three things for his Soul's health; to restore what he had taken away, to beg pardon for his Offences with Tears, and to distribute largely in Charity to the Poor. Add. *Cap.* 60.

## CHAP. XII.

## Of Prescription.

IT belongs to our present Design to enquire likewise concerning that Method of Acquisition by which he who hath gotten Possession of what was really anothers, by a just Title, and with honest Intentions, and hath also held it for a considerable time without being disturb'd or oppos'd, obtains the full Propriety of the thing thus possess'd, so as to extinguish all the Right and Legal Claim of the former Owner. This the Roman Law terms *Usucapio*, because the Thing is, as it were, taken and acquired by long Use or Possession (1).

The Word *Præscriptio* in the sense of the same Law imports strictly, that Plea, Demur, or Exception by which the Person thus in Possession invalidates the Claim of the first Proprietor. Though these different Names are frequently taken for the very same Notion; and the latter now prevails in Common Use, and is the Term by which we render the former.

It may be worth our while to premise, what the Roman Law appointed or directed in this matter; because we shall hence easily gather how far the Business depends on Positive Constitutions, and how far on the Laws of Nature.

II. *Prescription*, as *Modestinus* (a) defines it, is the Addition of a Property, by means of long Possession continued to the Term of Years fixed by the Law. *Cujacius* and others, on the Authority of *Ulpian*, use the word *adeptio* instead of *adjectio*, Acquisition instead of Addition; but we do not apprehend that this makes the least difference in the Thing. For he that having gotten Possession of a Thing with honest Intention, continues his Possession to that determinate Period which the Law expresseth, may be said to have somewhat added to him, which he hitherto wanted. And again, he

to whom the Law thus adds any new Property, may be said to have acquired or obtained it.

To proceed, 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.

And First, (2) Freemen are thus excepted: For since Liberty is so sweet a Comfort, as no one can be presum'd to have neglected any Opportunity of recovering, 'tis justly suppos'd that the Party in this Case continued so long under Servitude, and did not put in his Claim to be releas'd, only out of Ignorance of his present Condition; not that by this Continuance, he tacitly consented to be a Slave. So that this long Patience under his Misfortune ought rather to make him a more worthy Object of Pity, than to be interpreted to his Disadvantage. Things consecrated or set apart for the Service of Religion are likewise excepted; and so too are the Goods of Minors, during their Non-age: For by Reason of their unexperienc'd Years, the Neglect of challenging what is their own, cannot be so far charg'd upon them, as that they ought on this account to lose it; and it would be too hard and severe if they were to suffer for the Carelessness of their Guardians: Further, the Law excepts Stolen Goods (3), Runagate Servants, and Things gotten by Violence, tho' some Third Person hath obtain'd the Possession of them by honest means.

Thus the Laws of the Twelve Tables ordain, *Rei furtivæ æterna autoritas esto, Let the Claim against things stolen hold good everlastingly.* For, as to the Robber himself, his

(1) This is the most considerable sort of Civil Acquisition. Our Author speaks of Two other sorts in his Abridgment of the Duty of a Man and Citizen, B. 1. c. 12. f. 14. The First is when a Sovereign or the Laws take from a Criminal all his Goods, at least part of them, and applies them to the Publick Treasure, or to the Person Injur'd. Of this we shall treat more at large in B. 8. c. 3. The Second sort is by Arms, or by the Law of War. Of this we have treated in Chap. 6. f. 14.

(2) Our Author forgets, in reckoning up the things incapable of Prescription, Publick Places, Goods which appertain to the Publick, such as the Exchequer, and the Dominion of a Prince. See Mr. *Barbeyrac's* Second Note upon this Section.

(3) Vid. *Aul. Gell.* l. 17. c. 8.

Crime hinders him from prescribing. And the Third Person, the honest Possessor, is likewise stop'd in his *Right*, by that Fault which is suppos'd to affect and attend the Thing arising from the unjust Means by which it was before acquired: For though, properly speaking, there is no Fault or Blemish in the Thing considered by it self, yet inasmuch as it was taken from the former Owner, in an Unjust and Villainous manner, it seem'd Equitable to enact, That his *Right* should not hereby cease or be extinct; and at the same time to take Effectual Care, that no one should be a Gainer by his Wickedness. For, since Three Years Prescription is sufficient for movable Things, it had been easy for Thieves so to secure their Booty, by carrying it off, and putting it into other Hands, as that the Lawful Owner should not be able in a search of Three Years to discover it.

Besides, Amongst the Reasons on which the *Right of Prescription* is founded, One is the Negligence of the Owner, in seeking after them. But now, since Stolen Goods are usually concealed with the strictest Caution and Cunning, this Reason cannot take place against the Persons who lost them. Yet notwithstanding all this, since it was by some subsequent Laws (a) enacted, That all Actions after a constant Silence for Thirty or Forty Years, should utterly drop, and be extinct, the *Prescription* likewise of stolen Goods, as well as other *Prescriptions*, shall be valid, at Civil Law, after so long a Period, and shall overthrow the Claim of the former Proprietor: Which how Unreasonable soever it may appear to some, who look upon it as very absurd that Injury and Impunity should, by Length of Time, turn into a Foundation for Equity and *Right*; yet it deserves Excuse on account of the General Advantage arising from it to the Publick. Because it highly concerns the Publick Peace, that Suits and Quarrels should at length be finally quash'd, and not suffer'd to run on for ever, and that the Propriety of Things should not hang perpetually (1) in Uncertainty and under Dispute. And because within the Compass of Thirty Years Mankind seem to put on a new Face, it was thought very Inconvenient that the following Age should be disturb'd upon every slight Occasion.

Besides, When a Man had been without such a part of his Goods for Thirty Years together, he was justly suppos'd to have sat down quietly under the Loys; so that there was no need of troubling so long a Possession on his account. The same Reason will hold for that *Prescription* which is sometimes allow'd in Cri-

iminal Cases (2); it seeming Unnecessary to bring to the Bar, Offences committed almost an Age since, the Ill Effects of which, Time it self hath sufficiently purg'd and effac'd, so that the true End of Punishment is now superseded (b).

III. But that *Prescription* may Effectually proceed, 'tis requisite that the Party, receiving the Thing at the Hands of a false Proprietor, do obtain this Possession by a just Title (3), or upon such Grounds as are esteem'd sufficient in other Cases for the transferring and the acquiring of *Property*. And consequently, that he act in this Matter *bona fide*, with fair and honest Intention; that is, that he be able to alledge a sufficient Reason why he thus possesseth it, and be perswaded in his Mind, that the *Property* was transferr'd really on him, and himself constituted true Owner (c). According to the Civil Law, 'tis enough if a Man had this *bona fides* (4), this Uprightness and Integrity of Thought at his first entering on the Possession, tho' he happen afterwards to discover, that the Person who convey'd it to him was not the just Proprietor. But the Canon Law requires the same Integrity through the whole Term of Years on which the Prescription is built (d); so that if a Man comes in the mean time to know that the Thing was made over to him by one who had no *Right* to dispose of it, he begins immediately to be obliged to restore it to the lawful Owner, and from thence-forward detains it *mala fide*, foully and dishonestly; especially in Case he go about to hide it from the Owner's Knowledge by Craft and Design. Which Judgment seems to approach nearest to the Strictness and Sanctity of the Law of Nature: Inasmuch as upon the introducing of distinct Properties, all Men were supposed to enter into an Obligation, *That they would, to the utmost of their Power, let every Person enjoy his own again, when they should happen to be in Possession of it without his Consent* (e). But the Compilers of the Civil Law were contented with securing the outward Innocence of Men's Actions; and authoriz'd the Possessor quietly to enjoy what he had honestly gotten; leaving to the respective Owners the whole Care of seeking after their Goods, and of challenging them upon a timely Discovery.

IV. Another necessary Condition in order to *Prescription* is, *That it be founded on constant Possession, such as hath not been interrupted either Naturally (5), as if the Thing hath return'd in the mean-while to the former Owner, or hath at any time laid abandon'd or forsaken: Or Civilly (6), as if the Owner hath*

(a) Vid. lib. 7. c. 39. l. 3 & 4. C. de præscript. 30 vel 40 annor.

(2) Vid. Cod. lib. 9. t. 22. ad Leg. Cornel. de falsis, leg. 12. (b) Vid. Ant. Matth. de Crimin. ad l. 48. D. t. 19. c. 4. & t. 20. c. 4. f. 14.

(3) Vid. Instir. l. 2. t. 6. princip.

(c) Liban. Declam. 1. pag. 194. Edit. Paris.

A Man doth not become just Possessor of a Thing barely by taking it to himself, but by holding it innocently. Hence when the Lands, which were formerly King Apion's, being left to the Roman People, every Man seiz'd on what part he liked best: Tacitus calls this way of proceeding, *Diutina licentia & injuria*, A long continued Licentiousness and Injustice.

(4) Vid. C. lib. 7. c. 31. De Usucap. transferend. &c. (d) C. ult. Canon. de præscript. (e) See Chap. 13. l. 2. of this Book. (5) Vid. D. lib. 41. c. 3. De Usurpat. & Usucap. leg. 5. (6) C. lib. 7. c. 32. De acquir. & retinend. poss. leg. 10.

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.

Bæcler and Ziegler in their Annotations on Grotius (a) observe farther on this Subject, That the Space of time during which the Prime Possessor holds the Thing of which we speak, shall be reckoned to the Benefit of him that succeeds (1) in the Possession; provided that both the former, and the latter first entred upon it, with honest Minds, and upon a just Title: For otherwise the Prime Possessor shall not be allow'd to make over his Time to the next Holder; and consequently if the former came to the Possession by Dishonest Means, the Time he pass'd in it shall not be computed towards the Prescription of the latter, though he, for his own part, obtain'd the Possession fairly and justly.

And this Rule takes place as well in a General Successor, an Heir, a Particular, as a Buyer, a Grantee, &c. But then here is the Difference between these two kinds of Successors; the last of them, though he cannot reckon the Time of the dishonest Acquirer, to lengthen out his own, yet in case he himself was not privy to the wrongful Dealing, the Fault of the said Acquirer, if it cannot be used for his Advantage, shall not turn to his Prejudice; but he shall be allow'd to compleat the Term of Prescription in his own Person (2). Whereas 'tis otherwise in the Case of a General Successor, or an Heir (3): For he cannot by his own Ignorance and honest Intention, atone for the Fault of the deceased, whom he represents, and whose Rights he takes in full upon himself.

A longer space of Time is required for prescribing against one that is absent, than one that is present (4).

So again, Movable Things may pass into Prescription, sooner than Immovables. (5) The Reason of which latter Constitution seems to be, That Immovables are judg'd a much greater Loss than the contrary; that they are not so frequently made the Subject of Commerce between Man and Man; that 'tis 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 administer much less occasion to Controversies and Suits. Plato's Rules for the prescription of Movables are as follow; *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 and security in the Country,*

*the Person that lost it shall have ten Years allow'd him to put in his Claim* (b). As for the Prescription of Immovables, this the Constitution of Plato's Commonwealth was not acquainted with.

V. The chief Reasons which the Learned in the Roman Law assign for the first introducing of Property are to this purpose; *That in order to the avoiding of Confusion, and the cutting off of Disputes and Quarrels, it is of great consequence to the Publick Welfare, that the Proprieties of Things should be fixt and certain amongst the Subjects.* Which would be impossible, should perpetual Indulgence be allow'd to the Negligence of former Owners, and should the new Possessors be left in continual fear of losing what they held.

Then 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 secur'd in the quiet possession of any Thing convey'd to him? Nor would it be a sufficient Remedy in this Case, That if the Thing should be thus challeng'd by a Third Party, the Person from whom we receive it should be oblig'd to make it good (6); 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, (7) so many Successions to be declared void, so many Possessors to be ejected? It was therefore judg'd sufficient to allow such a space, as large as in reason could be desired, during which the Lawful Proprietors might recover their own. But if through Sloth and Neglect they suffer'd it to slip; the Prætor might fairly reject their too late importunity. And though 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 Publick. But we ought well to observe, That before we can charge the Ancient Proprietor with Carelessness and Sloth, we must suppose, That he had a convenient season to exert his Diligence.

Hence it is highly agreeable to Reason and Equity, That the Time during which a Country hath been the Seat of War, shall not avail towards Prescription: As Honorius particularly decreed, *That no one should reckon towards the procuring of Prescription, that space of time in which the Vandals staid upon the Roman Ground* (c).

(a) L. 2. c. 4. f. 9. (1) Vid. D. lib. 44. t. 3. De divers. temporalib. præscript. &c. leg. 14. f. 1. (2) Vid. Inst. lib. 2. t. 6. f. 7. (3) Ibid. f. 12. Vid. D. Lib. 44. t. 3. De divers. tempor. præscript. &c. Leg. 11. (4) Vid. C. Lib. 7. t. 33. De præscript. longi temporis decem vel viginti annorum. Leg. 11. & Justiniani Novel. 119. c. 7. Vid. Inst. Lib. 2. t. 2. princ. (5) Vid. Inst. ubi Supr. (b) De LL. l. 12. p. 990, 991. Ed. Wech. (6) See hereafter in B. 5. c. 5. f. 5. (7) See the Judicious reflexion of Aratus of Sicyon in Tully's Offices, B. 2. c. 23. *And he thought it Unjust that Possessions of 50 Years should be disturb'd, because many of 'em for a long time were held by Inheritance, many by Purchaser, and many by Marriages.* (c) Procop. Hist. Vandal. l. 1. c. 3.

VI. But there's no necessity, that in order to assert the Justice of Civil Governments, in establishing the *Right of Prescription*, we should have recourse (with a certain *Author* (a)) to that power of executing Punishment on the Guilty, with which the Chief Magistrate is invested. As if the Law denied an *Action* to those who for so long a Time forbore to challenge their own, for this Reason only, Because the Parties deserve to be put into the List of Criminals, for suffering *Prescription* to be pleaded against them; whilst by thus neglecting their Property, they not only prejudice the Common Good of the Society, but likewise Sin against their own Nature, which hath in all Cases an especial regard to the Publick Advantage: And that therefore as *Solon* ordain'd a Penalty against those who were idle and negligent, so here the neglect of the Proprietor is punish'd with the loss of his *Property*.

But indeed the principal aim and design of the Law concerning *Prescription*, is not to punish Mens Defaults in this respect, but to provide, that the State be not disturb'd by uncertain Titles, and by Properties in constant doubt and suspence. Tho' it's true, that by a Person's being denied to sue for Recovery, when he hath long neglected it, he suffers some loss or damage as a necessary consequence.

Besides, To be excluded from some Advantage, lying open to those only who are vigilant and industrious in their own Affairs, doth not come up strictly to the Nature of a Punishment. For we certainly use a Figure when we say, *That an Idle Temper is a sufficient revenge to it self: Or, That 'tis Punishment enough to the slothful and unactive, that being shut out from all Posts of Honour, they are constrain'd to pass their Days in Obscurity.*

Besides, The Assertion is not true, *That those who suffer their Goods to be with-held from them by Prescription, are really Offenders against the Commonwealth.* They indeed do manifestly injure the Publick, who either abuse and squander away their Substance, or whilst they sit brooding over it, and are Proprietors only in Name, and let it grow useless for want of Application. But now a Thing that is gain'd by Prescription, is however under the care and management of some Person; so as still to be serviceable to the Occasions of the Community. And 'tis altogether the same Thing to the State, whether such a piece of Ground, for Instance, be in the hands of this Man, or of that, provided it doth not lie quite neglected, without any one to cultivate and improve it.

To these Reasons we may add farther, That when any private Person receives advantage from another's Punishment, 'tis necessarily supposed, that he was before considerably hurt or endamaged by the party offending. Whereas he who commenceth a Proprietor, by the *Right*

of *Prescription*, can on no account be said to have suffer'd harm from the Neglect of the Party whom he thus succeeds (b).

Since then the Law concerning *Prescription* is not a *Penal Statute*, 'tis idle to dispute, Why the Negligence of the Proprietor should be rather punish'd by the loss of the neglected Goods, than by some Pecuniary Mulct? Tho' it is very evident, that such a Mulct could not procure the true End of the *Civil Constitutions* in this Affair, which was, *To cut off all those Suits and Quarrels that would for ever have been springing up, and to ensure, at least, a quiet Enjoyment to long Possessors, whose Case entitles them to more than ordinary Favour.*

For in the first place, the Matter must have been brought into Court by the Claim of the former Proprietor, where the Cause would have been the more difficult and perplex'd, by reason of the Things continuing so long in other hands; and then the Present Possessor was to be ejected, whence a new Hardship would arise. For if the Fine were to go to the Magistrate, then the Possessor's Just Title, and honest Intentions were likely to stand him in no stead. Nor if the Possessor himself were to receive the Fine for a Comfort and Recompence, would all the Doubts be hereby resolv'd. Because, should the Fine be less in value than what the Possessor loseth by quitting his Hold, he must still be, in part, a sufferer: But were it as much, or more, then the Ancient Claimant would get little by his Suit. Therefore there cannot be, in the Point before us, a more ready way to Peace and Quietness, than to declare, that after the Term of Years appointed for *Prescription*, the *Right* of the former Owner shall cease and be extinct.

VII. By what Law *Prescription* was first set on foot, the Learned are not well agreed: Most ascribe its Original to *Civil* or *Positive Law*, and oppose it to those Methods of *Acquisition*, which are commonly said to proceed from the *Law of Nations*. Nay, *Cujacius* (c) goes so far as to affirm, *That Prescription doth really contradict the Law of Nations, in that it takes a Man's Property from him, without his Consent: That it interferes likewise with Natural Equity, though only for the sake of Publick Good; whilst it endamageth Private Owners, but turns to the Benefit and Advantage of the Community.* To which *De Roy* (d) answers, *That each particular Proprietor in subjecting himself to those Laws which establish Prescription, doth at least implicitly consent to that translation of his Right.* Another Reason urg'd by *Cujacius*, to prove this Establishment to be contrary to the Law of Nations, is as follows: *That, according to the said Law, no Man can constitute another as the true Proprietor of a Thing, unless he were himself so before: Whereas, by the Civil Law, he who receives a Thing*

(a) *Hugo de Roy, de eo quod justum est, l. 3. t. 3, 4.* (b) Nor doth he rightly apply to the present purpose those Words of l. 31. of Book 16. t. 3. *D. Depositi, &c. Male meritis publice, &c.* He that hath deserv'd ill of the Publick by embazling what was deliver'd to him in charge, ought to be left to struggle with Poverty, that he may serve for an Example to deter others from Wickedness.

(c) *Ad Leg. 1. D. de Usucap.*

(d) *Dist. loc.*

from one who was not the Proprietor, may yet obtain the Property of it himself, if he can prescribe for it in the usual manner. To which *De Roy* (a) again replies, *That in the Business of Prescription, the Seller, or any other Non-proprietor conveys nothing more than the Title and Honest Possession; but that the Property is wholly added either by the Standing Law, or by the Publick Magistrate, who even according to the Law of Nations is invested with just Power to make new Ordinances, and to transfer Properties from one Person to another, out of a fair and reasonable regard to the Publick Good; the party who thus suffers for his own neglect, really consenting to this conveyance of his Property, or at least being presum'd to consent by his long silence.*

Some maintain Prescription to proceed from Civil and Positive Law, upon the strength of this Argument; that in case a Man hath not originally obtain'd a Right on some other bottom, the bare length of Time can give none, as being destitute of all power to produce any effect. *For tho' every Thing, say they, is done in Time, yet Time it self can do nothing.*

Now as to the Reason here propos'd, thus much indeed is certain, *That it depends wholly on the determination of Positive Law, why Prescription should be rather compleated at the Tenth or Twentieth Year (for Instance) than at the Ninth, or at the Sixteenth:* Yet no one can deny but that the consent of all Nations, to which they were mov'd by their Care of the Common Peace, might be able to assign some Moral Efficacy to the Course of Years; at least so far, as that in process of Time, some certain Presumptions and Favours on the side of Persons in possession, should be granted to defend and confirm their Right, tho' attributed to other Causes than the bare Time it self. For tho' pure Natural Reason, and the Agreement of all the World, do not fix any one point of Time as the necessary Condition of obtaining a future Right, yet they might allow this effect to a space of very considerable extent and latitude.

Others have chose to express themselves doubtfully and timerously in the matter; being sensible of the vast Advantage which the Law for Prescription brings to the Publick; they thought it probable, that from the very Nature of the Thing, and its antecedency to any Positive Ordinance, Prescription is of force to transfer Property; since Natural Reason in the strictest manner commands the doing of those Things which conduce to the Common Benefit and Peace. But then they qualifie this Assertion, by adding, *That though the Light of Reason suggests that the Thing is highly fitting, and that 'tis expedient it should be enacted by a Positive Constitution, yet 'tis not altogether so necessary, as to be immediately establish'd by the meer Law of Nature.*

Again, Many do not stick to acknowledge, that *prescription* is not repugnant to the Law of Nature; that it carries Natural Equity along with it; that it is grounded on the fairest Right, and, as it were, on the Law of Nature; yet they decline to assert in plain Terms, *That 'tis a direct Command of the same Law* (b).

VIII. *Grotius* (c) undertaking to shew that Prescription doth truly belong to the Law of Nature, and consequently, that it may be pleaded as a fair Title amongst those who are wholly govern'd by the said Law, in relation to each other, lays the foundation of it in the tacit Dereliction of the former Proprietor: For the proof of which, he supposeth beforehand, *That Nature allows every Man to renounce and abdicate his Right when he thinks fit to hold it no longer. Now that this desire of abdicating should be able to produce any Effect in relation to others, 'tis necessary that it discover it self by some certain Tokens; it being incongruous to Human Nature to derive any outward Efficacy from the bare Internal Acts of the Mind. These Tokens are either Words or Deeds. If the Will be express'd by Words, then there's no need of waiting for the Term of Prescription, since the Right is immediately transferr'd on the other Party. And it is the same when a Man declares his resolution concerning a Thing by some Positive Deed; as suppose, if he either cast it from him, or abandon it; unless the Circumstances be such, as that we ought to conclude that he either rejected, or relinquish'd it only for a time, with intention to demand and resume it again hereafter* (d). *Thus if the Right Owner of a Thing shall knowingly deal and bargain about the same Thing with another who hath the actual possession of it, he shall justly be deemed to have given up his own Right, so that it shall fall and be extinct upon the very moment of compleating any such Bargain or Transaction. Prescription therefore can take place in those Things alone which the former Owner hath not renounc'd either by Words, or by any Express Deed, or Overt Act, but in which we presume his Inclination to leave them, from his neglecting to enquire after them, and to challenge them again. For even Non-performances or Omissions, consider'd with their due Circumstances, do, in Moral account, pass for Actual Deeds, and may prejudice the Non-performer.* (e) *But before we can presume upon a Man's Intention from such an Omission, 'tis necessary that the Omission did not arise from pure Inculpable Ignorance. Wherefore those who are in possession of other Mens Goods, do then only gain the Property of them by the Tacit Consent of the former Owner, when he knows them to be thus possess'd, and yet forbears to challenge them upon a convenient Opportunity. For there can no other Reason be assign'd, why a Person who thus knows the matter, and hath his free choice to determine accordingly, should yet be utterly negligent and*

(a) L. 3. t. 4. f. 8. (b) Add. *Grot.* l. 2. c. 4. f. 9. *Baeler & Ziegler.* ad dict. loc. f. 1. (c) L. 2. c. 4. f. 3. &c. (d) Add. *Lib.* 41. t. 1. l. 9. *Secl. ult. D. de A. R. D.* f. 8. *Lib.* 14. t. 2. ad L. *Rhod.* l. 8. *Lib.* 47. t. 2. *Leg.* 43. f. 11. *D. de furtis.* *Lib.* 2. t. 14. l. 2. f. 1. *D. de pactis.* (e) *Vid. Numb.* XXX. 5. 12. *D. Lib.* 22. t. 1. l. 17. f. 1. *de Usuris.* &c. *Lib.* 41. t. 1. *Leg.* 44. *D. de A. R. D.*

silent in it, but this, that he hath no longer any care or concern for the Thing detain'd, nor will reckon it his own for the future (a).

Farther, As to the raising this Presumption of a Man's voluntary Neglect to demand his Property, length of time affords a very strong Conjecture: For 'tis hardly possible, but that in a course of many Years, we should gain Intelligence that our Goods are in other hands, and have Opportunity of recovering them, or at least of interrupting the Possessor's Title, by declaring and protesting against it.

Again, if we were at first hindred from putting in our Claim through Fear, this Fear too will in time vanish, and we shall be likewise able to provide so well for our own Security, as to be in no danger of suffering from the unjust Detainer.

As to the Objection, That no one can easily be presum'd to throw away his own; 'tis answer'd by affirming on the other hand, that no one can be thought willing, that a thing which for so vast a while he hath not at all regarded, nor given any one Indication of Care about it, should any more appertain to him.

Though all this be very plausibly alledg'd, yet 'tis certain that a long continued Silence doth not always give us sufficient Ground to suppose a Tacit Dereliction. For, as it may happen that a Man, for the longest space we can fix, might either have been ignorant of his Right, or hindred from asserting it through want of Power and Apprehension of Danger; (b) so again, if he claims his Goods, though after never so long a Season, 'tis manifest that he did not before absolutely abandon and give them over. And consequently this Foundation for Prescription will not be such, as shall hold universally, or extend to all Cases.

As to that other Reason offer'd by Grotius, to prove that a Dereliction may be presum'd from long Silence, Because we must not believe that Men are so uncharitably dispos'd towards each other, as that they would suffer any Person to continue in a perpetual Course of Sin, for the sake of a perishable Enjoyment; this doth not at all affect the present Question. For, besides that it seems a little too simple to flatter our selves with so large Promises of Men's Conscience and Piety; (c) he that comes to a Possession by Honest Means, and with Innocency of Intention, (and him only we have pronounc'd capable of commencing Proprietor by Prescription,) is really in no Sin; because the manner of his obtaining the Possession fully perswades him, that he obtain'd the Property together with it. And it doth not appear that any Man's obliged voluntarily to call in question his own Right, established upon a lawful and probable Title. But if the detaining of another's Goods after this manner, were indeed, in it self Sinful, the Guilt were to be

taken off, not by the Silence of the Owner, but by his express Confession, and the Renunciation of his Right; did he resolve to give full Relief and Satisfaction to the Conscience of the Possessor. But in this Case, the Possessor's Right would not be owing to Prescription, but to the Solemn Act of the former Proprietor.

IX. Amongst these different Opinions, this seems to be clear and evident, That as the Propriety of Things was introduced out of a regard to the Common Peace, so it flows as a Consequence from the same Principle, That they who have been let in to the Possession of any thing upon a fair and honest Presumption, should at length be secured in the Enjoyment of it; and that others should not be allowed to raise perpetual Suits and Quarrels about their Title. But the particular space of time within which such an Innocent Possession grows up to the force and strength of Property, we do not find precisely determined, either by Natural Reason, or the Universal Consent of Nations; but it is to be adjudg'd by the Opinion of good and true Men upon the Case, not without some considerable degree of Latitude. Yet so as that this Latitude shall not be cavill'd and pick'd at, with the like Sophistry as Horace hath used on another Occasion:

*Scire velim chartis pretium quotus arroget annus:  
Scriptor ab hinc annos centum qui decidit, inter  
Perfectos veteresq; referri debet, an inter  
Viles atque novos? excludat iurgia finis.  
Est vetus atq; probus centum qui perficit annos.  
Quid, qui deperit minor uno mense vel anno,  
Inter quos referendus erit? veteresne poetas,  
An quos & praesens & postera respuet aetas?  
Iste quidem veteres inter ponetur honeste,  
Qui vel mense brevi, vel toto est junior anno.  
Utor permissis, caudeq; pilos ut equina  
Paulatim vello, & demo unum, demo etiam  
unum, &c.*

Epist. I. L. 2. v. 35, &c.

I'd know what Years an Author's Ripe for  
[Fame;  
Suppose a Century gone; where shall his Name  
Be fix'd? ith' Ancient Roll of finish'd Wit,  
Or the Vile Modern? let the Bounds be set.  
He's old and stanch at a full Century's Date.  
What if he dropt a Month, a Year too late;  
With the old Heroes shall he share the Prize,  
Or sink with those our Children shall despise,  
Upon their Father's Judgment? We'll presume  
Him of full Age who comes so near the Sum.  
I'll hold you to't, 'till by degrees I clear  
The Horse's Tail, and pick it Hair by Hair (d).

But in fixing the particular Period, a regard shall be had both to the Ancient Owner, and

(a) Add. Bæcler ad Grot. d. I. Sect. 5. & Ziegler ad l. d.

(c) Add. Ziegler ad Grot. loc. citat. Sect. 8.

verbi signific.

(b) Vid. Can. 13, 14. Caus. 16. quest. 3. in Gratian.

(d) Add. Grot. in flor. spars. ad Leg. 177. D. lib. 50. t. 16.

to the New Possessor. To the former, lest he should be too soon excluded from the Privilege of following and finding out what he hath lost. In which point Natural Equity requires that *Prescription* should not be compleated in so little time between absent Parties, as between those who are both on the spot. To the latter, lest he should undeservedly suffer Damage, when 'tis too late for him to gain Redress by convicting the first Injurious Detainer (1), from whom the Thing was honestly receiv'd; or when the thing is so riveted to his Fortunes and Estates, as to make the chief Bottom upon which they depend. Hence, inasmuch as Movable Things pass in Commerce to others more frequently than Immovables, so that having gone through so many hands, 'tis more difficult to find out the Person by whom they were first convey'd, 'tis but reasonable to allow a longer space for the recovering the former than the latter; especially, since those likewise do much sooner suffer and decay by Use than these: For it would little avail the former Proprietor, to receive his Goods when impair'd and wasted, and rendred unfit for his Service. And tho' a Man at his first gaining such a Thing of anothers, may have made a very advantageous Bargain, or though his Title cost him little, yet it seems hard, and an obvious matter of complaint, that any one should be forc'd to part with a Thing that hath now a long Time grown, as it were, into his Patrimony and Inheritance: And the rather, because on the other hand, we have reason to believe, that he who hath contentedly wanted a Thing during a great part of his Life, within which he hath been able to make sufficient Provision for himself by other means, will not think it an Injury or Hardship that he be oblig'd to want it for ever (a). So that upon taking in all these Considerations, it will be no difficult Task for a fair and honest Arbitrator to find out such a Term for *Prescription* in particular Cases, as shall be agreeable to Natural Equity. Though 'tis the better way in Civil States, that all the Points of Controversy may be brought within a narrow compass, to fix in general some certain and necessary Bounds at which *Prescription* shall commence Valid, according to the Nature of the Subject. We are therefore altogether of Opinion, that *Prescription* as it abstracts from the Points of time establish'd by Civil Ordinances, is, as it were, the Corollary, or Appendix of Property. And by consequence, that when the Property was first introduc'd, it was likewise agreed upon by general Consent, for the sake of the Pub-

lick Peace, that he who possessed a Thing in his own name, neither by violent Detention, nor by fraudulent Concealment, nor by a precarious Title, should be presum'd the True Proprietor of it, till any one was able to prove the contrary: And that he who had held a Thing honestly obtain'd, a very long Season, during which any Man of ordinary Diligence would have enquired after his own, should defend his Hold against the Tardy Claimant, who so long neglected to make his Challenge.

X. Upon these Principles, and if we place the Reason of *Prescription* not barely in the Dereliction of the former Owner, we may with the more ease resolve this very intricate Question, *Whether or no, or after what manner, Children not come into the World, can lose their Right by the Tacit Dereliction of their Parents and Ancestors?* Which we may understand two ways; either of such *Prescription* as was compleated before Children were born, or of such as only commenced in their Father's Time, and was compleated at his Death. In the former Sense, if we take the Negative side, we are encounter'd with this Difficulty, that *Prescription* thus understood, will not in the least contribute to the Peace of Empires and Dominions; most Goods being in their Nature capable of descending by Inheritance to Posterity; and therefore 'twould be in vain for the Prescriber to overthrow the Claim of the Father, if the Son might afterwards renew the Suit. But if we incline to the Affirmative part, it will seem strange how Silence or Negligence should prejudice those who were unable to prefer an *Action*, or so much as to speak a word, and indeed, who were not yet in Being; or how the Default of one Person should thus turn to the Damage of another. Which Doubt *Grotius* (b) hath taken off by the following Remark: *That a thing not yet existent can have no Accidents, so a Person who is as yet no part of Nature, can have no Right, and consequently nothing can be said to be taken from him* (c). *By him, who is as yet no part of Nature, we mean him who is not Conceived, not he who is Conceived, but not Born: Because the latter in many Instances of Right, is already suppos'd to be a Member of Human Society* (d). It may be added in Confirmation of this Judgment, That the Goods of Parents do only then begin to belong to their Children, when the Parents themselves hold and enjoy them till the very Time at which the Children ought to inherit them. Which Rule may be thus extended to a larger Compass: He that is not yet in Being can acquire no *Right*, unless

(1) The Original in all the Editions of it, has it *per Evictionem*, This is an Inadvertency of our Author, who doubtless meant *per Evictionis prestationem*. (a) To which may be apply'd that of *Tully*, Off. 2. c. 22. *Where's the Equity, that an Estate possess'd many Years before, should be got by him that had it not, and be lost by him that had it?* See the Story of *Aratus* the *Sicyonian*, in the next Chapter. (b) L. 2. c. 4. f. 10. n. 2.

(c) *M. Senec. Controver. l. 1. c. 6. p. 93. towards the end, Edit. Gronov. Before we obtain'd any Actual Existence, Nature hath the whole Government of us, and casts us into what Fortune she pleaseth. Our True Rate and Value then commenseth, when we are at our own Disposal.* (d) *Vid. lib. 37. t. 9. l. 7. princ. D. de ventre in possess. mittend. & lib. 38. t. 16. l. 7. D. de suis & legitim. hered. & lib. 50. t. 16. l. 231. D. de verb. signif.*

by the Intervention of another already in being, from whom the *Right* shall be deriv'd to him upon his coming into the World, yet so as that it shall obtain no Effect in Relation to him, till after he is actually born. And this happens when any Thing is acquir'd or deliver'd to another, to be held in such a manner as that he shall be able to transmit it to his Successors. Yet here there is an observable Difference; for some Things are so conferr'd on another, as that the Interest of the Giver is not at all affected, whether the Thing descend to the Heirs, or not; though so far as he is concern'd, he grants the Receiver free leave thus to transmit it. But other Things are conferr'd after such a sort, as that the Donor retains a *Right* over the manner of holding, which he himself appointed, so that it cannot be altered without his Consent. Now which soever of these ways we suppose a Thing possess'd by any Man, with the power of transmitting it to his unborn Posterity, if it happen by any Means to be intercepted or alienated before the Birth of the Heir, he is not in the least injured thereby; unless the Title or Pretension to it (if not the Thing itself) were expressly left him in the manner of an Inheritance. For in the former Case, since both the Thing holden, and the way of holding it are fully in the Possessor's Disposal, if he convey it away from himself; or if, by any Change whatsoever it cease to be his, all the *Right* he had to it is immediately extinguish'd; and consequently cannot be derived upon his Heir as yet unborn, who can claim no Right to Goods of this Nature held by his Ancestors, but what they deliver to him, as it were from hand to hand, after he is actually in Being (a). But in the latter Case, inasmuch as the prime Donor still reserv'd to himself a power over the Tenure (1), if his Consent be obtained, the Possessor doth not at all damnify those that come after him, should he either alienate the Thing or give it over for lost by whatever Accident it was convey'd from him. Though all this be true, yet *Pisistratus* was of another Opinion; as appears from his Epistle to *Solon*, where he gives the following Reason amongst others for his seizing on the Government; *I have not usurped what belong'd to others; I only claim that by my own just Right and Title, which the Athenians, having first confirmed by Oath to Codrus and his Family, afterwards took away* (b).

The Question taken in the latter of the two Senses which we observed it to be capable of, is denied by the *Civilians*; for they say, That *Prescription heretofore begun, stops during the Years of Minority* (2), and upon their Expiration runs on effectually again. Yet I am of Opinion, there may be a Case, in which the Favour of Possession shall over-balance the Favour of

Minority: As for Instance, suppose it should so happen, that when I want only a Month or Two of completing 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 been started before the Goods devolv'd upon the Minor. Here certainly, if the Business be referr'd to the Arbitration of an honest Man, and one who knows that the Grounds and Reasons of *Prescription* are not to be drawn barely from the Neglect of the former Owner, he will give Judgment for me rather than for the other Party. Nor, doth it seem so very grievous, that a *Right* which under the Father was, as we may say, at its last Gasp, should utterly expire under the Minor Son: And especially, because Men esteem it a much greater Hardship to let go a Thing which they have held a considerable time, than to be debarr'd of what is not yet come to their Hands.

XI. From hence it appears, that they too, who are subject to no Common Law besides that of *Nature and of Nations*, may allege against each others Claim, a long, uninterrupted, and honestly obtained Possession: And so much the rather, as Publick Possessions cannot be disturbed without far greater Confusion and Danger than Private. Though it must be confessed, that in Controversies between Princes and States, it is frequently not altogether so Necessary to appeal to *Prescription*, since the *Right* of the Possessor may, or at least should be deduc'd more solidly from other Foundations. And *Bæcler* (c) hath observ'd before us, That those who in this Business of *Prescription*, mention only the Point of Time, often intend to sum up their whole Claim in this short Expression: Under which are likewise to be understood the Adjuncts of Time, as the quitting the Thing which is now the matter of Dispute, or the Intention of quitting it, or any Tokens of renouncing the Right and Title. And since the Plea of Time is in the main plausible, especially with *Vulgar Hearers*, (as if it gave an Advantage to other Proofs,) it is a politick Stratagem to urge this Notion in general, and in gross, wilfully avoiding all Explications or Additions which might be able to give Strength to such a thing as Time, which of it self can produce no Effect; and instead of them, to heap up Instances and Examples of former Disputes, that the Discourse may seem more full, and may carry a fairer Colour as to the main Point.

(a) *Vid.* lib. 1. t. 9. l. 7. c. 1. de Senator.

(1) See hereafter in B. 8. c. 5. l. 9.

(b) *Diogen. Laert.* in

*Solon*, lib. 1. f. 53.

(2) *Vid.* C. lib. 7. t. 35.

*Quibus non obijcitur longi temporis prescriptio.* leg. 3.

(c) *Ad Grot. dist. loc. sect. 2.*

*Tacitus* (a) calls it by no better Name than *Vaniloquentia*, *Impertinence* or *Idle Talk* in *Artabanus*, when he laid claim to the Ancient Bounds of the *Persian* and *Macedonian* Empires.

*Sapores*, as *Ammianus Marcellinus* (b) informs us, renewed the same Claim many Ages after; to whom *Constantius* gave this Answer in his own way; That 'twas strange he should forget how the *Persians* were enslaved by the *Macedonians*; the latter of which Nations being subdued by the Roman Power, their Bonds-men could not but fall under the same Dominion (c).

Thus likewise, *Solyman* the Great Turk would often say, That he had a Right to the City of Rome, and to all the Western Empire, as being the lawful Successor of *Constantine*, who had remov'd the Imperial Seat to *Byzantium*. Yet in the most noble Examples upon Record, you will find, that besides the Argument of long continued Possession, some Title or other capable of producing Sovereignty, hath been at the same time alledg'd.

Thus *Isocrates* (1), under the Person of *Archidamus*, having shown in the first place that the *Lacedaemonians* became Masters of *Messene* by the Title of a Just War; afterwards brings in the length of Possession, as a kind of Secondary and Inferior Proof: *Nor are you Ignorant*, says he, *that all the World agree, Possessions whether Publick or Private, should after a long Period of Time, be fix'd and confirm'd, and pass as lawful Inheritance.* To which he subjoins, That the Title of his Country to *Messene*, was not controverted heretofore, when a fair Opportunity was offer'd to that purpose (d). And indeed in Causes of this Nature, 'tis always a fair Presumption in favour of the Possessor's Right, that during so long a space, no Person else hath put in his Pretensions. For these Matters are usually of so very great importance, and are transacted so openly and in broad Day, that if a Third Party hath any Right in the Case, he

can neither be long ignorant of it, nor want occasion of preserving it, at least by declaring and protesting against the Usurper.

Therefore there can happen very few Cases, in which *Dominion* and *Sovereignty* shall not be the Consequences of *Prescription*, when a State or People have possess'd themselves of any Thing upon a Peaceful Title. And as for what they gain in War, it is hardly necessary to plead *Prescription* on that account. For so long as the Hostility continues, the possession of all that hath been won from the Enemy, is supported only by Force and Violence; and at the same time the Enemy hath a Right of recovering his Losses by any means he can use: Especially, if, having given any unjust occasion of the Quarrel, he is ready to make satisfaction. Hence, inasmuch as a War may be protracted for more than Fifty Years, they who lost any Place at the first breaking out of the Difference, may regain it by Force at any time before the Business is adjusted by a Peace.

The *Numidians*, in *Livy* (e), pleading *Prescription* against the *Carthaginians* for a Tract of Land, (which bore the Name of *Emporia*), talk to this purpose; That the Right was sometimes held by the State of *Carthage*, and sometimes by the Kings of *Numidia*, as either had opportunity to seize upon it; and that the Possession was always in the Hands of those who appear'd strongest in the Field.

When a Peace is concluded, 'tis easy to see what both sides are to hold for the future; and then what is yielded up by one Party, the other immediately acquires with full Right, and hath no need to wait for the Title of *Prescription*. If any Third Person lays claim to the same Thing, he will be sure to declare his Pretensions in good time; and if possible, whilst the Treaty is in agitation: For afterwards Warriors will not easily be prevail'd upon to restore what they have won by the Sword, to those who were Idle Spectators of the Quarrel (f).

(a) Ann. 6. c. 31. (b) L. 17. c. 5. (c) In *Zonaras*, Tom. 3. ad ann. 354. See likewise *Herodian*, l. 6. c. 6. (1) *Isocrat.* in *Archidam.* p. 208. Ed. *Parisi.* See *Judges* XI. 15. &c. (d) *Add. Alberic. Gensil. de Jure Belli*, l. 1. c. 22. (e) L. 34. cap. ult. (f) *Vid. Grov.* l. 3. c. 6. Sect. 7.

## CHAP. XIII.

### *Of the Obligations which arise immediately from Property.*

HAVING enquired into the Nature and Origin of *Property*, as likewise into the several ways by which it is establish'd, it follows that we consider those Obligations, which upon the introducing of *Property* affect Mankind, immediately (1) and on their own account, (2) without the Intervention of other Duties. Of these the first is, That every Man shall suffer another who is not engag'd in

Hostility against him, to dispose of his own Possessions, and likewise quietly to hold and enjoy them; nor shall either by Force or Fraud, impair, divert, or draw them to himself. Whence it appears, that Theft, Rapine, removing of Boundaries, and the like Crimes are forbidden by the bare *Law of Nature*. *Euripides* (a) speaks excellently to this purpose;

(1) *Vid. Grov.* L. 2. c. 10. (2) See *Titius's* 303d Observation, cited in Mr. *Barbeyrac's* 1st Note upon this Sect. (a) *Helen.* v. 909, &c.

Μισὴ τῶν βίβλων, &c.

God hates the Violent, commanding All,  
To live on what their Honest Pains procure;  
And not to feed their Wants with Mutual Spoils.  
Oppressors should be banish'd Human Race,  
Unworthy of the Name. One Common Heaven  
Gives Light and Air to Man; one Earth a Seat,  
A Scene of Industry, where All may strive  
To raise their Stock, and spread their Fortunes wide;  
But not to rob, or force their Neighbour's store.

II. Farther, When the Things of one Man come into the Hands of another without the latter's Fault; (where under the General Name of Things we comprehend likewise our *Right* over *Persons*, so far as it may be profitable to us, as the Right of Masters over their Servants,) we are to consider, whether the Thing be still remaining or not.

As to Things which remain, there ariseth this Obligation concerning them; That he who is in possession of what belongs to us, ought to employ his utmost ability towards putting it again under our Command. Which Obligation doth not exert its force till such time as the Party in possession comes to know that the Thing is ours.

We add, That he employ his utmost ability, or do as much as in him lies; for no one can be bound to an Impossible Performance. Nor is he oblig'd to put himself to charges in making the Restitution; and whatever Expences he hath been at on any Thing on that account, he may fairly demand of the Owner, and may detain the Thing till they are paid. But 'tis enough if he signifie, that another's Goods are in his Hands, (a) and that he will be no hindrance to the Owner in the Recovery of them. And these Rules are so true, that the *Roman* Laws forbid Men to challenge their own when found by others, *sine pactione*, without some Bargain in order to give the Finder satisfaction (b); whilst they affirm at the same time, *That he who takes up any Thing of another's with a design of converting it to his own Use, is guilty of Theft, whether he knows the particular Owner, or not* (c) (2) Yet if I become Master of a Thing upon a Just Title, and with Honest Intention, I am not bound to call my own *Right* into dispute, and to give publick notice that such a Thing is in my Custody, to the end that it may be challeng'd, if it should happen to belong to another. For when the manner of my getting the Possession was in no respect faulty, my Innocence and Integrity clear me from all Imputation of Guilt in detaining another's Goods.

This farther Restriction is likewise to be understood in the present Duty; If he who was before the true Owner, hath still any probable means left of his recovering what he lost; that the Obligation we are now asserting, may not be thought to overthrow the *Right* of Prescription (d).

III. Now that this Obligation is sufficiently founded in the bare Notion of *Property*, appears evident. For since a person may happen, by many Accidents, to lose his hold, and be thrown out of the *Possession* of what is really his own, our Goods, and especially those which are movable, would be in a very slippery and uncertain condition, if when they stray into another Man's Hands, he might intercept or conceal them from us; much more, if he might detain such a Thing openly, and repulse us with Violence, when we attempted to make good our Claim. And therefore as in a State of *Communion*, 'tis a matter of *Right* that each Person shall be allow'd to use the Common Store as fully and freely as the rest; so upon the first appropriation of Things, when all other Persons did, as it were, renounce their *Right* to what any one had receiv'd as his private Share, the distinct Proprietors are supposed to have made this Agreement amongst themselves, (3) *That he who chanced to be in possession of Another's Goods, after he knew it to be Another's, should cause it to return to its Owner.* For the Power and Virtue of Property would be too weak, and the keeping of Things would require too much Expence, as well as too much Care and Trouble, if these stray'd Goods were only then to be restor'd when the Owner made a formal Challenge of them; because he must very frequently be ignorant which way they are gone, or where they are lodg'd.

As to a Man's being bound to restore a Thing when claim'd by the Owner, 'tis altogether the same case whether he got possession by Honest or by Dishonest Means: For this Obligation doth not arise from any Default, or any Fact of ours, or from any particular Covenant made with the Claimant, but from the Thing it self; or rather from that General Covenant to this purpose, which we suppose to be the necessary attendant of Property. He then who obtain'd the Thing honestly, is barely oblig'd to make Restitution; but he who procur'd it dishonestly, besides the necessity of Restitution, hath likewise contracted a Guilt, and is on that account, liable to Punishment. *Good Faith*, or Honest Intention, doth then cease, at least, in the Court of Conscience, when a Man hath full assurance, that what he holds belongs to

(a) Vid. D. Lib. 10. t. 4. l. 1. f. 3. *De fugitivo*. We speak here all along of the Innocent and Well-meaning Possessor; for the Obligations which lie on the Dishonest Possessor are open'd in another place. See the next Paragraph towards the End.

(b) Vid. Lib. 47. t. 2. l. 43. f. 9. D. *de furtis*. Lib. 19. t. 5. l. 15. D. *de Præscript. verbis*. & Lib. 12. t. 5. l. 4. f. 5. D. *de cond. ob turp. caus.* (c) Josephus Antiq. IV. c. 8. He that takes up Gold or Silver in the Way, let him seek out the Person who lost it, and by the help of the Cryer, let him restore it in the same place where 'twas found; and let him be persuaded, that 'tis a very ill way of gaining Profit, to enrich himself by the damage of others. (2) Concerning this, see c. 6. f. 12.

(d) Comp. Grot. in the place above-cited. (3) This general Agreement is not at all necessary. See Mr. Barbeyrac upon Chap. 4. and 6. f. 5.

another (a). Though 'tis enough to secure him from Human Punishment, if he were thus well-meaning and sincere only at his first entering on the Possession.

IV. This is confirm'd and illustrated by the Divine Law it self, *Deut.* XXII. 1, 2, 3. And lest any should imagine that the Duty there enjoin'd is to be paid to Friendship only, 'tis expressly added, *Exod.* XXIII. 4. that the same ought to be perform'd to an Enemy.

*Josephus* (b) hath given us this Gloss on the Law which we are now mentioning: *If any Man* (says he) *find Gold or Silver in his Way, let him seek out the party who lost it, and restore it by the Hands of the Publick Cryer, in the very place where he took it up, judging with himself, that no Advantage can be good, which ariseth from another's Damage. The same he must do with regard to the stray Sheep and Cattle he meets with in the Desert. If he cannot presently find out the Owner, let him retain the Things in his own Custody, calling God to witness, that he intended not to make a Gain of what belong'd to his Neighbour.* Yet the Mortal Hatred which the Jewish Nation profess'd against all others, afterwards turn'd this Natural, into a Civil Law, to be put in practice only towards their own Countrymen (c).

One of the most remarkable Instances of *Restitution* which History affords, is that of the Emperour *Theophilus*, Who when a Woman cry'd after him in his Progress, and claim'd the Horse which he rode, finding upon enquiry that the Governor of a certain Province had taken it away, and presented it to him in his own Name, he immediately gave back the Horse to the Poor Woman; and having no others at hand from his own Stables, was content to make use of the next he could borrow. Which, they tell us, was the rise of that Custom which afterwards obtain'd, for the Emperours to carry in their Train a great number of Horses, for Supplies in case of any such Accident (d).

The Example of the *Spartans*, which *Grotius* mentions (i), who condemned their General *Phœbidas* for seizing on the *Cadmean* Fort, and yet still kept the Place in their Hands (e), doth not come up to our Point: For they were, no doubt, injurious and dishonest Possessors, and therefore were bound to Restitution by another Principle. Nor is the Story of *M. Crassus*, and *Q. Hortensius* more proper in the present Question, as *Tully* (f) gives the Report: *Some Persons*, says he, *brought out of Greece to Rome a Forged Will of L. Minutius Basilus, a very Wealthy Man; and the more easily to carry their Point, put down M. Crassus, and Q. Hortensius, two who had the greatest*

*Power and Interest in the City, as Joint-Heirs with themselves. The two Gentlemen, though they suspected the Deed to be Counterfeit, yet relying upon their own Innocence in the matter, did not refuse to make this small Advantage of the others Wickedness. What then? is it enough that they appear to have had no hand in the Fact? I am not of that Opinion: For he certainly is to be censur'd as Unjust, who, not only forbears to drive off an Injury from another, but aids and encourages it.* Here the Gentlemen had as great a share in the Crime of Forgery, as Receivers are said to have in that of Theft; inasmuch as they apprehended themselves to have been put into the Will for no other Reason, but that their Name and Authority might protect the Authors of the Cheat.

From the same Head we may discover the Custom of awarding *Wrecks* to the Prince, or to the State, to be disagreeable to Equity (g). As we may likewise gather the Absurdity of that Practice in some Countries, by which the Stolen Goods when discover'd, are not restor'd to the Owner, but are claim'd by the Publick Treasury (h).

V. Inasmuch as this Engagement to restore the Goods of Others ariseth from a General Agreement amongst all Mankind, a Bar is hereby put to all particular Contracts made about a Thing which is any way kept from the True Owner; the effect of which is, that when the Thing is known to be Another's, any Bargain about the conveying it to a Third Party, becomes null and void. And this too is the Ground of *Diogenes's* Jest on two Thieves, one of which had plunder'd the other; *One* (he said) *had stolen somewhat, but the other had lost nothing* (i).

As to that Law of the *Digest* (k) produc'd by *Ziegler* (l), to prove that a Contract made after such a Discovery, is not always evacuated or hinder'd by the force of *Property*, it is really no prejudice to what we now assert: For in the Case there alledg'd, the Interest of the Creditor is more concern'd that the Pledge should remain safe, than the Interest of the Debtor who owns it; and the Debtor cannot challenge the Pledge, unless upon Payment (m).

The Judgment of *Tryphoninus*, in the same place of the *Digest*, upon the other Case which he there proposeth, doth not to me appear satisfactory. *A Man Cast for a Capital Crime*, (says he) *hath deposited an Hundred Pounds in your Hands; the Man is afterwards transported, and his Goods confiscated; the Question is, Whether you shall restore the Hundred Pounds to him who gave it you in Charge, or whether you shall pay it into the Treasury? If we regard only the Law of Nature and of Nations, the Money is*

(a) Vid. Lib. 16. t. 3. l. 1. Sect. ult. D. l. 2. l. 3. l. 4. *depositi, vel contra.* (b) *Antiq.* l. 4. c. 8. (c) Vid. *Seldem De J. N. & G. Sec. Hebr.* l. 6. c. 4. & *Grot.* in Annot. ad. d. l. Sect. 1. Add. *Polyb.* l. 6. c. 31. princip. (d) *Cyropalate de Off. Constant. & Cedren.* (i) *Ubi Supra.* n. 3. (e) *Plutarch & Cornel. Nep.* in *Pelopid.* (f) *Off.* 3. c. 18. (g) Vid. *Grot.* l. 2. c. 7. f. 1. & *Bæcler* ad. d. l. *Jac. Godofred de Imperio Maris*, c. 11. *Jo. Loccenius de Jure Maritimo*, l. 1. c. 7. f. 9. *Bodin.* de *Repub.* l. 1. c. 10. *Gramond Hist. Gall.* Lib. 16. and others. (h) Vid. *Anc. Matthe. de crimin. tit. de furtis*, c. 4. f. 4. (i) *Diog. Laert.* l. 6. f. 54. (k) Lib. 4. t. 9. Leg. 1. f. 7. *Naus. Caup. Stab. &c.* (l) *Ad. Grot.* d. l. Sect. 1. (m) See a full Instance in *B. XVI.* t. 3. l. 31. f. 1. *D. depositi vel contra.*

to be given back to the party who committed it to your Trust (1); if we consider the end of Civil Government, and the Rule and Method of Positive Laws, you ought rather to throw it into the Publick Stock. For he who hath deserv'd ill of the whole State, should be left to struggle with Poverty too amongst his other Inconveniencies, that his Example may deter others from offending.

But indeed, since Sovereign Rulers have even by the Law of Nations a Power to punish Criminals in their Fortunes and Estates; when such a Penalty is justly decreed against a Malefactor, 'tis agreeable to the very Law of Nature, that all his Goods should be forfeited to the Government. Yet that the Confiscation of Goods should attend any one particular Crime rather than others, is purely owing to the appointment of Positive Constitutions. The consideration of that Benefit which accrues to the Publick from Penalties duly inflicted, (the Reason urg'd by *Tryphoninus*) did indeed shew that such a Penal Sanction ought to be approv'd of; but it was not, properly, the Cause why the Treasury should have the advantage of the Criminal, as to challenging the Sum which he had lodg'd in other Hands. For by the Sentence of the Court all the Right and Property of the Condemn'd Criminal over his Goods was taken from him, and conferr'd on the Government; and consequently, what he formerly gave in Trust, is to be deliver'd back not to him, but to the Publick Receivers. Because all kind of Property, whether it ariseth from Positive Ordinances, or from the Law of Nations, hath this effect amongst others, That he who is in possession of any Thing over which the said property extends, shall be bound to restore it to the party who at present appears to be the true Owner. What Demurs and Exceptions the Law of restoring Things given in charge admits in other Cases upon account of particular Circumstances, is frequently shewn by Authors (a).

Upon this Natural Obligation to *Restitution*, the Compilers of the Civil Law have built a great number of additional Rules (b). And this too is the Ground of claiming by Judicial Process, what is detain'd from us (1), together with all the *Actions* which border on that Claim; and, in some sort, the *Action* of false Debt (2); the *Action* for Recovery of what we have given (3), either upon some Reason, which Reason hath not been made good, or else upon no Reason at all (4). Though these *Actions* are said likewise to depend upon a kind of Imaginary Contract. For when we deliver

a Thing without intending it for a matter of pure Bounty, it is suppos'd to be given by the one Party, and received by the other on this Condition, That it shall be delivered back, in case there appear no Reason why it was given.

What hath been said about the *Restitution* of the main Thing or Substance, extends likewise to the Fruits or Profits of it, such as are now remaining; so much still being deducted as amounts to the Charges of producing, gathering or preserving them.

VI. But if what we have honestly gotten, though really belonging to another, hath been as honestly spent, then it seems most agreeable to Natural Equity, that we should not pay the whole Value of it to the Owner, but only the Advantage they brought us, or so much as we were made the richer by it; provided still that the Owner hath not been requir'd for what he lost, some other way. For if I honestly acquire and consume what was stolen from you, when you have already received full Satisfaction from the Thief, you can then demand nothing of me, how much soever I have been a Gainer by my Bargain. The Ground and Reason of this Assertion is not so much to be taken from the End of Property (5), (which was establish'd that every Man might, according to Proportion, enjoy his own; whereas he who gains by what is mine, hath more than his Proportion, as I on the contrary have less;) as from the following Consideration; That a Thing in which I have not lost my Property, either by my own free Consent, or by Default, or by the Right of War, still belongs to me; as doth likewise all the Fruit and Product of it. When such a thing therefore hath fallen into another Man's hands, who hath made an Advantage by spending it; his Honesty and good Intention secure him indeed from all Guilt and Censure; yet he can on no Pretence withhold the Profits when I lay Claim to them, because they are to be look'd on as the Residue, or the surviving part of the Thing, at least they are the proper and necessary Fruit proceeding from it. Hence 'tis one of the most common and proverbial Sayings, That *no Man ought to gain by another's Loss*: That is, by such a Loss as he did not himself procure either by his Consent or Default, so as to be the Cause of the Damage, or to have it any way imputed to him: For it can be no Sin in me, to take an Occasion of Advantage from the Loss or Damage of another, when it was not of my own procuring (c). It is observable that in the

(1) Vid. D. Ibid. princip. (a) Vid. Ciceron. Off. 3. c. 25. Seneca de Benef. l. 4. c. 10. Ambros. de Off. l. 1. c. ult. To which may be added what Polybius (in excerpt. Peiresc. p. 172.) reports of Ariarathes King of Cappadocia, who having recover'd the Kingdom from Orophernes, demanded of the Prienians the forty Talents which Orophernes had put into their Hands; and upon their refusing to deliver them to him, fell upon their City with Fire and Sword, in Polybius's Opinion very unjustly. Tho' this Action of Ariarathes may be commended, if we first suppose that Orophernes had injuriously depriv'd him of his Crown. (b) Vid. l. 25. t. 2. leg. 25. D. de act. rer. amotar. (1) Vid. D. lib. 6. t. 1. (2) See above, B. 3. c. 4. f. 5. (3) See the Ninth Chapter of this Book, sect. 4. (4) Vid. D. lib. 12. t. 7. (5) Vid. Grot. l. 2. c. 10. f. 2. (c) See Montaigne's Ess. l. 1. c. 20. Cicero, Off. 3. c. 5. 'Tis against Nature to increase our own Advantage, by the Damage of another Man. Which is borrowed from that of Terence, Andr. A. 4. Scen. 1. Hocine est credibile, &c. Add. lib. 50. t. 17. l. 206. D. de divers. reg. juris.

Books of the *Roman Laws* many Cases are determin'd according to the Equity of this general Rule, with some Difference from the ordinary Tenour and Strictness of the Letter (a) (1).

VII. From the Rules already propos'd may be drawn a satisfactory Decision of many Points usually controverted as well by Lawyers as Divines; which we think it may be proper to transcribe out of *Grotius*: First, *He that honestly and innocently gains Possession of what is anothers, (for of him only we would here be all along understood; inasmuch as the Dishonest Possessor doth not only stand oblig'd on account of the thing it self, but is farther obnoxious by his own Crime:) so long as he continues in this Integrity (b), is bound to no Restitution, in case the thing perish or be lost; because he neither enjoys the Substance, nor any Fruit or Advantage of it (c).* We add, That he doth not stand bound, though it should have happened to perish by his Default: For his honest Intention was to him in the place of Property. Now a Proprietor though he lose his Goods through his own Neglect, yet is thought to sustain sufficient Damage by the Loss, and is liable to no farther Punishment: but we are to pronounce otherwise, if the Person in Possession, understanding the thing to be anothers, voluntarily made away with it to avoid Restitution.

VIII. Secondly, *Such a Possessor through honest Mistake, is bound to restore not only the thing it self, but likewise such Fruits or Products of it as are still remaining; because, in Natural Estimation, he that is Owner of the thing, is Owner too of the Fruits (d).* Yet here they do distinguish between the Fruits of the thing, and the Fruits of the Man's own Labour. *Grotius* is of Opinion, That *the former only ought to be given up, and not the latter; because these are not due to the thing it self, tho' perhaps they could not have been procur'd without it.* Others think, that even the latter Fruits should be restored, and alledge a Law of the *Code* (e) in favour of their Assertion. And indeed this Judgment seems to come nearest to the Rule of Kindness and Humanity; provided this Clause be subjoin'd, that the honest Possessor may in this Case deduct, as well the Expence which the thing hath put him to, as a due Reward for his Labour (f): As likewise that to prevent troublesome Suits, the Proprietor upon claiming his own should not be too raking and greedy, should not (as we say) sweep Dust and all: for after the Business hath been qualified by these two Alleviations, it will seldom happen that the honest Possessor shall have much to give up out of the Advantage he made by his own Industry.

IX. Thirdly, *Such a Possessor is bound not only to restore the thing, but likewise to satisfy for the Fruits which he hath spent, if it appear, that he would have spent as much otherwise (g): For he is judg'd to be so much the richer, whilst by spending anothers Goods, he hath saved his own (h).* Yet here we are of Opinion, That besides the Limitation above added, it should be likewise consider'd, whether the well-meaning Possessor be able to recover of the Party, who sold him the Thing, so much as he loseth upon its being claim'd by the true Owner. If this is impossible to be done, the Possessor is ne'er the richer by the Bargain, when he is forced to restore what he bought, and yet cannot make himself whole by recovering the Price he gave. As to the Example of *Caligula* produced from (i) *Sueton*, who tells us, That *when he restored any exil'd Princes to their Dominions, he gave them up likewise the Revenues, which had been brought in the mean-time into the Roman Treasury:* We may observe, that he believed their Kingdoms to have been unjustly taken from them, and consequently himself to be in dishonest Possession. Or if he did not condemn his Predecessor's Act in this matter, yet it may still be question'd, whether he restored these Fruits and Profits out of supposed Duty and Conscience, or out of meer Generosity. So that we take it to be the truer Judgment to affirm, that the Innocent Possessor is not oblig'd to restore the Value of what he hath spent, when he cannot recover Damages of the Person who cheated him with this false Title. For in that Case, he cannot be supposed to have enrich'd himself by the Purchase. And it seems a greater Hardship to pay the Value of a thing that is spent and gone, than to restore the thing it self were it forth-coming.

X. Fourthly, *Such a Possessor is not bound to make good those Fruits or Profits which he neglected to take; because he neither hath them, nor any thing else in their Room.* And his Negligence about what was his own, or in all respects the same as if it had been his own, is adjudg'd to be a sufficient Prejudice to him (k).

XI. Fifthly, *If such a Possessor having receiv'd the thing as a free Gift, shall have afterwards bestow'd it on another, he is not oblig'd to make Satisfaction to the Owner, unless it appear, that he would have given as much some other way; for then the sparing his own Stock will be reckon'd a matter of Gain and Advantage to him.* This Account seems to suppose a Distinction between Donations out of Duty, and Donations out of meer Bounty; as that the former only are to be made good in the Case before us, and not the

(a) Vid. *Instit.* lib. 4. tit. 7. Upon the same Foundation the *Action* which they term *de in rem verso* seems to depend. Vid. *D.* lib. 15. tit. 3. (1) See Examples of this in *Grotius's* B. 2. c. 10. f. 2. n. 2, &c.

(b) *Comp. Ziegler. ad Grot. d. l.* (c) Vid. *D.* lib. 5. t. 3. l. 40. *D. de hered. petit.* & lib. 6. t. 3. *D. de rei vindic.*

(d) *Add. lib. 6. t. 1. l. 20. l. 50. D. de rei vindic.* (e) *Lib. 3. tit. 32. leg. 22. de rei vindic.*

(f) Vid. l. 5. t. 3. l. 36. f. 5. l. 38, 39. *D. de hered. petit.* & l. 6. t. 1. l. 27. f. 5. l. 31. l. 48. l. 65. *D. de rei vindic.*

(g) Vid. lib. ubi sup. l. 25. f. 8, 9. *D. de hered. petit.* & lib. 6. t. 1. l. 52. *D. de rei vindic.* (h) *Add. l. 46. t. 3. l. 47. f. 1. D. de soluton.* (i) *Calig. c. 16.* (k) Vid. lib. 6. t. 1. l. 78. *D. de rei vindic.*

latter. Because ordinarily speaking, no Man is presumed to give, in this gratuitous manner, unless he thinks himself to have somewhat superfluous; and consequently, his Inclination to give, is judged to have proceeded from his Opinion, that the thing which he thus disposed of, and which proved to be another's, was more than he wanted for his own use. And as to that Obligation which ariseth from such a Bounty in the Receiver, it is by no means reckon'd amongst those things which are capable of being rated at a set Price; and therefore he who only expects an uncertain return for what he hath actually bestow'd, doth not, in the least, appear to have been made richer by what he parted with on this Prospect (a). But it is to be considered likewise farther, whether the present be still remaining in the last Receiver's hands or not: If it be, the Proprietor shall claim it directly of him, and not trouble the Intermediate Receiver: If not, the main Burthen shall still fall on the Person who either now possesseth the thing, or hath been made richer by it. But the Intermediate Possessor shall only come in for a small Share in the Burthen, inasmuch as he too perhaps had an Opportunity of making some Advantage (b).

XII. Sixthly, *If such a Possessor having first bought the thing, shall afterwards have alienated it, he shall not be bound to give the Owner any more than the Overplus of the prime Cost; or so much as he hath gain'd by his Bargain. But if it first cost him nothing, and yet he hath sold it, he shall then be obliged to give up the Price received, in case the Owner cannot recover the the thing it self of the present Possessor; and unless the former Party hath squander'd away the Price he took, which if not so easily gotten, had not been so prodigally spent.* But he who puts a thing off for just so much as it cost him, is no Gainer, being supposed only to recover his Own. Nor can it be said in this case, that the Price supplies the room of the thing; unless he parted with it out of a knavish Design: Because otherwise, the Owner is to challenge his Goods from the Hands of him who is now in Possession.

There is a Law of the *Digest* (c) urg'd in the present Case, which runs thus; *If after a Thief hath sold the Goods he stole, the Owner of them shall by violent means get the Price out of his hands, he seems to be guilty of Robbery as much as the other party was before, and to be equally obnoxious to the Law. For all agree that the Advantage of a Stolen Thing, or the Money into which it is turn'd, is not it self likewise Stolen.* But this Law properly respects Civil Governments. For those who live in a State of Natural Liberty, may as fairly seize by

Violence the Price of what hath been stolen from them, as the Thing it self.

XIII. Seventhly, *Such a Possessor, tho' he purchas'd the Thing at a considerable Expence, yet is bound to restore it, and cannot require his Charges of the Owner, but of the Seller. For, otherwise, the Right of Challenging would turn to no account, if the Challenger were to refund the Price. And he who buys a Thing of another whom he might suspect not to be the true Proprietor, ought to have provided particularly for his own Security, in case the Thing should afterwards happen to be claim'd: Tho' this Condition of securing the Buyer's Title, is indeed imply'd in all Contracts of Sale, according to Natural Equity (d).*

To the Rule above-mention'd the following Exception ought to be added; *Unless in a Case where the True Proprietor could not in all probability have recover'd possession of his own, without some Expence: As suppose the Goods were detain'd in the hands of Thieves or Pirates, and from them purchas'd.* For here the honest Man who delivers the Goods, may fairly deduct so much as the Proprietor would have gladly spent to regain them: Because, the Actual Possession, especially when not to be recover'd without difficulty, is capable of being rated at a certain value, and the Proprietor when reinstated in it, is adjudg'd to be, on this account, so much the richer. Whence arose the Custom for Persons who have lost any Thing, to promise *Mercenarii*, a Reward and Encouragement to the Finder. (e) For the same Reason, tho' the buying of what's already our own be void, according to the ordinary Course of the Civil Law, yet *Paulus* (f) affirms it to be good and valid, if it be first agreed upon, that the possession of what's our own may be purchas'd, when remaining with another.

'Tis propos'd as a farther Question on this Point; *Whether a Man who buys a Thing thus detain'd, purely with design to convey it to the Owner, may demand the Price to be refunded?* Some take the Negative part; because, say they, *The Right accruing to the Proprietor cannot be taken off by this allegation of the Buyer.* (g) But indeed, if such a Purchaser foresaw with fair probability, that the True Owner would hardly recover his Goods by other Means, and if the Price which he gave do not rise above what the Actual Possession which he restores may be valu'd at, then 'tis absolutely requisite that what he expended should be repaid him. But whether he who redeems the Thing in this Case shall be allow'd an *Action* against the Proprietor, such as they term *Negotiorum gestorum*, or to recover the Charges he hath been at in the Proprietor's Business, it is the Province of the *Civilians* more nicely to State and en-

(a) *Vid. lib. 5. t. 3. l. 25. f. 8. D. de hered. petit. Comp. Ziegler ad Grot. d. 1. sect. 7.* (b) *Add. Struv. Exercitat. XI. sect. 13.* (c) *Vid. Lib. 47. t. 2. l. 48. Sect. ult. D. de furtis.* (d) *Vid. Lib. 5. t. 3. l. 22. D. de hered. petit. l. 25. princ. & Sect. 1. & Lib. 18. t. 1. De Contrah. Emp. &c. Leg. 16. & C. Lib. 6. t. 32. l. 3. & C. de rei vindic. Lib. 21. t. 2. l. 1. D. de evict. &c. Lib. 14. t. 2. l. 2. f. 3. D. de L. Rhodia, & Lib. 8. t. 45. l. 16. D. de evict. & Lib. 6. t. 2. l. 2. C. de furtis.* (e) *Vid. Mosch. Idyll. 1. imitated by Apuleius, Metam. l. 6.* (f) *In Lib. 18. t. 1. l. 34. f. 4. D. de Contrah. emptione.* (g) *Vid. Lib. 50. t. 17. l. 11. D. de divers. reg. juris.*

quire. (1) The Reason which Grotius offers for his omitting to determine that Matter, is, *Because the aforesaid Action ariseth purely from the Civil Law, having none of those Foundations to rest upon, from which bare Nature introduceth an Obligation in the Case.* But tho'tis not indeed the Concern of the Law of Nature to examine or determine to what Particular Action at Civil Law, the present Case may be, or ought to be reduc'd; yet it cannot be deny'd, but that the very Action above specify'd, of recovering Charges on account of Business manag'd for another, hath a Foundation in Natural Equity, and in Tacit Compact. (2) For it cannot on any pretence be requir'd of me, that I should by my Kind and Generous Assistance preserve or improve another Man's Goods altogether gratuitously, and without receiving what I am out of Pocket in his Service (a). It seems therefore the most plain and natural way of resolving such Cases, that the party who redeems a Thing after this manner, as likewise he who transacts any Business on another's behalf, be suppos'd to hold the Thing which he hath redeemed, or about which he hath employ'd his Money or his Pains, as a Pledge or Mortgage, till such time as he receives satisfaction. Yet if there be no Fruits of his Labour remaining, which he might take hold on for his own security, and if the other barbarously deny to pay him for his so useful and profitable Assistance, I am not of opinion that he may apply the same Means towards asserting his Right, as are us'd in that other kind of Right which ariseth from express Contract; But all he can do shall be to expose the Ungrateful Wretch to Publick Hatred and Detestation, as one who doth not deserve the least Instance of Good Will from Mankind (b). The Roman Laws have consider'd the Equity of such a Restitution, in handling the like Cases (c). And in the whole Compass of this Affair, Terence's Remark ought to pass for a General Caution, that *Jus summum summa saepe est malitia* (d); *The highest Right is very often the highest Wrong.*

XIV. Eighthly, In the Opinion of Grotius, *He who buys another Man's Goods, cannot return them upon the Hands of the Seller, and demand back his Money in their stead: Because so soon as ever they came under his power, there commenc'd in him an obligation of restoring them to their true Owner.* In which Case, we are of a dif-

ferent Judgment: For certainly I am not bound to purchase a Thing which I knew to be another's, only that the True Master may recover his Goods, and that I may lose my Money. When therefore I find the Thing which I bought to belong to another Owner, and am unwilling the Claim should be directed against me, either to avoid the trouble of the Dispute, or because I despair of getting my Money again of the Seller, I should think, That I might fairly recede from such a Bargain, (provided it were not too late,) to avoid the drawing upon my self an unnecessary and unprofitable Contention; yet so as that I should be at the same time oblig'd to discover to the Owner, upon his demand, where his Goods are lodg'd, that he may have an opportunity of regaining them (e).

XV. Ninthly, *He who comes honestly by the Possession of a Thing, and knows not whose it is, is not, by the Law of Nature bound to give it to the Poor; tho' such an Appointment by Civil Ordinances would be very just and commendable.* The Reason is, Because by the force of Property none can claim a Right in the Thing besides the Proprietor. But now to the Party here concern'd, the not appearing of a Proprietor, is the same as if there really were none: Which is indeed a General Rule in other Cases. And therefore there's no body who hath a better Title to hold the Goods, whilst the Owner is unknown, than he who after this fair and upright manner is at present in possession of them.

XVI. Tenthly, What Grotius asserts, *'That a Fee taken either on a dishonest account, or for an honest Service, yet such as ought to have been perform'd gratis, is not to be restor'd,* we allow; if the necessity of Restitution is to be deriv'd wholly from the Propriety of Things, consider'd by it self. For thus, he, to whom any Thing hath pass'd with the Consent of the former Owner, cannot be oblig'd to refund it. But when the Cause of receiving such a Fee was dishonest, as suppose Extortion, then there ariseth an Obligation to restore it, from another Principle. And under the General Name of Extortion ought to be comprehended all Ways and Methods (though not so violent) of picking Mens Pockets by Corrupt Dealings: As when Magistrates refuse to administer Justice without a Bribe (f).

(1) An *Actio negotiorum gestorum* is, when One Man has done for another a Business unknown to Him, without any Commission or any express Order from Him. See B. III. t. 5. D. *De Negotiis gestis*. (2) See Mr. Barbeyrac's Third Note upon this Section. (a) Add. Ziegler ad Grot. d. I. Sect. 9. (b) See 1 Sam. XXV. 7. 15. 21.

(c) Vid. Lib. 11. t. 7. l. 14. sect. 13. D. *de religiof. & sumpt. funerum.* & Lib. 3. t. 5. l. 6. f. 3. D. *de negot. gest.* & Lib. 14. t. 2. l. 1. D. *de lege Rhodia.* (d) *Heautontim.* Act. 4. Scen. 5. v. 47, 48. (e) Vid. Lib. 6. t. 1. l. 17. princ. D. *de rei vindic.* & Ziegler ad Grot. d. I. Sect. 10. (f) See 1 Sam. XII. 3, 4. Where Samuel's Intention seems to have been, not to make shew of any extraordinary Sanctity, but to declare by that Solemn Protestation that he had in no respect transgress'd the Common Duty of a Judge; and consequently, that he had not deserv'd by any Fault of his to be thrust out of his Office, by the creation of a King. See before, Book. III. c. 7. Section 9.

O F T H E  
LAW of NATURE  
A N D  
N A T I O N S.

B O O K the F I F T H.

By WILLIAM PERCIVALE, M. A. *Student of Christ-Church.*

C H A P. I.

O f P R I C E.

**S**INCE Things that are the Subject of Property, are of different Natures, and administer differently to human Necessities, and since it often happens, that either the same Thing belongs to many, (the Parts of which are not in all respects alike) or that Things of a different Nature are to be exchange'd for one another; hence it becomes necessary for Men to agree upon some common Measure, by which Things of a different Nature may be compared together, and made equal to one another. Now Things are thus compared, and found to be equal, or unequal in respect of their Quantities, for Equality is nothing else but an Agreement of Quantities; and therefore we must consider the Quantity of Things and Actions, as far as they are useful to human Life, together with the Foundation and common Measure of that Quantity.

II. We find then, that Things are said to be equal, not only as they agree in *the three Dimensions*, but in some other respect. Thus Honour, Labour, and Wages are said to be equal, or unequal, not by reason of their agreeing, or disagreeing in Dimension, but upon some other Account. And therefore there must be some other Quantity, besides that which is term'd Physical and Mathematical, tho' Philosophers have hitherto talked of no other. Which is evident, if we consider, that the Nature of Quantity in general, does not con-

sist in the Extension of Substance, but in Things being capable of having a Value put upon them, and consequently of being compared together. But since Things receive a Value, not only from their natural Substance, but also in respect of some Moral Consideration, it follows, that besides the Natural, there must be also a Moral Quantity (1). However Things of the same Nature and Goodness receive a Value even from their Natural Quantity, as a great Diamond, *cæteris paribus*, is more valuable than a small one; which yet we have not always a Regard to in the Valuation of Things of a different Species, or Goodness; for a great Dog is not always more Valuable than a little one; or a great Mass of Lead than a small Piece of Gold.

How Persons are Morally valued according to Opinion (2); and their Actions, according as they are productive of Merit or Demerit, has already been discoursed of in its proper place (3). My Design here is only to treat of the Moral Quantity of Things and Actions, as they are conceiv'd to have some Use in the common Affairs of Life, and as they are capable of being compared together in order to Commerce. This we call *Price*, which is the *Moral Quantity or Value of Things or Actions, by which they are usually compared together in order to Traffick.*

III. *Price* may be divided into *Proper* and *Eminent* (4); the *first* is placed in Things

(1) See B. 1. c. 1. f. 22. (2) See B. 8. c. 4. (3) See B. 1. c. 8. See B. 8. c. 3. f. 18, &c. (4) In the Original 'tis *Pretium Vulgare*, which Mr. Barbeyrac translates *Price Proper* or *Intrinsic*, because thus 'tis distinguish'd from *Pretium Commune* in Sect. 9. and more properly expresses the Idea our Author had of the Term *Vulgare*.

and Actions, so far as they are capable of procuring either the Necessaries, or Conveniencies, or Pleasures of Life: The *other* is placed in Money, which is supposed to contain *virtually* the Prices of all Things else, and to be the common Measure and Standard of them.

IV. For the right understanding the Nature of the *proper Price*, it is necessary to consider distinctly, First, upon what it is founded; Secondly, what it is that raises or sinks it. The Foundation of the Price or Value of any Action or Thing is, Fitness (1) to procure, either mediately or immediately, the Necessaries, or Conveniencies, or Pleasures of human Life. Hence in common Discourse we call those Things that are useless, Things of no Value; and those Men too we say are of no Value, that are unprofitable Burthens of the Earth. Thus the Cock in the Fable set no Value upon the Jewel, because of no use to him. *Grotius* (a) is of Opinion, That *Want* is the most natural Measure of the Price of things: Where if he means, that Want, in its own Nature is the Foundation of Price, or that therefore Men only value a thing, because they want it, it will not universally hold true. For, if so, those things, that are subservient to our superfluous Pleasures, wou'd bear no Price, which yet the Luxury of Man has set a great Rate upon. For we do not really want any thing, but what we cannot, unless with great Inconvenience, be without (b). But if his meaning be, that the Want of the Buyer raises the Price, I own it is commonly so; but, that it is the Natural Measure of Price, that the more a Man's Necessities press him, the more may be justly exacted of him, no honest Man will admit; Nor does that place of *Aristotle*, (c) cited by *Grotius*, make for the purpose: For the *χρῆσις*, or Want he speaks of there, which in a manner preserves and holds together all Commerce, is not the Foundation of Price, but of Bartering only. For if Men wanted Nothing, but what they could supply themselves with, there would be no Bartering, or Exchanging Commodities, but every one would keep and enjoy his own (d).

V. Yet it is observable, that some of the most useful Things of human Life have no Price set upon them, either because they are and ought to be free from Property; or because they are excluded from Commerce; or,

lastly, because they come within the reach of it, no otherwise than as Appendages of some other Thing: besides, the Law has remov'd some Actions from Commerce, and thereby exempted them from Price. Thus the Air, the Sky, the heavenly Bodies, and the vast Ocean not being appropriated, can bear no Price, how serviceable soever they may be to human Life. And the Law having forbid things sacred to be brought into Commerce (2), has thereby exempted them from Price, although some of them have nothing in their own Nature to render them incapable of it. Nor, can any Price be assign'd for a Free-man's Head, it being a Contradiction to be free, and at the same time expos'd to Sale; for he is no sooner expos'd to Sale, but he ceases to be free: And therefore, even upon this Account, Liberty is said to be an invaluable Thing, because the Advantages of it are so great as to exceed all Value (e) (3).

Many Things also have no Price, because they are not capable of being possess'd separately by themselves, which yet very much enhance the Price of the Thing they appertain to; as the want of them takes from it not a little. Thus the lying open to the Sun, a clear and wholsom Air, a pleasant Prospect, the Winds, Shades, &c. considered separately in themselves bear no Price, because they cannot be enjoy'd without the Land they belong to; but yet of what Moment they are in the Purchase of Lands and Tenements, no Man is Ignorant. (f) And hence, by the way, it appears, how the Cause that *Demosthenes* pleaded before the Judges, about the Shadow of the Ass, ought to be decided: For he that hired the Ass could not hinder the Owner from lying down where the Shadow of the Beast fell, but might have immediately have taken it away by driving the Ass to some other place. Lastly, whatsoever Actions, either divine, or human Laws command to be done *gratis*, or forbid to be done at all, and so exclude from Commerce, cannot be brought under any Price. Of which Nature are those several Actions which have some supernatural Effect assign'd to them by divine Institution; as Remission of Sin, by the Absolution of the Priest; the Application of spiritual Benefits, by means of the Sacraments; and such like. Which who-soever confers upon another for any valuable

(1) See Mr. *Barbeyrac's* 1st Note upon this Sect. (a) L. 2. c. 12. §. 14. (b) *Mat.* IX. 12. (c) *Nicom.* l. 5. c. 8. p. 65. B. Ed. Paris. (d) *Ib.* *Arist.* *Polit.* l. 1. c. 6. (9) *Bartering obtains in every thing, and began Naturally from some Peoples having more than they had occasion for, and others having less. For then they were forc'd to exchange till they had furnish'd themselves with what they wanted.* (2) By *Res Religiosæ*, the Roman Law understands principally places where any thing had been buried. See *Instit.* B. 2. t. 1. §. 8, 9. and *Dig.* B. 11. t. 7. *de religiof. & sumptib. funerum, &c.*

(e) Here 'tis worth observing what *Philo Judæus de Spec. Leg.* p. 597. Edit. Genev. delivers. *Prices were set upon those who had devoted not only their Goods, but themselves; not according to their Beauty, or Stature, or such like, but according to their Age and Sex: for the Law fixes CC silver Pieces Price for a Man, from the 20th to the 60th Year of his Age, and a CXX upon a Woman; from the 5th to the 20th Year LXXX for a Man, and XL for a Woman; from Infancy to the 5th Year XX for a Man, and XII for a Woman; if past the 60th Year for a Man LX, for a Woman XL. All of the same Age and Sex are rated at the same Price, for Three good Reasons: 1st, Because the Dignity of the Vow is the same whether great, or mean Persons make it. 2dly, In the Case of a Vow Persons ought not to be rated upon the same Terms with Slaves expos'd to Sale; for those are more, or less esteem'd according to the Beauty and Vigour of their Bodies. 3dly, and chiefly, Because with God there is no Respect of Persons, as there is with Men.* (3) See the 27th Chap. of *Levit.*

(f) *Pliny, Nat. Hist. lib. 12. cap. 1.* says of the Plane-tree, That the People pay Taxes for the very Shade of it. Thus in Holland those that have Windmills pay a Yearly Tribute for the Publick Wind, as is pretended.

Confideration, is guilty of Simony: and to measure fuch Things with Money is look'd upon as Impiety and Irreverence towards the Divine Author (a). Unlawful too it is, to beftow Ecclefiaftical Preferments for Money, upon unworthy Perfons, which ought to be given to deferving Men gratis (b). Neither ought the Rewards and Testimonials of Virtue and Learning to be fold to thofe that don't deferve them; not only becaufe by this means they grow cheap, but becaufe fuch Men are often, by a pompous Title, recommended to publick Employments, to the great Prejudice of the Common-wealth (1). And indeed 'tis a Shame to the Men of Letters that fome fhould take fuch Liberty, as *Fabius of Bentivoglio* (c) expreff in Jeft, who going to make a certain Perfon a Doctor, met by Chance an Afs, that yawning with an open Mouth, look'd as if he were laughing; to whom, *Why laugh you,* fays he, *you Silly Creature? We can make you a Doctor too, if you have but Money* (d). Thus a Judge ought not to fell that Juftice which he fhould adminifter gratis (e). A Ruffian, or a Sorcerer, can't juftify his being hired, for Money, to kill a Man. A Scholar ought not to debase his Style and Learning in writing Scandal, nor ought any Man to prostrate his Credit by maintaining an unjuft Cause, or to ruin a juft one by Perjury; and many more of the fame Stamp.

VI. There are feveral Reafons why the Prices of Things fhould rife, or fall, why one Thing fhould be prefer'd before another of as great, or greater Ufe. For here the Necessity of the Thing, and the Eminency of its Ufe, does not always take place. Nay, we generally find the moft neceffary Things are cheapeft, becaufe by the peculiar Providence of God, Nature affords a greater *Increase* of them (f). That which chiefly raifes the Price, is Scarcity. *Thofe*

*Things that are fcarce,* fays *Sextus Empiricus*, (g) *are valued: thofe that grow amongst us, and are every where to be had, are quite otherwife. If Water were difficult to be met with, how much more valuable would it be, than the Things we moft value now? Or, if Gold lay in the Streets, as common as Stones, who, do you think, would value it, or lock it up? And therefore fome have thought it a Matter-piece in Trade, to procure a Scarcity. As the Dutch, in many Parts of the Indies, root up the Cloves and Nutmegs, to prevent too great a Plenty of thofe Spices (h). Befides, a Thing is ftill more valuable, when 'tis not only fcarce, but alfo comes from remote Places. Pliny (i) tells us of two Boys, the one Born in *Asia*, the other in *France*, who were wonderfully alike, and whom therefore the Merchant fet a prodigious Rate upon, and the Purchafers look'd upon nothing, in his whole Eftate, to be more valuable. For the Ambition of Mortals efteem thofe Things moft, which few Men have in Common with them; and on the other fide, thinks meanly of thofe, which are feen in the Hands of every one. Nay, fo perverfe we often are, as to efteem a Thing the more becaufe it is forbidden; its being forbidden whets our Curiofity. And therefore *Lucian* (k) with Reafon ridicul'd thofe, *Who in Winter load themfelves with Roses, and are pleas'd with them when fcarce and out of Season; but naufeate and defpife what is in Season, and agreeable to Nature.**

But, generally we fet a great Value upon nothing, but what raifes us in fome Meafure above the Rank and Condition of others: and for this Reafon Honours particularly, are more valuable for being fcarce (l). Tho' indeed it proceeds from the Corruption and Pravity of Human Nature, that we value real Goods more or lefs, according as few or many poffefs them in Common with us. For my Goods are never

(a) See *Acts VIII. 20.* (b) *Add. Decretum Gratiani, Cauf. 1. Quæft. 1, 2, 3.* (1) *Vid. Plin. Nat. Hift. l. 16. c. 4.* (c) *Vid. Janum Nictum Erythraeum, Pinocotheca 2. c. 29.* (d) *Ovid. de Arte Amandi, L. 2. v. 163. Secum habet ingenium, qui cum libet, accipe dicit.* The Practice of the Chinese is otherwife, of whofe Examinations and Preferments, *Vid. Neuhof. in Gen. defcrip. Sina. c. 3. Plin. N. Hift. l. 16. c. 4.* 'Oaken Crowns were the noble Badge of the Soldier's Valour, but now of late are Marks of the Emperor's Clemency, fince, by Reafon of the Licentiousness of our Civil Wars, it feems meritorious not to kill a Subject. O happy Times! which have rewarded fuch noble Services with Honour only, and, when other Crowns were valued for the Gold they were made of, would not allow the Preferring a Subject to be rewarded with any Thing that might bear a Price, thereby clearly profefling, that they thought it a Sin even to fave a Subject for the fake of Lucre.

(e) *Non bene conducti vendunt perjuriam testes, Non bene selecti iudicis arca patet. Turpe reos empti miseris defendere lingua,*

*Quod faciat magnas turpe tribunal oper. Turpe tori raditu census augere Paternos, Et faciem Lucro protituisse suum.*

*Ovid. Amor. lib. 1. El. 10. v. 37, &c.*

*Plutarch*, in the Life of *Romulus* p. 25. talking of the Duty of Patrons towards their Clients, adds; 'Tis accounted a mean and sordid Thing for thofe who are Rich to accept of a Fee of thofe who are Poor. From whence the *Cincian Law* afterwards had its Original. *Hic clamosi rabiosa fori Jurgia vendens improbus, iras & verba locat.* *Sen. Herc. fur. v. 171, &c. Vid. Quint. Inftit. Orat. l. 12. c. 9.* The Roman Laws thought it mean to fet a Price upon Philofophy and Civil Knowledge. *Vid. lib. 50. t. 18. leg. 1. f. 4, 5. D. de Extraordin. cognit. and Grot. in Flor. Spar. in h. l. and Quint. Inftit. Orat. l. 12. c. 7.* where difputing whether a Price ought to be fet on Eloquence, among other Things, fays, *It may be a Means of vendring Things Cheap to put a Price upon them.*

(f) 'Whatsoever is neceffary for Mankind, the Divine Providence has contriv'd, that it fhould not be dear, or hard to be got, as are Pearls, Gold, Silver and other Things, which neither our Body, nor Nature requires: but as for thofe Things we cannot fafely be without, fhe has plentifully difpers'd them throughout the World. *Vitruv. de Architect. l. 8. in the Preface.* (g) *Pyrron. Hypoth. l. 1. c. 14. p. 29. Ed. Genev.* (h) 'The Egyptians do not permit their Paper-reed to grow in many Places, by which they procure a Scarcity, and confequently raife the Price, but hinder the common Ufe and Advantage of it. *Strabo, l. 17. p. 550. Plato Euthydemo, p. 211. C. Ed. Wech.* That which is fcarce is valuable, Water is not valued altho' the moft ufeul Thing in the World. *Mamertin Paneg. Julian. c. 11. n. 3. Ed. Cellar.* 'Curious Dainties are not valued for their Tafte, but for their being hard to be gotten.

(i) *L. 7. c. 12.* (k) *In Nigrino. p. 38, 39. Ed. Amft.* (1) *Vid. Corn. Nep. Miltiade, c. 6. Cic. de Invent. l. 2. c. 39.* The Rewards of Vertue ought to be chafte and facred, not to be communicated to wicked, or mean Perfons; for Things that are fcarce and difficult are recommended to Men by the Rewards that attend them.

the worse, because others possess the like; nor the better, because others want them. Thus my Health is not the less valuable to me, because others also enjoy theirs; nor the more, because others are sick. Nor is my Knowledge less worth, because others are knowing too; Nor would the Value of my Wisdom rise, should other People prove Fools. He therefore that prides himself in seeing others want the good Things which he is Master of, seems indeed to take Pleasure in other Men's Misfortunes: and on the other side, he that thinks his own Goods the worse, because others possess them in Common with him, seems to be moved with Envy.

(a) But indeed, as in many Things, so in this, the general course of Men's Inclinations deviates from right Reason. Hence it is, that the Luxury of Man has set most unreasonable Rates upon many things, which Human Nature could easily be without. Which some think were contriv'd on purpose, that there might be some Use in vast prodigious Riches. What mighty Rates some Pearls bear, *Whose Goodness consists in such a Degree of Whiteness, Largeness, Smoothness and Weight; Qualities so hard to be match'd,* (b)? Nay, the Folly of Men fancies there must be something extraordinary in what costs much. Heliogabalus order'd the Prices of the Dainties, provided for his Table, to be represented to him greater than really they were, for that, he said, created an Appetite to them (c). Janus Nicius Erythraeus (d) tells us of Tulips, that thirty Years ago (when he writ this) they lay upon the Top of the Alps without any Care or Notice taken of them: Yet when they were brought to Town, the People, fond of them for their Rarity, set such a Price upon them, as that every Root sold for above a hundred Crowns. But

after they had encreas'd and grew common, their Price sunk so low, that hardly any Thing was cheaper. (e) For Mankind is so whimsical and silly, as to think those happy who possess Superfluities; rather than those who abound in all the Necessaries and Conveniencies of Life. And therefore it ought to be rank'd among the senseless Opinions of the common People, to value Things, either for their being new, or scarce, or hard to be gotten, or brought from far, unless their Goodness also, and their Usefulness recommend them (f). But those Things, that are of daily Use, and especially such as relate to Provision, Apparel, and Arms, rise in their Price, when they become necessary as well as scarce; as in a Dearth of Corn, or in a Siege, or in slow Voyages, where Hunger and Thirst are craving to be satisfied, and Life must be preserved upon any Terms (g). When Hannibal besieged *Casilinum*, a Mouse was sold for two hundred Pieces of Gold, and he that sold it died of Hunger, whereas he that bought it was preserv'd. The Prices of Artificial Things, besides the Scarcity of them, are much rais'd by the Neatness of the Art; (h) The Reputation of the Artificer adds Credit to some, and others are the more valuable for the Character of their former Possessor. As *Lucian* (i) mentions one, who had bought *Epicetus's* earthen Lamp at three hundred *Denarii*, hoping, no doubt, to get *Epicetus's* Wisdom, by studying by that Light. Thus the City *Cusco* in *Peru* was in so great Request, that even the Seed that grew near it, tho' really no better than any other, was yet of more Value, than that which grew elsewhere (k). In short, the Difficulty, the Elegancy, the Usefulness, Necessity of the Work, the Scarcity of Workmen, their being Masters in the Art (l), their not being under a

(a) See *Numb.* XI. 28, 29. *Mark* IX. 38, 39. (b) *Plin.* Nat. Hist. l. 9. c. 35. 'Pearls bear the greatest Price of any Thing; they were first brought to Rome when *Alexandria* was taken, not long before *Sylla's* Time; but a little after were so much in Fashion, that even ordinary Women affected to wear them; for they used to say, 'A Pearl to Women, when they appear'd in Publick, was as good as a Lictor. *Idem. ibid.* Some Jewels are so valuable that no Price can be set upon them. *Id.* l. 37. *Proem.* Our Coral amongst the *Indians* bears as great a Price, as their Jewels do amongst us. *Idem.* l. 32. c. 2. *Ad. Idem.* c. 17. 34. L. 10. c. 29. L. 12. c. 14. 17. 19. L. 13. c. 15. L. 37. c. 4. L. 6. c. 17. Of *Silk.* With so much Pains, and so far is it brought, that Women when they appear in Publick may be seen through. At this Day, *Amber* with us bears a moderate Rate, in the *East* 'tis vastly dear. (c) — *magis illa juvant, quae plaris emuntur.* *Juv. Sat.* 11. v. 16. Luxury has impos'd a Price upon the very Dregs that the Sea casts up. *Curr.* l. 8. c. 9. n. 19. — Old Plate receives a Value from the Fame of the Workmen, Brass from a few Mens folly. *Sen. Consol. ad Helv.* c. 11. (d) *Pinacoth.* l. 3. c. 17. & 24. In the Life of *J. Barclay* who was a great Admirer of them. (e) 'As our Desires are, so are our Esteem of Things; and there's no End of raising the Prices of Things, unless we first set Bounds to our Extravagancies, *Cicero* in *Verrum.* l. 4. c. 7. *Chins* and Earthen Wares are the dearer for being brittle. For 'tis an Argument of Riches, and a glorious Piece of Extravagancy to have a Thing that shall immediately be wholly destroy'd. *Plin.* l. 33. The Brittleness makes *Crystal* the dearer. For among unskilful People, the Danger, which ought to sink the Price, raises it. *Sen. de Ben.* l. 7. c. 9. *Strab.* l. 2 p. 87. *Ed. Genev.* Of precious Stones, that are so much valued, that those that have them not, are as happy as those that have them. (f) *Vid. Charron de la Sageffe.* l. 1. c. 39. num. 11. and l. 2. c. 10. num. 2. *Agatharcid.* de *Mari rubro.* c. 49. speaking of the *Alilai* and *Cassandrini* whose Country abounded in Gold, says, 'They bartered Gold for a tripple Quantity of Brass, but gave double for Iron. For they proportioned their Rates according to the Plenty, or Scarcity of the Commodities; in which we have not so much Regard to the Nature of the Thing, as the Necessity of its Use. (g) *Plin.* Nat. Hist. l. 8. c. 57. *Quintil.* Declam. 12. p. 176. *Ed. Lug. Bat.* 'In a very great Scarcity any Thing that can be bought is cheap. (h) In which *L. Mummius* was so ignorant, that when he had taken *Corinth*, and thereby got Possession of the Statues and Pictures drawn by the ablest Masters, he proclaimed to those whom he had hired to transport them into *Italy*, that if they lost them, they should find him new ones. *Vell. Pat.* l. 1. c. 13. (i) *Adversus indoctum.* p. 386. *Ed. Amstel.* (k) *Garcilasso de la Vega* Comment. Reg. l. 3. c. 20. (l) 'The *Athenians* had more need of good strong Roofs to their Houses, than the famous Ivory Statue of *Minerva*, yet I had rather be *Phidias* than the best of Carpenters. For a Man must be rated, not according to what he can do, but according to what Reputation he is in; especially, since few can Draw, or Carve finely: but any one is capable of being a Carpenter, or a Porter. *Cic.* in *Bruto.* c. 73. 'Thus *Nicias* gave a Talent for a Servant to look after his Silver Mines, *Xen. Mem. Socrat.* p. 435. in fin. l. 2.

Necessity of working, all contribute to the raising of the Price (a).

VII. But sometimes it happens, that some certain Things are valued at a high Rate, by some particular People only, which may be called the *Price of Fancy* (b). And this where Animals are the Object, proceeds from a sort of Acquaintance with them; (1) or, because they know how to fute themselves with our Humour; or because we have escaped some imminent Danger by their Assistance; or perhaps they are the Remembrancers of some signal Event. Besides, some Things are recommended by the Friend that gives them, so that we wou'd not part with them for several others of the same Goodness (c). Many also put a Value on Things because some great Man, whom they are willing to compliment, has express'd an Esteem for them. Thus this, or that Provision, or Apparel rises in its Price, when the King is pleas'd to be taken with it. But here some observe, that the Fancy of the Buyer ought not to raise the Price of the Commodity, unless some other Causes concur. The *Roman* Laws make no Allowance for the Fancy of the Party in the Restitution of Damage done by Chance (d); And yet Merchants frequently raise the Price when they see the Buyer fond of the Commodity. *Diodorus Siculus* (e) observes what an Advantage the *Italian* Factors made of the Drunkenness of the *Gauls*. They bought them Wine, and sold it at most unconscionable Rates; For they had a Boy for a Hogthead, and so exchange'd their Wine for a Butler.

However the Affection of the Seller may fairly raise the Price, if so be he signifies it to the Buyer; for to part with a beloved Thing, for the Sake of the Buyer, deserves some Consideration (f). Lastly, the Price of Things is sometimes enhanced by some vicious Habit of Mind, as Vain-Glory, Cruelty, and the like (g).

VIII. And these, always, raise the Prices of Things, as their Contraries always lower them. But, in order, to regulate the Prices of particular Things, *pro hic & nunc*, and to reduce them to a just Standard; we must remember, that in the State of Nature every one has power to put what Price he pleases upon his own

Goods, as being, in that State, the sole and supreme Master of them. For, in this Case, should another prize my Goods, it would still be in my power to accept or reject it; and thus I should in the end put the Price upon them my self: and, though I lay never so extravagant a Rate upon them, no Man can have any Cause to complain; for, no one ought to be concern'd how much I magnify my Riches in my own Fancy: and they who think the Price too great, may let it alone. And therefore, if any one has a Mind to my Goods, 'tis fit I should put what Price upon them I please: as on the other side, should I force my Commodity upon another, I must take what the Buyer, who is indifferent, will be pleas'd to give me. Indeed, if any one, through ill Nature, or Hatred, or Envy, refuses a Man in want, either to sell at all, or, at least, sells upon hard unreasonable Terms, then, and only then, is there Cause to complain. From whence it follows, that in a State of Nature, the Price of every thing is to be determined by the Agreement of the Contractors; nor can any one be said to have offended against the Law of Commerce for making the best of his Market, provided he has not been Inhuman towards the Necessitous (h).

But in a regular Government the Prices of Things are determined; either by an Order from the Magistrate, or some Laws, or else by the common Judgment and Estimate of Men, together with the Consent of the Parties. The former may be called the *Legal*, the other the *Natural Price* (2). The *Legal* is always presum'd to be consonant to Justice and Equity, unless the contrary does evidently appear: for sometimes gross Ignorance, and more frequently, Hatred, or Favour towards the Buyer or Seller, or some other Corruption, or private Interest interposes. The *Legal Price* is fixt, as it were, in a Point, and admits of no Latitude, but the least Excess becomes Injustice. And when 'tis fixt (as most commonly it is) in Favour of the Buyer, the Seller cannot, in Justice, demand more; but the Buyer may, with the Consent of the Seller, sink below it; provided he does not fall short of the lowest Degree in the *Natural Price*: and the Seller may lawfully take less,

(a) That sort of Work is most artificial, which depends least upon Fortune; that the most sordid, which most defiles the Body; that the most servile, which is of most Labour to the Body; that the most ignoble, which requires the least Vertue. *Arist. Polit.* l. 1. c. 7. (11). And again, That Exercise, Art, or Discipline is to be reputed mean, that renders either the Body, or the Soul unfit for the Practice of Vertue. *Pol.* l. 8. c. 2. As for the more noble Arts, some are more worth than they cost; you purchase of a Physician Life and Health, Things invaluable; of a learned Tutor the Liberal Sciences, and the Adornment of the Mind. And therefore, in such Cases, we do not pay for the Things they teach us, but for their Labour, *Sen. de Ben.* l. 6. c. 15. (b) It was a Saying of a certain *Arabian*, Whatsoever is dear, although it be dear, yet, if I have a Fancy for it, it is not dear; nor can any Thing, that pleases, be said to cost too much. *Leo Afric.* l. 3. All Gifts are valued as they are acceptable to the Receiver. *Liban. Declam.* 41. p. 870. *D. Ed. Paris.* (1) See our Author's Abridgment, *De offic. Hom. & Civ.* Lib. 1. c. 14. l. 4.

(c) — *Mihi lintheum remitte*

*Quod me non movet estimatione,*

*Verum est μνημόνων mei sodalis.* *Catullus, Carm.* 12. 11, 12, 13.

— *Acceptissima semper*

*Munera sunt, Author quæ pretiosa facit.* *Ovid. Epist.* XVII. v. 71, 72.

(d) *Vid. Lib.* 9. t. 2. l. 34. *D. ad L. Aquil. & Lib.* 35. t. 2. *Leg.* 36. *Ad Leg. Falcid.* (e) *L.* 5. c. 26. p. 304. The same d. l. c. 17. relates, That the People of *Balaeres* valued one Woman at the Rate of four Men, they were so prone to Venerary. (f) *Ad.* l. 62. f. 1. l. 63. *D. ad L. Falcidiam.* (g) What Rates the old *Gauls* set upon the Heads of their Enemies, See in *Diod. Sic.* l. 5. c. 29. p. 307. and *Strab.* l. 4. (h) See *Gen.* XLI. 49. XLVII. 13. &c.

(2) That is, as Mr. *Barbeyrac* has it, the Ordinary or Current Price.

provided it does not tend to the Perjudice of others of the same Trade. But if the Price be fixt in Favour of the Seller, then the Buyer cannot lawfully press the Seller to take less, who yet, if he thinks fit, may take it; for any Man may recede from his own Right: However, in this Case, the Seller may take more, provided it does not exceed the highest Degree in the *Natural Price*. On Labour, the Price is generally fixt in Favour of the Labourer; on Commodities in Favour of the Buyer. In some Places, a more subtle Method is taken to prevent unreasonable Prices; as in *Greece* the *Fishmongers* were not permitted to sit, but obliged to sell their *Fish* standing, that so by the Tedioufness and Tirefomness of the Posture they might be forced to sell them while they were sweet, and at a moderate Rate.

IX. But the *Natural Price*, which is not fixt by Law, admits of some Latitude, within which more or less may be demanded and given (a). (1) By Reason of this Latitude they generally, divide the *Natural Price* into three Degrees, the lowest, or favourable, the middle, or reasonable, the highest, or rigorous: within which Degrees any Thing may be bought, or sold dearer, or cheaper. But, of what Extent this Latitude may be, it is not easy to give a Rule that will reach all Cases; But that may be said to be the just Price, which is generally agreed upon by those who sufficiently understand the Market and the Commodities (b).

X. In regulating this *Natural Price*, Regard is to be had to the Labour and Expence (2) of the Merchant in Importing and taking Care of his Goods; for upon this Ground it is that a Merchant can justify his selling so much dearer than he bought: But this Regard is only to be had to those Expences which they are usually put to; extraordinary Chances have nothing to do here. And therefore it can be no Reason for a Merchant to raise his Rates because he happened to break his Leg, or to fall sick, or because Part of his Goods were cast away, or stolen; unless such Accidents contribute to the Scarcity of the Commodity; much less can he bring in his own extravagant and superfluous Expences. But his Time, his Study, his Care, in getting, pre-

servng, and sorting his Commodities, as also his Servant's Wages may fairly be rated by him. And it would be inhuman, and tend to the Discouragement of Industry to allow a Tradesman, or a Man of any other Calling, no more Gain than just enough to supply him poorly and sparingly with the Necessities of Life. The Difficulty also, and Length and Danger of the Voyage may be brought into the Account, as also the different Value of Moneys and Commodities in different Countries. Besides, the Way of Sale may alter the Case; for they who sell by Retail may demand somewhat more than those who sell by Wholesale; their Trouble being greater, and it being more advantageous to have a round Sum paid down at once, than to receive the same by little and little. But what sudden and frequent Alterations the Market admits of by Reason of the Plenty, or Scarcity of Buyers, Money, or Commodities, is well known. For the Scarcity of Money and Buyers proceeding from some particular Cause, meeting with a Glut of Commodities, Sinks the Price (c). As on the other side, the Plenty of Buyers and Money, or the Scarcity of the Commodity raises it (d) (3). Besides, it helps to lower the Price, when the Seller forces his Commodities upon us of his own accord, as if they lay upon his hands (e), for that proceeds from a Scarcity of Buyers, and besides, in this Case, the Purchaser has often no Occasion for the Thing, nor would buy it but that he thinks it a good Bargain: and indeed, in such a Case we often buy not so much for our own, as for the Seller's sake. And therefore, when Things are sold by Auction, or Inch of Candle, they often go off for less than otherwise they would sell for; it being the Condition of that sort of Sale, that the Ware should go to the highest Bidder: and yet, sometimes, the Warmth and Emulation of the Company rises above the ordinary Price: which is, indeed at all Times, rais'd by the Plenty of the Buyers. Lastly, the Seller ought to have Allowance made him for the Loss ensuing, or the Gain he foregoes by selling at that particular Time when the Buyer is Importunate: for it would be unreasonable to ex-

(a) Of this Price *Seneca* is to be understood when he says, *What matter how much it is, since the Buyer and Seller agree upon it; the Value of Things is according to the Market, when you have commended them, they are worth so much as they can sell for and no more. De Benef. l. 6. c. 15. And Law 63. of Book XXXV. t. 2. of the D. ad L. Falcid.* The Prices of Things are not fix'd according to the Fancy, or Use of particular People, but as they are valuable to every Body. See also *Law 33. of B. IX. t. 2. of the D. ad L. Aquiliam.* In some Places, (says *Aristotle* *Nicom. 9. 1.* towards the end.) The Laws allow no Action for voluntary Commerce; thinking it reasonable that the Creditor should intirely depend upon the Honesty of the Debtor. For they thought the Debtor fitter to judge how much ought to be paid, than the other. For many Things are differently rated by those that are in Possession, and those that desire to be in Possession of them: every one setting a great Rate upon his own. But a Return ought to be made according to the Opinion of him that is to make it, which perhaps ought to be adjusted not according to the Value he puts upon the Things, when in Possession of them, but according to the Value he puts upon them before he had them.

(1) Vid. *Grot. L. 2. c. 12. f. 14. & Cicero. Verrin. de Signis. Qui modus est in his rebus Cupiditatis, idem est estimationis.* (b) Hither may be referred that of *Varro de Ling. lat. l. 4. Pretium est, quod estimationis emptioisque causa constituitur: dictum a peritis, quod hi soli possunt facere recte id.* Yet *Salmasius de Ujuris*, ridicules this Derivation.

(2) See *Grot.* in the place above-cited. (c) Cheapness proceeds from a Multitude of Sellers. *Tacit. An. 6. c. 17.*

(d) Vid. *Socrat. Hist. Eccles. l. 3. c. 17.* in the beginning. (3) Mr. *Barbeyrac* here has added a Period taken out of our Author's Abridgment. *De Offic. Hom. & Civ. B. I. c. 14. f. 6.* where 'tis said, a high Price is set upon a thing, when 'tis sold only to please One importunate to have it, and without which Intreaty it would not have been sold.

(e) Especially, where *Cato's* Rule of good Husbandry is observed, which *Plutarch* relates in his Life, 'Nothing is cheap that is superfluous, but what we have no Occasion for, although 'tis sold for a Farthing it comes dear.' 'Tis a Proverb, *Merx ultronea putet. Proffer'd Ware stinks.*

pect me to part with my Goods, but upon such Terms as to be no loser by them. Besides, the Loss, or Gain by Reason of slow, or prompt Payment, may be, and indeed always is, brought into the Account: for a Day is part of the Price, which is more if paid down upon the Nail, than if paid some time after; for, in the mean time, I might, perhaps, turn and apply it another way to my Advantage (a). And therefore, (b) *Polybius* commends the Generosity of the *Younger Scipio*, for paying his Sisters their Portions forthwith, which he was not obliged to do till two, or three Years after, and that too at Rome, a City where no Man gives away any Thing at all, or pays a Penny before it be due; so diligent is every Body in getting Money, and so much Advantage do they make of the Time.

Lastly, we may add, what *Themistocles*, when he was going to sell his Farm, gave a publick Advertisement of (c): That he had a good Neighbour. A House, says *Sadus* (d), that has got such a Neighbour as you, (speaking to a Rascally Jew) may possibly sell for Ten Drachmæ of bad Money, but there is Hopes that when you are gone, it may be worth an Hundred. A good Neighbour therefore raises the Price of a Farm: especially, in a Country, where the good old way of the Spartans obtains (e), Who made free with their Neighbours Servants, Dogs and Horses as if they were their own: And when a Man wanted any Thing that his Neighbour was Master of, he need but to open his Store-house, and to furnish himself from thence with what he had Occasion for. The Cause of raising the Price of Slaves in *Justin* was very unusual and not a little owing to Cruelty. The Price of the Theban Captives was rais'd, says he, not for their being serviceable to the Buyer, but out of Hatred to the Enemy (f).

XI. But, when most Nations had degenerated from their primitive Simplicity, 'tis easy to imagine, that this proper Price could not suffice for the Dispatch of Business and Commerce which daily increased. For, Commerce consisted in Bartering only, and Work was paid in Work, or else in Commodities. But after our Luxury had increas'd our Necessities, and we, not content with the Produce of our own

Soil, had a mind to the Delicacies of other Nations, it was hard for any one to possess such Goods, for which any other would be willing to barter those Commodities that we wanted, or which, indeed, could be exactly equivalent to them. And, in a well regulated State where the Subjects are divided into various Orders and Ranks, there must needs be several Sorts of Men, which would not be able to subsist, or at least very hardly, did the simple Way of Bartering still prevail. As 'tis very evident that those Nations, who are yet unacquainted with the Use of Money, are perfect Strangers to the more improv'd and cultivated Way of Living (g).

XII. And therefore the most civiliz'd Nations by Agreement, thought fit to set a certain Eminent Price upon some particular Thing, as a Measure and Standard for the Price of every Thing else: by the Help of which one might procure any saleable Commodity, and Commerce might be carried on more conveniently. To this Purpose, *Aristotle* (h) discourses excellently, When Want, says he, had made Bartering necessary, any simple Exchange of Commodities was sufficient to answer our present Exigencies. But because we knew not what, or how much we might have Occasion for hereafter, the Use of Money was introduc'd; which is, as it were, a Pledge, or Security, on which Men have agreed to impose such a Power, as to make it capable of procuring any saleable Commodity. And in another Place (i), When Men's Necessities were to be supply'd from abroad, by importing what they wanted and exporting what they abounded with, it was necessary to introduce the Use of Money. For every Thing necessary for Life could not easily be convey'd backward and forward. And therefore to carry on such a Barter, they consented to give and receive such a Thing, at such a Value, as Iron, Silver, or any thing else: which, at first, was determin'd by Quantity, or Weight: but after, had a Stamp put upon it, to save the Trouble of Weighing; for the Stamp is a Token and Demonstration of such a Quantity. Again (k), because an Architect deserves more for his Work than a Shoemaker does for his; and it would be difficult for these Two to barter together, it being unreasonable to give a House for a Pair of Shoes; therefore to render such Things saleable, Mankind

(a) *Vid.* Mart. l. 6. ep. 30. (b) *In excerptis Peirescianis. Add.* Grot. l. 2. c. 12. f. 14. (c) *Plut.* Apothegm. p. 185. D. (d) *Rosar. Perf.* c. 4. (e) Mentioned by *Plutarch* Institutis Laconicis. p. 238. Ed. *Wech.*  
 (f) *Just.* l. 11. c. 4. (g) *Vid.* *Busbeq.* Epist. 3. where he treats of the Manners of the Colchi. *Add.* l. 1. print. lib. 18. r. 1. D. *de contrah. Empt.* And therefore *Maximus Tyrius*, *Diff.* 36. p. 344. Ed. *Lugd.* A. 1630. is in a sweet Dream, when he says, 'Meat, Drink, and Raiment and other Necessaries Men provide, by bartering Brass and Iron; and those of more Value, by Gold and Silver. But this is through the Corruption of Mankind: for without any Use of Metals they might communicate gratis to one another, by this most just Measure, that he who wants, should provide for his Necessity, by borrowing of him that abounds, and he that abounds should lend upon no other Condition, than that he in his Turn should be serviceable to him. (h) *Nicom.* lib. 5. c. 8. Money was found out as a common Measure, to which all other Things should be referred. *Nicom.* 9. cap. 1. (i) *Pol.* lib. 1. 6. (9).  
*Nicom.* lib. 5. cap. 8. 'All Things that are barter'd ought to be capable of being compared together, to which Use Money is subservient, which in a manner is a Medium, for it measures all Things: For Money was substituted, by Consent, and is, therefore, called νόμισμα as being such, not by Nature, but νόμος by the Law; it being in the Power of Man, to alter it or make it useless. Every Thing ought to have a Price set upon it, for so there will be continual Traffick, and where that is, there must be Society. Money therefore, as a Medium, renders Things commensurable, and consequently equal. For there can be no Society where there is no Exchanging; nor Exchanging, where there is no Equality; nor Equality, but where Things are commensurable. (k) *Magn. Moral.* lib. 1. c. 34. *Rhet.* lib. 1. cap. 16. 'Money is, as it were, the Rate of the Worth of other Things. And therefore all others are procurable by it.

have thought fit, by common Consent, to make use of a Piece of Silver, which they call Money: and this, for the Maintenance of Civil Communication, they have agreed should be accepted for any Commodity according to the Value and Price of it.

XIII. For this Purpose, the more noble and scarce Metals, Gold (a), (1) Silver and Brass seemed most proper. For as we accept a Man of known Credit and Value, and not every common Fellow for a Surety, so no Man would part with his Goods, which perhaps he had acquired with great Labour and Industry, for what he might meet with any where, as a handful of Dust or Sand; it was necessary therefore 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 in it. These Qualities are found in Metals, which are also of such a close compacted Substance, as not easily to be worn out, and yet capable of being divided into minute Pieces, both which are absolutely necessary for that which is design'd to be a Standard and common Measure in Commerce. But since this Use of Money does not follow from the Nature of Things, but the common Consent and Agreement of Men (b), any thing else, in Cases of Exigency, may serve in its stead. Thus Leather, Paper, and such like, with some certain Stamp upon them, have often pass'd for Money, in times of Necessity; which, when those Emergencies were over, have been exchange'd for the common Species (c). Thus in the Kingdom of Congo and Tombutto in Africa (d), and in many Places of North America, a certain sort of Sea-shell is in Use, instead of Money. The Apalachites, a People of Florida (e) use certain black and white Grains for Money. The small Money of the Province of Canichu are Lumps of Salt (f), which are also currant among the Abyssines; (g) Though certainly such sort of Money is capable of carrying on but a very small Trade. In the Kingdom of Siam the great Money is Silver, the small a certain sort of Shell (h). And here, by the way, we may observe, that, in Congo, they look upon Iron to be a nobler

Metal than Gold, or Silver, because these are of little Use, whereas that affords most convenient Instruments for the Service of Life. Among the Ethiopians Brass was the most scarce and precious Metal (i). And indeed laying aside the Use of Money, Mankind could better be without Gold and Silver than without Iron. The Peruvians (k) thought themselves happy that the Europeans help'd them to Iron Instruments. And one of their Grandees could not enough admire a Pair of Sizzers brought over by the Spaniards, saying, *Had the Spaniards brought nothing else, but Razors, Sizzers, Combs and Looking-Glasses, it would have easily oblig'd them to give all their Gold and Silver in return.* For before that, they shaved themselves with Knives of Stone, not without great Pain. As for their Gold and Silver and Jewels they gave them their King, not as Tribute but as a Gift (l). In a certain Country of Arabia, they bartered an equal Weight of Gold and Silver for Iron, for they abounded in the former Metals and wanted the latter (m). Heretofore these Metals us'd to pass by Weight (n); insomuch that still, among some Nations, the Money is denominated from the Names of Weight. But that growing inconvenient it became customary every where for the several Princes of each Nation, to coin Money of a certain Size, and to Stamp it with a certain Mark, to determine its Value (o).

XIV. But although the Value of Gold and Silver and Money depend upon the Agreement of Men; yet the supreme Magistrate has not a Power at large of determining it as he thinks fit: but must have regard to some certain Considerations. And First, all Nations, that we know of, agree that Brass is less worth than Silver, and Silver than Gold; and that Silver bears such a certain Proportion to Gold (p). Again, Money is not design'd for the Convenience of Commerce between Natives only, but also between them and Foreigners. And therefore, if the Magistrate shall raise the Money extravagantly, he would render it useless in our Traffick with Foreigners. Indeed among Subjects of the same Nation (q), *Neither the Banker, nor the Farmer can refuse the*

(a) Which why it is esteemed the most noble, may be seen in *Plin. Nat. Hist. lib. 33. cap. 3.* about the end.

(1) *Vid. etiam lib. 34. c. 14. Plin. N. H. & Lucian. in Charon. p. 350. Ed. Amst. where Iron is prefer'd to Gold.*

(b) *Add. Philostr. in vita Apollonii Tyan. lib. 2. cap. 3.* (c) *Vid. Polyæn. Stratag. lib. 3. cap. 10. n. 1. of Timotheus and Demetrius. Seneca de Beneficiis, lib. 5. cap. 14. at the End.* (d) *In Leo. Afric. lib. 7.* (e) Concerning which, *vid. Rochefort Descript. Antillarum Insul. Part 2. c. 8. n. 8.* (f) *As Paul of Venice relates, lib. 2. cap. 38.*

(g) *Franc. Alvarez. cap. 46.* (h) *Vid. Jod. Schouten, in Descript. Regn. Siam. Add. Polydor. Virgil. de Invent. rer. lib. 2. cap. 20. Alexand. Neapol. lib. 4. cap. 15. Budeus ad l. 1. D. de contrah. empt.* (i) *Herodotus Thalia concerning the Ethiopians.* (k) *Garcilass. Comment. reg. l. 1. 21.* (l) *Idem ibid. l. 5. c. 7. Add. Th. Mor. Utopia, l. 2.*

(m) *Diodor. Sic. l. 3. c. 45. Add. Strab. l. 16.* Iron is therefore said to be better than Gold, because this is defended by that. *Lucian. in Charon. d. l. And Plin. Nat. Hist. lib. 34. cap. 14.* (n) *Vid. Plin. lib. 33. cap. 3.*

(o) From whence that of *Juvenal, Sat. 14. v. 291. Concisum argentum in Titulos, faciesque minutas. Alex. Severus* gave Order, 'That the Pieces of Money of Two, Three, Four and Ten Pound weight, up to those of Fifty and an Hundred, which *Heliogabalus* had coin'd, should be melted down and no longer pass in Payment; and that for the future the Money should be denominated from the Quantity of the Metal. For he observed that the Emperour was at a greater Expence in Largeesses, by being under a Necessity of giving away Ten Shillings, nay sometimes Thirty, Fifty or a Hundred in a single Piece, because he had not a sufficient Stock of smaller Pieces to distribute. *Lamp. c. 39.*

(p) 'If for half a Pound of Gold a Man receives a double Proportion of Silver, he receives only a double, whereas he ought to receive a Twelfth Proportion, *Plat. in Hipparcho, p. 514. C. Ed. Wech.* In the League that the Romans made with the *Ætoliens*, they were to give one Pound of Gold for ten of Silver, *Polyb. excerpt. leg. l. 18. 5. Add. Bod. de Rep. l. 6. c. 3. p. 1071, &c.* (q) That of *Arrian* takes place, *Dissert. Epist. l. 3. c. 7.*

*King's Money; but whether they like it or no, must take it in Payment.* But between us and Foreigners, should not the Quantity and Goodness of the Metal be so adjusted, as to render our Money, at least, as good as that of the Country with which we traffick, it would be a great Clog and Hinderance to Merchandize, and would reduce us again to the Necessity of Bartering, which, of it self would not be sufficient to carry on Trade, unless we export as much, or more, than we import; and Foreigners stand in need of our Commodities and we not of theirs (a). And because, where our Estate lies in Movables, it chiefly consists in Money, it must apparently be much less'n'd, when that admits of so much Alloy as to discover its own Baseness in its Looks (1). *Polyænus* (b) relates of *Leucon*, that he commanded all his Subjects to bring in their Money, to have it new coined; and, when he had coin'd it, he order'd every Piece to go for Double, and so gain'd half of the Money without doing Wrong to his People. Indeed such a Thing, as this, may admit of some Excuse, in Case of Necessity, if remedied when that is over. But what *Zonaras*, and others tell of *Nic. Phocas* cannot be palliated. For he having coin'd a Quantity of light Money, besides the Weighty that was Currant, would receive none but the Weighty into his Treasury, but made all his Payments in the light (c).

Some Legislators, indeed, have taken this Course to extirpate Covetousness, Luxury, and such Vices, by introducing base Money. *Lycurgus* (d) cry'd down all the Gold and Silver of Sparta, and allowed Nothing to pass but Iron, having assign'd a small Price to a vast Weight and Bulk of it; so that 10l. would take up a large Room, and require a Team of Oxen to bring it Home. By this Means, he utterly rooted out several Sorts of Villany. For who would steal, or cheat, or receive a Bribe which could not be conceal'd: and which no Man was the better for having in his Possession, since it could not be apply'd to any other Use. For, they say, he made all the Iron red hot and quenched it in Vinegar, which, by that Means, became Brittle and good for Nothing. By the same Methods were all idle superfluous Arts rooted out, when Nothing could be got by them: for the Iron Money not passing in Greece, none of the foreign Delicacies could be imported from thence into Sparta, which cut the very Nerves and Sinews of Luxury. *Lysander* (e) brought back Gold and Silver into Sparta, and with them Avarice. Indeed among other Nations too, Covetousness crept in with the use of Money. For as long as their Riches consisted in Corn, Cattle, and

such like, the Cumberfomness of their Goods, together with the Difficulty of managing and preserving that which was so liable to Corruption, was sure, at length, to put a Stop to their Boundless Desire of encreasing their Store. But now since the Use of Gold and Silver has been found out, a Covetous Man may embrace his Millions. *Plato* (f) in his Common-wealth, to take off his Subjects from too great a Thirst after Lucre, commanded, *That no private Man should have any Gold or Silver: That the Money which the Subjects make use of, should be such as passes no where else. But yet that the Publick should have in Possession some of the currant Money of Greece, in Case they should have an Occasion of waging War, of Travelling, or of sending an Embassy; that Travellers, at their Return home, should pay into the Publick, all the foreign Money they bring with them, and receive that of their own Country for it.* The great *Cham* at *Cambalu* put his Royal Stamp upon a vast Sum of Money made of the Bark of Mulberry-Trees, which no Man in his Dominions, upon pain of Death dared to refuse, or to coin and use other (g). The Foreigners too, who traded into those Parts for the Gold, Silver and Jewels which they imported, were forc'd to take that Money which they converted into the Commodities of the Country, and so exported again. By which Means that Prince heaped up a prodigious Quantity of Gold and Silver. The *Persians* call the leather Money, which an unjust King had imposed upon them, *Schebreena* (i. e.) Money impos'd on the Subject at the Pleasure of the Prince. The Memory of which has made such an Impression upon them, that when they would denote the Injustice of any King, they express it by saying, *He imposes Leather Money upon his People* (h). On the other hand, the Care that the *Venetian* Senate took of their Subjects, is much to be commended: For when the small Money had been debas'd, and a vast Quantity of it crept in among them, that Calamity not being removable any other way, the Senate made a Decree, That whosoever within such a time, should bring in their Bad Money should have it exchange'd for Good. Upon which Account, above Five Hundred Thousand Crowns were disburs'd out of the Treasury (i).

XV. But since Money is the common Measure of the Value of other Things, its Value ought, by no means to be alter'd, but where the Interest of the Publick does evidently require it. And then too, the more moderate the Alteration is, the less will the Peoples Accounts be confounded. And therefore, such a sort of matter was chosen for the carrying on of Com-

(a) Vid. *Polyb.* l. 6. c. 47. about the end. (1) See Mr. *Barbeyrac's* Note upon this Section. (b) *Lib.* 6. c. 9. *Add. Bodin. de Rep.* l. 6. c. 3. *Greg. Tholosan. Syntag. juris univ.* l. 36. c. 2. (c) *Add. Jo. Mariana, Hist. Hispan.* l. 15. c. 9. (d) *Plutarch in Lycurg* p. 44, 45. *Ed. Wech.* (e) *Vid. eundem in Lysandr.* (f) *De Legibus,* lib. 5. p. 848. (g) See *M. Paul. of Ven* l. 2. c. 21. (h) *G. Gentius ad Sadi Rosarium Persicum,* c. 3. *Add. Buchanan Hist. Scot.* l. 12. p. 450. (i) *Andr. Maurocenus Hist. Venet.* l. 14. p. 641. We may observe out of *Plin. Nat. Hist. lib. 6. cap. 22.* That the King of *Taprobanes* very much admired the Justice of the *Romans* in that *Denarii*, which he had taken, were all of equal Weight, whereas the Stamp made it appear that they had been coined at different Times, *Vid. Solin. Cap. 66.*

merce, the Publick and Unalterable Value of which, constantly apply'd to the same Quantity, might be able to relieve and supply all the Inconveniencies that were found in simple Barter (a).

But yet as to the Unchangeable Value of Money, we must observe what *Grotius* (1) asserts, *That the Currency of Money is not naturally derived from the Matter only, nor yet from this, or that particular Form and Denomination, but from its Capacity of being compar'd with all other Things, or at least, all those that are most necessary.* The Meaning of which place is, that it does not proceed from the *Matter* (2) of the Money only, v. g. its being Gold or Silver, that a certain Piece goes, *pro hic & nunc*, for so much, and is equivalent to such a Commodity, (for the Currency of Money does not only depend upon one Piece's being equivalent to another of the same Quantity and Quality, (for all *Consumable Commodities* are such,) but upon its containing Virtually the Prices of every thing else,) nor from any particular Denomination, as that it is call'd a Ducat, Crown, Dollar, or Florin; nor from its having such a certain Stamp (b); but from its Capacity of being compar'd, in respect of Plenty, or Scarcity with other things, especially those that afford the more Necessary Supports of Human Life. Now Land does this; for from it, mediately or immediately, proceed most Things, that Human Life subsists upon. And the Product of it being one Year with another pretty equal, it may be presum'd to have its Natural Value fix'd and certain, to which the Prices of other Things, at least, of such as have not received their Value from the Luxury, or Folly of Man, are refer'd as to a Standard. For 'tis very reasonable that the Prices of such things, as are the Product of Land, or are maintain'd by it, should be regulated by the Price of the Land it self. Since therefore the Land, every where, is in private Hands (most Men's Estates being now in Land) the Value of Money must needs rise, or fall according as it is scarce, or plentiful, in Proportion to Land. For every civiliz'd Nation, consisting chiefly of two Sorts of Men, the *Farmer* and the *Tradesman*, or *Labourer*, if in a great Plenty of Money, Land, and its Product should sell cheap, it must needs break the *Farmer*: and on the other Hand, should Money be scarce, and Land and its Product dear, it must needs beggar the *Tradesman*. Which in Fact we find true; for when a plentiful Harvest makes Corn cheap, if the Work of the *Tradesman*, and those that earn their Living by their Labour, stand at the same Rate as in less fruitful Years, the *Farmer* is found to get little by his plentiful Crop. And the same Inconvenience presses the *Tradesman* and *Labourer* when Corn is dear; if still their

Labour keeps its old Price. Since therefore, in indifferent Years, the Commerce between the *Labourer* and the *Farmer*, is best adjusted, and there is then least Complaint between them; it is evident, that in fixing the Price of Money, the greatest Regard ought to be had to Land, especially where the Country does not subsist upon Merchandise only, but chiefly upon its own Produce.

XVI. From what has been said we may judge, whether a Farm, that was rated at a hundred Pounds two hundred Years ago, ought not, *ceteris paribus*, to be rated at more now; and whether the Wages that were large enough then, are not, in all Reason, a little too scanty now. For it will not suffice to say, that the Pieces of Money have the same Weight, Goodness, Name and Shape which they had formerly. But we must consider, that within these two hundred Years, such a vast Quantity of Gold and Silver has been imported into *Europe* from *Africa* and the *Indies*, not to mention the many Silver-Mines of *Europe* it self, that the Value of Money has, by degrees, sunk very much; infomuch that (as *Bodin* (c) observes) Commodities bear ten times the Price they did formerly, by Reason of the Plenty of Gold and Silver. And therefore the old Price of Land and Wages ought to rise, *ceteris paribus*, in the same Proportion (d). For suppose commerce to be carried on by pure Barter in any Country, which affords very little Wine, but abundance of Corn; here, for a small Parcel of Wine, we shall receive a great deal of Corn: but if, by good Management, the Vineyards should happen to produce a larger Vintage, without doubt, for the same Quantity of Corn, we must give a greater Proportion of Wine than formerly. In like manner when Money is scarce, in Comparison of other Things, a great many Things will be purchas'd with a little Money: but Money, on the other hand, increasing, more of it must be given for the same Things. For since the Metal as to its *Natural Price* may be, and often is, brought into Commerce, as well as other Commodities, its Value must rise and fall according to the Scarcity or Plenty of it. And the *Eminent Price* of Money must, necessarily, follow the *Natural Price* of the Metal: for it is unreasonable that a Quantity of Silver, consider'd as a Commodity, should bear a very different Price from what it does when consider'd as Money. For so the same Thing, consider'd as its own Measure, would be greater, or less than it self, consider'd as the Thing measured. And this is the Reason why, when the Prices of almost every Thing else have been alter'd by Reason of the Plenty of Money, Gold and Silver have still kept their old Price, an Ounce of Silver being worth about a Crown now, as well as formerly. For if the Price of

(a) *Vid. lib. 18. t. 1. l. 1. D. de contrah. empt.*

(1) *B. 2. c. 12. f. 17.*

(2) *Vid. leg. ubi supr.*

(b) *Vid. l. 1. D. de contrah. empt. ubi supr.* Money is of use, not so much, for its Substance; as its Quantity. Also *lib. 46. t. 3. l. 94. f. 1. D. de Solution.* In Money the Species is not so much consider'd as the Quantity.

(c) *De Rep. l. 6. c. 2. p. m. 1028.*

(d) *Add. Val. Max. lib. 4. c. 3. f. 12.*

Bullion, like the Prices of other Things, had been *v. g.* quadrupled, an Ounce of Silver now would cost four Crowns, so that little would be got by Coining Money.

When therefore the Price of a Thing happens to be changed, we must carefully distinguish, whether that Change be made in the Value of the Thing, or in the Value of Money. The former happens when the Plenty of Money, standing as it was, the Commodity begins to be more plentiful, or scarce, than usual; the latter, when the Commodity remaining as usual, the Plenty of Money has increas'd, or decreas'd: Thus when in a Plentiful Season, I can buy a Bushel of Wheat for one Crown, which, in a Dearth I cannot have under Three, the Reason

is because the Value of Wheat, and not of Money, is chang'd; but when a Farm now lets for two hundred Pounds, which an Age ago let but for an Hundred; the Value, not of the Farm, but of the Money is alter'd (a). But although Money admits of vast Changes, and a Common Measure ought to be fix'd and unalterable, Money, nevertheless, is capable of being made a common Measure. For this Change in Money, is never so sudden, as in other things, which depend very much upon the Uncertainties of the Weather, Storms and other Casualties; but the Value of it is lessen'd by such insensible Degrees, that we do not perceive it while it decreases, but, after a long time, find that it has decreas'd (b).

(a) 'The Royal Treasure, being brought into the City, at the *Alexandrine* Triumph, caused such a Plenty of Money, that the Interest of it sinking very much (*Orosius* says half in half) the Price of Land was rais'd, *Sueton.* in *August.* 42. *Add.* *Joseph. de Bello Judaico*, lib. 6. c. 32. *Franc. Lopez de Gomera Hist. Gen. Ind.* cap. 117.

(b) *Add.* *Jac. Godofredi Dissert. de mutatione & augmento Monetæ aureæ.*

## CHAP. II.

### Of Contracts in General, that presuppose the Price of Things.

WE come now to treat of such Contracts as presuppose Property and Price. And first, we will enquire into the Difference between *Simple Pacts* and *Contracts*. *Hobbes* (a) defines a Contract to be the *Action of two, or more, making over their Right to one another. But since in every Contract, either both Parties perform their Bargain upon the Spot, so as neither trusts the other; or one performs and the other is trusted: or neither performs, but each trusts the other; To the first of these only, he gives the general Name of Contract: The other two Sorts, where either one, or both Parties are trusted, he calls Pacts. But this Difference does not concern the intrinsic Nature of Contracts and Pacts, but regards the Execution of them only: and 'tis against common Sense that a Sale, v. g. where the Goods are deliver'd for ready Money, should be call'd a Contract, but where the Goods are deliver'd, and the Money not paid 'till some Time after, should be call'd only a Pact.*

II. The *Roman* Lawyers almost all agree in making *Pact* the general term which comprehends all the affairs, wherein Men are concern'd with one another, and (b) they define it in general to be, *The Agreement of two, or more in the same Thing.* Then they divide *Pact* into *Pact* properly so call'd, and *Contract*; the former is, *when the Object is some Matter of no Consequence, and, in its own Nature, incapable of bearing an Action in the Civil Court.* This they again divide into *Simple Pact*, and *not Simple,*

which latter they again subdivide into *Legal* and *Additional* (c). They say farther, that an Agreement may become more than a *Simple Pact*, either by its own intrinsic Nature, or by the external Confirmation of the Law: for it is that, that properly renders Agreements *Legal Pacts*. Moreover, They tell us, that this intrinsic Nature may be of two Sorts, for some do not retain the general Name of Agreements, but are called by some particular Name of Contract; others, altho' of no particular Denomination, or Form, yet exceed the Limits of *Simple Pact*, by having a Matter of Consequence for the Object of them, as the Performance of a Promise, the Delivery of Goods, or the Doing of Work; and these are properly *Contracts*, which by their own Force effectually oblige; and which, in Justice and Equity, bear an Action. Yet they add, that *Simple Pacts* may be made Actionable, by Consent of the Parties; and *Pacts* added to such Contracts as admit of Equity, partake of the Nature and Force of Contracts (1).

III. But since *Pacts* are not, in their own Nature, Actionable in the Civil Court, and 'tis our Business to explain the Force they have in their own Nature, we can't therefore follow this Division so closely. For 'tis evident, that the Law may deny Agreements, even in Matters of Consequence, an Action in the Civil Court (d). (2) But as to what the *Roman* Law says, that *Simple Pacts* admit of no Action, we must

(a) *De Civ.* c. 2. § 9. (b) *L. 2. t. 14. l. 1. f. 2. D. de Pactis.* (c) *Ubi obiter monendum cordatioribus recte abstinere a vocabulo Pactorum vestitorum. Non enim quia dicitur e. g. ex nuda gratia, ex nuda benevolentia, etiam dicendum fuerit ex gratia vestita.* (1) See Mr. *Barbeyrac's* Notes upon this Section. (d) To this purpose says *Strabo*, l. 15. p. 488. in the beginning. 'A Trust of Charge cannot be recovered by Law; Witnesses and Seals signify nothing; for 'tis but a bare Trust. *Sen. De Benef.* l. 3. c. 15. *Wishes* 'That no Debts had the Benefit of the Law, but were left to depend entirely on the Honesty of the Party. (2) See *Grat. B. II. c. 18. f. 10.*

distinguish between such as are *Affirmative*, and such as are *Negative*. The Force of *Negative* *Pacts*, (where the Agreement is, not to demand) is both in the Natural and Civil Law, not to be productive of, but to exempt from an Action:

(1) For since they are design'd in Favour of the Debtor, that Nothing may be demanded of him, they can be of no other Use, than to keep off the Demand of the Creditor, *i. e.*, to exempt from an Action. But as for *Simple Affirmative Pacts*, they do not want, in themselves, a Power of obliging (a). But the Reason why the *Roman* Law did not make them Actionable, was, to prevent a vast Multitude of Law-suits; especially, considering that some of these *Pacts* proceeded from Unadvisedness, (for else they might have been made in Form of Law) and others were of no Use, as tending to no Consequence, (b) when put in Execution. Thus if any should agree, not to Wash their Hands, or Comb their Head, or change their Linnen for such a Time (as some Slovens have done) what need would there be to trouble a Magistrate upon the Breach of such Agreements: Which indeed are scarce allowable by the Law of Nature.

IV. In my Opinion, the Difference between *Pact* and *Contract* may be best taken from the Object, so as to call that *Contract* which concerns those Things and Actions that are the Subject of Traffick, and so presuppose Property and Price; and that *Pact*, by which we Covenant about other Things. By this Means *Pacts*, strictly speaking, will take in all Negative Agreements, by which we Covenant not to do, or not to demand, what otherwise we might do, or demand: As also those Agreements that have, for their Object, the Exercise of our Natural Faculties, so far as they barely tend to the promoting mutual Profit and Advantage, consider'd merely by themselves, without any Regard to Price, or any valuable Consideration; in a Word, when we agree to do some Work that is not Mercenary: Tho' some Agreements there are, which not being conversant about Things, may indifferently be called either *Pacts* or *Contracts*, as that of Matrimony.

V. All *Contracts* may be divided into three Sorts. First, Those that lay an Obligation upon one Party \* only, which Condition cannot be changed by any Thing *ex post facto*; as in the Loan of a consumable Commodity, and Stipulation. Secondly, Those that equally oblige both Parties †, as in Buying and Selling, Letting and Renting, Partnership, &c. Thirdly, Those of a Middle-Nature, as the Loan of a Thing not consumable, a Trust, a Pledge, &c. Which naturally, as appears from the principal End of the *Contract*, oblige me only

that am the Receiver; nor can they originally affect the Giver. But Accidents may fall out so as to lay an Obligation upon him also: as if I shou'd be at necessary Expences for the Thing, or suffer Damage by it, for which the Owner ought to be answerable. In this Case the Expences are to be repaid, and the Damage made good.

VI. Again, The *Roman* Lawyers frequently divide *Contract* (2) into *Real*, *Consensual*, *Literal*, and *Verbal*. The *Real* is so call'd, not because it is conversant about some real Thing, for all *Contracts* are so; but because a Pre-delivery of some real Commodity, is necessary to intitle us to a demand of that, which gives this *Contract* its Denomination (c). Thus I must have received something of my Creditor before I can stand obliged as a Debtor (d): nor can a Trust, or Loan be demanded, before it has been deliver'd to me. But, by the way, the *Contract* of Lending is one Thing; A *Pact*, or Promise to lend, another. A Trust, one Thing; a Promise to take in Charge, another.

*Consensual* are so call'd (3) (not because they alone require the Parties Consent) but because they immediately oblige, upon each Parties declaring his Consent, by proper Signs. Nor is it necessary, that some Thing should be first delivered, or some Work first done.

A *Verbal* *Contract*, or Stipulation, (4) as it consists in usual Forms of Asking and Answering Questions, is unknown to the Law of Nature.

Nor is it more agreeable to that Law, that a Man who has not receiv'd a Thing, should be oblig'd by bare *Writings*, (5) as much as if he had. But yet, there is good Reason why this should obtain in the *Roman* Law: For since the Magistrate cannot be satisfy'd of the Truth of a Debt, but by Instruments and other Proofs, when *Writings* appear owning the Debt, he must presume upon it, till the Contrary be prov'd. Indeed there are no *Contracts*, but what may be express'd in Writing; and this may be done two Ways; for either the *Contract* may be made, and the Consent of the Parties declar'd in Writing; and, in this Case, the *Contract* is then finished, when the *Writings* are, in all Respects, perfected; which obtains chiefly in *Consensual*, and such Sort of *Contracts*: Or else the Writing is only an Evidence of a *Contract*, already finish'd. Which last is to be presum'd, if the Case be doubtful (e).

VII. Again, *Contracts* are divided into *Named* and *Nameless*. The former Sort are those, which by reason of their daily Use, have a particular proper Name assign'd them, expressive of the Form and Contents of the Business; and which being mention'd, imme-

(1) *Nuda pactio obligationem non parit, sed parit Exceptionem*, D. Lib. 2. t. 14. De *Pactis*, Leg. 1. f. 4. (a) See above l. 3. c. 5. f. 9, 10, 11. (b) That this is the Signification of the Word *Causa*, so often made use of by the *Civilians* is plain from *Plaut. Asinar. Act. 3. Scen. 1. v. 17. Sola ego in castris ubi quiesco omnis familia causa consistit, i. e. omne emolumentum quod ex familia capis.* (\*) *εὐνομία*. (†) *δίκη*. (2) *Obligationum quae ex contractu sunt, quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu.* Instit. l. 3. t. 14. De *Obligat.* (c) *Vid. Lib. 2. t. 14. l. 17. D. de Pactis.* (d) *Add. Val. Max. l. 8. c. 2. f. 2.* (3) *Vid. Institut. Lib. 3. t. 23. De Obligat. ex Consensu.* (4) *Vid. Institut. ubi sup. t. 16.* (5) *Vid. Institut. ubi sup. t. 22.* (e) *Vid. Gror. l. 2. c. 16. f. 30. and hereafter in c. 5. f. 2. in fin. ibiq. not.*

diately signifies what was done: (for altho' Bartering, which is reckoned amongst the *Nameless* Contracts, seems to have a Name, yet 'tis a general one, and does not express, whether it be the Contract of *Goods for Goods*, *Buying*, *Selling*, or any other) And therefore in the *Roman Law*, these had certain fix'd Forms of proceeding; whereas others of less frequent Use, containing no more than what was expressly mention'd, had no Proper Form of their own, but one accommodated to the Thing, and therefore an Action, upon Account of these, was always express'd in a certain Form of Words (a).

VIII. The Division of Contracts into † *Gainful* and \* *Chargeable*, makes most for our Purpose, whereof the first brings some Advantage to one Party *gratis*, as in the Case of a Loan, Commission, or Charge. (1) The latter binds both to an equal Share of the Burthen; for here we act, or give, in order to receive an equivalent. Upon this, seems to be founded the distinction of Contracts into those that admit of Equity, and those that are tyed up to the Rigour of the Law. In *the former* the Magistrate has Liberty to weigh and estimate the Thing, according to Equity and Conscience; in *the latter* he is oblig'd, right, or wrong, to proceed according to the Stated Forms of Law. Now Reason tells us, that *Chargeable Contracts* are of the former Sort, and admit of a more loose Interpretation in the Courts of Equity; for since the Obligation is mutual, neither Party ought to be overburthened. But *Gainful Contracts* belong to the latter, and do not allow of such a loose Interpretation, or that any one should be bound to do more than he has expressly declar'd; for else a Man's Generosity might prove too great a Burthen to him (b).

IX. All *Chargeable Contracts* are reducible to four Heads. First, † *Goods for Goods*; Secondly, \* *Work for Work*; Thirdly, † *Goods for Work*; Fourthly, \* *Work for Goods*. Where the Word *Work*, is taken in a large Sense, so as to comprehend even the *Deed* of another Man. *Grotius* (c) admits of but three, leaving out *Goods for Work*: For that, he thinks, falls in with *Work for Goods*; and indeed, there is no real Difference between them, for both express that Goods and Work are barter'd for one another: But in one, the Contract, in a manner, begins upon the Delivery of the Goods; in the other, upon Doing the Work. So that, in the one, the Doer seems the Author of the Contract; in the other, the Giver: For in some Contracts, tho' both Sides are equally oblig'd, yet they take their Rise from one only. As in *Buying*, the Buyer begins the Contract; in *Letting*, the Tenant, &c.

To the *first Head* belongs all those Contracts, where one Thing is exchange'd for another, as in Bartering strictly so call'd. Where we may observe a Distinction nice enough, which some make between the general Contract of *Goods for Goods*, and *Bartering*. The *former* is, when the Things exchange'd are indefinite, as an Ox for a Mule; or where, at least, one Part is so; as a Horse for this particular Ox; Oyl for Corn in general. But when the Goods, in Contract, are determin'd, v. g. this Ox for this Horse, it becomes *Bartering* (d). Hither may be referred the giving Money for other Money of different Species, or in a different Place: which is now call'd *Exchange* (e). Sometimes indeed, Money is given for Money, so as to make it perfectly Buying and Selling; as the Money stamp'd with Victory; which *Pliny* (f) tells us, before it had received that Stamp, was accounted Commodity. If Goods are given for Money, the Contract is call'd *Buying* and *Selling*. Sometimes the Use of a Commodity is given for a Commodity, as if I lend my Horse for a Book. Sometimes the Use of one Thing for the Use of another, as if I let you live in my House, upon Condition that you let me enjoy your Land. Sometimes the Use of a Thing for Money, which is properly call'd *Letting* and *Renting*. Some Things too we give in order to receive as much, of the same Sort, some Time after.

Of the *second Head*, *Work for Work*, there are innumerable Sorts, according to the infinite Variety of useful, or pleasant Actions, which may, in a manner, be exchange'd and perform'd for one another (g).

To the *Third Sort*, *Goods for Work*, belong the Letting out, or Hiring work, or Day-labour for Money, as also that Sort of Contract, by which Goods are secur'd and free'd from Danger for Money, which is call'd *Insuring*. As also when any Commodity, consumable or not consumable, is given for the Performance of any Work.

To the *fourth Head*, *Work for Goods*, belong those Contracts, by which any Work is done for any Thing, or for the Use of any Thing, and such like (h). Besides, there may be Contracts not reducible to any of these Heads, as implying Disjunction (i). Such as were the Nuptial Donatives among the *Muscovites*; of which *Sigismund*, Baron of *Herberstein*, gives this Account. *Those that are invited to the Wedding present the Bride; all the Presents the Bridegroom marks, and lays up carefully; when the Wedding is over he reviews them, and those that he likes, he sends to the Market to be priz'd: all the rest, he returns back with Thanks. Those*

(a) Vid. *Grot.* l. 2. c. 12. f. 3. (†) *Contractus Beneficus.* (\*) *Contractus Onerosus.* (1) Our Author has forgot to mention *Donations made between Living Parties*, as well in Chap. 4. as in this, but Mr. *Barbeyrac* in his First Note upon the 1st Sect. of that Chap. has supply'd this defect. (b) Add. *Arn. Vinnius* ad. f. 28. *Instit. de Actionibus*, Lib. 4. t. 4.

(†) *Do ut des.* (\*) *Facio ut Facias.* (†) *Do ut Facias.* (\*) *Facio ut des.* (c) In the aforesaid Place. (d) Vid. *Mornacium* ad l. 5. *D. de præscriptis verbis.* (e) In Latin, *Cambium*, in Greek *Κόλλυβον*.

(f) *Nat. Hist.* l. 33. c. 3. (g) In *Amm. Marcellinus*, l. 16. c. 10. This sort of Contract is called *Pañum reddende vicissim*. And in *Apuleius* in *Apolog.* *Mutuarias operas cum vicinis cambire.* (h) Vid. *Totum* t. 5. l. 19. *D. de præscript. verbis.*

(i) As also the *Contractus estimatorius*, de quo vid. l. 19. t. 3. *D. de estimatoria actione.* Add. *Plaut. Captiv. Act.* Sc. 3. v. 18, &c.

that he keeps, he makes amends for, at the end of the Year, according to the Value of them, either in Money, or something equivalent. If any one puts a greater Value upon his Gifts, the Bridegroom appeals to the sworn Apprizers, and forces him to stand to their Valuation. But if, in a Years Time, he does not make a Return, or send back the Gift, he is fined double. And if he forgets to have it valued by the sworn Apprizers, he is forc'd to repay it at the Value of the Giver. And this Custom the Common People observe in all Sorts of Donatives. The same Thing is related of the Presents, the Persians give liberally to Strangers (a); for which, if they do not receive a greater Return, they not only complain, but often revoke what they had given, or the Value of it.

All these Sorts of Contracts have this in Common, that when they are perform'd on both Sides, the Parties have no longer any Thing to do with one another upon this Score. And therefore Grotius (b) (1) calls them *Dirimtorii*, and opposes them to those Contracts which he calls *Commutatorii*, the Completion of which consists in having Dealings continued between the Parties, as in that of Partnership, where for one anothers Advantage, Two, or more joyn, either Work, or Goods, or Work on one Side, with Goods on the other. And these together with those which we call *Gainful* are generally *Simple* Contracts.

X. But some Contracts are *Mixt*, and as it were compounded of two Sorts; as if I designedly buy a Thing for more than the Value, and so give the Overplus of the Price to the Seller; or sell a Thing for less than the Value, and so give what is wanting of the Price to the Buyer: This is partly Giving, partly Buying and Selling. Thus *Cæsar* sold vast Farms to *Servilia* for a Trifle (c). If I give greater Wages than the Work is worth, it will be partly Gift, partly Hire: Which great Men sometimes do out of Grandeur, thinking it for their Honour to reward any Man's Work more than it deserves, and this is partly Liberality, partly Contract (d). And on the other side, a Man may accept of Part of his Wages, and forgive the rest (e). If I bargain with a Goldsmith to make me Rings out of his own Gold, it will be partly *Buying*, partly *Hiring* (f). Tho' some look upon it to be only *Buying*: Since in Buying, we not only pay for the Materials, but for the Workmanship too. And there is little Difference whether the Thing is already made, or to be made. Nor can I be properly said to hire, where the Person of the Workman remains at his own Disposal (g). When Land is lent out for Rent, it is a *Mixt* Contract of *Selling* and *Hiring*, tho' the Law of *Zeno* makes it a Species of it self. A *Grant by Fee* is so far a *Gainful* Contract, as being much greater than the *Military Service* that is due for it. Indeed

as far as this *Military Service* may be exacted for the Protection that the Lord gives his Vassal, it partakes something of the second Sort of Contract, *Work for Work*; yet that which is the Principal in the Contract, belongs to the third Sort, *Goods for Work*. But if this *Fee* be charged with the Incumbrance of a certain Quit-Rent, so far it partakes of Land-renting. Lastly, *Nautick Interest*, or what we call *Bottomry*, which vastly exceeds all other common Usury, is mixt of Borrowing and Insuring. But in Partnership, tho' one contributes Money and Work, another only Money, yet it does not seem to be a *mixt* Contract. For it does not become mixt from the different Performances (for if I hire a Man to dig in my Vineyard, to sow my Ground and plant my Orchard, it is all but the Simple Contract of Hiring) but from our Agreements in Matters, of a different Nature, by one and the same Covenant.

Grotius (h) is of Opinion, that a Contract becomes *mixt* by the *Accession of one Act to another*, as in Suretiship and Pledges. But in this he seems not so very accurate, for a third Species must result from a Mixture properly so call'd: Whereas in Suretiship, the Security is not mixt with the principal Contract, but is only added to it, as an extrinseck Confirmation. For the giving Security makes no Alteration in the Debt; but only makes Provision for the Creditor, in Case the principal Debtor should prove insolvent. However to speak more accurately, there are in Suretiship two Contracts, which seem to be but one, because the same Surety hath to do with both Creditor and Debtor; for there passes but a bare Promise between the Surety and the Creditor, and yet, strictly speaking, that Promise only shews that he is oblig'd to make good the Debt, and is not that which obliges him; for that which obliges him is the principal Contract, whereby the Surety, by his Promise, has brought an Obligation upon himself to supply the Failure of the Debtor. So that this Promise partakes of the Nature of the Contract it self. Now this Suretiship is no Gain to the Creditor; for he gets nothing by it, but a proper Means of recovering his own. And although his Security is hereby provided for, yet not the Creditor, but the Debtor is beholden to the Surety: for without this Security, the Creditor had never enter'd into Contract.

But when the Surety pays the Debt, then there arises an Account between him and the Debtor. For in this Case, he is suppos'd to have lent the Debtor the Money, or, which is all as one, to have paid it by his Order and Commission. Now this Act of Suretiship cannot be reckon'd an Act of Liberality, either in respect of the Debtor, or Creditor, for the Debtor gets nothing by it, and the Creditor, without it, had not entred into any Engagement.

(a) Vid. *Petrus, della Valle*, Itin. Part. 2. Epist. 1.

(b) In the aforesaid Place. (1) See Mr. Barbeyrac's 5th Note upon this Section.

(c) *Suetonius Julio*, c. 50. (d) *Add. Matt.* 20. 9. &c. *Lib.* 26. t. 7. L. 12. f. 3. *D. de Ad-*

*mon. B. & peric. tutorum.* (e) *Add. Val. Max.* L. 5. c. 2. f. 10. (f) So says Grotius in the aforesaid Place, f. 5.

(g) Vid. *Lib.* 18. tit. 1. l. 20. *D. de contrah. empt.* & *Lib.* 3. t. 25. f. 4. *Instit. de locat. & conduct.* (h) In the aforesaid Place, f. 6.

## C H A P. III.

## Concerning the Equality that ought to be observed in Chargeable Contracts.

**I**N all Contracts that are purely *Chargeable*, and have nothing of the *Gainful* mixt with them, where the Law, or the Market has fixt the Prices of Things, an Equality ought to be observed: Or, one Party ought to receive as much as the other; and if one happens to receive less, he has a Right to demand the rest. And this is plain from the End of such Contracts, for therefore a Man enters into them, that for his Goods or Work he may receive an Equivalent; which for certain Reasons he prefers to his own Goods or Work.

But yet this admits of a more accurate Demonstration; for since Contracts are necessary for my obtaining those Things which I had no Right to claim; and since it is presum'd that a Man gives nothing *gratis*, which he parts with upon Contract; we cannot therefore think, that any one designs to give away, by Contract, more than he supposes he receives, and consequently a Contract can give a Right to another Man's Goods, no farther than as they are equivalent to something, which that other Man receives (a).

II. Now to find out, and adjust this Equality, it is necessary that the Parties contracting, be each of them alike acquainted with the Commodity and the Qualities of it (b). And therefore he that is going to make over the Property of a Thing ought to expose, not only the good Qualities, but also, to the best of his Knowledge, the Defects and Faults of it; for, otherwise, a just Price cannot be assign'd (c).

*Plato* (d) makes it a Law, that if a Physician buys a Slave, who labours under any in-

curable Distemper of Body or Mind, he must stand to the Bargain: but if an unskilful Person makes the Purchase, the Seller, that imposes upon his Ignorance, must be fined double: But if one unskilful Man buys of another, the single Price is to be restor'd (e).

III. This Necessity of discovering the Faults, arises from the Nature of the Thing, because otherwise a just Price could not be assign'd, and not from the common Bond of Humanity, (as if that received a closer Tye by Contract) nor from the Contractors (1) entering into some sort of Acquaintance, which may seem to oblige them to other Duties, than those that are required by the Nature of Contracts; for when the Conditions are perform'd on Both sides, we don't think our selves more oblig'd to him we dealt with, than to any other Man, though indeed such an Occasion may, sometimes, be the Means of an Acquaintance and Friendship with him. And therefore, it is no Consequence, that, because it is not against the Law of Humanity to conceal a Thing, therefore it is not against the Law of Contract. For if I be not engag'd in Contract, I may lawfully conceal from others several Things, though I alone am Gainer by it, which if I should discover, other People would share with me. As in case I should find a Treasure in a desert Place, without any Owner, no Law obliges me to tell another, that he too may partake of it (2) (f).

IV. But as it cannot be doubted, but the Faults of the Thing it self ought to be declar'd; so

(a) Vid. *Deut.* XXV. 13, &c. L. 47. t. 2. L. 52. f. 22. *de furtis*, L. 6. f. 1, 2. *D. de extraord. crimin.* L. 32. f. 1. *de Leg. Cornel. de falsis.* (b) Φῶς ἀπολήμασι ἐπέτι, Contracts ought to be made in the Light, *Eur. Cycl.* v. 137.

*Consule de gemmis, de tincta murice lana,*  
*Consule de facie corporibusque diem.* *Ovid. de Arte Amandi*, L. 1. v. 250, 251.

(c) To this Place belongs B. 19. t. 1. L. 1. f. 1. *D. de Añ. Empt. & Vend. Lib.* 18 t. 1. L. 43. f. 2. *D. de contrah. empt.* As also the whole 1st Title *De aedilit. edict.* B. 19. Where the Faults are reckoned up one by one, which ought to be told in Sale of Cattle and Slaves; and which, if conceal'd, makes void the Bargain. *Add. Gell.* 1. 4. c. 2. *Cicero*, *Off.* 3. c. 16. 'It is an Ordinance of the Civil Law, in the Matter of Estates, that the Vender should still tell the Purchaser the Defects, or Inconveniencies of the Estate; for it being sufficiently provided by the twelve Tables, that every Man should make good what he promises, or declares by Word of Mouth, upon the Penalty of double Damages, for denying it; the *Civilians* have set a Punishment upon Concealments too, by enacting that if the Seller of an Estate, knew any Fault, or Error, without expressly acquainting the Purchaser with it, he should be obliged to make it Good. Add the Example that follows in *Cicero*, *Ambros.* *de Off.* 1. 3. c. 10. 'In Contracts the Faults of the Commodity ought to be express'd, which, if it be neglected, although the Goods be in the Possession of the Purchaser, yet the Bargain may be vacated by an *Action of Deceit*. (Although what he there says of an *Action of Deceit* does not rightly agree with the *Roman Laws*.) *Laëtant.* 1. 5. c. 17. 'He who does not correct the Error of the Seller, (as suppose he sees him deliver, by Mistake, a more precious Commodity than was agreed for,) or who does not own his Servant to be a Runaway, or his House to be infected, consulting his own Profit and Advantage, is not a Wise Man, as *Cornelius* would have it, but a crafty Knave.

(d) *De LL.* 1. 11. p. 965, *Ed. Wech.* (e) *Plato* in the same Place, 'Let no Commendation, or Oaths attend the Sale of any Commodity. (1) See *Grotius* B. 2. c. 12. f. 9. n. 1. cited and explain'd in *Mr. Barbeyrac's* First Note upon this Section. (2) See above B. 4. c. 6. f. 13, and *Mr. Barbeyrac's* 2d Note upon this Section. (f) *Vid. Matt.* 13. 44. For here if the Purchaser had told of the Treasure, he had not bought the Field so Cheap. *Vid. Grot.* 1. 2. c. 8. f. 7. *Hitherto may be referred the Story of Anicas*, who first discovered the *Samojedes*, and settled a Trade with them, related by *Lundorpius* in his *Continuation of Sleidan*, *ad an.* 1607. *Cic.* *Off.* 3. c. 10. says well, 'That we ought not to neglect our own Advantage, when we can improve it without Injury to another. For as *Chrysippus* Elegantly observed,

so whether circumstantial Matters, which tho' they be not of the Substance of the Thing it self, yet Help in the just prizing of it, ought to be laid open, both on the side of the Buyer and of the Seller, has been controverted among the Ancients. Cicero (a) has a Case to this purpose. *An honest Man, says he, sets Sail from Alexandria to Rhodes with a Freight of Corn; the Rhodians in great Distress for want of it, and the Commodity bearing an excessive Price: This Person knows that there are other Alexandrian Ships under Way, and bound for the same Port, and with the same Cargo: shall he tell the Rhodians there are other Merchants coming with Relief, or say nothing of it, and make the best Market of his Corn, that he can? Antipater is of Opinion, That all the Circumstances ought to be laid open; so that the Purchaser may not be kept ignorant of any Thing (tho' it does not concern the Substance of the Thing in hand) which the other knows. Diogenes on the other side says, That the Vender is bound to discover all the Faults, so far as he is obliged to it by the Civil Law; and to manage his Bargain without Fraud; so that being to sell the Commodity, he may, without Deceit, make the best of it. Here, says he, I have brought my Corn; I have expos'd it to Sale; I set no higher a Rate upon it than others do, nay perhaps I can afford it cheaper, there being now a greater Quantity than there was before. How is that? replies Antipater, Is it not our Duty to consult the Good of Mankind, and serve human Society? Don't we lie under an Obligation, from our Cradle, to make our private Interest the same with the publick, and the publick the same with our private? Shall we then conceal that from the People, which it so much concerns them to be inform'd of? To this Diogenes: 'Tis one thing to conceal, and another not to tell. Do I tell you, at this Instant, what is the Nature of God, and what the Happiness, or Chief Good of Man, which it much more concerns you to know than the Price of Corn? And yet you will not say, that I conceal this from you. But I am not oblig'd to tell whatever is for your Advantage to hear. To this Antipater replies, Yes, you are oblig'd, if you remember that Men are naturally linked together in Society. Well, says Diogenes, I do not forget it: But will you have it to be such a Society, as that no Man shall have any thing particular in it of his own? If so, there's no longer any Buying and Selling, but only Giving. Here Cicero himself seems to incline towards Antipater's Opinion (1),*

for, he says, *This Concealment of the Corn Merchant is not the Practice of an open, a frank, a sincere, a just, a good Man; but rather of a shifting, a close, a deceitful, a malicious Huckster. And yet Cicero himself seems to free him from the Imputation of Knavery; for a little after (2), he defines Knavery to be, The Pretending one thing and the Doing another, which cannot be objected in this Case. And therefore, the Merchant, did not act unjustly, in saying nothing of the Ships, that were coming. For Justice only obliges us to expose, what immediately concerns the Thing it self; as If a House, by reason of its being infected, had been commanded, by the Magistrates, to be pulled down; with which Example Cicero illustrates this Passage. But nothing of this Nature, was conceal'd; the Goodness of the Corn appear'd openly, and, at the Time of Contract, was really worth as much as it was sold for, altho' likely to be less worth, in a little time. Nor had the Rhodians a Right, properly speaking, to know this of the Merchant, as never having made any Bargain with him about it (3). But whether he acted against the Law of Courtesy and Good-nature, is another Question, which I would not easily hold in the Affirmative. For, Good-nature does not oblige me, to do another Man a Courtesy gratis, except he be in extream Want of it. But this was not the Case of the Rhodians, they wanted Corn indeed, but not Money, for they were famous among the Ancients for their Riches. Besides, I am not oblig'd to do a Kindness, when 'tis like to tend more to the Detriment of the Giver than the Benefit of the Receiver. But, in this Case, the Merchant would have lost more than the Purchasers would have got by the Intelligence. For if he vended it to a great many Purchasers at the Market-price, each would have felt it but little, and if any one Man had engross'd the whole, he might thank his own Avarice, if he lost by it; and indeed we cannot expect, in the common way of the World, that Men should be so very exact in the Performance of this Duty: For, provided the Love of Money does not tempt the Merchants to cheat us, we may easily excuse them from what the Law of Courtesy and Good-nature may seem to oblige them to.*

V. As for Faults already known to the Buyer, they need not be mentioned, for, in this Case, both Parties proceed upon the same Foot (4). So likewise, where the Seller has told the Faults,

observes, 'He that runs a Race, ought to endeavour might and main to get the Victory, yet he must not lay hands on him that he runs with, or use any other foul Play. And just so it is in human Life, any one may lawfully endeavour to better his Condition, but not at the Expence and Injury of another. Ambr. has express'd this Passage, Off. l. 3. c. 4. In Contracts, that of Val. Max. l. 8. c. 2. f. 1. ought to take place. 'A fair Dealer ought, neither to magnify the good Qualities, nor conceal the ill ones of his Commodities. Hither may be referred that of Plato de Leg. lib. 11. p. 966. The Law which provides against the Seller's Over-reaching, ought also to be extended to the Workman. And therefore he had best take heed, that he does not rate his Work at more than 'tis worth, for he can't be ignorant of the Value of it. And certainly it ought to be allowed, in a free State, that a Workman should make use of Art, which is a plain Thing, and far from Deceit to impose upon the Unskilful. Hither too may be apply'd, that which Socrates says he heard of Aspasia, 'Good Match-makers, that are sincere in their Commendations of others, do good in making Alliances between Families; but those, that are false, do no good in Commending. For, when the Parties are undeceived, it so happens, that they hate one another; and those too that were instrumental in the Match. Xen. Mem. l. 2. p. 439. Ed. H. Steph. (a) Off. l. 3. c. 12. (1) Chap. 13. d. 1. (2) Chap. 1a.

(3) Vid. Groc. l. 2. c. 12. f. 9. n. 2. (4) Vid. Groc. l. 2. ubi supr. n. 3.

the Bargain ought to stand good; for then 'tis manifest that the Buyer consents to them; Cicero (a) has a Case to this purpose. Gratidianus sold to S. Orata those very Houses which he himself had bought of him, but a few Years before. These Houses paid a Duty to Orata; (which was out of his Mind) but Gratidianus made no Mention of it in conveying his Right. The Cause was brought into the Court. Crassus was for Orata, and Anthony for Gratidianus: Crassus insisted upon the Law, that the Seller knowing it, ought to have acquainted the Purchaser with the Incumbrance, but did not do it. Anthony insisted upon Matter of Equity, that the Incumbrance was not unknown to Orata, who had sold the Houses; which made it needless for Gratidianus to say any thing of it, nor could Orata be said to be deceived, that knew what Title he had bought (b). Upon the same Principle was founded the Sentence that Marius gave in the Case of (c) Fannia, who had been married to Tinnius, but upon a Divorce demanded back her Dowry, which was considerable. He objected Adultery against her. The Cause was brought before the Consul. After a Hearing on both sides, it appearing that she had been an immodest Woman, and that her Husband knowing her to be such, had yet ventur'd to marry her, the Consul reprov'd them both, and order'd him to restore her Dowry, and her to be fin'd four *Asses* for her scandalous Behaviour (d).

VI. Besides, as in all Pacts, so especially in Contracts, neither Party should be forc'd into a Bargain by an unjust Fear. The *Lacedemonians* therefore did right in rescinding the Purchase of the Land, that the *Elians* had extorted from the Possessors through Fear: For they were of Opinion, To force a Title from the weaker, under Pretence of Purchase, was no better than downright Robbery (e) (1). Thus when Cicero (f) objected against *Verres*, the Pictures and Statues, which he had brought out of *Sicily*, *Verres* thought he could answer the Accusation in a Word, by saying, *I bought them*. But Cicero replies, *That their Ancestors had wisely enacted that whosoever should be sent Governour*

into a Province, should not be allow'd to make any Manner of Purchase. And for that Reason, Money and Equipage was provided them by the Publick. Slaves indeed were not, because there was scarce any Man of Figure, in Rome, but had some of them. And yet no Man, in his Province, could buy a Slave, but in the room of a dead one: for they look'd upon it to be Plundering, and not Purchasing, when the Seller could not sell at his own Rate. And in a Province they were convinced, that if the Governour, back'd with Power and Authority, should be permitted to buy what he pleas'd, it would be brought to that pass, that he would have whatsoever he had a Fancy for, whether expos'd to Sale or no, and at his own Rates (g). But yet sometimes the Subject may be forc'd, by the Government, in Matters of Sale or Hire. As when Merchants are oblig'd to sell, that which the Government is in great want of; or when their Waggon, or Ships, or they themselves are prest; which, when the Good, or Necessity of the Publick requires, and a just Rate is paid, may be fairly allowed of. Sometimes too, the State obliges us to buy such a sort of Commodity, of this or that Man only, and no where else.

VII. But 'tis plain, that in *Gainful Contracts*, this Equality does not take place; for where an Equality is to be observed, the Contract ceases to be *gainful* (h). And yet, in a Charge, or a Commission, an Equality may sometimes be regarded, tho' indirectly, and by Accident; for if any thing, besides Labour, has been laid out in soliciting the Business, or managing the Charge, it ought exactly to be refunded. And the reason is because in such Contracts as these, the Labour is given *gratis*, but the Expence, tacitly agreed upon to be repaid (i).

VIII. But in *Chargeable Contracts* an Equality is to be so strictly regarded, that if one Party has receiv'd more than his Due, he must not retain the Overplus, upon Presumption that it was design'd for a Gift. For Men do not enter into such sort of Contracts with a Design to give any Thing. And therefore such a *Mixt Contract* must not be presum'd unless the Party

(a) De Off. l. 3. c. 16. (b) For as Ulpian says, L. 19. t. 1. l. 1. f. 1. D. de act. empt. 'He does not seem to have the Thing conceal'd, who knew it, nor ought he to be advertis'd of it who was not ignorant. Add. lib. 18. t. 1. l. 43. f. 1. l. 57. f. 3. D. de contrah. empt. Lib. ult. D. de Edilit. editio. To this belongs that of Horace, l. 2. Ep. 2. v. 14, &c. where he brings in a Fellow selling a Slave, who after having reckon'd up his good Qualities, adds

— Semel hic cessavit; & ut fit,  
In scalis latuit metuens pendens habenz.  
Des nummos, excepta nihil te si fuga ledat.  
Ille serat pretium pæne securus, opinor.  
Prudens emisti vitiosum: dicta tibi est lex.

This Boy was faulty once, he stay'd at Play,  
And when he fear'd the Lash, he run away:  
Buy, if you like him now, his Faults are told.  
The Dealing's fair, and he may take your Gold,  
And ne'er be thought a Cheat for what he fold.

Mr. Creech.

Add. lib. 29. t. 5. l. 1. f. 33. D. de Scto Silaniano. Lib. 21. t. 1. D. de Edilit. editio, leg. 14. f. 10.  
(c) Plutarch in Mario, p. 427. Ed. Wech. and Val. Max. l. 8. c. 2. f. 3. (d) Vid. lib. 48. t. 5. l. 13. f. 9. 10. D. ad L. Jul. de adult. (e) Xenoph. l. 3. rer. Græcarum, p. 288. (f) Vid. Grot. l. 2. c. 12. f. 10. (g) Orat. 9: l. 4. c. 5. (h) Add. lib. 18. t. 1. l. 46. l. 62. D. de contr. empr. & lib. 48. t. 11. l. penult. D. ad L. Jul. repetund. l. 6. Lib. 2. t. 20. l. 11. de his quæ vi metusque causa, &c. Constitur. Sicularum, l. 1. t. 88. f. 1. Tacitus, An. 14. c. 14. in fin. 'When the Purchaser can force him to it, the Seller lies under a Necessity of parting with his Goods. Hither may be referred what Dio Cassius relates of Caesar, l. 42. who after Pompey's Defeat seized upon that Money, which he had no other Pretence of Levying, than under the specious Name of a Loan, though otherwise he had taken it by Force, as if it had been his Due, and never had any Design to restore it. (i) Vid. S. Fin. Instit. de Mandato, lib. 3. t. 27. f. 13. & D. lib. 16. t. 3. l. 1. f. 9. D. Depos. &c. (i) Vid. l. 12. prin. D. depositi. d. 1.

expressly consents to it, or it appears that he knew the Thing to be under-rated (a).

IX. From what has been said it follows, that altho' all the Faults have been expos'd (1), and Nothing demanded more, than what was suppos'd to be the Value, yet if afterwards there appears to have been an Inequality, without any Fault of the Contractors (as suppose some Blemish lay undiscover'd, or they mistook the Price) it ought to be corrected, and Amends made to the Sufferer (b). Nor is it necessary by the Law of Nature, that this Inequality should exceed the Half of the just Price. For that famous Law (c), which refuses Relief, but where the Inequality is so notorious, is purely positive, and founded principally upon this, that it would be impossible to dispatch Business, if the Magistrate might be appeal'd to for every little Injury of this kind. And besides, the Nature of the Market requires, that we should look about us if we would not be deceiv'd; for whatever Rate the Seller puts upon his Goods, the Price is ultimately determin'd by the Buyer (d); though indeed the Determination of this Law is too gross. For tho' the Magistrate ought not to be troubled for every Trifle, yet I see no Reason why he should not relieve me, if I have been very much injur'd, although not half in half; As if I should sell a House worth 900*l.* for 600*l.* 'tis hard I should be debarr'd the Benefit of the Law, for the Recovery of the 300*l.* when in much less considerable Cases an Action is allowed me. And therefore as a small Damage, even in the Law of Nature, is not sufficient to break off a Bargain, so where the Damage is great, although it amounts not to half the just Price, the Bargain ought to be rescinded, or the Price made up. And this Greatness of the Damage is to be estimated, either by the Exorbitancy of the Price, or the Poverty of the injur'd, which sometimes renders the Loss intolerable to him, which a richer Man would not be sensible of. Nay, even where the said Law is in force, the Buyer is oblig'd, in Conscience, to make up a very great Damage, although it comes not up to half the Price; for that Law only designs the Ease of the Magistrate, and not that one Man should be a Gainer at another's Loss. Indeed they do

well to extend the Benefit of the Law to the Buyer as well as to the Seller, which too, they tell us, is to be extended to all other sort of Contracts.

Among the *Jews* (e), if one defrauded another, whether Buyer, or Seller, the Law afforded no Relief, if the Cheat came under the sixth Part of the just Price. But if it exceeded the Sixth Part, the Buyer might either immediately, or at any time during the Negotiation rescind the Bargain, and recover the whole Price: but if the Seller had been the Sufferer, he was never barred from making a Recovery. And the same Law obtained in the Bartering of *consumable Commodities*, as of Fruit, Corn, and such like. But the *Jew* only, if injur'd, enjoy'd the Benefit of this Law; and not the *Gentile*, if injur'd by a *Jew*.

X. To what has been said, the *Roman* Lawyers have taken a great deal of Pains to reconcile a Passage in the *Digests* (f), which says, *That, in Buying and Selling, the Parties may Naturally over-reach one another.* Of which *Grotius* (g) seems to give a good Explication. For, he shews, that *May* and *Must* do not always denote that it is Lawful, but only that it is so far permitted, as that the Sufferer can have no Remedy, in case the other insists upon the Bargain, and, being tax'd of Injustice replies, that it was nothing but what was agreed upon betwixt them: And he that won't open his Eyes, as the Saying is, must open his Purse (h). As for the Instance of *Jacob* (i), his Craftiness is the more excusable, because he had to do with a designing Man, who endeavoured every way to over-reach him, and who impos'd hard Conditions upon him, giving him only half of the Young for keeping his Sheep, and yet making him stand to all Accidents. So also the Word, *Naturally* (k), does not always signify, what ought to be done, or what is congruous to the Law of Nature, but what is customary, as, 1 *Cor. XI. 14. Doth not even Nature it self teach you, that if a Man have long Hair it is a shame unto him.* Yet here the word *Κουὰν*, to have long Hair, may be taken for too nice a Care in adorning the Hair, which Women seem to claim as their Right, and which looks too effeminate in a Man (l). Tho' indeed it is

(a) An Example we have in *Pliny*, l. 7. *Epist. 11. & 14.* where he says he had, upon the Score of Friendship, sold Lands for less than they are worth. It was generously done of *Scævola*, who being upon a Purchase, bid the Proprietor tell him, in one word, what he would have for the Estate; who when he had done it, *Scævola* told him he had undervalued it, and gave him 10000 *Sesterces* more than his Bargain, *Cic. Off. l. 3. c. 15.* (1) *V. Grot. l. 2. c. 12. f. 12.* (b) *Add. lib. 19. t. 1. l. 13. Princ. f. 1, 2, 3, 4. D. de us. emp. & lib. 21. t. 1. l. 1. f. 2. D. de edit. edicto.*

(c) *Lib. 4. t. 44. l. 2. C. de rescindend. vendit.* (d) To which may be apply'd that of *Cicero*, *Off. l. 3. c. 17.* Laws and Philosophers provide against Frauds different ways: The Laws regarding only Matters of Overt Act, whereas Philosophers judge according to Equity and Reason. (e) *Selden, de J. N. & G. l. 6. c. 5.* (f) *Lib. 4. t. 4. l. 16. f. 4. D. de minoribus. Add. lib. 19. t. 2. l. 22. f. 3. D. locati, &c.* (g) *L. 2. c. 12. f. 26.* (h) *Add. Lex Bajuvarior. t. 15. c. 9. f. 1. and Capitulare Caroli, l. 5. c. 210. In Xenoph. de memorab. Socr. l. 2. towards the End, this Rule is given, 'Tis a Piece of good Husbandry when a valuable Thing can be bought cheap, to buy it.* Add a witty Saying of *Cicero's* in *Gellius*, lib. 12. cap. 12. *Vid. Sen. de Beneficiis, lib. 6. cap. 38.* Where he disputes, whether *Demades* did well, at *Athens*, in condemning one who got his Livelihood by providing things necessary for Funerals, having proved that he desired a quick Trade, which could not be without the Death of a great many People. *Add. Capitulare Caroli, l. 1. c. 131.* (i) *Gen. XXXI. 39* (k) *Mornacius* upon the words *naturaliter licet circumvenire*, explains the word *naturaliter* by *ἁπλοῦς*; dexterously; but he is in the wrong. For that word does not belong to *circumvenire*, but to *licet*.

(l) According to that of *Ovid*, *Ep. 4. Heroid. v. 75.*

*Sint procul a nobis juvenes, ut famina, compsi.*

disagreeable to the Dictates of Natural Reason for a Man to assume that Habit, which length of time has appropriated to Women, and by which their Sex is distinguish'd from ours. But to return to the Matter in hand (a). Every Man has naturally a great Desire of increasing his Stock, and therefore Trade could hardly be carried on in a Society, were there not some Incouragement for Industry (b). Besides, each Party seems by tacit Consent, (since an exact Equality, even by the nicest Scrutiny, is so difficult to be determin'd,) to indulge one ano-

ther the liberty of deviating a little from the true Price. And therefore it seems to be the receiv'd Law of the Market, that every one should be free to make his best Advantage of Buying and Selling, provided there be no Deceit in the Commodity it self (c). For if there be; the Opinion of *Fulgentius* (d) will take Place, who says, *That Mercury was therefore suppos'd to be the God of Trade and Thievery, because there is no Difference between the Cheating and Lying of a Tradesman, and the Robbery and Perjury of a Thief* (e).

(a) Lib. 4. t. 44. l. 8. C. de rescind. vendit. 'It is the constant way of Buying and Selling for the Buyer to beat down the Price, and the Seller to raise it, till after many words on both sides, the former rises in his Bidding, and the latter falls a little from his Demands, at last they agree in a certain Price. *Anacharsis*, in *Diogenes Laertius*, B. 1. f. 105. did not absurdly call the Market, 'A Place to cheat one another in, and destined to Covetousness. *Add.* l. 18. l. 19. D. de edilit. edicto. (b) *Vid.* l. 17. D. de contrah. empt. 'He deserves to be laugh'd at who suffers himself to be imposed upon. *Plin.* l. 1. c. 24. princip. 'To make a bad Bargain is the more ungrateful, because it exposes the Folly of the Maker.

*An tibi mavis  
Insidias fieri pretiumque avellier ante  
Quam mercem ostendi?* —————

*Hor. Sat. l. 1. f. 2. v. 103, 104, 105.*

Would you be cheated, the Occasion's fair?  
Since you would Buy before you see the Ware.

Mr. Creech.

(c) *Add. Mich. Montaigne*, Ess. B. 1. c. 20. (d) *Mytholog.* l. 1. c. 23. (e) 'The Ephori fined a Young Man for buying a Farm at a cheap Rate; and the Reason they gave was, because so Young a Man was so much given to Lucre. *Æl. V. H. l. 14. c. 44.*

## CHAP. IV.

### Of Gainful Contracts in particular.

WE come now to consider some of the principal Contracts more particularly; which, tho' they have been handled very Copiously by the *Roman* Lawyers, yet, since most of what they have said, has been taken from the Law of Nature and Nations, may fairly be brought back to their proper place. Of *Gainful Contracts* the chief (1) is a \* *Commission* (2), whereby one Man undertakes *gratis* another Man's Business, at his Request, and upon his Authority. This Contract indeed does not directly and in it self, presuppose Property and the Price of things, but only by Accident, so far as the Person giving the *Commission* is concern'd to repay to the Person receiving it, whatsoever Charges he happens to be at in the Management of it: for his Labour only is suppos'd to be promised *gratis*. Now if any Man undertakes another's Business, unknown to him, and manages it with Success, the *Roman* Law allows him (†) an *Action for Business done*, which is founded upon what we may properly call a *Tacit Commission* (3), as is the Obligation between a Guardian and a Minor (a).

II. The old *Romans* were extremely Exact and Conscientious in the Discharge of this Trust. For they look'd upon it to be founded upon good Nature and Friendship, the great

Bands and Cements of Human Society: And therefore deservedly had those in Detestation, who under such specious Pretences should deceive one, who lays himself open to their Mercy, by having too good an Opinion of their Probity (b). In private Affairs, says *Cicero*, our Ancestors thought guilty of the highest Crime, not only him that manag'd his Commission Knavishly, for his own Gain and Advantage, but even him who was wanting in his Care, and therefore judged the Breach of Trust to be as bad as Theft. For where we cannot be present our selves, the Fidelity of our Friends is presum'd to supply our place; which, whosoever violates, impugns the Safeguard of every Man, and, as much as in him lies, disturbs Society. We cannot do every thing our selves, at some things, some are better than others. And therefore we contract Friendships, that by mutual good Offices our common Advantages may be carried on. Why do you undertake a Commission, if you design to neglect it, or to make a Gain of it? Why do you intrude your self into my Concerns, and by your pretended Kindness clog and hinder my Designs? Stand off, I can get another to do it for me. You undertake the Burthen of an Office, which you think you can go through with, and which never seems heavy to those, who are not light themselves; this therefore is the basest of Crimes; because it violates the two most sacred

(1) Here our Author, as has been observ'd in another place, has forgot to mention *Donations between Parties living* as Principal Contracts. See his first Note upon this Section. \* *Mandatium*. (2) See what we have said upon this in B. 3. c. 9. (†) *Actio negotiorum gestorum*. (3) See above in B. 4. c. 13. f. 7. (a) *Vid.* lib. 44. t. 7. l. 5. prin. f. 1. D. de obligat. & action. (b) *Vid.* lib. 3. t. 2. l. 1. D. de his qui nor. infam. & lib. 17. t. 1. l. 1. f. 4. D. mandati, &c.

*Things, Friendship and Faith.* For no Man commits his Business but to a Friend: Nor trusts any but whom he thinks faithful. The greatest of Villains therefore must be he who breaks in upon Friendship; and at the same time cheats him, who had not been capable of being thus cheated, had he not believed the Villain honest (a).

III. For the same Reason the Roman Laws require, that a Commission should be executed, with the utmost Diligence, altho' undertaken purely for the Benefit of the Person intrusting it (1). Of this Corn. Nepos gives us Atticus as a perfect Pattern (b). He never made any Promise but with great Care and Caution; for he did not think it a Piece of Generosity, but rather Levity, to promise more than he could perform. But when once he had undertaken any thing, he was as indefatigable in the Prosecution of it, as if it had not been his Friends but his own Concern; in such a case, he look'd upon his Reputation to be at Stake, than which nothing was more dear to him (c).

But if we hope to succeed well in giving a Commission, we ought to consider and form our Opinion of the Man from his past Diligence, and the Tenor of his former Life. For he that trusts a profligate Person may thank himself for his Disappointments, unless he particularly takes upon him to be more diligent than ordinary, and is capable of being so. We read a pleasant Story of a Man (d), who had sore Eyes and came to a Horse-Doctor for Relief; the Doctor anointed his Eyes with the same Ointment he us'd amongst his Horses; upon which the Man falls blind, and the Cause is brought before the Judge; who acquits the Physician; For if the Fellow, says he, had not been an Ass, he had never apply'd himself to a Horse-Doctor.

IV. On the other hand, the \* Agent ought to be repaid whatever Charges he has been at in the Execution of the Commission. For having promised Nothing gratis, but his Care, Diligence and Fidelity, a tacit Compact is suppos'd to have been made for the Repayment of Charges: And indeed it would be hard to render a Man's Kindness expensive to him (2). And the same holds good of any Loss that happens, by Reason of the Trust, but not of such a Loss as is only occasion'd obliquely by it: And therefore those Damages only are to be made up, which directly proceed from the Commission, and not those which happen only by the By, whilst the Business was on Foot. To this purpose is that Passage in the Digests (e): The Agent shall not account to the Person employing him, all the Expences, though perhaps some of them he had not been at, were it not for his Commission; as if he has been plunder'd, or shipwrack'd, or put to Charges by his own, or his

Servants Sickness. For such Expences as these, ought to be imputed to Chance, and not to the Commission. Indeed when a Man of his own Accord, upon no other Motive than his own Good-will, takes upon himself the Management of another's Business, he is suppos'd willingly to run the Risque of all Casualties, that unexpectedly happen in Human Affairs. But, the Case is alter'd, when a Man is commanded to manage another's Business, for there he that commands is concern'd to bear him harmless; since, in this Case, the Person in Commission had not Power to act otherwise. But when a Man undertakes a Business, in its own Nature, hazardous and dangerous, he is suppos'd (unless he expressly declares against it) to take upon him the common Accidents, that usually attend such a Business (f).

V. It is a celebrated Question, Whether a Commission can be satisfied by an Equivalent? which we find elegantly debated in Gellius (g). The Question, says he, is whether having a Commission given, and Orders how to manage it, you ought to act Counter, if it seems for the Advantage of him that gave it? Those that hold the Negative, argue that many have determined to have their Business done after such a particular Manner; and therefore he whose Business it is, having deliberated and fixed upon a Method, it ought not to be done otherwise, altho' some sudden unexpected Accident should promise a better Issue; for fear, in Case of Disappointment, the Guilt of Disobedience, and the Punishment due to it should unavoidably follow: Whereas should the Thing succeed right, Thanks be to Providence: But yet an ill Precedent would be introduc'd, for breaking in upon well laid Counsels, and the Sacredness of a Commission. Others, on the contrary, are of Opinion, That the Inconveniencies that may happen, upon acting Counter to Order, ought to be compared with the Probability of succeeding; and if the former appear lighter and less than the latter, then ought we to proceed accordingly: For fear of losing an Opportunity, which Heaven, in this Case, seems to offer; neither need we fear giving such a Precedent, if those that follow the Example never do it, but with the same Reason. Then follow some Precepts of Prudence, Particularly, Regard is to be had to the Temper and Nature of him from whom the Commission is receiv'd; that he be not of a cruel, rough, untractable, inexorable Disposition (h), for, in such a Case, the safest way would be to stick to his Orders. He adds as an Example Crassius Mutianus, Who sent an Architect for the greater of two Beams to raise his Battering Ram with, but the Architect thinking the lesser the fittest, brought that, upon which Account Mutianus order'd him to be scourged; for he imagin'd that Discipline would be trampled upon, and Authority despis'd, if a Man,

(a) Cic. pro S. Roscio, c. 38, 39. Plautus Mercatore, Act. 2. Sc. 3. v. 42. 'Every wise Man ought, in the first place, to look after a Commission intrusted to him. (1) Vid. Jac. Gothofred. ad leg. 23. D. de div. reg. juris.

(b) In Vita Attici, c. 15. (c) Ter. And. Act. 4. Sc. 1. v. 5. &c. (d) Sadius, Rosar. Pers. c. 7. \* Mandatarius, &c. (2) See Grot. B. 2. c. 12. f. 13. (e) B. 17. t. 1. l. 26. f. 6. D. mandati, &c. (f) Vid. Mornac. ad l. 26. f. 6. D. mandati, & lib. 17. t. 2. L. 52. f. 4. pro Socio. (g) L. 1. c. 13. (h) As was Piso in Seneca de Ita; l. 1. c. 16.

under Command, instead of obeying the Orders of his Superior should impertinently interpose his own Judgment: Though this is to be said for the Architect, that *Mutianus* sending a Man, Skilful in the Art, and signifying to him what Use he design'd the Beam for, seem'd in a manner to advise with him about it (a). On the other side, we have an Example of Mildness in the Emperor *Adrian* (b); for when the People had demanded Something in a tumultuous Manner, he order'd the Cryer to proclaim Silence. But he fearing the Consequence of such an harsh and unusual word, stretch'd out his hand, and having thereby procured Silence, cry'd aloud, *This is what the Emperor would have*, with which the Emperor was not offended (c). *Grozius* (d) is of Opinion that a Commission may be discharg'd by an Equivalent, provided it appears, that it was not prescrib'd to be manag'd under any particular Form, but under the general Consideration and Prospect of some Advantage which may be obtain'd, as well one way as the other.

In short, the State of the Case is this: In some Commissions the Business only is specified, and the Management of it left to the Discretion of the Agent: Sometimes the Management too is prescrib'd, but rather by way of Advice, as seeming best to him that gives the Commission; but yet so as not to exclude the Agent from using his own Method (e) if it should seem best at the Point of Execution. But lastly, The Method is sometimes so strictly prescrib'd, that the Agent cannot depart from it, let what will happen. Here 'tis plain that a Commission is satisfy'd with an Equivalent in the Second Case, not in the Third. To this Purpose we have a Case in the *Digests* (f). *I commission you to be Surety to Sempronius for Titius, you don't make your self a Surety, but give Sempronius a Commission to trust Titius. If you have been at Expence, upon this Account, the Question is, Am I responsible?* Which is declar'd in the Affirmative. *For I gained my End, which was, that Sempronius should trust Titius, and whether he does it by your Suretiship, or your Commission, it is all alike to me: And I am obliged by one, as well as the other, to repay what you have laid out upon this Account.*

But, as I observ'd above, we must carefully distinguish (g) between the Commission of a Su-

perior, and the Commission of a Friend; which two are widely different, and agree in Nothing but the Name: And therefore what the *Civilians* have said upon the latter, are very injudiciously apply'd to the former. For, in private Affairs, 'tis easy to presume, that the Method is prescrib'd only by way of Advice, so as to leave Room for the Discretion of the Agent. But when a Business is enjoy'd by a Superior, the bare Execution of it is suppos'd to be meant; and, in this Case, it will not be lawful to depart from the Method prescrib'd, unless Leave be given (as frequently it is) by an express Clause to deviate from it, as Occasion shall require: or unless the Words interpreted according to Reason, and the receiv'd Rules of Speech, so as to answer the Design of the Commission, can warrant the doing of it. For that Sense that the Meaning of his Words fairly imports, is to be presum'd, the Meaning of the Person: Yet this Liberty is not to be taken, but in Cases of Necessity, for all the Force of Authority would be eluded, and the Commonwealth would be often brought into Danger, if a Minister, of his own Head, should take upon him the Part of the Governour (h). Yet Ministers of great Abilities, do well in neglecting the foolish Orders of their Prince (i).

VI. (†) A Loan (that is when we allow another *gratis* the Use of any Commodity not consumable) carries along with it these Conditions; that it be carefully preserv'd, and with the same Diligence that prudent Men keep their own (k): That it be not put to any other Use, nor made Use of any farther than the Person lending design'd it (l): Lastly, That it be return'd in the same State and Condition as when it was borrowed (m); indeed what Detriment it necessarily receives from the ordinary Use of it, need not be repair'd, for that the Owner is suppos'd to give *gratis* (n). Besides, if I lend a thing for such a certain Time, and in the mean while by some unforeseen Accident want it my self, the other is obliged to deliver it immediately upon Demand: For no Man is presum'd to lend his Goods, but so long as he can conveniently be without them. And he must be either very careless, or have a Design to impose upon another, who lends those Things which he is Likely to want himself. And therefore a Loan for a certain Time, is

(a) *Add. Mich. Montaign. Ess. l. 1. c. 16.*

(b) *Vid. Xiphilin. Epit. Dionis ann. 118. & Zonaræ, Tom. 2.*

(c) 'One time when *Commodus* found the Bath too warm, he order'd the Keeper of it to be thrown into the Furnace: But the Servant, who had received the Order, threw in a Sheep-skin, by the Stink thereof to induce the Emperor to believe his Order to be put in Execution. *Lamprid. in Commodo, c. 1.* (d) *L. 2. c. 16. f. 21.*

(e) As in the Proverb, *Mitte sapientem & ipsi nihil dicas.* (f) *L. 17. c. 1. l. ult. f. 1. D. mandati.* (g) Which *Bæcker* takes Notice of in his *Dissertat. de religione mandati.* (h) *Tacitus, H. L. 1. c. 73.* 'If every Man, when he is commanded, is allowed to ask Questions, there is an End of all Authority. And again, *l. 2. c. 39.* 'Tis a poor Comendation for a Soldier to comment upon, rather than execute the Commands of his Superior. *Add. lib. 49. t. 16. l. 3. f. 15. D. de re militari, & Liv. l. 44. c. 34.* (i) See 2 *Kings XVIII. 14. XIX. 6.* *Vid. Val. Max. l. 3. c. 8. f. 1. Cor. Nepos, Epam. c. 7, 8.* 'Thus *Bavalan* did wisely in not putting in Execution the Murder of *Cliffon*, which his Master, the Duke of *Bretagne* had intrusted him with. See the Story in *Bussier's Hist. Franc. l. 11. p. m. 391.* and *Mezeray, p. 526. tom. 2. Par. Edit.* 'Tis remarkable, that the Vice-Roy of the *Indies* had a fair Opportunity of seizing upon the City *Alen*, but yet did not do it, because it was against the King's Command, when yet the Taking of that place was of the greatest Importance. *Hier. Ofor. de gestis Emanuel. l. 11.* (†) *Commodatum.* (k) *L. 13. t. 6. l. 5. f. 5. D. commodati.*

(l) *Vid. Val. Max. l. 8. c. 2. f. 4.* And *Gellius, l. 7. c. 15.* *Vid. lib. 13. t. 6. l. 5. f. 8. in fin. D. commodati, & lib. 47. t. 2. l. 54. f. 1. de furtis.* (m) *Vid. lib. 13. t. 6. l. 3. f. 1. D. commodati.* (n) *Add. l. ult. D. commodati.*

upon Condition, that the *Owner* shall not, in the mean Time, have urgent Occasion for the thing himself, but without such an urgent Necessity a *Loan* ought not to be demanded before the Time (a).

Let us see therefore in what such a *Loan* as this, and (\*) a *Grant at Will and Pleasure* differ and agree. In respect of the Object and the Use they agree; for the same thing that may be *lent*, may be *granted* during Pleasure, and the Use, in both Cases, is given *gratis*. But they differ, in that the *Loan* is a Contract, the *Grant* is not: the former obligatory on both Sides, the latter only on one. The *Loan* is given for a certain Time, or End; the *Grant* only during the Will of the Giver. The Receiver of the *Loan* must make good all Damages; the Receiver of the *Grant*, only those that happen by his Knavery, or gross Negligence (b).

It may indeed be doubted, whether the Receiver of a *Loan* is bound to stand to those Chances which it was not in his power to prevent, and this is generally held in the Negative (c). But, in my Opinion, we ought to distinguish, whether or no the Damage had happen'd, if the Thing had continued in the *Owner's* Custody (1): for if it had, no Restitution is due; but if it had not, it seems due in Equity: for otherwise a Man's Generosity and good Nature might be too expensive to him, if besides the free Use of his Goods, he must be depriv'd of the Perpetuity of them, which he had not been but upon this Account. Nor is there any Reason why he, rather than the *other*, should bear the Burthen of the Misfortune, since the *other* was the Occasion of it. The *Roman Law* (d) gave the *Lender* Damages if the *Loan* was stole; and yet such a Robbery might be committed without any Fault in the Person robb'd. Indeed if a Man, by Fire, should lose all and be reduc'd to extream Poverty, it would be Inhuman to demand the Value of the *Loan*; and since Fire, Ship-wrack, and such Chances often happen, the *Lender* may be presum'd willing to run the Risque of them (e). But yet if the *Borrower*, when he might have sav'd the *Loan* preserves something more Valuable of his own, he becomes responsible. For tho' no Man can blame him for letting that perish which was less Valuable, yet since it might have been sav'd, and was lost for the Benefit of the *Borrower*, there is no Reason, why the *Lender* should stand to the Loss (f). On the other side it is but reasonable, that if any Ex-

pence has been laid out upon the *Loan*, besides what was necessary for the Use of it, the *Owner* should repay it (g).

VII. (†) A *Charge* is when we commit to another's Trust and Custody any Thing belonging to us to be kept *gratis* (2). And here the *Trustee* is bound to preserve it diligently, and to return it upon Demand (h). Yet sometimes Circumstances may so happen as to excuse him from making a Return even then. A *Charge*, (i) which you have receiv'd from a sober Person, you shall not return when he is drunk, or extravagant, or mad. For in such a Condition, he is not fit to make use of it. Nor shall you return it to Debtors or Slaves, whose Creditors and Masters lie in wait for them, for this would not be to return, but to betray the *Charge*. Suppose a Man (k), in his Senses, leaves a Sword in your Keeping, and demands it when he is mad; in such a case, to restore it is a Crime, and the Refusal of it a Duty. What if you should receive Money, in Trust, for him, and then find that he is taking up Arms against his Country, Would you return the Money? certainly not; because it would be against the Common-wealth, which ought to be prefer'd. To restore (l) a *Charge*, is in it self a commendable Thing; yet all Times and Places may not be proper for it. Sometimes the restoring it may be as bad as the disowning it. The *Owner's* Advantage ought to be consulted, and if the restoring it tends to his Prejudice, it ought to be withheld (m).

But if I had agreed to call for the *Charge* at such a certain time, I may nevertheless, if I please, change my Mind, and demand it sooner (n). A Passage in *Quintilian* (o) seems counter to this. Some *Charges*, says he, are depos'd to be return'd at Demand; some at such a Time. How was this depos'd? To be paid you when you had left off being Extravagant: but when you demanded it, you had not parted with your Extravagancies, and therefore it was not due; nor can he be said to have broke his Trust for refusing to restore it at a Time when you your self own he could not be forc'd to it. To this I answer, If he, that demanded it, was the very Person that depos'd it, it ought not to be withheld; but if another had depos'd it, suppose him whose Heir the Demandant is, the *Trustee* could not be oblig'd to restore it, before the Conditions required were perform'd (p).

As for the Degree, it is allowed on all hands, that ordinary Diligence is sufficient, for the Contract is not for the *Trustees*, but the *Depo-*

(a) Vid. D. ubi sup. l. 17. f. 3, 4. D. commodati. (\*) Precarium. (b) Vid. Wisseback ad D. disp. 24. f. 19.

(c) Vid. lib. 13. t. 6. commodati, &c. § l. 19. & lib. 44. t. 7. l. 1. f. 4. D. de oblig. & act. (1) Vid. Grot. l. 2. c. 12. f. 13. n. 1.

(d) Vid. D. ubi supra, l. 21. 22.

(e) And thus I think that Law the 18. prin. and

l. 5. f. 4 & 7. D. commodati ought to be limited. Neither can I well approve of what is said in l. 19. D. diff. tit. which does not seem to agree with what is said in l. 12. f. 1. D. diff. tit. (f) Vid. l. 5. f. 4. D. commodati. See also Exod. XXII. 13, 14, 15. And d. l. 1. 18. princ. D. commodati. (g) Add. ubi supra, l. 18. f. 2. D. commodati. (†) Depositum.

(2) Vid. lib. 16. t. 3. Depositum, &c. leg. 1. princ. f. 8. (h) Vid. Instit. l. 3. t. 15. & l. 12. f. 3. D. depositi, ubi supr.

(i) Philo Jud. de plantatione Noach. (k) Cicero Offic. l. 3. c. 25. (l) Vid. Sen. de Benef. l. 4. c. 10. (m) Ambr. Offic. l. 1. c. ult. brings these Instances. If a Man who had intrusted Money to you, joins with the Barbarians against his Country; or, if any present be likely to rob him of it; or, if he be mad and cannot keep it, you ought not to restore it. Would it not be a Breach of Duty to give a mad Man his Sword? Or to restore any Thing stolen to the Prejudice of him that lost it? (n) Vid. lib. 16. t. 3. l. 1. f. 45, 46. D. depositi. (o) Declam. 245.

(p) Add. Val. Max. l. 7. c. 3. f. 5. inter externa.

ment's Advantage, and it is his own Fault if he depofes his Goods in the Hands of a carelefs Perfon: And for this Reason the *Trustee* does his Duty, if he takes the fame Care of the *Charge*, as he does of other Things, and applies the fame Diligence about that as about his own Affairs, be it never fo fmall (a). But fince, in a *Charge*, fome Offices of Friendship do ufually intervene (for no Man depofes but with a Friend, or one that he has a good Opinion of) I think, generally fpeaking, that Care is requir'd in the Management of a *Charge*, which diligent, induftrious Men ufually take about their own Affairs. Nay fometimes a more exact Care is neceffary, not only when it is exprefly promifed, but when the Condition of the *Charge* requires it, as if it be very valuable, or if ones whole Fortune depends upon it (b). Which Carefulnefs does not confift in having it Day and Night before our Eyes, but that we lay it up in the fafeft place we can, and where it is likely to receive leaft Damage. And therefore although I fatisfy the Laws of Friendship, if I take the fame Care of my Friend's Goods as I do of my own, nor can any one, in Modesty defire more; yet it is fit, when I cannot fave both, that I negle& my own, if of little worth, to preferve my Friends that is more valuable; for Inftance, in a Fire, I ought to preferve a Cheft of Gold and other precious Things, or full of Deeds and Writings of Moment, rather than fome of my own poor Houfhold-ftuff. But then the *Deponent* will be oblig'd to pay me the Value of thofe Things which I fuffer'd to perifh for the Prefervation of his, as well as other Expences and Loffes receiv'd upon the Account of the *Charge*. But if a Man fhould prefer the Prefervation of his own mean Goods to the more valuable *Charge* of his Friend (if it has not been covenanted to the contrary) he can be thought only to have Violated the Laws of Friendship and Good-nature, and cannot be forc'd to make good the Value of the Thing; for he is no Gainer by it, and the Intermiffion of Acts of Friendship and Good-nature does not oblige to the Reftitution of what Loffes may happen thereupon. But the Reason why the *Roman* Lawyers require a lefs Degree of Diligence in a *Charge*, than in a *Commiſſion* is becauſe the latter is manag'd by our own peculiar Act, and which therefore we have in our own Power to direct in every little Circumftance of it. But, in the former no Body defires, that I fhould be oblig'd to fit up, and watch by my *Charge* Night and Day, it being enough if I lay it up in a convenient place, and never view it, unlefs when ſome particular Occaſion requires, as I uſe to do with ſuch Things of my own. To the Law in *Exod. XXII. 12. If it be ſtolen*

from him, he ſhall make Reftitution unto the Owner thereof; *Grotius* adds this Glofs, *Provided it be by palpable Negligence, which does not much differ from Knavery.*

It may bear a Queſtion, *Whether the Trustee may make uſe of the Thing intruſted with him?* To which I answer, that if the *Charge* can poſſibly receive any Damage in the Uſe, he ought not to do it without the Owner's Conſent (c). But if the Thing be never the worſe for being uſ'd, as if I ſhould lay a Silver Cup for Ornament on the Side-board, or make Uſe of it for the Entertainment of ſome extraordinary Gueſt, I don't ſee any Harm in this, provided the Owner is not particularly concern'd that no Body ſhould ſee it, and the *Trustee* knows that he is to ſtand to whatever Riſque it may run by being ſo uſ'd. But when the Owner has lock'd or ſeal'd up the *Charge*, we ought not, upon any Account, to open it (d). Nay a *conſumable Commodity* given in *Charge*, although neither lock'd nor ſeal'd up, may not be made uſe of by the *Trustee*, unleſs he be able to reſtore the ſame in Quantity and Quality upon Demand: for we are often in ſo great want of ſuch Sort of Things, that we cannot part with them upon any terms. Laſtly, 'tis well ordain'd in the *Roman* Law, that whoſoever ſhould diſown a *Charge*, which the *Deponent*, in Diſtreſs, had repoſed with him, as being in Danger of Fire, Shipwreck, Tumult, or ſuch like, ſhould be fined double; for ſuch Inhuman Villany deſerves to be ſeverely puniſh'd, which does not ſcruple to make a Gain of thoſe Men, who are the Objects of Compaſſion (e). Nay I think it a worſe Crime to diſown, or with-hold a *Charge*, than to commit a Robbery, for here only Juſtice and Property are violated, but there Friendship and Good-nature too ſuffer (f). Nor does it extenuate the Crime that the *Trustee*, having the *Charge* put into his Hands, has an Opportunity of playing the Knave (which is otherwiſe tempting enough) laid in his Way; whereas the Thief has no ſuch Temptation, but of his own Accord ſeizes upon other Men's Goods, and, which is more, breaks in upon that common Security, which makes every Man's Houſe his fafeſt Sanctuary. Nor is a *Guardian* guilty of a leſs heinous Crime, who debauches an Orphan committed to his *Truſt*, and receiv'd into his Houſe (g).

Since the Keeping only is given *gratis*, it is plain that all Expences laid out upon the *Charge* ought to be repaid. Upon which Ground it is rightly declar'd in the *Digeſts* (h), *That if a Charge be receiv'd at Aſia to be reſtor'd at Rome, it muſt be at the Expence of the Owner, not of the Trustee.*

(a) *Vid. lib. 44. t. 7. l. 1. f. 5. D. de obligat. & act.* (b) *Add. Ambr. Off. l. 2. c. 29.* (c) *Scævola* in *Gellius*, l. 7. c. 15. He that uſes a thing that was ſimply committed to his keeping; or puts it to other Uſes than the Owner gave him Leave, is guilty of Theft. *Add. Inſtit. de oblig. quæ ex del. naſ. lib. 4. t. 1.* (d) *Add. lib. 16. t. 3. l. 1. c. 36. D. depoſiti.* (e) *Vid. l. 1. f. 1, 2, 4. D. depoſiti, d. 1. Quintilian, Decl. 245. adds, 'A Charge ought to be reſtor'd the ſooner, for being deliver'd ſecretly and without Proof. Add Exod. XXII. 7, 8, 9. Lev. VI. 2, &c.* (f) In *Pifidia* the Breach of this Duty was Capital, *Nicolaus Damascenus.* (g) *Add. Ariſt. Prob. Sect. 29. Qu. 2 & 6. Alio l. 1. f. 2. & l. 67. princ. D. de furtis.* (h) *Lib. 16. t. 3. l. 12. princ. D. depoſiti.*

## C H A P. V.

## Of Chargeable Contracts in particular; and, First, of Bartering, Buying and Selling.

**O**F Chargeable Contracts, Bartering is deservedly esteem'd the Chief; for in Days of Yore, before Money was found out, there was no other Method of maintaining Commerce (a) (1). Now Bartering may be made two ways; either the Commodities may be valued for Money, and then, instead of Money, exchang'd for one another; or the Commodities may be immediately compar'd together. The first sort is, in a manner, *Buying and Selling*, for here the things are rated according to their Prices on both sides; which sort of Bartering is at this day, very frequent.

And therefore there is no reason to conclude, that pure Bartering was in use, at the Time of the Trojan War, as most do from that Passage in *Homer*, *Iliad*. ii. v. 472.

Ἐνθεν ἄρ' οἰνίζοντο κρηνοκόμωυτες Ἀχαιοί,  
Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἰθωνί σιδήρῳ,  
Ἄλλοι δὲ ῥινόισι, ἄλλοι δ' αὐτοῖσι βόωνιν,  
Ἄλλοι δ' ἀνδραπόδοισι.

The Grecian Chiefs their cheerful Bowls prepare,  
And barter Bras and Steel for sumptuous Fare.  
Some truck with Slaves or Skins of slaughter'd Kine,  
And some the Ox it self exchange for Wine.

For, says *Pliny* (b), *I wish we could quite lay aside the Use of Gold, which all Good Men speak against, and which was found out to the Destruction of Mankind. How much happier was it when one thing was exchang'd for another? As (if Homer may be believed) was done at the time of the Trojan War: For then, I suppose, Commerce was set on foot for the Conveniencies of Life. He tells us, That some purchas'd with Hides, some with Iron, others with Plunder: Tho' he himself was an Admirer of Gold, yet he so rated things, as to make Glaucus exchange his golden Arms of a hundred Oxen Price, for Diomedes's of Nine. Hence it is, that the Fines inflicted by the old Laws, consisted of Cattle, even at Rome. Indeed, at this day, nothing is more common, than for Souldiers to exchange their Booty for other Commodities, for their Booty does not always consist of Money, and they do not scruple to take other things that come in their way. And therefore it does not follow, that Money was not in Use at the Time of the Trojan War, because the Souldiers purchas'd Wine with their Plunder; nay there is mention made of Talents of Gold in *Homer*, for in *Iliad*. i. v. 122. *Agamemnon* promises to give *Achilles*, δῖος δὲ χρυσίου τάλαντα, Ten Talents of Gold. &*

*Odyss*. vi. v. 393. Each of the *Phæacian* Princes gives *Ulysses*, χρυσίον τάλαντον πμῆεντος, A Talent of venerable Gold. And altho' that Gold in *Odyss*. i. v. 11. is call'd χρυσόν πολυδαίδαλον, Yet it is not probable, that all Gold was then wrought; or us'd only for Cups and such sort of Vessels. Nor does it appear why *Homer* should give such a Veneration to Gold, if it had not been then the Standard-price of other Things. Besides, πολυδαίδαλον may signify any Materials, capable of being finely wrought upon. As for *Homer's* calling *Glaucus's* Golden Arms ἐξαπέμποια; or, worth an hundred Oxen, and *Diomedes's* Bras ones ἑννέαβοια; or, worth Nine Oxen, without doubt he did it because, in old time, the greatest Riches consisted in Cattle, of which Oxen being the Chief, because of the absolute Necessity of them in Husbandry, it was usual to refer the Price of other things to them; which common way of speaking did not immediately grow out of use, after Money had been made the Measure of all Things: And therefore it is observ'd (c), that Maidens, who by reason of their Beauty, received great Presents from their Gallants, were called παρθένους ἀλωροβοίας, Virgins who gain Oxen: but granting that coin'd Money was not then known among the Grecians, yet the use of Gold and Silver, by weight, might possibly have obtain'd in Commerce. Indeed that many Nations used Money before the Trojan War, is plain enough from holy Writ.

This place of *Homer* puts me in mind of the Controversy between *Cassius* and *Sabinus* (d), Whether, before Money was in use, or now since the use of it, it might be call'd Selling, if, v. g. I should give my Cloak for a Coat? *Sabinus* asserted that it was, from this Passage of *Homer*, as if the Grecian Army had bought Wine with Bras, Iron and Men; but οἰνίζουσι does not properly signify to buy Wine, but to procure it by any means whatsoever, as among the Latines, *pabulari*, *lignari*, *frumentari* signify to forrage, to get Wood and Corn by any method whatsoever. The other Opinion indeed seems more feasible, because it is one Thing to buy, another to sell: the Buyer one Man, the Seller another: the Price one thing, and the Commodity another, but for the same Man to be Buyer and Seller, and the same thing both the Commodity and Price, seems absurd. But to this we reply, what we just now said of the two sorts of Bartering, for if we suppose the things to be first rated by Money, the Buying

(a) The Dutch made use of the simple and ancient way of Bartering Commodities, *Vid. Tacit. de morib. Germ. c. 5.*  
(1) See *Gror. B. 2. c. 12. §. 3. n. 3.* (b) *L. 33. c. 1.*  
(c) As *Dydimus* remarks. *ad Hom. II. 2. v. 236.*  
(d) *Id. lib. 18. t. 1. l. 1. D. de contrah. empt.*

will be reciprocal, and therefore not absurd for the same Person, in a different Respect, to be both *Buyer* and *Seller*.

Under the name of *Bartering* may be brought the reciprocal Donations which commonly pass between Friends ; which not being a Contract, does not require Equality. And to this may be refer'd the changing of Arms between *Glaucus* and *Diomedes* (a), which for the Inequality may perhaps be stil'd Foolishness on *Glaucus's* side, but cannot be call'd Injustice in *Diomedes* (b). Among the *Russians* there is a Market for holy Images, which they do not pretend to *sell*, but to *exchange* for Money (c).

II. But since Money has been introduc'd, the Contract of *Buying* and *Selling* has been most in Use, whereby the Property of a Thing, or some Right Equivalent to it, is acquired for a certain Summ of Money : And here the first Enquiry is, *when the Contract is so compleated, that nothing remains, but that the Seller relinquish the thing, and the Buyer take Possession of it?* According to the *Roman* Laws the Contract is compleated as soon as both Sides have agreed upon the Price ; and then the *Buyer* can force the *Seller* to deliver up the thing : and the *Seller* can oblige the *Buyer* to take it, and to pay down the Price immediately, or at the time appointed (d).

But the Contract may be *incompleat*, and not capable of bearing an Action, either upon a general or a particular Account. The *First* is when the *Buyer* and the *Seller* (1) are not agreed, but still endeavour to bring one another to their own Terms ; where they are both free to give back and break off the Bargain, having not yet contracted an Obligation, provided there be no Deceit, nor Design, in either Party, to illude the other ; which indeed obtains in all Contracts. The *Latter* is, when the Bargain turns upon some Conditions (2), either express, or understood ; as if the Ware is first to be seen, or tasted (3) ; for here the Bargain goes upon a Supposition, that the thing will not only appear as the *Seller* had represented it, but that it will then please too. For indeed the Knowledge of the thing is always Necessary for the determining the Price, and it is imprudent to buy without seeing it, where we cannot depend upon the word of the *Seller*.

The Determining of the Commodity, by Weight, Measure, or Number (4), is not properly a Condition of Sale, unless the thing be

so, as not to serve my turn, but in such a Quantity. However, for putting the Contract in Execution, it is necessary to measure, number, or weigh, for we cannot otherwise specify the Thing, and set it apart from those of the same sort. Nor, without this Measuring, can the Goods be deliver'd, or Property transfer'd ; for I have no other way of determining what belongs to me, and what to the *Seller*. Sometimes indeed we buy at a Lump, and then measuring is only for Experiment, not for the rating of the Commodity : for, in that Case, the Measure does not precede the Delivery ; It being one thing to sell this Vessel of Wine that holds ten Gallons, and another to sell ten Gallons out of this Vessel.

Lastly, The Bargain is *incompleat*, if the Parties (5), particularly, agree to have one anothers Consent express in Writing, and the Writings be not yet finish'd. But 'tis another Thing, if this Writing is design'd only for a help of the Memory, or an Evidence of the Thing (e)

III. And here we must take special Care to distinguish between the *Contract* it self and the *Execution* of it. The *Contract* is compleated as soon as the Commodity and Price is agreed upon, provided there be no Condition added, that can suspend the Obligation, or any thing else, that can leave Room for either Party to recede from the Bargain : but the *Execution* of the Contract consists in the actual Delivery of the Money by the *Buyer*, and of the Commodity by the *Seller*. It is indeed most natural, that as soon as the Contract is compleated, it should be put in Execution ; or, that as soon as the Price is agreed upon, the *Buyer* should deliver the Money and receive the Commodity. Which they call *Trucking with ready Money* (f).

But when there is some time between the Completion of the Bargain and the Delivery of the Thing ; it may be demanded to whom the Damage, or the Profit of the Commodity belongs in the mean time, to the *Buyer*, or to the *Seller* ? 'Tis well known that the *Roman* Law, as soon as ever the Bargain is compleated, imputes the Risque of the Commodity to the *Buyer*, altho' it be not yet deliver'd, and altho' the *Seller* remains Master of it. By *Risques* they mean the Accidents 'tis liable to, from external Injuries, as Theft, &c. or internal Decay proceeding from Natural Causes (g). But how can the Damage belong to the *Buyer*, when he is not

(a) *Vid.* Hom. Il. d. l. (b) *Maximus Tyr. Dissert.* 23. says, '*Glaucus* rated his Purchase from the Occasion, not according to the real Value. And again, *Dissert.* 24. 'Nor had he that receiv'd the golden Arms more than his due, nor he that receiv'd the brazen, less ; but both did generously ; the Inequality of the Matter being made up with the Equality of the Design, that each had of obliging the other. *Add.* *Ifocr. ad Nicocl. in princip.*

(c) *Olearius itin. Perf.* l. 1. c. 1. (d) *Add. lib.* 19. t. 5. *D. de præscript. verbis, &c.* Leg. 5. f. 1. *Sine pretio nulla venditio est.* Lib. 18. t. 1. & l. 19. l. 34. f. 5, 6. l. 35. f. 1, 5, 6, 7. *D. de contrah. empt. &c.*

(1) *Vid. D. ibid. leg.* 35. f. 1. (2) *Vid. D. ibid. leg.* 7. f. 1. See above in B. 3. Ch. 8. (3) *Vid. D. ubi supra, leg.* 34. f. 5. (4) *Vid. D. ubi supra.* (5) This not only respects Contracts of *Selling*, but likewise all other Contracts, *Vid. G. lib.* 4. t. 21. *De fide instrumentor. &c. leg.* 17. *Vid. Instit. lib.* 3. t. 24. *De emptione & venditione princip.*

(e) What the *Hebrews* observed, in Relation to this Contract, is curiously taken Notice of by *Selden*, *De J. N. & G. secund. Heb.* l. 6. c. 1 & 4. Add a Place of *Theoph.* in *Stobæus*, *Serm.* 42. (f) *Vid. Plaut. Afin. Act.* 1. Sc. 3. v. 47. As also *Plato de Leg.* l. 11. in his *Common-wealth* enacts, 'That whatsoever is bought and sold, be done in such a certain Place of the *Forum*, the *Seller* delivering the Commodity, and the *Buyer* paying down the Price immediately. (g) *Vid. d. tit. de peric. & commod. rei venditæ.*

yet the Owner, whereas the Loss of a Thing is to the Owner? To which some answer (1), that that Trite saying, *The Loss is to the Owner*, is true, when the Owner is oppos'd to those who have barely the Use and Custody of the Thing; and not to those who have Right in it and a Power to call for it as their own. Which Distinction is founded upon this Reason, that the Buyer might and ought to have immediately taken Possession of the Commodity, and to have paid down the Money; which if he had done, it had perish'd in his own keeping; and therefore his Delay and Negligence ought not to turn to the Loss of the Seller. Besides, the Risque belongs to the Buyer, not only because he is the Owner; but because the Seller, after the Completion of the Bargain, in respect of the Buyer, is not consider'd as Owner, but as Trustee of such a particular Commodity, for which, if it be lost without his Fault, he ought not to be responsible.

But after all, since it is the Seller's Business to give the Buyer Possession, if he has not discharged this Duty, I do not see why he, rather than the other, should not stand to the Loss of it. For the Answer, *That a Person, having promis'd any certain thing, does not stand oblig'd in case the thing be lost*, does not come up to our Case (a): For there the other Party was to have gain'd the thing gratis; and it would be hard and unjust for a Man that had promis'd a certain Species, upon the Loss of it, to be bound to make good the Value. But in such Dealings, as admit of no Latitude, the Case is altered; for why should the Buyer, who has not yet had the Delivery made him according to the Contract, be deprived of the Goods, and yet pay the Seller the Price of them (b).

The best way to discover natural Equity, in this Point, is to distinguish whether the Delay, was absolutely necessary, for the Delivery of the Commodity; or only occasion'd through the Default of one of the Parties; and if occasioned, Whether by the Buyer, or the Seller?

The first Case may be put thus, suppose I buy Cattle, which at present are at some distance, and the Seller in driving them to me, happens to have them intercepted by Robbers, Wolves, or some other Accident: in this case no doubt the Loss is the Sellers.

Where the Delay has not been necessary, but occasion'd by the Seller, then too the Loss lies at his door.

But if the Buyer be the Occasion of it, then he stands to the Loss of it. For the very Moment, that the Commodity was due, and the Seller ready to make Delivery of it, the Property pass'd to the Buyer, and the Thing then began to belong to him only (c). And there-

fore, if the Seller out of Kindness keeps in Custody the Goods, which the Buyer did not so much as commit to him in Trust, 'tis unreasonable to expect, that he should stand to the Casualties that may attend them. But in Case the Buyer had committed them to his Custody, then must they be look'd upon as a Charge, and consequently the Receiver must be free from whatever Casualties may happen to them. In which case, the Delivery of the Commodity ought to be made by a Fiction *brevis manus* (2), otherwise than is done in the Loan, or Letting of a Thing. For there, by the Delivery we alienate our own, but here the Alienation is made to us. What has been here said of the Damage may be apply'd to the Gain also (3).

IV. Moreover 'tis usual for this Contract to be qualified with the Addition of several other Pacts, according to the Pleasure of the Contractors, or the Law of the Land. In which, the Law of Nature is concern'd no farther than that each Party stands to his Agreement, provided nothing absurd, or unjust is contain'd in it, and that every Subject conform himself to the Law of his Country, as he expects to have his Contract Valid in it. Thus nothing is more common than to agree upon Payment of the Money sometime after the Delivery of the Thing; and also, that the Thing shall not be deliver'd till such a time; the Property, in the mean time, together with the Gain or Hazard attending it, lying in the Seller (4).

Besides, We frequently practise what the Civilians call *Addictio in diem*, which gives the Seller Leave to accept of any better Bargain, that shall offer it self by such a day. This 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 (d). In the former case, the Property pass'es over to the Buyer; in the latter, it remains in the Seller, till the Completion of the Contract.

What they call *Lex Commissoria* makes void the Bargain, if the Price be not paid by such a Day. And in this case, either the Seller may immediately deliver the Goods, and in Default of the Payment, claim them again with the Emolument (e): or else the Goods may be kept in Possession, till Payment be actually made: which last seems to be the safest Way, for generally this Clause is design'd in Favour of the Seller, to save him from being put to any Trouble in quest of his Money: whereas, the Trouble would be the same, were he to recover his Goods out of the Hands of an ill Paymaster (f).

Sometimes too either the Laws of the Land,

(1) Vid. C. lib. 4. t. 24. De pignoratitia actione, leg. 9. (a) According to lib. 45. t. 1. leg. 33, l. 83. f. 7. D. de verb. oblig. & lib. 35. t. 2. l. 30. f. 4. D. ad L. Falcid. in fine, & lib. 4. t. 3. leg. 18. f. 5. D. de dolo malo.  
 (b) Ziegler ad Grof. l. 2. c. 12. f. 15. (c) Vid. supra, l. 4. c. 9. f. 5. (2) See above in B. 4. c. 9. f. 9.  
 (3) Commodum ejus esse debet cujus est periculum, Vid. Instit. l. 3. t. 24. f. 3. De empt. & vendit. (4) Vid. Instit. ibid. l. 1. d. Caton. de re rustica, c. 80. (d) Vid. lib. 18. t. 2. l. 2. D. de in diem addict. (e) Vid. lib. 18. t. 3. leg. 5. D. de lege Commissor. (f) Vid. l. 2, 3. D. d. t.

or the Parties themselves grant one another the Liberty of breaking off the Bargain (†), which is done several ways; for sometimes a Clause is added, 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 (1). And this certain day may be express'd with a different Design, either to signify the Term, after which the Seller may have Power to break off the Bargain: or the Term, to which, and not longer, such a Liberty shall be granted. Where 'tis observable, that as this Power of redeeming is design'd in Favour of the Seller, who sometimes upon urgent Occasions, is forc'd to part with that which he would not willingly lose for ever (a): So the fixing a Term to that Power, is in Favour of the Buyer; for it is to his Advantage, if he be not forc'd to quit the Possession of his Purchase in some short time, to be at length sure of the Perpetuity of it. Sometimes too, when the Sale is made in Favour of the Seller, the Buyer is allow'd the Liberty to bring back the Commodity whenever he pleases, or at such a certain time, and the Seller is oblig'd to refund the Money (b).

Another more easy sort of *Redemption*, is what they call *jus œquidistans*, or, *the Privilege of the first Refusal*, that is, if the Buyer be hereafter dispos'd to part with the Commodity, he must let the Seller have the first Refusal at the same Rate he would sell it to another. In many Places certain Persons pretend to this Privilege by Law; as the Landlord in the Sale of his Tenant's Stock, the Creditor in his Debtor's Goods, the Neighbour in the Purchase of a neighbouring Farm, any Member in a Thing that belongs to the Society, and the next a Kin, in the Goods of their Relations, which is peculiarly call'd *Retractus Gentilitius*, or *the Family Privilege*.

Usual too it is, at the selling of Land, to except one spot, and the Use of it; as Prodigals, when they sell their Estates, do sometimes reserve a Title to as much as may serve for their Grave, to which many think *Virgil* alludes, *Ecl. 3. v. 104, 105.*

*Dic quibus in terris, & eris mihi magnus Apollo,  
Tres pateat Cœli spatium non amplius unas.*

Tell where the Round of Heaven, which all contains,  
To three short Ells on Earth our Sight restrains.  
Tell that, and rise *Apollo* for thy Pains.

Thus *Menius*, when he sold his House to the Censors for a *Basilicon*, reserved the Right of one Pillar to build upon, that from thence he

and his Posterity might see the *Gladiators* that then used to fight in the *Forum* (c).

What the Divine Law prescribes about *Redemption*, may be read in, *Lev. XXV. 13, &c.* (2). The Reason of which Injunctions was taken from the particular Constitution of that Commonwealth founded by *Moses*; for his Design was that an equal Degree of Liberty should flourish amongst them; to which End, it was necessary to hinder any from engrossing to themselves so much Land, as might make others divested of their Patrimony, dependent on them; for so by degrees, Lordship and Tyranny might be introduc'd (d). The same End did *Lycurgus* propose to himself, when he divided the Territories of *Sparta* into 39000 Parts: which he distributed among the People by Lot; and forbid them to encrease, diminish, subdivide, or sell (e).

Besides, there is another common way of Selling, which they call *per averfionem*, where Things of different Value are not rated separately, but sold altogether.

Lastly, Things are sometimes so sold, as to return again to the Seller after a certain Term of Years, without his being oblig'd to refund the Price. Thus, in *England* Gentlemen sell their Ground for 30, or 35 Years, upon Condition that the Buyer shall build upon it after such a particular manner; which sort of Contract is something like that of *Renting*.

V. As for any other Obligations between the Buyer and the Seller, they easily appear from the Nature of the Contract, and the additional Paets. The Buyer is oblig'd to pay the Price agreed for at the time appointed, and to give the Receiver a good Title to it, I mean, to pay him with his own, and not another Man's Money (3). And if he pays another Man's Money, and it happens to be challeng'd by the Owner, he is oblig'd to pay it over again, and as much more as the Receiver loses, by having it thus challeng'd. As for the Seller, he is oblig'd to deliver the Goods bargain'd for, with such Qualities as the common Nature of Contract, or the particular Agreement requires, and that too at the time appointed (f). And if, between the Completion of the Bargain, and the Delivery of the Goods, the Seller should repent, and be desirous to return the Money with Amends, the Buyer nevertheless is not oblig'd to accept it; but may force him to stand to his Bargain, unless in point of Good-nature he be otherwise perswaded; but if, through the Default and Knavery of the Seller, the Delivery cannot be made, the Money together with Damages is to be restored. What the Law is,

(†) *Retractus*. (1) *Vid. C. lib. 4. t. 54. de pactis inter empt. & vendit. compositis, leg. 2.* (a) 'The Emperor *Marcus*, in want of Money, having sold all his Imperial Furniture, afterwards gave leave to the Purchasers, for any of them, to bring back their Purchase, and receive their Money, *Jul. Capitol.* (b) *Vid. Liv. l. 31. c. 13.*

(c) *Unde Menianorum nomen ejusmodi projectis adhasisse creditur. Alcon, Ped. in divin. Cicer. c. 16. p. 328. Ed. Grav.*

(2) Upon which place, see *Mr. Le Clerc.* (d) For I cannot approve of the Reason that *Grotius* brings of this Law, *viz. That 'tis much easier to find a dwelling Place any where than Food.* *Vid. Grot. ad d. l. v. 29.*

(e) Among the *Lacedemonians*, it was held unlawful and dishonourable to sell Land that had been a long time in the Family, *Herack, de Pol.* (3) *Vid. D. lib. 19. t. 1. leg. 11. f. 2. & C. lib. 49. leg. 7. & leg. 13. f. 19. D. ubi Sup.*

(f) *Vid. l. 11. f. 1, &c. D. de Act. emp.*

when the *Seller* is not in the Fault, we have said above.

But if a Man *sells* the same thing to Two, and has as yet deliver'd it to neither, without doubt the first Bargain ought to take place; and much rather, if the thing has been already deliver'd to him. But yet, in this case, the knavish *Seller* ought to make Satisfaction to the last *Purchaser*, for whatsoever Loss he is at by being thus disappointed. But supposing the Delivery to have been made to the *last*, he, upon the Grounds of the Civil Law, will be prefer'd to the *other*: For he receiv'd the thing of the *Owner*, upon a just Title; and the *first* can have no Action against him: Not a real one, for he was not yet Master of the thing; nor a personal, for no Intercourse had passed between them: Neither can the *Seller* have any Pretence to revoke the Bargain (a) (1). *Grotius* (b) too, in this case, prefers the Title of the last, *Because, by the Delivery of the thing, the Buyer makes over all his Right, which is not done by promising to sell it.* But here *Grotius* does not seem to be consistent with himself; indeed the Promise to *sell* is not *selling*, but yet he had asserted, that the Property is made over at the very Moment of Contract, although the thing be not then delivered: and therefore after such a Sale, no Right can remain in the *Seller*, any further than what tends to the Delivery of the thing into the Hands of the *Buyer*; and consequently whatever Bargain the *Seller* concludes afterwards, it is null and cannot stand in Prejudice of him, who before has got a Right to it. And this being granted, I question whether the favourable Plea of Possession, thus unjustly acquired, can always hurt the Title of the first *Purchaser*. Moreover, since a Man does not lose his Right in a Thing by being deprived of the Possession of it, and since a Man may honestly come by the Possession of another's Goods; if therefore, such a Possessor *sells* a thing to a Third Person, he does not extinguish the Right of the *Owner*; nor can he transfer to another a better Title than he had himself. And therefore, although the Design of the *Buyer* be to acquire a Property in the thing, yet since the thing, which is thus sold, either ignorantly or designedly, is another Man's, it is as much as can be expected, if the *Seller* gives the *Buyer* free Possession, and puts him in Power of using it, and bears him harmless (2), if his Title be disputed (c).

VI. There is also a peculiar sort of Sale, where the Purchase is no certain thing, but *Hope* and *Expectation* only, on which, by

Agreement of the Parties, a *Price* is laid. Nor is there any Default in this sort of Sale, altho' afterward the thing happens to be above, or below the *Price*. The same obtains at *Auctions*, and where things of different *Prices* are sold altogether at a Lump: for all such sort of Bargains have something of Chance in them (d): Such as was the Cast of a Net (e), bought of the *Milesian* (f) Fisher-men, which occasioned a famous Suit between the Fisher-men and the *Buyer* of the Cast; for they having drawn out a golden Table in their Net, the *Buyer* claim'd it as his, for that he had bought whatever should be taken, or the Fortune of the Cast: whereas the Fisher-men, on the other side, contended that the Bargain had regard only to what Fish should be caught. And indeed they seem to have been in the right, for in explaining any Contract we ought to consider the Intent of the Contractors; and here 'tis evident, they had no thoughts of Gold, but of Fish only: nor does it make for the *Buyer* that it was a Purchase of Chance; for that was only design'd to extend to the Quantity of Fish, and not to any Thing else, which by great Fortune might come to the Net. And therefore the Table ought to be look'd upon as a Treasure found by Chance.

As for the Decision of the Oracle, which adjudged it to the wisest, that plainly favour'd of the Crafty Covetousness of the Priests, who thereby bid fair for the procuring such a glorious Prey to themselves: For what Mortal would arrogate to himself the Title of the *Wiseest Man* (g).

VII. In this place something may be expected to be said concerning *Monopolies*, *Whether any, or all of them be against the Law of Nature, or no?* For 'tis an odious Name, and the Laws of many States brand it grievously. But here we must exempt several Things from the invidious Title of *Monopolies*, which indeed are not such. For sure 'tis prohibited by no Law, nor can it come under the Name of a *Monopoly*, if only one Man, in any Town, has got the way of making some sort of Manufacture, or if one Man only has got such a sort of Grain in his Ground, or if some certain Commodity be the Produce only of one particular Country (h). For *Monopolies*, as such, imply that others too would sell the same did not one Man ingross the whole Trade to himself. And therefore, he who alone brings a Commodity from a Foreign Country, cannot be said to set up a *Monopoly*, provided he does not hinder others from importing the same. Nor is it unlawful for

(a) *Add. lib. 6. t. 2. l. 9. f. 4. D. de publicana in rem actione.* (1) *Add. C. lib. 3. t. 32. de rei vindic. leg. 15.*  
 (b) *Add. d. l. f. 15. (2) Sive tota res evincatur, sive pars, habet regressum empt. in vendit. D. lib. 21. t. 2. de Evict. &c.*  
 (c) *Add. Plaut. Perf. Act. 4. Sc. 4. (d) Vid. l. 39. t. 4. l. 9. princ. D. de publicanis.* But yet add *Plin. l. 8. Ep. 2.*  
*See Sueton. in August. c. 75. (e) Concerning which see lib. 18. t. 1. l. 8. D. de contrah. empt. L. 11. f. 18. l. 12. D. de act. empt.*  
 (f) *Plut. in Solon, p. 80. Edit. Wech. says between the Fisher-men of Cos, and a Milesian Stranger. Diog. Laert. lib. 1. f. 28. between some young Men of Ionia, and the Milesian Fishermen in Thalet.* (g) According to that of *Sophocl. Antigone, p. 257. Edit. H. Steph. All Priests are greedy of Gain. See Val. Max. l. 4. c. 1. f. 7. inter externa.*  
*Mornac. ad. l. 12. D. de act. empt. &c. (h) Since there is no such Produce of Alum in any other Country, which yet is of great use, it is not to be wondred at, that the Lipareans have the Monopoly of it, and setting what Prices they please upon it, make vast Returns. Died. Sic. l. 5. c. 10. p. 293. Ed. Rhodom.*

any Nation, that abounds in one particular Commodity, to bargain with another Nation to let them only have the Trade of it, for any one may sell his own when and to whom he pleases; indeed when we happen to have a Superfluity of what another cannot be without, then the Law of Humanity requires, that we should not make such a Bargain to the Prejudice of others. But if a Man, without contracting with the Owners, should of his own Head, aim at a *Monopoly* by hindring some by Force, and others by clandestine Contrivances from coming to the same Place, and by that means lay a Necessity upon all others to buy of him, it is plain that he offends against the Law of Humanity, and impudently breaks in upon the Liberty of the rest.

As for *Monopolies* among private Citizens, it cannot be accounted illegal, or oppressive that every one is not allowed to set up what Trade he pleases, but those only who have gain'd a right by the Charter of the Corporation; thus in most Cities of *Europe* no Man can open a Shop, or betake himself to any particular Trade, but he who has served some time an Apprenticeship at it, for it is not enough that he is expert in it.

Besides, the Magistrate may give one Man, or one Company of Men the sole Power of Importing certain Commodities from certain Places, exclusive of all others. And there may be several good Reasons for the granting such a Privilege. For it requires vast Charges to settle a Trade with a very remote Nation, and perhaps after great Expences it may not succeed at all; and therefore the Authors of such a Commerce ought, in reason, to have Security, that others may not intercept *gratis* what they have established at their great Risque and Charge; and besides such privileg'd Companies are better able to assist the Publick with their Riches, upon any Emergencies, than private Persons: By this means too a greater Trade may be carried on, and with better Credit: Nor is this Method liable to so many Tricks and Shifts, since the Gain comes into the common Bank to be divided proportionably amongst them all. But as for these Privileges, a prudent Government will not grant 'em, but where the Commodities are imported from remote Places, and with great Hazard; and which do not so much concern the Necessaries as the Superfluities of Life. Nor even then must the

Merchants be allowed to enhance the *Price* of those things at their Pleasure; for it is against Reason to give a few an Opportunity of scraping up exorbitant Riches out of the Fortunes of the rest, when the Publick gets nothing by it.

Lastly, It seems unjust that Tradesmen, or Farmers should be forced to sell their Manufactures, or the Produce of their Ground to certain People only, who sell the same to others by Retail; for by this Means the Riches of the State may come into the hands of a few, to the Detriment and Oppression of the rest.

I cannot but take notice, by the way, that *Grotius* (a) brings the Example of *Joseph*, when he was Viceroy of *Egypt*, in Justification of *Monopolies*: Tho' that Example is not much to the Purpose, for neither did the King hinder others from *buying* up the Corn in the Years of Plenty, nor any from *selling*, who had too much: Neither had the *Alexandrians* in *Strabo* (b) the *Monopoly* of *Indian* and *Aethiopicke* Commodities from any Privilege, but from the Situation of the Place.

But a *Monopoly*, properly so call'd, as having the Force of a Privilege, cannot be set on foot by private Men: For how can a private Man justify his hindring others from meddling with such a sort of Commodity, when he has no Command over, nor can lawfully use Force against them; and therefore the *Monopolies* of private Men are spurious and illegal, and do not depend upon Rights and Privileges, but are generally carried on by clandestine Frauds and Combinations: As if some few by a Trick should debar others from Trading to those Places from whence they have their Commodities, or should hinder those that have them from bringing them to Market: Or, if they should enter into a Combination to buy up all such sort of Commodities, and then stiffe them, that so the Scarcity may enhance the *Price* (c). The Knavery of such ought as much to be corrected, as those who (d) enter into Compact to raise extravagantly the Prices of other things, by agreeing privately to sell nothing under such a Rate: Which piece of Roguery Labourers and Workmen are sometimes guilty of (e).

I cannot discommend the Sagacity of *Thales*, who rented all the Olive-yards, having foreseen by his Skill in *Astrology*, that there would be great Plenty of *Olives* that Year (f) (1).

(a) L. 2. c. 12. f. 16. (b) L. 17. p. 549. Ed. Gen. Casaub. (c) Against whom may be apply'd that of *Apollonius Tyaneus* in *Philostr.* l. 1. c. 12. in the Beginning. 'The Earth is the Mother of all, for she is Just; but you being Unjust have made her only a Mother to your selves. (d) *Ut in Velabro Olearii de quo vide Erasmi. Adag.* (e) *Add. Plin. l. 8. c. 37. de erinaceo. L. un. C. de Monopol. L. 6. D. de extraord. crim. and Cujacius obs. X. 19.* (f) *Arist. Pol. l. 1. c. 7. (11.) Diog. Laert. l. 1. f. 26.* (1) *Vid. Cicer. de Divinat. l. 1. c. 49.*

## C H A P. VI.

## Of Renting and Hiring.

**R**enting and Hiring (\*), whereby the use of a Thing, or Labour is granted for a certain Rate, bears some Affinity to *Buying* and *Selling*, and may be brought under almost the same Rules (1). For the *Rent* or *Wages* answers the *Price*; and the *Use* of the Thing or the Labour answers the *Property* which is acquired by *Buying*; and as the Contract of *Buying* and *Selling* is completed when the *Price* is agreed upon, so is this of *Renting* and *Hiring* when the Parties are agreed about the *Rent* and *Wages* (a). And as a thing sells the cheaper, when sold in Favour of the *Seller*, and the dearer when in Favour of the *Buyer*; so in *Renting* and *Hiring*, if a Man is at a loss for a Tenant, or wants Work, he is contented with small *Rent* or *Wages*; but if his Land or Work is sought after, he may demand much greater. Lastly, as in *Buying* and *Selling* 'tis generally the *Seller's* Business to name the *Price* (b), and the *Buyer* ultimately resolves upon it; so is it also in *Renting* and *Hiring* (c). But as he who *buys* any Commodity, without agreeing upon the *Price*, is suppos'd to oblige himself to the common *Price* of it; so in this Contract if terms are not agreed upon, it is left to the Equity of the Person *Renting* or *Hiring*, who is nevertheless oblig'd to give as much as is usually given (d). That way of paying for a Work of Pleasure, which *Aristotle* (e) mentions, is a perfect Cavil. *A certain Person promis'd a Musician the better he play'd, the more he should be rewarded. The next Day, when the Musician claim'd his Promise, he reply'd that he had repay'd Pleasure with Pleasure. But Aristotle was right in saying, He had as good received nothing, since he did not receive that which he expected* (f). In this Contract also if any Damage happens to the Labourer, whilst he is about his Work, 'tis his own Loss, and not the *Hirer's* (g). Among the *Ephesians* there was a remarkable Law concerning Architects, that if the Charge in Building amounted to a fourth Part more than what the Architect had

computed it, he was bound to make it good out of his own Pocket (h).

II. But if a Man *rents* a Thing, and any Accident intercepts the Use of it, or renders it worse, *Ought the Loss to be the Landlords, or the Tenants?* To which some answer in short, that if the Thing itself perishes, the Loss belongs to the *Landlord*: but as for Barrenness and other Mischances, which intercept only the Use of it, they are, unless provided against by Covenant, generally at the Loss of the *Tenant*: And the *Landlord* may justly demand the full *Rent* agreed upon, although perhaps the *Tenant* has not made so much of his Land as was expected. For, the *Landlord* gave the *Tenant* Power to make the best of it; and the Hopes of the Produce when they made the Bargain, was really worth so much; and therefore since he made good his Part, 'tis but fair that the *other* should also make good his.

But to canvas this Question more nicely, 'tis manifest, when the Thing perishes, without the *Tenant's* Fault, he is not oblig'd to make it good, but from that time his *Rent* ceases. For the Title to the whole *Rent* is founded upon Presumption that the Thing be in Being, during the Time included in the Contract; but if the Thing ceases to be, the Contract ceases also (i). And upon this, is founded the Law of *Sesostris* an *Egyptian* King: *That if the Violence of the River should wash away any part of the Land, the Tenant should be proportionably abated in his Rent* (k). Again, we must distinguish between those things, where the *Landlord* may and ought to assign a certain and determined Use: And those, whose Use, as to Quantity, is uncertain and depends upon Chance, and which, upon that Account, neither can, nor ought to be determined. To instance in the former sort; I *hire* a House to dwell in, which my *Landlord* is obliged to make habitable, and therefore if the Violence of a Storm, or my Neighbour's Fire should intercept the Use of it, I may fairly withhold in Proportion so

(\*) *Locatio & Conductio*. (1) *V. Instit.* l. 3. t. 25. princ. (a) *V. Instit. ibid.* § 1. 19. t. 2. *D. locati*. Which yet how it may be tacitly prolong'd, *V. l. 13. § 11. l. 14. D. h. t.* (b) *Plaut. Perf.* Act. 4. Sc. 4. v. 37. 'Tis your Ware, you ought to set the Price. (c) 'Whose Business is it to assign the Price? He who delivers the Thing, or he that receives it? He who delivers it seems to leave it to the other: As they say *Protagoras* used to do, for whatever he taught, he left it to the Scholar to set a Value upon what he learn'd, and was paid accordingly, *Arist. Nic.* l. 9. c. 1. Tho' concerning this Custom of *Protagoras* he himself thus speaks in *Plato*, in the Dialogue that bears his Name. 'My way is this, when I have taught any one, if he pleases, he gives me as much Money as I demand; if not, I bring him into the Temple, and make him declare upon Oath what he thinks my Teaching is worth, and so much I receive.

(d) See *Mat.* XX. 4, 7. (e) *Nicom.* l. 9. c. 1. *Vid. & Plut. de auditione*, p. 41. *D. & de fortuna Alexandri*, p. 333, 334. (f) *Rectius similem cavillationem adhibuit Bochoris apud Plutarchum Demetrio*, pag. 901. *D. Quum quidam amaret Thonidem meretricem, poposcit illa ingentem pecunia summam. Adolescens inde, cum in somnis sibi visus esset cum illa concumbere, liberatus est libidine. Ob id mercedem ab illo institit Thonis judicio exigere. Cognita causa iussit Bocchoris illi quantum postulaverat Thonis argenti in vas numeratum huc atque illuc manu jactare, ac meretricem umbra frui. Quanquam Sententiam hanc arguit Lamiæ iniquitatis. Neque enim, inquit, ademit meretrici umbra pecuniæ cupiditatem, Somnium vero amore adolescentem expediit.*

(g) *Vid. lib.* 14. t. 2. l. 2. f. 1. l. 6. *D. de lege Rhodia*. (h) *Vid. Vitruv.* l. 10. pref. (i) *Vid. lib.* 19. t. 2. leg. 15. f. 2. in fin. & *ibid.* l. 9. f. 4. *D. locati*.

(k) *Vid. Herod. Euterpe*, l. 4. c. 7. f. 12.

much of the *Rent*. For the *Rent* was determined for the Use, which the House, in the Condition it was in at the making of the Bargain, was capable of affording, during the whole Time I had hired it for; and the Use being lessened, without any Fault of mine, the *Rent* ought to be lessened also, unless it be immediately repaired without any considerable Inconvenience, or Loss to me (a). And so, if a *Tenant*, or a *Farmer*, by force of Arms, be drove out of his House, or Farm, 'tis manifest, the *Rent* from that time ought to cease; for, in this case, the Thing is morally lost to the Owner, till the Enemy be ejected. But if the Corn be gathered in, and then plundered by the Enemy, the case is altered; and the *Tenant* is then obliged to stand to the Loss.

As for *Labour*; if a Man be hired only for the Dispatch of some transient Business, and any Mischance hinders him from performing it, he can have no Title to his *Wages*: But if a Man takes another into his Service for a continued time, and such an Accident happens, in common Humanity he ought not to discard him, or to abate his *Wages*; especially if there be Hopes that he may make Amends by his future Diligence for the time he has lost; or if his former Behaviour has deserved such Favour.

III. But as for those Things, whose Produce is uncertain, as Fields, Orchards, Vineyards, Rivers for Fishing and such like; as a plentiful Produce is to the Benefit of the *Tenant*, so a bad one is to his Loss: Nor in Strictness of Justice can he desire any of the *Rent* to be abated by reason of a poor Harvest, especially since the Barrenness of one Year is made up by the Plenty of another; for a good Husband is not used to let or rent such Things for one Year only (b). Nor can that common Objection take place here, That no Body ought to grow rich at another's loss: For the *Landlord* might urge the same in a plentiful Year for the raising the *Rent*, whom in that Case the *Tenant* would have no Regard to. For, because the Produce is more one Year than another, the *Landlord* had rather be sure of such a *Rent*, than depend upon the Uncertainty of the Season: And, on the other side, the *Tenant* lays out a Certainty for the Hopes of an uncertain Gain, for which, if it fails him, he can blame no Body but himself. However that *Medium* proposed in the *Digests* (c) may be rightly applied here, *If the Produce happen to perish by Floods, or by Birds of Prey, or by the Inroads of an Enemy, or by a Blight or Drought, the Landlord ought to make Allowance, and the Reason added is, lest the Tenant, besides the loss of what Corn he had sowed, should be forc'd to pay the Rent of the Ground too, and so bear a double Misfortune. But if the Corn proves bad,*

*and nothing happens more than ordinary, the loss is then the Tenants.* Where it appears that this *Medium* consists in a Division of the Mischances to which the Produce is liable, into ordinary and extraordinary (d), for if the *Rent* was to be abated for every little loss, it would give continual Occasion for impertinent Law-suits. And therefore the *Rent* of Land is determined according to the middle Produce, computing one Year with another, lest the *Farmer* upon every little loss should have Occasion to complain; and yet 'tis difficult to lay down precisely how great the loss ought to be for the Abatement of the *Rent*, which may better be left to the Discretion of an honest Man considering all Circumstances, than to the Determination of any general Rule.

Sometimes a *Farmer* takes Land upon Condition to pay his *Landlord* the whole Produce of it, deducting first the Value of his Labour. And here the *Farmer* is, as it were, an *Hireling*, and if the Year prove Barren, the loss is to the *Landlord* only.

If the *Tenant* should by any Accident have the Use of the Land intercepted, and the *Landlord* should, in the mean time, let it to another, or reap the Profit himself, which otherwise would be due to the *Tenant*; whatsoever Gain he makes of it, he ought to refund it to the first *Tenant*, or else to receive it in part of Payment for the *Rent* (e).

Hither may be referred the Law in *Egypt*, relating to Physicians; who, if they took Care of their Patient, according to the Direction of the publick Book, were not answerable, if he died under their Hands; but if they acted against those Directions, they were tried for their Lives (f). *Alexander de Rhodes* (g) relates that in the Kingdom of *Tunquin*, they agree with the Physician for a certain Rate at the Beginning of the Distemper, but which he does not receive till he makes his Cure; and if the Patient miscarries, he has nothing for his Pains; by this means they think to quicken the Diligence of the Physician. The same Author tells us of a Physician, who being consulted and bargaining for his Fee, said, *That were the Patient a Young Man, he would not Cure him, under a 100 Scudi, but since he was Old, he would be contented with 20, because the Life he should restore was not likely to last long.*

IV. But if my Labour, suppose in a Journey, can be serviceable to many, and I am hired by one Person, to the full Value, *Can I exact the same Price from others also?* *Grotius* (h) is of Opinion I may, if the Law of the Land does not interpose; for it has no Relation to the Contract which I made with the first: Nor is my Labour the less valuable to him by being serviceable to others also. However such a

(a) *Vid.* l. 15. f. 1. l. 30. *D. h. t.* (b) *Vid.* *D. ubi supra.* (c) l. 15. f. 2. *D. h. t.* (d) *Vid.* l. 25. f. 6. *D. h. t.* Where it is well added, 'The *Tenant* ought to bear contentedly a moderate Loss, when an immoderate Gain is not taken from him. (e) The Duty of the *Tenant* and *Landlord* in respect of any Thing or Labour let out to hire, is shew'd in *Instit.* l. 3. t. 25. f. 5. & in *D. ubi supra.* l. 9. f. 2, 3, 5. l. 11. l. 12. l. 13. l. 25. f. 3, 4, 7, 8. l. 27. l. 30. f. 4. l. 38. l. 55. f. 1, 2. l. 60. f. 2. l. 61. *princ. D. h. t.* (f) *Died. Sic.* l. 1. c. 82. (g) *Itin.* Part II. c. 30. (h) l. 2. c. 12. f. 19.

Contract as this, does not seem agreeable to Equity and Good-nature, tho' perhaps it is not strictly unjust. For when one Man alone has paid for the whole Labour, if it can do service to others also, without being the more painful to the Performer; in respect of them, it ought to be rankt among those Favours, which are of no Expence to the Doer, and are yet Beneficial to the Receiver. But yet since 'tis hard that the first Contractor shou'd bear the whole of the Burden, it is but reasonable, that the others shou'd contribute to him their Proportion. Thus if I hire a Ship to my self, the Owner cannot take in others without my leave; and if I am disposed to admit of it, the Advantage redounds to me only.

But yet in Arts and Sciences, which receive a Value from the Scarcity of such as understand them, the whole Price may be fairly demanded of each, though the same Trouble would inform many; for such sort of Arts, the more common they are made, the Cheaper they grow: And therefore though my Labour be never the greater to me by being apply'd to many, yet I can demand a Price upon Consideration that my Knowledge will be less worth the more it is communicated. Some indeed are not willing that the Salary, which a Man receives for

teaching the Liberal Sciences should come under the Denomination of *Hiring*, because Learning cannot be sold for Money; and so they are for making this, one of those Contracts which want a Name, reducible to the 4th General Head, *Work for Goods* (a). Be it as it will, it seems to have this in common with *Hiring* of Labour, that the Honesty and Industry of the Party only, and not the Event is to be regarded; so that although ones Labour happens to be in vain, yet the Salary agreed upon may be demanded (b).

*Eschines* acted directly counter to this sort of Contract, for he gave People Money to come and hear him (c): And so did the pompous and Ambitious Rhetoricians at *Rome*, who by Intreaties and Entertainments did what they could to get themselves Auditors. *Socrates* did not demand Money of his Auditors, but wondered, *That a Man professing himself to be a Teacher of Vertue should insist upon so mean a Reward, and not rather look upon himself to be the greatest Gainer, in having procured a good Friend; that such a Man ought not to Fear, lest he, whom he had made Good and Honest, should forget to be Grateful to his Benefactor* (d).

(a) *Vid. L. 50. t. 13. l. 1. f. 4. D. de extraord. cogn. Vid. Sen. de Benef. l. 6. c. 11.* How poor School-Masters are often cheated of their Wages is shew'd in *Lucian. de mercede conduct.*

(b) *Mercedem appellas? Quid enim scio? Culpa docentis scilicet arguitur, quod larva in parte mamilla Nil salit Arcadico juveni. Juv. Sat. 7. v. 159, &c.*

Pay, Sir, for what? The Scholar knows no more At Six Months end, than what he knew before. Taught or untaught, the Duncce is still the same, Yet still the wretched Master bears the Blame.

Sometimes that which *Pliny* mentions of the *Tarandus* or *Buff*, *N. H. l. 8. c. 34.* may be applied; *When he appears in his own Genuine Complexion, he is like an Ass. 'Tis an excellent Master that can make a Fool wise, Eurip. Hipp. Coron. p. 921, 922. Nature is too violent and powerful for any Discipline, Lib. Decl. 29.* Though sometimes that may be reply'd which *Lucian* mentions in *Hermotim*, *Tom. 2. p. m. 293.* The Speech which *Aureng-Zebe* the great *Mogul* made to his Tutor, is worth observing, *Vid. Bernier de rebus in regno Mogoris gestis, Part. ult. p. m. 57.* (c) *Vid. Diog. Laert. l. 2. f. 62.* (d) *Vid. Xenoph. Apomnem. l. 2. p. 426. Ed. H. Steph. in fin.*

## CHAP. VII.

## Of the Loan of a Consumable Commodity.

THE *Loan* of a (a) *Consumable Commodity* is founded upon this Condition, that the same Quantity and Quality be returned in kind (b). Things thus lent are call'd *Consumable* (c), because they are *consumed* and perish in the Use: And therefore 'tis enough if the same sort of Things, tho' not the self same Individuals be returned. The (d) *Loan* of a *consumable Commodity* differs from the (e) *Loan* of any other thing not *consumable*, and from the (f) *Use* of a thing *let out to hire*, in this respect. In the two latter, the self same numerical thing that was *lent*, or *let out*, is to be restored, and no other without the Consent of the Creditor: And that, not only because the Value of such

sort of Things is not always capable of being exactly adjusted (1), but because it was expressly the Condition of the *Loan*, or *Letting*. Whereas in the *Loan* of a *Consumable Commodity*; if, for Example, my Neighbour borrows a Bushel of Wheat, and returns me another Bushel of the same Goodness, I am suppos'd to have received my own.

These *Consumable Commodities* are said to consist of Number, Weight and Measure, as being thereby determin'd and specified; whereas other Things have their Quantities determin'd by Nature. And therefore, *Consumable Commodities* are peculiarly termed *Quantities*: But other things which don't come under this sort

(a) *Res fungibilis.* (b) *Vid. Instit. l. 3. t. 15. princip.* (c) *Vocantur res, quæ mutuo dantur, fungibiles, seu quæ functionem in suo genere recipiunt, ideo, quia quodlibet ex isto genere vice alterius ita fungitur, seu alterius vicem subit, ut qui ex aliquo genere, eadem qualitate & quantitate receperit, idem recepisse censetur, D. L. 12. t. 1. l. 2. f. 1. quæ functionem, &c.*

(d) *Mutuum.* (e) *Commodatum.* (f) *Locatum.* (1) *Vid. D. ubi supr. de rebus creditis, leg. 2. f. 1.*

of *Loan* are called *Species*. And here we must observe, that, *v. g.* Oxen are not therefore a *Consumable Commodity* because 50, or 100 of them may be sold by Tale; for the Number, in that case, does not specify them, but only denotes the Quantity of the *Species* (a).

II. The Use of these *Consumable Commodities* is either ordinary, or extraordinary. The latter is, when a Man borrows to make an Appearance of being better provided, than really he is; for sometimes 'tis of great Importance to be thought Rich; as if a Man, in order to gain upon the Affections of his *Mistress*, should borrow a Sum of Money and shew it for his own: in this case, the Money is not taken up as a *Consumable Commodity*, nor is the Borrower ever Owner of it; and therefore, he ought to return the very same *in Specie*. But the Ordinary Use of such Things consists in the loss of them; or, in other Words, I can't directly apply them to my Use, unless they be *consum'd*, and so become lost to me. This is plain in Corn, Wine, and other Things that turn to Nourishment; And Money it self I can't make use of in buying Necessaries, and paying Debts, unless I part with it: So that although the Substance of the Money remains, yet as to me it is utterly lost. And therefore, when such Things as these, to the end they may be put to their ordinary Use, are made over to another, not with a Design to barter, but with a Design to have the same return'd again; since the *Species*, that was delivered, must be *consumed*, the Restitution must necessarily be made in the same kind.

III. Money, (which commonly goes by Number, or Counting,) Gold and Silver in Bullion, Bread, &c. (which passes by Weight) Corn, Salt, Wine, Beer, Oil, &c. (which are specified by Measure) and, in general, all sorts of Provision; as Flesh, Eggs, Milk, and even entire Animals, considered as Provision, come under the Name of *Consumable Commodities* (b). For suppose I am to make an Entertainment, and have not Provision enough at Home, or Money to buy it; I may borrow of my Neighbour, not only Eggs and Flesh, but Fish, Lobsters, Hares, Hens, Geese, and even Sheep and Calves, upon Condition to repay him again in kind (c). Fair Paper may likewise be brought under the same Denomination, as being *consum'd* in the Use; for Paper, once scribed upon, is lost for any other Writing. In short, under this Denomination may be reduc'd any sort of Commodity, which can be determin'd by any certain Measure, and which, (if after it has been

apply'd to its genuine and principal Use, it cannot be intirely restor'd again to its former Condition,) is capable of being repaid in kind. For such sort of things altho' they are generally the Matter of Sale, yet sometimes happen to be borrowed. As if *v. g.* I should procure a certain Quantity of Cloth for my own Use, and should let a Friend, who has immediate Occasion for some of the same sort, and has not wherewithal to buy it, make use of it, upon Condition to return me as much and as good of the same kind.

IV. And this Contract is perform'd not only expressly, but sometimes tacitly: As suppose I should pay a Man Money by Mistake, which I did not owe; or should give a Man Money for some Reason which afterwards does not appear; in this Case the *Roman Law* admits of an (d) *Action for Money paid where not due*, and for some Reason which does not appear. For since such Money was not paid as a Gift, but as a Debt, or for the procuring an Equivalent, and yet the Receiver became Master of it; it is the same Thing as if it had been borrowed, and may be demanded back as such. And therefore the Foundation of these Actions may not improperly be call'd a *Tacit Borrowing* (e). Thus *Mauritius* the Emperor having given *Childebert* the *French King*, Money to drive the *Lombards* out of *Italy*, after he had made Peace with them, demanded it back, *Childebert* indeed would not so much as vouchsafe him an Answer, but that was because he was more powerful than just (f).

V. Some Years ago *Salmasius* and some *Civilians* had a Dispute, *Whether the Loan of a Consumable Commodity was an Alienation?* Now it is plain, since the ordinary Use of such Things consists in the Consumption of them, they must be made over to the Receiver, with full Power to dispose of them as he pleases; which cannot be done without investing the Property in him. But because the *Creditor* gives in order to receive back, and the *Debtor* receives in order to refund; therefore neither is the Estate of the one lessen'd, or the Estate of the other increased by it. Unless the *Creditor* may be rather thought a Loser, having only an Action against the *Debtor's* Person in lieu of his Money, which, by Reason of the Trouble and Uncertainty attending it, may be reckon'd less worth than the Money it self. And hence it is, that as Debts, due to any Man, are look'd upon as Part of his Fortune: so a Man is supposed to be worth only so much as remains to him after his Debts are paid. And he that owes more than his Estate comes to, may fairly be said to be worth less than nothing (g). In a word, he

(a) *Add. Jac. Godofredi dissert. de equalitate & functione in mutuo.* (b) *Vid. D. ubi supr. l. 2. f. 1. D. de reb. cred.*

(c) *Add. Plin. N. H. l. 9. c. 55.* (d) *Conditio indebiti, & conditio causa data causa non secuta.* (e) Which is otherwise called by the *Civilians* *Quasi-contractus.* (f) *Paul Warnesfrid. de gest. Longobard.* 'By the way we may observe out of *Plutarch*, why the *Gnostians* used to take away forcibly the Money which they borrowed at Interest. Perhaps, that the *Creditor* might evade the Law against *Usury*. For should the *Debtor* refuse paying Use for what he thus took away, he would have an Action of Robbery against him. *Quaest. Graec. p. 303. Edit. Ifsch.*

(g) To this Purpose was that Saying of *Caesar's*, that he wanted 2500 *H.S.* to be worth nothing, *App. de bell. civil. l. 2. p. 432. B. Ed. H. Steph.* Hence Money borrowed is call'd *as alienum*, another Man's Money; not that the Person borrowing has not the Property of it, but because he receiv'd it upon Condition to return as much. On the other side, he who is out of Debt, may say *meo sum dives in aere*, The Money that I have is my own.

that lends Money does indeed *alienate* it, yet so as neither to lessen his own Estate, nor to add to that of his *Debtor*.

VI. It is a Question of greater Moment, *Whether, if a Change happens in the Money, between the Borrowing and the Payment, regard must be had to the Value of Money, as it was at the time of Borrowing, or as it is now at the time of Payment?* Here most think fit to distinguish between the *intrinsic* Goodness of Money and the *extrinsic*; whereof the former consists in the certain Quantity of such, or such a Metal: the *latter* in the publick Rate, or Value impos'd by the Magistrate. If the Change happen in the *intrinsic* Value, as suppose the Metal becomes baser or lighter (for the Change in Money is generally for the worse) then they think the Money ought to be reduc'd to the Value it bore at the time of Borrowing. For this Contract obliges not only to restore the same Thing in kind, but in Goodness also; indeed otherwise the same Quantity would not be restor'd. And therefore, if for Example, in Money newly coin'd a fourth Part of the *intrinsic* Goodness be wanting, for 100*l.* lent in old Money I ought to receive 125*l.* in the new. In like manner if I lend another 100*l.*, half of which is perfectly alloy, I ought to receive only 50*l.*, when the Baseness of the Coin is redress'd. For tho' it be in the Breast of the Government to Raise or Lower the Value of Money, yet if the *extrinsic* Valuation, differs very much from the *intrinsic* Goodness of the Coin, (since Regard must be had to Foreigners, unless we would reduce our Commerce with them to pure Bartering,) the Price of Commodities will be Determined rather by the *intrinsic* Goodness, than the *extrinsic* Value and Denomination of it. For supposing the Money diminish'd a 4*th* Part, we should give a 125*l.* for that which we us'd to pay but a 100*l.* And therefore if a Man should pay me an Old Debt of 100*l.* in so much new Money, he would really pay me a 4*th* Part too little.

VII. But if, without any Alteration in the *intrinsic* Goodness, the *extrinsic* Value should rise or fall; then Regard ought to be had to the Value of the Money, as it was at the time of Contract, and the increase or decrease of it ought to be at the Gain or Loss of the *Debtor*. For Example, if I should lend 100 *Guineas* in Specie, when they go for 26*s.*, and afterwards they should rise to 30*s.*, I can't demand more than 26*s.* the *Guinea*, if my Debt be paid in Silver, and if Payment be made in *Guineas* I must deduct 4*s.* from each, and so receive not much more than 86 *Guineas* in Specie.

And on the other hand, if they sink to 22*s.* and my Payment be made in Silver, I can demand 26*s.* for every *Guinea*. But if I be paid in *Guineas*, I ought to have an Addition of 4*s.* to each, and so to receive above 118 *Guineas* in Specie.

But yet this does not clear the Business, for against the former Determination, the *Creditor* may make his Exceptions, for had he kept his *Guineas*, the Increase had been to him; which if he be now forc'd to lose, another makes a Gain at his Loss: And the same Plea may the *Debtor* have in Bar of the *latter*.

And therefore we must enquire further, 1*st*, Whether any certain sort of Money was lent, *v. g.* *Guineas* in Specie, upon Condition that so many should be return'd in Specie, and in no other Money; or 2*dly*, Whether they were paid as common current Money; or 3*dly*, Whether all the Money of the Nation, or 4*thly*, Only that Particular Species has undergone a Change. In the 1*st* Case, without Dispute, the Number of *Guineas* is to be return'd. In the 2*d*, the former Decision takes place, and therefore the Value of *Guineas* in such a *Loan* must be referred to some other Species as a Standard; *v. g.* so many *Guineas* of 26*s.* The 3*d* Case, where the Change affects the whole Body of the Money, in Comparison of the Plenty or Scarcity of other Things, may be determin'd from what has been said in *Chap. I. S. 16.* although it hardly ever happens in Fact, that this General Change in the Money affects the Payment of an old Debt. As for the 4*th* Case, when the Value of any one Species rises without any *Intrinsic* Alteration, all the other Money must needs have been debas'd. Thus *v. g.* when *Guineas* rose from 26*s.* to 30*s.* It was a sign that the Silver Money in its *Intrinsic* Value was grown worse. And therefore in this Case, if *Guineas* were lent in Specie, and the Payment be made in Silver, *Guineas* ought not to be valued as lent at 26*s.* but at 30*s.* But if common Money was lent, the *Debtor* gets the Advantage of the Rise, unless the Largeness of the Sum, or the Enormity of the Change may plead for some Consideration in behalf of the *Creditor*.

As for other *Consumable* Commodities, provided they be return'd at the Time and Place appointed, 'tis little regarded whether their Price has Risen or Fallen; but the Advantage of the Rise, and the Loss of the Fall belongs to the *Creditor*, unless they had agreed about it otherwise.

But when the *Debtor* is backward in his Payment, and the Price, in the mean time, happens to be altered, the *Roman* Lawyers (a) are at a Loss to what Time or Place the Valuation ought to be assign'd; It seems most Reasonable that it be adjusted according to the Time and Place of Payment. But, if it be through the *Debtor's* Fault that the Payment is protracted; and the Price, in the mean time, alters, it ought to be to his Loss (b).

VIII. *Whether Usury, which is generally given for the Loan of Money, be repugnant to the Natural and Divine Law?* is a Question

(a) Instance in Wine, *lib. 12. tit. 1. l. 22. D. de reb. cred. C. 4. D. de eo quod certo loco, &c.*

(b) *Add. lib. 13. t. 3. l. ult. D. de condict. Triticaria.*

that has been warmly debated (a). How the old *Hebrews* explain the Divine Law (b), relating to *Usury*, *Selden* (c) gives a large Account; *viz.* they thought it was unlawful not only to receive but even to give *Usury*; and that the very *Scrivners*, *Notaries*, *Witnesses*, and *Procurers* of such *Bargains* contracted a *Guilt*. However, the *Money* of *Orphans* was allowed to be put out to *Interest* to a *Rich Man*, provided he gave the *Gain* to the *Orphan*, but bore the *Loss* himself.

Now they had two sorts of *Usury*; the one was (d) *Usury properly so called*, which was covenanted for, and received at the *Beginning*, or during the *Contract*; And this was suppos'd forbidden by the *Divine Law*: The other was called (e) *The Resemblance of Usury*, and was forbidden only by the *Decrees of the Elders*.

A *Man* was *Guilty of Usury properly so called*, not only when he received back a *Consumable Commodity* with *Increase*, but if by *Reason* of such a *Loan*, he lived in another's *House Gratis* till he was paid; or gave less *Rent* for it, than otherwise he would have done; or if he received an *Emolument* from a *Pawn* left with him upon *Account* of the *Debt*. And yet a *Man* never suffered in their *Courts* for receiving *Usury*, as was usual for the *Violation* of other *Divine Laws*, but was obliged to *Restitution* only. But, if the *Usurer* himself was *Dead*, his *Heirs* were not so much as obliged to that; for they did not refund *Money*, or any other *Consumable Commodity*, but only *Plate*, *Cloaths*, *Instruments*, *Cattle* and such like, which had been received upon that score. And this was done in *Honour* of the *Deceased*, and out of *Respect* to his *Memory*, and that too only if it appear'd that he repented of it, and had *Thoughts* of making *Restitution* before he died; for otherwise the *Heirs* were not oblig'd to refund at all. Besides, *Private Men* were not permitted so much as to receive a small *Present* from their *Debtor*, while he continued such; the *Lawyers* indeed might, for they were presum'd by no means willing to *Violate* the *Precept* against *Usury*, but to receive it purely as a *Gift* and not as *Interest*.

By that which they called the *Resemblance of Usury* they were forbidden to receive any *Profit* or *Acknowledgment* of the *Kindness*, (altho' utterly beside the *Contract*, and after the *Expiration* of it,) except the *Payment* of the *Principal* before the time appointed. And this again they divided into two sorts; The *One* which related to the difference of the *Time*, in which something was perform'd, by the *Debtor*, to the *Profit* and *Advantage* of the *Creditor*: The *Other*, which related to the different manner of *Contract*.

The former they again divided into *Antece-*

*dent* and *Consequent*. By *That*, they understood whatsoever a *Man*, designing to borrow, gave to the *Person*, upon whom he had this *Design*, in hopes to bring him to it the more easily. By *This*, whatsoever the *Debtor* after the *Receipt* of the *Loan* bestowed upon the *Creditor* in order to prolong the *Time* of *Payment*. Nay, they would not so much as allow the common *Offices* of *Humanity* to be perform'd by the *Debtor* to the *Creditor*, unless what was used to pass between them before the *Loan*.

The latter sort was thought to have  *REGARD* to such a *Contract* as this; Says the *Seller*, if you buy to day, you shall have it for 90*l.* but if you put it off till to morrow you shall pay 100*l.* Here the *Delay*, together with the *Increase* of the *Price*, seems to intimate, that 10*l.* is to be paid as *Use*. In this *Case* the *Law* did not oblige to a *Restitution*, nor did there lie an *Action* against the *Party* in the *Civil Court*: Yet, he who offended against these *Decrees of the Elders*, was liable to *Corporal Punishment*. He likewise, that received a *Farm* in *Pledge*, was not allowed to let the same to the *Owner* for *Rent*, for that lookt like *Usury*.

But, these obtain'd only between *Hebrew* and *Hebrew*; of a *Gentile* they might lawfully demand *Usury*, from *Deut. XXIII. 20*. Nay they thought themselves commanded to do it, in order to drain them of their *Riches*, and weaken those *Nations*, which *God* had otherwise destin'd to *Destruction*. Yet *Leo of Modena* (f) says, That *Text is to be understood of the seven Nations only, that dwelt in Canaan: and not of the other Gentiles: of whom it was not lawful to receive Usury. But yet that many, by reason of the Miseries of a long Captivity, and their Lands being withholden from them, and for want of a better way of getting a Livelihood, had degenerated from the Integrity of their Forefathers. But he protests that to be false, which some spread abroad, That the Jews every Day take an Oath to do what they can to cheat the Christians, and, he says, it was invented to render them odious.*

IX. Let us now consider, whether what has been thus punctually observ'd among the *Jews*, be the *Dictate* of the *Law of Nature*; or the *positive Law of God*; and that not peculiarly calculated for the *Jews*, but for all *Nations*. As for what has been added by the *Jewish Elders*, 'tis plain, that is altogether *positive*, and imposed only to prevent *Cavils*, which designing *Men* had found out to evade the *Force* of the *Law*. But in general our *Opinion of Usury* (1) is this; provided it does not oppress and grieve the *Poor*, but answers the *Advantage* which we our selves might have made, or which the *Debtor* does actually make of our *Money*, (espe-

(a) Which ought to be Canvass more nicely, because most People are not of the *Persian's* Opinion, Who, as *Plut.* relates in his Book against *Borrowing*, among their *Sins*, give the *second Place* to *Lying*, but the *first* to *Borrowing*, because it often happens that they that *Borrow*, *Lie*. Tho' *Herodotus*, in *Clio*, in my *Opinion* better assigns the *first* to *Lying*, the next to *Borrowing*. (b) Which is extant, *Exod. XXII. 25. Lev. XXV. 37. Deut. XXIII. 19.* (c) *De J. N. & G. sec. Heb. L. 6. c. 9.* (d) רבית קצוצה i. e. *Usury fixt and determined.* (e) אַנְק רבוי i. e. *The Dust of Usury.* (f) *De Ritibus Hebraicis*, p. 2. c. 5. (1) See *Mr. La Placette's Treatise upon Usury.*

cially if he borrows not out of Necessity, but in order to make a Gain of it,) the Law against it is neither that of Nature, nor that of God universally obliging all Nations; but a positive Law to the *Jews* only, founded upon Reasons in a manner purely Politick. And it was generally the Opinion of the *Rabbins* themselves (a), that *Usury* was neither Theft, nor against the Law of Nature, as being founded upon Consent and free Contract.

But the same may be evidently proved from Reason; for tho' the *Jews* were by the Divine Precept join'd together in a closer Tie of Amity than ordinary, yet they were oblig'd to exercise towards others all the common Duties of the Law of Nature (b). And therefore, if *Usury* be against the Law of Nature, I don't see how the God of Holiness could indulge that Nation which he had peculiarly sanctified, in the Practice of it, and in a manner charge them to violate a Precept of the Law of Nature, in Prejudice of those who had never injur'd them; if indeed that Passage in *Deut.* XXIII. 20. (1) ought to be expounded not of the *Canaanites* only, but of any other Nation.

There seem to be several good Reasons why such a Law against *Usury* should more especially obtain amongst the *Jews*. The first may be taken from the Genius of the People; for they were as much addicted to the scraping up of Riches then, as now; in which they thought their greatest Happiness to consist. And therefore, that their Thirst after Riches might not tend to the Oppression of the Poor, God seems to have provided by this Law. But yet least too great a Violence should be offer'd to their Inclinations, he permitted them to use greater Liberty among Strangers.

Besides, the Constitution of that Commonwealth required such a Law. For 'tis evident, *Moses* design'd to have it *Democratical*, (for such a State may admit of a Chief at the Head of it) and nothing contributes more to this than to preserve, as much as possible, an Equality of Riches amongst the Members; and to this end, were the Laws of *Jubilee* and *Remission* instituted, and those against alienating Land for ever (c).

And the very Condition of those Times furnishes us with another Reason for the Law a-

gainst *Usury*. For that Nation had then a more plain way of Trading, which consisted in Pasture and Husbandry, or Manufactures; *Merchandise* was simple and moderate, the Secrets of Trade and Navigation being not known to them; and, in such a State, no one borrows but when he is prest with Necessity. And therefore *Deut.* XXVIII. 12. it is mention'd as an Argument of the greatest Happiness; *Thou shalt lend unto many Nations, and thou shalt not borrow* (d). Since the Gains, in such a case, could not but be very small, the least *Usury* imaginable must needs be very Burthensome. And where the Money borrowed is laid out upon the Necessaries of Life, it will be next to impossible ever to recover it; for how can your Labour be able to bring you out of Debt, when it was not sufficient to support you from Borrowing (e)?

*Grotius* (f) brings this as one Reason among others of the Law in *Deut.* XXIII. 19. *That the Chief Riches of the Jews lay in Husbandry and Money, whereas most of the neighbouring Nations made vast Returns by Merchandise: And therefore Usury was allowed the Jews in their Dealings with them, which, with very good Reason, was forbid to be taken of one another; for Usury laid upon Husbandmen is every where oppressive.* Besides, *Moses* endeavour'd by that Law to endear them to one another; and they had the more frequent Occasion to put it in Practice, because then only small Sums were borrowed, and those too by the meaner sort, and such as struggled with Want and Poverty. From hence *Philo Judæus* (g) inforces the Exercise of Charity and Liberality among Fellow-subjects: Which Vertue the great *Legislator* has indeed established by several other Laws (h).

But now Money is borrowed for other Ends, viz. in order to increase and improve ones Wealth. When a Man borrows for this Purpose, why should another lend for Nothing? Nay, 'tis an unreasonable Thing, when you vastly improve your Fortune with my Money, not to admit me into some Share of the Gain (2): For I, in the mean time, am debarr'd from making that Advantage which I might otherwise have expected by applying it to my own Use. Besides, I have parted with something Valuable, which ought therefore to be considered; for in lieu of my Money I have only

(a) As *Selden* in the aforecited Place informs us. *Sat.* 14. v. 103, 104.

(b) And therefore they are deservedly censured by *Juvenal*,

*Non monstrare vias, eadem nisi sacra colenti;  
Quæstrum ad fontem solos deducere verpos.*

Ask them the Road, and they shall point you wrong,  
Because you do not to their Tribe belong:  
They'll not betray a Spring to quench your Thirst,  
Unless you shew them Circumcision first.

*Mr. Dryden.*

(1) See *Mr. Le Clerc* upon the place above-cited. (c) *Lev.* XXV. 14, 31, 35, 36. *Deut.* XV. 2. Add *Num.* XXXVI. Which the Law of *Solon* resembles, *That an Heire's should marry her next Kinsman by her Father's side.*

(d) Add *Deut.* XV. 7, 8. (e) 'Upon this Account the State of *Athens* was involved in such Troubles, by means of *Usury*, that it could not be remedied otherwise than by *Solon's* *σείρα ἀρχαία*, i.e. *Shaking off the Burthen.* Vid. *Plut.* *Solone*, which Mischief *Rome* also felt in its Infancy. (f) Upon *Luke* VI. 35. (g) *De Charitate.*

(h) See *Exod.* XXI. 10, 11. XXII. 22, 23, 25, 26, 27. XXIII. 4, 5, 9, 11, 12. *Lev.* XIX. 9, 10, 13, 33. XXIII. 22. XXV. 6, 10, 11, 35, 36, 37, 39, &c. *Deut.* XIV. 28, 29. XV. 2, 4, 7, 8, 9, 10, 11. XXIII. 24, 25. XXIV. 10, 11, 12, 13, 14, 15, 19, 20, 21. XXVI. 12, 13. (2) *Mr. Barbeyrac* in his Third Note upon this Section illustrates this at large from *Mr. La Placette's* 5, 6, and 7th Chap. of his Treatise concerning *Interest*.

an Action against your Person, which can't be prosecuted without some Trouble (a). It may also happen by some Accident or other, that my Debt may be lost (b). Nay sometimes the Debtor must be courted and caress'd, that it be not lost. And some borrow on purpose to make their Creditors dependent on them. As the *Mareschal de Rochelaure*, when he was tax'd by *Lewis XIII.* with taking part with the Duke of *Mayenne*, pleaded in Excuse, That he did not follow the Duke, but his Money: For his Debt would be but in a desperate Condition if he did not stick close to his Debtor (c). Besides it is not feldom that we lend to Persons who are utterly unable to pay (d).

And therefore some are of Opinion, that it would be for the Advantage of the Publick, to allow none but Merchants to take up Money at Use; for this would make the Poor industrious and force them to Frugality, who some of them are not afraid to pay Interest for Money to maintain their Extravagancies. And Monied Men, rather than let their Money lie dead, would either take to Merchandise themselves, or would put out their Money to those that do; which would make Trade flourish, to the great Benefit of the Common-wealth (e). *Grotius* (f) is of Opinion, That the Legal Interest ought to be stated, not according to the Gains of the Borrower, but the Loss, that thereby accrues to the Lender; as in Buying and Selling, and other Contracts, no Regard is had to what the Receiver may make of the Commodity, but what goes away from the Seller. And, in this case, so much goes away as every Man, in his own Calling, might and usually does make of his Money; Allowance being made for Hazards, which in some Cases are more, in others less: with whom I so far agree that no Man can complain, if his Debtor makes a vast and unexpected Return of his Money: But yet there is no doubt but I may demand higher Interest of him that makes a very Gainful Trade, than I can of another who drives a Poor one.

X. The Arguments which are brought against Usury, are easily answer'd. It is urged that

the Loan of a Consumable Commodity ought to be given Gratis, because the Loan of all other Things is so. But I answer, that as I have a Power of Granting the Use of my Goods, that are not Consumable, either Gratis or for Rent; whereof the one is a Loan, the other a Letting: so what should hinder me from granting the Use of my Money also either Gratis or for a certain Recompence? But, if you should insist, that that only is a Loan which is lent out Gratis; the Consequence would be, that Money lent upon Interest ought to be called by some other name, and not that it is unlawful.

Another Objection is, That Money is a Barren Thing (g), of no Use to Human Life, as are Cloaths, Buildings, Cattel, &c. And therefore nothing ought to be demanded for the Use of it. To which I answer, that tho' Money is so far Barren, as not to produce its like; yet after an Eminent Price has been set upon it, by the Industry of Man it gains a Faculty, which naturally it had not, and becomes Productive of those Things, which are both in a Natural and Civil Respe& Fruitful. And therefore Usury is not to be look'd upon as a Natural but as a Civil Increase (h). Besides, Money let out to Interest is not apply'd contrary to its proper Use; for he who borrows Money does it at least for the sake of Bartering. And Property it self was first settled, with a Design that every Man's Goods should be immediately Beneficial to himself; and yet it is not against Nature, to let out our Goods to another for Rent (2).

There is another Objection, which is somewhat nice; In Consumable Commodities, the Property cannot be distinguish'd from the Use, and therefore the Use can't be made over, but the Property must too, and vice versa. For as the Substance of Corn, Wine, and Flesh, perishes in the Use of them; so the Money that I expend perishes to me, as being remov'd out of my Estate. And therefore since the Use can't be distinguish'd from the Thing, nothing ought to be demanded for the Use; it being enough, if the Thing be restored in

(a) For every Body does not consider that of *Martial*, B. 2. Epig. 13.

*Et Judex petit & petit Patronus:  
Solvas, censeo, Sexte, Creditori.*

(b) 'My Slowness, in paying what I promised, has made me ashamed of my Debt; however, I may avoid the Censure of the World by paying it with Interest, *Pind. Olymp. Od. 10.* (c) *Gramond. Hist. Gall. 1. 5. Diodor. Sic. 1. 19. c. 24. Plut. Eumene p. m. 591. C. Edit. Franc. 1620.* (d) To whom that of *Martial* may be apply'd, L. 1. Epig. 76.

*Dimidium donare Lino quam credere totum  
Qui mavult, mavult perdere dimidium.*

(e) *Vid. Lud. Septatium, de ratione status, 1. 2. c. 15.* (f) *Ad Lucam VI. 35.* (g) See *Mat. XXV. 24.*

(1) Mr. *Barbeyrac* in his First Note upon this Section explains the Text above cited. (h) Of which however *Seneca* speaks severely enough: I see, says he, Deeds and Bonds and Writings, the Emblems of Covetousness, which deceive our vain Minds. For what are Usury and Accounts, but Names unnaturally imposed upon Things for the Support of Human Avarice? What are these Bills of Contract, these Computations, these Prices set upon Time, this cruel Interest upon Interest? They are all Evils of our own making, and depend upon our selves, they have nothing in them of Solidity, that can be either seen or held, but are the empty Dreams of a covetous Mind, *De Benef. 1. 7. c. 10.* *Aristotle* too is severe enough upon Usury, The Art of Usury, says he, is deservedly odious, for it makes a Gain of Money it self, and not of that for the sake of which it was found out; for the Use of Money is to carry on Traffick. But Usury encreases it, and is therefore called τικον, for the thing Begotten is like the thing that Begets: But in Usury Money is both the thing Begetting and Begotten, and therefore this sort of Gain is Unnatural, *Pol. 1. 7. (10.)* towards the End. (2) See Mr. *Barbeyrac's* Second Note upon this Section.

kind. To this I answer, that indeed the Use of a *Consumable Commodity* does not properly differ from its Substance (a) (1), but yet it does not therefore follow, that the Power to make Use of it upon an Obligation to return the same in kind some time after is not worth something. Now 'tis a Condition in every *Loan*, that the Thing be not return'd 'till some time after; But if I Borrow Money for such a certain Time I may lay it out upon other fruitful Commodities, or make a Gain of it some other way. And thus suppose I Borrow Provisions, or other Necessaries, my Gain consists in this, that I am not necessitated to part with my Goods upon ill Terms to procure Bread: Or, my Money, which must otherwise have been thus expended may now be laid out to more Advantage.

And here we may observe by the way, what *Aristotle* (b) relates of *Cypselus*, *Who having devoted all his Goods to the Gods of Corinth, the first Year paid the Tenth part of them, and so for ten Years together.* But in strict Justice this did not satisfy his Vow, unless for the Relief of such a Rash one, any favourable Interpretation may be allow'd. That Saying of *Cato* in *Cicero* (c), who thought *Usury* as bad as Robbing and Murder, is to be understood only of Extortion; which reduces the Poorer sort to Extremities, and administers to the Covetousness of the Rich. *Our Ancestors*, says the same *Cato* (d), *enacted in their Laws, that a Thief should be condemn'd to pay Double, but an Usurer Quadruple.* And yet he himself, if we may believe *Plutarch* (e), did craftily enough exercise that sort of *Usury*, which we now call *Bottomry*. *Augustus* very justly Censur'd some *Roman* Gentlemen, for taking up Money at low Interest, and letting the same out at high (f). *The Old Romans and Greeks* (g) *abhor'd Usury, as being Burthensome to the Poor, and the Foundation of Suits and Quarrels:* The *Persians*, as being not very far removed from Deceit and Lying. And certainly 'tis unbecoming a Christian for a small Sum to accept of Interest from those, whom it is in a manner Charity to relieve (h). The *Greeks* took an excellent Method to support their Friends in Distress: For several entred into a Society, and had a Common Chest, to which each contributed a certain Sum every Month; and out of this they lent Money without Interest to any of the Society, that should happen to be reduc'd to Necessity; upon Condition to refund it, if his Circumstances should ever happen to grow better (i) (1).

XI. In Confirmation of what has been said for the Lawfulness of *Usury*, it is observable

that those who are against it, allow of some Contracts, which in effect amount to the same Thing. Thus, suppose *Caius* is furnish'd with Money enough to Buy a *Farm*, which *Seius* has a Mind to, but wants Money for the Purchase; *Caius* at the Request of *Seius*, buys the *Farm*, and lets it to *Seius*, No Body can deny but that this Contract is Lawful. But if *Caius* should lend *Seius* the Money to buy it himself, and *Seius* should pay so much for Interest as he must otherwise have paid for *Rent*; I don't see but that the Contract would be very Just. Nay, this latter Contract is much more for the Advantage of *Seius* than the former, for here he purchases the Property of the *Farm*.

Again, should any one put his Money into an honest Man's hands, upon Condition to be admitted into an equal Share of the Gain, which he should make of it; no Man certainly would call this Contract Unlawful. But in Equity 'tis the same Thing, if instead of this uncertain Gain, he Bargains for a certain Sum, which will never be the less Lawful, for being called by the Name of *Interest*.

The *Alcoran* forbids *Usury*, and yet the *Moors* Borrow Money to carry on Trade, and allow the *Creditor* half the Gain; but if the *Principal* happen to be lost, the *Debtor* refunds that only; but if only part of the *Principal* perish, the Whole must be made up out of the Gain of the Remainder.

A *Mortgage*, whereby a Man receives the Produce of Land given in Pledge for the *Loan* of Money, is acknowledged to be Lawful (k) (2): But if no Pledge be given, why may not the *Creditor* receive something answerable to the Produce of it (1).

*Grotius* (m) rejects the Name of *Usury*, but allows the Thing. For, says he, *there are some things which look like Usury, but are Parts of another Nature: as the Amends that ought to be made a Creditor for the Loss he is at being out of his Money, and the regard that ought to be had to the Gain he might have made of it; still Deductions being made for Uncertainties and Accidents, and the Pains he must have taken in the Management of it. Thus it is not properly Usury to demand a Consideration for the Charges he is at, who lends much Money, and provides it on purpose; and for the danger of losing the Principal, where good Security is not given.* Now the Interest for Money lent, not to a poor Man, but to one that makes a Gain of it, we demand upon this very Account, because we are debarred from making that Gain of it, which otherwise we might; and because it is worth some Consideration to have, instead of our Money, only

(a) *Vid.* lib. 7. t. 5. l. 1. and 2. *D. de Usu. eor. quæ usu consumuntur.* (1) See Mr. *Barbeyrac's* Third Note upon this Section. (b) *Oeconom.* l. 2. c. 1. (c) *Off.* 2. in fin. (d) *De re rustica, princip.* (e) *Cato Major.* (f) *Suet. in August.* c. 39. (g) *Appian.* l. 1. de Bello Civili, p. 382. B. Edit. H. Steph. (h) *Vid.* *Siracid.* XXIX. l. 2, &c. *Psal.* XV. (i) That Contribution-Money was called *ἕραρον*. (1) *Vid.* *Cicer. de Offic.* lib. 2. in fin. See *Cassiodorus's* Comment upon the 16th Chapter of *Theophrastus's* Characters. (k) *Ad.* lib. 20. t. 2. l. 8. *D. in quibus caus. pignus tacite contrah.* (2) See hereafter Chap. 10. Sect. 14. (1) Among the *Persians* *Usury* is forbidden, but *Mortgages* allowed even under the *Lex commissoria*, *Olear. itin. Perf.* l. 5. c. 36. (m) *L.* 2. c. 12.

an Action against the *Creditor*; and certainly 'tis reasonable we should be admitted into Part of the Gain made of that Money, which we were not oblig'd to lend, either in Justice, or Charity. What Honest Man therefore will quarrel about words? And who would not laugh at those who pretend they don't take *Usury* for their Money, but only what they themselves might have made of it? Besides, this superstitious Nicety is not at all consistent with the Decrees of the Civil Law; for according to them the *Usury* is ascertain'd and agreed upon before-hand: And the Damages allowed the *Creditor*, for what he might have made of his Money, are among other Reasons demanded, for Failure of Payment at the time appointed, which ought to be stated according to the Loss sustained, be it what it will; but because it would be difficult to prove and adjust it exactly, it is therefore generally reduc'd to regular *Interest* (a) (1).

Since therefore 'tis lawful to demand Damages for tardy Payment, or because we lose by not having our Money paid in at the time appointed; why may we not bargain for something certain before-hand, upon Consideration that our Money is in another Man's Power, whereas we were not oblig'd for his Benefit to venture the Loss, or to neglect the Gain that might be made of it (b).

XII. Lastly, It being evident, that Men could not be found who would lend as much Money *gratis*, as Human Necessities and Commerce, (as carried on now a-days, among most civiliz'd Nations) required; several Shifts were found out and allowed of to evade the Decrees of the Canon Law against *Usury*. Among which may be reckon'd the † *Purchase of a Yearly Income* (2); where for so much Money, I have such an immoveable thing made over to me for the Payment of it: Out of which I receive a certain Rent for ever, or for such a limited, or unlimited Time, or for Life. And this *Income* may, upon Payment of the Principal, sometimes be redeem'd, sometimes not. Nay, sometimes if the thing given for Security happens to be lost, the Person of the Debtor is Responsible for it. But that such a Purchase as this differs only in Name and

Shew from *Usury*, no Man is so blind as not to see (c).

Nay, in Consideration of the Usefulness of moderate *Usury*, the *Popes* themselves permitted under a specious Title, *Mountains*, as they call them, of *Piety*; that is, they did not allow either Pledge, or Interest to be taken for three *Sc.* lent to a poor Man; but for larger Sums Pledges might be taken for Security, and every Month some small matter paid as Interest: and if the Pledge were not redeemed in a Year, it was to be sold by *Auction*, and the Remainder, after Payment of the Debt, restor'd to the Owner (d). After much Debate, *Usury* was allowed of in *Holland*, as a Thing beneficial to the State, and even those who took it were permitted to enter into Holy Orders.

How much the Laws against *Usury* are evaded by \* *dry Exchange* (3) (as they call it) is well known among the Merchants. To which may be refer'd that sort of Contract, which is called in *Spanish*, *Mohatra* (e). When a Man takes up Goods upon Trust at a high Rate, and immediately sells them again to his *Creditor* at a low one. 'Tis more tolerable when Goods are bought dear, by reason that a long time is allowed for the Payment, and immediately sold to a Third something cheaper for ready Money: For hereby a Man may avoid the Necessity of taking up Money at unreasonable Interests: or, in the mean time, may make so much Gain as to be very able to pay the Debt at the time appointed. And this is common in *Muscovy* (f).

It is requisite indeed, that private Men should be hindred by Law from exacting what Interest they please, and that it should be fix'd at such a certain Rate: Yet a Man may fairly expect something more, when his Money is lent but for a short time (g) (4).

The *Egyptian* Law (h) did not permit the *Principal* to be more than doubled by *Usury*, and allowed the *Debtor's* Goods to be seized upon, but not his Person: Whatever they got by their Labour, or any other just Title, were look'd upon as their Goods; but as for their Persons, they belong'd only to the Publick, to be dispos'd of in its Service, according as they were best qualified for the Duties of War, or Peace.

(a) *Vid.* l. 17. f. 3. l. 22. t. 1. *D. de Usuris.* (1) Concerning this, *Salmasius de Usuris*, and *Mr. Placette de l'Interet* are worthy to be consulted. (b) *Add. Baco. Serm. Fidel. c. 39.* † *Emptio sensus annui.* (2) See *Mr. Barbeyrac's* First and Second Notes upon this Section. (c) *Add. Fran. Hotoman. obs. l. 2. c. 1.* & *Jo. Labard. Hist. de rob. Gall. l. 6. p. 393.* (d) *Alex. Severus* lent publicly at 4. per Cent. but gave many poor People Money without Interest to buy Land, and was contented to be paid out of the Produce. *Vid. Lamprid.* Something of the same Nature (but that they part with nothing *gratis*, or without Security) is still practis'd in *Lombardy*; so called because formerly most of the Usurers in France were *Lombards* and *Jews*, who afterwards were so odious as to be expelled the Kingdom. *Vid. Hen. Steph. introduit. ad apolog. pro Herodoto, l. 1. c. 6.* \* *Cambium Siccum.* (3) Concerning this see *Mr. La Placette's* Last Chap. of *Usury.* (e) *Vid. Montaltii, lit. provincial. 8.* & *ad eam Wendrok, not. 3.* (f) *Olear. itin. Perf. l. 3. c. 7.* (g) *Vid. Leonis Novell. 84.* (4) See *Mr. Barbeyrac's* 4th Sect. of this Chapt. (h) *Diodor. Sic. l. 1. c. 79.*

## C H A P. VIII.

## Of Partnership.

**P**artnership is a Contract by which two, or more join together their Money, Goods, or Labour, upon Agreement, that the Gain, or Loss shall be divided proportionably between them (a). And here, if every Man contributes equally, each must receive an equal Share in the Gain, or Loss: but if they contribute unequally, their Shares must be adjusted according to the Laws of *Geometrical* Proportion (b). And the same obtains, if two, or more join Labour; or *one* Labour and the *other* Money (1); or each Party both Labour and Money.

II. Upon breaking of the *Partnership*, if each Party contributed only Money, 'tis plain upon a Division, each must receive according to his Contribution. But if both Money and Labour was contributed it must be consider'd after what manner the Collation was made: For when Labour is contributed on *one* side, and only the Use of Money on the *other*, he who contributed the Money does not admit the *other* to a Share in the Principal; but only to his Proportion of the Gain that might be made of the Money and Labour join'd together. And, in this case, as he that contributed only Labour has no Title to any Part of the Money, when they break off *Partnership*; so the *other* alone, as Owner, is concern'd in the Risque that the Money is expos'd to, and in such a *Partnership* as this, not the Money it self, but the Risque that it runs, and the Gain that may be probably expected from it, is compared with the Labour. And therefore when the Gain is to be proportion'd, we must not compare the Labour with the Principal (as if, one having contributed Work to the Value of 100*l.* and the other 1000*l.* in Money, the former were to receive only a tenth Part of the Gain) but to the Risque and Hazard that the Money is expos'd to, which if computed to be worth 100*l.* each Party shall gain equally.

The best way, in this Case, is to rate the Risque of the Principal, and the Hopes of the Gain, according to the Interest, that is generally given for Money. Supposing then this Interest to be 6*l. per Cent.* if one Party contributes Labour worth 60*l.* and the other 1000*l.* in Money, they shall share Equally of the Gain.

But sometimes the Labour and Money are fo interwoven together, as to give him, that contributed only his Labour, a Share even in the

Principal; the Labour of the *one*, and the Money of the *other*, being in a manner united into one Mass. As when *one* lays out his Money upon unwrought Commodities, and *another* spends his Labour in working them up, and managing them. Thus, if I give a Weaver 100*l.* to buy Wool, and he makes Cloth of it, computing his Labour at 100*l.* 'tis manifest, that here both of us have an equal Interest in the Cloth; And, when it is sold, the Money must be equally divided: Nor, ought I to substract the Money, that I contributed at first, and then divide the Remainder with him (c).

III. Besides, 'tis not unjust to enter into such a *Partnership*, as that one Party may have a Share in the Gain, without being in danger of partaking of the Loss (d). But this is irregular, and a mixt Contract of *Partnership* and *Insuring*: and here an Equality will be observ'd, if the *Insuring* Party receives a greater Gain than the other, in Proportion to the Risque he runs in bearing the other harmless. But for one to partake of the Loss and not of the Gain, is repugnant to the very Nature of *Partnership*; for no Body ever enters into such a Contract, but upon the Prospect of some Advantage (e).

IV. Sometimes People enter into *Partnership* for all they are worth (2); in which Case each Party, according to his Condition and the Laws of good Husbandry, may take from the common Stock as much as is necessary for the handsome Maintenance of him and his (3). But since few Men's Circumstances will induce them to continue long in such a *Partnership* as this (f), it would be convenient to agree at first, what Share of the Gain each shall pretend to upon breaking off. Where *Grotius* (g) observes, that no Regard ought to be had to what has been actually gain'd by this, or that Man's Contributions; but to what might probably have been expected from them: For therefore it is that many join their Stocks together, that each may be admitted into a Share of what is gain'd by the Goods of others.

Now tho' no Man ought to have his Liberty so far intrenched upon, as to be confined to a *Partnership* longer than he desires; yet since a great Degree of Fidelity is required among *Partners*, he ought not to break off unseasonably and to the Detriment of others (h). Upon this Point *Cicero* (i) discourfes very seriously. *It is*

(a) *Vid.* lib. 17. t. 2. l. 73. and l. 52. f. 3, 4. L. 60. f. 1. *D. pro Socio.* (b) In Partnership the more a Man contributes the more does he receive. *Arist. Nic.* l. 8. c. 16. In the same Sense ought that in the *Digests* to be explained, l. 29. D. h. t. *If it be not mentioned what Share each Party contributed, they must be presum'd to be all Equal.*

(1) *Vid. Infir.* l. 3. t. 26. *De Societate*, f. 2. (c) Compare *Grotius*, l. 2. c. 12. f. 24. (d) *Vid.* l. 29. f. 1. *D. h. t.*

(e) *Vid.* l. 29. f. 2. *L. h. t.* (2) *Ibid.* f. 5. (3) *Ibid.* leg. 73. (f) *Vid.* l. 70. *D. h. t.* (g) *D. L.*

(h) *Vid.* l. 65. f. 5, &c. *D. h. t.* (i) *Pro Sext. Roscio*, c. 40. *Add. Quintil. Decl.* 320.

accounted, says he, a base thing to deceive a Partner in ever so small a matter, and with reason: For he who enters into Partnership does it in hopes of gaining to himself an Assistant. To whom therefore can he fly for Succour that suffers from him on whom he depended? Those Crimes are of the blackest hue, against which there is the least guard: We may defend our selves against the

Malice of others, but to an Intimate Friend we lie open: For how can we provide against a Partner, whom we cannot so much as suspect without violating our Duty? Well therefore did our Ancestors judge him, who deceiv'd his Friend in this Point, fit to be reckoned amongst the worst of Villains.

## C H A P. IX.

### Of Contracts that depend upon Chance.

WE come now to such Contracts as depend upon *Chance*; where the Parties refer themselves to some uncertain Event, and give Security to stand to, and to be determin'd by it. Some of these indeed have no Relation to *Price*, yet most of them have; and therefore, we think fit to discourse of them all together in this place.

These Contracts may be either *Publick* or *Private*; The *Publick*, are such as concern either *War* or *Peace*. In *Peace* some Nations determine Themselves by *Lot* in choosing Judges, in assigning Provinces, and in disposing of Offices, when the Competitors, both in respect of their Right and their Abilities, are Equal; for otherwise should one have a better Right, his Right might be Prejudic'd: Or should another have greater Abilities, the Commonwealth might suffer by it (a). In such Cases the Parties are suppos'd to enter into Compact to acquiesce without Complaint in the Determination of the *Lot*, as having voluntarily submitted to it (b). And when a Superior uses *Lots* about that which he might enjoyn of his own Authority, he is suppos'd to depart from his Right, and of his own accord to submit himself to their Determination.

The Design of these *Lots* is not to search into the hidden Decrees of God, unless where he positively commands it (c), but to put an end to Streifs and Differences (d), or that a Person, who otherwise has Power to decide them by his own Authority may avoid the *odium* of the Party against whom he decrees; and leave no room for a Complaint of the Injustice of the Sentence.

But in a Controversy where the Party cast is Punishable by Law, 'tis absurd to apply any thing of *Chance*; for no Man ought to be punish'd, unless matter of Fact be evidently prov'd against him: Whereas a *Lot*, let it fall out how it will, can never be able to undo what has been done, & *vice versa*; and therefore *Lots* are not capable of adjusting such Matters. But

when a Multitude are in fault, and 'tis inconvenient for them all to suffer, then indeed the Criminals may be punish'd by *Lot*.

In *Private Affairs* *Lots* are of great use, either in dividing of Inheritances, or conferring upon One a Benefit, or a Burthen which cannot be divided, and yet which many have an equal Title to (e).

III. Nor are such Paets as these of less use in *War*, either when the Issue of the whole is thrown upon the Event of a Battle between both Armies, or between two or more chosen out of each side (f): Or when some dangerous and honourable Post is to be assigned, for which many are equally qualified (g).

Indeed almost all solemn Wars, at least after all Terms of Peace have been rejected, seem to suppose an Agreement between both Parties, that which side soever shall have the good Fortune to be Conqueror shall have Right to give Laws to the vanquish'd: and this is the reason that no Party can ever urge as an Exception against any Treaty that he was forced to it by Fear; for he who takes the Field, when the Controversy may be decided otherwise, is suppos'd to commit the Decision of it to the Sword, and therefore cannot complain whatever Condition the *Chance* of it imposes upon him. And this too is the reason, that when they come to Articles, the Parties engaged are presumed to stand upon equal Grounds as to the Justice of their Cause, and whatever Mischief has been done on either side is forgiven, as suppos'd to have been done by Consent.

Such a Covenant as this do they enter into, who decide their Quarrel by a *Duel*, and therefore he that kills, is not oblig'd to make Satisfaction to the others Wife and Children for the Loss; for they join Battle by Agreement upon this Condition to Kill or to be Kill'd. But since these *Duels* when undertaken by private Men of their own Heads, directly thwart the end of Civil Judicature, they are deservedly restrained by severe Penalties. For

(a) For as *Isocrates* in *Areopag.* says, pag. 248. Ed. *Paris.* Fortune governs the *Lot*. And *Callimachus* in *Hymn. Jovis.* v. 63, 64. For a Thing that each has an equal Title to, 'tis convenient to cast *Lots*. And *Philostr.* in *vita Apoll. Tyan.* l. 3. c. 9. Fortune has no Prudence, so that the worst may be chosen by *Lot*. (b) Vid. *Justin.* l. 1. c. 10. & l. 18. c. 3.

(c) See *Prov.* XVI. 33. (d) See *Prov.* XVIII. 18.

(f) Vid. *Grac.* l. 2. c. 23. f. 10. & l. 3. c. 20. f. 42.

(e) Add *Numb.* XXXIV. 13. *Jos.* XIV. 2. *Psal.* XVI. 6. (g) Vid. *Hom.* J. 7. v. 171.

merly indeed they were allowed of, (but absurdly, and against the End of Civil Government) either to clear a Man of a Crime objected, or to demonstrate his Right in Contest (a). Thus heretofore in *Germany* a Point of Law whether the Uncle, or the Son of the Elder Brother deceas'd, should take place in the Father's Inheritance? was absurdly left to the Determination of a Duel (b).

IV. Among these Contracts of *Chance* we may reckon \* *Wagers* (i), when two differ about some future or past Event, if not known to either Party, each laying down a certain Pledge to be his, who shall happen to be in the right. These *Wagers* seem to be Reciprocal Promises, and Conditional Bargains; which are so far mixt with *Chance*, as not having their Event depending on the Parties. The *Riddle* indeed propos'd by *Sampson* to his Friends, seems rather a *Sport* than a *Wager* (c), it being a Contest of Wit, whether he could propose a Thing with greater Obscurity than they should answer with Acumen. But his Friends play'd foul, in solving his *Riddle*, not by their own Ingenuity, but by the Treachery of his Wife. Though perhaps it was not so very fair in him, to make a private Fact, and not some common matter the Subject of his *Riddle*. For 'tis almost impossible to find out such particular private Facts as those, by guessing.

V. All sorts of *Plays* where the Parties contend for something, carry with them a Covenant, depending more or less upon *Chance*. And the more they admit of Ingenuity, Sleight, Cunning or Strength: the less are they concern'd in *Chance*; and indeed are only so far dubious, as the degree of Strength or Dexterity is not as yet manifest, or, as some unforeseen Accident may interpose (d), or as Human Wit and Industry does not exert it self so much at some times as it does at others. Many are dependent both upon *Chance* and *Skill*, as *Gaming* at *Cards*, and the like; others are entirely at the Mercy of *Chance*, as *Dice*. None of which are Naturally Unlawful, for it is by Consent that we engage in them, and each Party ventures Equal, and plays for Things that are in his own Disposal. But because the Publick is concern'd that no Man should mispend his Estate; and a Man may be easily undone by *Gaming*, if he plays high (e); at least much Time, which is a precious Thing, may be consumed in it (f), and because it is frequently the Occasion of Quarrels (g), and several other Inconveniencies; it is therefore the Business of the Government to consider, how far *Gaming* should be permitted, and how high (h); but generally speaking, those *Plays*

seem most allowable, that admit least *Chance*, and most Ingenuity, and *vice versa*. Now in all sorts of *Gaming* 'tis a standing Rule that no foul Play be made use of, *For they that run in a Race are suppos'd to contend by Swiftness, not by Tricks; to endeavour at the Victory by Speed, not by laying on of Hands, or tripping up the Heels of their Adversaries* (i)

VI. Of the several sorts of *Gaming*, that which we call \* *Raffling* is, when Many contribute towards the Purchase of a thing, and then leave it to *Chance*, which One shall have the whole. In this there are two sorts of Contracts; for in respect of him who exposes his Goods, it is Selling: in respect of them to whom they are expos'd it is casting Lots for them. For, by Agreement, he whom Fortune favours is to have the whole, and the rest are to be at the Loss of what they contributed. The Rule here is, that the whole of the Money contributed should equal, and not exceed the Value of the Commodity: And that every one of the Contributors should have an equal *Chance* for it, in Proportion to their Contributions.

VII. Another sort is, when a certain Number of Tickets, *Benefits* and *Blanks* are cast into a Glass, and several, at certain Rates, buy the Liberty of drawing them with this Condition, that he who draws a *Benefit* shall receive the Value inscrib'd upon it.

This something resembles our † *Lotteries*, and comes nearest to that Sort of Contract, which we call the *Purchase of Hope*, tho' there be Hazard enough with it. The Rule here is, That the Price of all the Tickets should not much exceed the Value of the *Benefits*; I say, *not much*, for Charges are to be consider'd, and the best *Benefits* may happen to be drawn first, and if so, People won't be so forward to venture upon the remaining Tickets.

Such *Lotteries* as these, are sometimes set up to collect Money for publick Buildings, or for the Relief of the Poor; in which Case, the Price of all the Tickets together, is generally much larger than the Value of the *Benefits*; which Overplus is in the Nature of Alms and Charity given after a free and chearful manner (k).

But, in fine, for an Equality in *Gaming*, it is not only requisite, that the Venture on each side should be equal; but also that the Danger of losing, and the Probability of winning should bear Proportion to the Thing contended for; *v. g.* in a Game that depends upon Skill or Ingenuity, if One Man is twice as Skilful as the Other, it is fit he should lay down a double Stake. So if Ten lay down each of them a Guinea for him that throws highest, it may

(a) Vid. *Jur. Canon.* tit. 10. *De purgatione vulgari, & passim Cod. Legum antiquarum Lindenbrogii, ejusq; Glossarium in Vocabulo Campio & Duellum.* (b) *Apud Sigibertum Gemblacensem ad ann. 942.* \* *Sponsores.*

(i) See Mr. *Barbeyrac's* First Note upon this Section. (c) *Judg. XIV. 12, &c.* (d) *Vid. Virg. Æn. l. 5. v. 328.* (e) *Juv. S. l. v. 88, &c.* (f) *Ovid Trist. l. 2. v. 483, 484.* (g) 'The *Alcoran* together with Wine forbids those Plays which depend on *Chance*, because they administer frequent Occasions of Quarrelling. *Cap. de Mensa.*

(h) *Vid. L. II. c. 5. D. de aleatoribus, & ibi juris Romani interpretet, Photius, Nomocan, Tit. 13. C. 29. Selden de Jure, N. & G. Sec. Hebr. l. 6. c. 11. (i) Ambr. Off. 3. c. 4.* Which is taken from the Saying of *Chryssippus* in *Cic. Off. 3. c. 10. Loteria.* † *Olla Fortuna.* (k) *Add. Martin Delrio Disquisit. Magic. l. 4. c. 4.*

seem unreasonable that he who ventures but one Guinea should gain Nine; but then we must consider that it is nine times more probable that he loses than that he wins. Upon which Ground some (1) think it a foolish thing to be afraid of Thunder, for of 2,000,000 Men perhaps not one may perish by it; and therefore not only the Greatness of the Evil, but the Probability of its not happening ought to be considered.

VIII. To these Contracts, that of *Insuring* bears some Affinity; when for a certain Sum a Man takes upon him the Risque that Goods are to run in Transportation from place to place, chiefly by Sea; which, if they happen to be lost, the *Insurer* is bound to make good. This Contract is null, if either the *Insurer* knows for certain that the Goods be already safe, or the *Merchant* that they be lost. For the matter of this Contract is suppos'd to be a Loss considered as uncertain. Whereas if the *Insurer* is certain that the Goods are arriv'd safe, he runs no Risque: and if the *Owner* knows that

they are lost, he can't demand another to run the Risque of them; for what is not in Being can't be liable to Risque. As for the Price of such *Insuring*, it is to be stated by the common Rate, or by the Agreement of the Parties. Thus much is certain, that the more or greater the Dangers are, which the Commodity is expos'd to, the greater Rate may be demanded for *Insuring* it; as if the Seas be infested by Enemies and Pirates, more may be demanded than if only the Uncertainty of Tempests were apprehended. And in respect of them too, more in Winter than in Summer (a). This Contract I have mention'd here, because in respect of the *Insurer* it chiefly depends on Chance. There is mention made in *Livy* (b) of an *Insuring* which cost nothing, for they, who bought up Cloth and Corn to be transported to *Spain*, demanded, *That what was on Board should be Insur'd by the Publick from the Danger of the Enemy and the Seas*: But what Cheats were committed by this means we may read in the same Author (c) (2).

(1) This may be seen more at large in Mr. *Bouhour's Art of Thinking*, Part IV. Chap. 16. and the Last, whence our Author has taken most of this Section. (a) *Add. Loccenius de Jure maritimo*, l. 2. c. 5. (b) *L. 23. c. 49.* (c) *L. 45. c. 3.* (2) See Mr. *La Placette's Treatise of Restitution*, B. 4. c. 15.

## C H A P. X.

### Of Accessory Pacts.

HAVING done with principal Contracts that subsist by themselves, I come now to those that are only *Accessory* and have no Existence, but as they are added to others. These may be divided into two sorts; for *Some* are apply'd in order to add, or take away something from the principal Contract, and these the *Civilians* call *Additional Pacts*: *Others* are added only as a Confirmation and Security to Contracts already completed.

II. The *Roman Lawyers* (a) distinguish, between such *Additional Pacts* as are added before, or immediately upon the entire Completion of the principal Contract, so as in a Manner to be part of it, and such as are added sometime after; Then they examine whether the Contracts, to which they are added be such as admit of Equity, or such as are tyed up to the Rigour of the Law; And lastly, Whether they affect the Essentials of the Contracts, or such Things as naturally flow from them, or such only as are Accidental to them. Whereof the *First* are so Necessary, as that no Contract can be without them: The *Second* generally proceed from the Contract, altho' they be not express; yet so as that they may be varied by the Parties, without affecting the Essence of it: The *Last* have no Dependence at all upon the Essence of the Contract, but owe their Being purely to

the Pleasure of the Parties. Moreover they think it ought to be considered, whether these Pacts be added to encrease, or to lessen the Obligation.

III. Concerning all which we may form these following Conclusions. *I. A Pact so affecting the Essence of a Contract as to make it Unlawful, or against good Manners, is Null.* For we have proved above that no such Covenant can stand Good; Thus if a Bride should add a Clause to her Contract of Marriage, by which She might be allowed the Use of other Men; or, if a Steward should add it as a Condition that he should be permitted to imbezil his Master's Goods, they would neither be Valid. So it would be absurd for a Man to make a Bargain, and at the same time to protest that he is forc'd or frightned into it: or, for a Man in any Contract whatsoever to confess that he does not design to deal honestly (b).

IV. *II. When the Pact so affects the Essence of the Contract, as utterly to change the Form of it, Regard must be had to the Intent of the Contractors*; For if they designed the Contract, according to the Import of the words in which it is express'd, 'tis plain that the Pact which is Repugnant to it must be Null; for they cannot be suppos'd to Will things, which are Inconsistent and Destructive of each other. Thus it would be Ridiculous, if a Man should

(a) *Add. D. lib. 2. t. 14. de pactis*, L. 7. f. 5. (b) *Vid. D. lib. 16. t. 3. Depos. vel contra*, L. 1. f. 7. & f. 35.

pretend to *Buy*, and yet add such a Condition as would make it impossible for Him to receive the Commodity, and the other the Money; or, if he should so *Let* a House, as to make over the Property of it to the *Tenant*; or enter into *Partnership*, so as to have neither the Gain nor the Lots in Common.

But if the Parties did really intend the Change, and mistook only in the wording of it, or for some certain reasons chose to speak improperly, provided it be not against the Laws, it will stand Good, and not be quash'd for the Impropriety of a Term (a).

V. III. *Pacts which are added immediately upon the Completion of the Contract, whether they concern the Essentials of it, or those Things which naturally flow from it, or those which are purely Accidental to it, are Valid if they be not Repugnant to Law.* For since both Parties are here suppos'd to have Power to dispose of these Things, they must be obliged to what they Consent to (b); thus, although it be Natural in *Buying* and *Selling*, that the *Buyer* be put in Possession of the Commodity, yet the Parties by an *Additional Pact* may order it otherwise (1).

Thus the Obligation to make good a Defect may be augmented or diminish'd, beside what the Nature of the Contract would otherwise admit of; and the same obtains in *Consensual Contracts*, if between the Completion and the Execution of them a Pact be *Added*; for this is the same Thing, as if the Parties proceeded upon a new Contract (c).

The Purchase of an Annuity, seems to be such a sort of Borrowing, as may be referr'd hither. For I receive Money upon Condition to pay to such a certain Man, so much Interest as long as he lives, provided that after his Death, the *Principal* be my own; whereas otherwise the Nature of a *Loan* requires that the *Principal* be return'd to the *Creditor* or his Heirs.

VI. IV. *A Pact added to a Contract some time after its Completion, if it be Negative and designed to take from the Obligation, and so made in Favour of the Debtor or Defendant, is Valid.* Thus some time after a Debt has been contracted, the *Creditor* and *Debtor* may enter into Covenant concerning the putting off the Payment, the Changing the Place of it, the Species of Money, the Forgiving the Interest, &c. (d).

VII. V. *By the Law of Nature, as far as bare Pact is capable of Action, a Pact added to a Contract some time after its Completion, although it encreases the Obligation, and so turns*

*in Favour of the Creditor or Plaintiff, may be Valid.* For the Reason why the *Roman Law* denies it, (*viz.* because a bare Affirmative Pact does not bear an Action,) is out of the Verge of the Law of Nature (e). Thus suppose I had bought a Commodity, which by the Bargain is to be delivered by such a Day, if afterwards we Covenant to have it deliver'd sooner, there is no Reason but that I should receive the Benefit of it. Or, suppose I *Let* you my House for two Years, and we afterwards by Consent limit the Time to one, at the End of the Year you ought to quit Possession: but then I can't demand the Rent that would be due for the other Year. And thus in *Loan* of Money, I don't see why the time of Payment may not be Anticipated as well as put off by an *Additional Compact* (f); nay altho' no Allowance be made to the *Debtor* for this Anticipation, yet he has no Injury done him, if he voluntarily submits to it. But 'tis manifest that his Obligation ought not to be encreas'd against his Will, and therefore naturally as much as is added to him by this Subsequent *Pact*, ought to be taken off somewhere else. Thus, if the *Creditor* will have me pay him at another place, than that which we agreed upon, I on the other Hand can fairly demand an Abatement of so much as it is my Interest to pay it in the former. But 'tis against the Nature of *Bartering* and *Chargeable Contracts*, that any *Pact* should be added to encrease the Obligation so much on one side, as to make an Inequality; as if the *Buyer* and *Seller* should agree upon such a Price, being the true Value of the Commodity; and yet afterwards should Covenant, that the *Buyer* should pay more than the Commodity is worth. Unless this be a mixt Contract of *Buying* and *Giving*, I can't see how the *Additional Price* can be demanded (g).

VIII. Hither I think may be referr'd what we call a \* *Trust*, when we make over to another the Property of a Thing upon Condition to have it restor'd again: which I mention among the *Additional Pacts*, rather than the *Principal Contracts*, because it is always added upon the Delivery of the thing. And this seems to be call'd a *Trust*, because, whereas otherwise when the Property of a Thing is made over to another, he may dispose of it as he pleases, and either keep it himself for ever, or part with it to another; by this *Additional Pact* we seem to *trust* to his Honour and Honesty, that he will not use his Property otherwise than according to Agreement, and will be willing to part with it again upon Demand. And therefore the Solemn Form of this Contract among

(a) *Vid.* D. lib. 18. t. 1. de contrah. empt. &c. L. 80. f. 3. lib. 19. t. 5. de prescript. verb. &c. L. 4. & 6. & lib. 17. t. 2. pro Socio. L. 5. f. 2. (b) *Contractus enim legem ex conventionione accipiunt*, D. ubi supr. Leg. 1. f. 6. *Vid.* Leg. 24. & 26. f. 1.

(1) *Vid.* D. lib. 19. t. 1. de act. empt. & vendit. L. 11. f. 18. (c) See above in Chap. 2. f. 6. *Vid.* D. lib. 2. t. 14. de pactis, L. 7. f. 6. *Vid.* Leg. 58. & lib. 18. t. 1. de contrah. empt. L. 72. t. 4. de rescindenda vendit. L. 1, 2, & C. lib. 4. t. 45. *Quando liceat ab emptione discedere*, L. 1. (d) See above Chap. 2. f. 3. *Vid.* D. lib. 2. t. 14. de pactis, L. 7. f. 5. lib. 18. t. 1. de contrah. empt. L. 72. (e) In the Laws before cited. (f) *Vid.* lib. 13. t. 5. L. 3. f. 2.

D. de constit. pecun.

(g) Compare *Arn. Vinnii tract. de pactis*, c. 9, &c.

Fiducia.

the Romans ran, *As honest Men ought to deal together without Deceit* (a). And because the *Trust* was so very Extraordinary, the Breach of it was therefore branded with a particular Infamy by the *Roman Laws* (b). We have an Example of this sort of *Trust* in *Livy* (c). Philip, when he saw that he must fight, and raise Forces in all Parts, being solicitous for the City of Argos, thought it best to put it into the Hands of Nabis King of Lacedemon in *Trust*, to be restor'd again, if he return'd with Success: but if not, to be kept for himself.

Among the *Turks*, if a Man swears to put away his Wife, altho' he immediately repents of it, he is yet oblig'd to stand to his Oath: but in order to recover her again, he enters into a *Trust* with his Friend, and gets him to marry her, and immediately after, to part with her. For after a Divorce, unless the Woman be married again, she can't return to her first Husband (d).

But such a *Trust* as evades the Force of the Law, ought not to be contracted; as if I should give a Man, who is free from Taxes, my Estate in *Trust*, in order to cheat the Tax-gatherers.

IX. As for such *Pacts* as are added by way of Confirmation and *Security* to Contracts already compleated, the most usual is that, by which one Man gets another to be bound for him, so as to be Responsible in case he should fail. This *Personal Security* is required in these Three Cases.

First, Between Man and Man for the Performance of something Valuable, which is call'd *Suretiship*. Secondly, In Criminal Affairs, which is commonly call'd *Bail*. Thirdly, In Publick Concerns, where *Security* is given by *Hostages*.

For the right understanding the Nature of *Suretiship*, we must look back to the last Section of the second Chapter to this Book, to which we add, that being bound for another we make our selves so far liable, as that if he does not pay the Debt, we must. But then Recourse may be had to the *Principal Debtor*, and the whole with the Charges may be recover'd of

him. Now since *Suretiship* is only an additional Confirmation to a Contract, the *Surety* cannot naturally be oblig'd to more than the *Principal* (1); So that if the *Principal* was oblig'd only conditionally, the *Surety* cannot be oblig'd, unless the Conditions be made good, nor can he be confin'd to such a Time or Place which the other was not oblig'd to. And whatsoever Exceptions the *Debtor* might make, the *Surety* can plead them to his Advantage (e). One that orders another to trust a third Person does the same thing as if he made himself a *Surety*; for by such an Order he is presumed to interpose his Credit. But if he gives Order for 1000*l.* and the Person takes up but 500*l.* he will stand responsible for no more than was taken up; for the meaning of the Order was that he should have Credit as far as 1000*l.* But tho' the *Surety* cannot be oblig'd to more than the *Principal*, yet he may sometimes be oblig'd to less; as when he undertakes for only Part of the Debt, or for the Whole, under certain Restrictions, or upon Condition that the time of Payment should be prolonged, or a more convenient Place assigned for it.

The End and Design of *Suretiship* makes it appear, that the *Surety* ought to be a Man of Substance and Credit, and able to answer the *Creditor's* Sute, which indeed is suppos'd by the *Creditor's* Acceptance of him (f).

X. But yet it is not impossible but the *Surety* may lie under a greater and a stricter Obligation than the *Principal*; for He interposes himself of his own Accord, the more to confirm the *Principal Contract*, without whom the *Creditor* had not enter'd into it. And indeed Necessity forces some People to contract a Debt, but nothing but Generosity, and an Ostentation of Kindness, and a Confidence in his Riches engages the *Surety* in another's Concern. And therefore the *Creditor* has, sometimes, more reason to blame the *Sureties* than the *Principal*; For it was upon their Account that he trusted at all, and they certainly are to be blam'd who without utmost Necessity derive a Burthen upon themselves, which they ought to have known

(a) *Uti inter bonos bene agere oportet, & sine fraudatione*; Vid. Cicero, de Offic. L. 3. c. 17. & in Topicis, c. 10. & ad Famil. L. 7. Ep. 12. (b) There are Three private Concerns, upon the honest Discharge of which, a Man's Reputation and almost his Life depends, *A Trust*, *Guardianship* and *Partnership*, Cic. pro Roscio, C. 6. If a *Guardian* ought to be Faithful, if a *Partner*, if one entrusted with a Commission, if one that has receiv'd a *Trust*, Id. Topicis.

He who by means of his *Trust* has defrauded any One is condemned immediately, Id. pro Cæcina, C. 3. But in what Matters the Romans interpos'd this *Trust* you may meet with every where amongst their Lawyers. De Fiduciario Patre. Vid. Caium, Instit. 1. 6. A *Trust* was contracted in Childrens succeeding to their Father's Goods. Vid. lib. 3. t. 2. f. ult. Inst. de legit. agnat. success. L. ult. lib. 8. t. 49. C. de emanc. liber. de fiduciaria possessioe. Vid. Budæum ad l. 2. lib. 1. t. 2. D. de orig. juris. Greg. Tholosan. Syntag. juris, l. 23. c. 5. f. 2. Vid. Inst. l. 1. t. 19. De tutela fiduciaria. Vid. Bachov. ad d. t. Instit. De fiducia circa pignus contracta. Vid. Idid. Etymol. l. 5. c. 25. Cujac. ad Pauli recept. sent. l. 2. t. 13. Sic & in fidei commissis instar fiducia intercedit. Vid. princ. l. 2. t. 23. Inst. de fidei commiss. & ibi Bachov. &c.

(c) L. 32. c. 38. So Alboinus delivered up Pannonia to his Friends the Hunns upon Condition that if the Longbards should ever have Occasion to return, they should restore it back. Vid. Paul. Warnfried. de gestis Longobard. L. 2. C. 7. Nabarzanes (in Curtius. l. 5. c. 9.) advises Darius to make over his Kingdom to Bessus for a Time, so as to receive it back again when Things should be settled. Hercules having subdued Sparta placed Tyndarus the Father of the Dioscuri in the Throne, which being his by Conquest, he entrusted with him, upon Condition that he would restore it safe and sound to Hercules's Sons. Diod. Sic. l. 4. t. 33. Boetius (in Topic. Cicero. ubi supr.) begins a Case with, If a Man fearing the Badness of the Times should make over in *Trust* a Farm to a Powerful Friend, to return it when Times should mend.

(d) Moncony's Itiner. Tom. 1. p. 465. compared with Olearius Itiner. Persic. l. 5. c. 23. (e) Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligantur. &c. Instit. l. 3. t. 21. de Fidejussorib. (f) Vid. lib. 2. t. 11. D. si quis cautionibus & lib. 2. t. 14. L. 32. D. de pactis, lib. 3. t. 3. L. 51. D. de procurat. lib. 14. t. 6. L. 9. 3. de Scto Macedon. lib. 16. t. 2. l. 4. l. 5. D. de compensat. (f) And therefore Vulcan (in Homer. Odyss. θ. v. 352, 353) when Neptune offered to be a *Surety* for Mars, replies, That the *Security* was as bad as the Debt, for if Mars should run away, How should he be able to seize upon Neptune among the Gods?

they were not able to bear. And therefore Wife Men every where dissuade us from *Suretiship*, unless we would involve our selves in unnecessary Evils (a). The *Romans* kindly provided for the easiness of Women by the *Velleian Decree* (1); and by the *Roman Law* the *Principal* satisfied the whole Debt by giving up all he was worth, tho' not sufficient to discharge the Debt (2); which Favour was not indulg'd the *Surety* (3). For he was look'd upon as call'd in for the Relief of the *Creditor*, that in case the *Principal* should prove insolvent, the Debt might be recovered of him. Tho' indeed this way of satisfying a Debt, by parting with all a Man is worth, is altogether unknown to the Law of Nature; unless common Humanity may plead, that if a Man be brought to want by some fatal Calamity, and not by Luxury or Idleness, it ought to suffice if we strip him of his Patrimony, and not proceed any farther against his Person.

Besides, the *Surety* may be more strictly oblig'd than the *Principal*, in case he takes upon him by Oath, or under a Penalty, what the other barely promis'd. Thus it is the Custom in some Places, in default of Payment, at the time appointed, to oblige the *Sureties* to appear at such a certain Place, and not to depart thence 'till the Debt be satisfied, and this they call a *Pledge*. Tho' by reason of some Abuses, which proceeded from it, it is now generally disused.

XI. But because *Suretiship* is only an Addition to another Man's Debt, it is most natural for the *Creditor* to make his Demands first to the *Principal*, and upon Failure there, to apply to the *Surety* (b). And if the *Surety* pays the Debt, the *Creditor* must make over to him all the Right that he had against the *Principal*; if that can be of more Service to him towards the Recovery of the Debt, than if he sued in his own Name; especially if any Pawn had been given for Security in Part, it must be deliver'd up to the *Surety*. But if several had bound themselves for a Debt all jointly, and not each for the whole, in case of Failure in the *Principal*, the Burthen ought to be divided amongst them, and each obliged to pay his Proportion; unless one should prove insolvent, for then the Burthen

must lie the Heavier upon the Rest. For a Number of *Sureties* were therefore provided, that if this or that should fail, the rest might be *Security* to the *Creditor* (c). Those who entirely take upon themselves in their own Name another's Obligation (\*), so as to be esteem'd as *Principals* in the Eye of the *Creditor*, differ in some respect from *Sureties*. Whether such as these can recover of the Person for whom they engaged, what they laid out in his Service, and what method they ought to take to do it, is to be Determin'd according to the Nature of the Kindness; for this Act in them may be a *Free Donation*, or a *Commission*, or a *Loan*, or a *Recompence*, or such like.

'Tis usual also for a *Surety* to provide for himself by (†) *Counter-Security*, whereby he may recover what he lays out for the *Principal*, if the *Principal* himself proves deficient. The Person that gives this *Security* owes the same Obligation to the first *Surety*, as the first *Surety* owes the *Creditor*; and has the same Action against the *Principal*, as the first *Surety* himself had.

XII. As for *Bail* (\*) or the Obligations, that those lie under who engage for Criminals, 'tis Observable that many of the Ancients were of Opinion, that a Man was so far Master of his own Life, as to have Power by his bare Consent to engage it for another, so far as even to forfeit it for another's Crime (d). But that a *Surety* should by his bare Consent make himself liable to a Punishment, which otherwise ought to be inflicted on a Criminal, does not seem agreeable to those Rules of *Vindictive Justice*, which ought to obtain in Human Societies; indeed if a Man knavishly interposes himself, that the Criminal may have an Opportunity of escaping Justice, he ought to suffer as much, as it is the Concern of the Magistrate that the other had not escaped his Hands; which may sometimes be Capital, especially if he who thus escap'd be like to do more Mischief (e).

Farther than this, such a substituted Death is not lawful in the Civil Court: For no Man has so much Power over his own Life, as to

(a) Prov. VI. 1. &c. XI. 15. XVII. 18. XXII. 26, 27. XXVII. 13. Ecclus XXIX. 24, 27. Be a Surety, but at your Peril, was the saying of Chilon. (1) D. Lib. 16. t. 7. L. 1. f. 1, 2. (2) V. C. Lib. 7. t. 71. L. 1. & Instit. L. 4. t. 6. De actionib. f. 40. (3) V. Instit. Lib. 4. t. 14. De Replicationib. f. 4. (b) 'This the Roman Law calls *Beneficium excussionis & Ordinis*. The Condition of a *Surety* deserves Pity, for his Kindness ruins him, and his good Nature breaks him. But the *Creditor* cannot with any Face apply to the *Surety*, but when he cannot recover his Debt of the *Principal*, Quint. Decl. 273. (c) Add. Phœd. l. 1. fab. 16. (\*) *Expromissores*. (†) *Fidejussor indemnitate*. (\*) *Vades*. (d) Andocides (*orat. de myster.*) relates, that *Manthiteus* and *Apsephion* sat by the Altar humbly praying that they might not be put to the Rack, but that their *Bail* might be taken, which was no sooner granted, but they mounted their Horses and fled to the Enemy; leaving their *Bail*, who were forced to undergo those Tortures which they themselves ought to have suffered. The Story of *Damon* and *Pythias* (whom *Diod. Sic.* in excerpt. *Peiresc.* calls *Phintias*) is well known as related by *Cicero* in libr. de *Amicitia*. Of whom *Manil. Astr.* 1. 2. v. 1. says,

Et duo qui potuere sequi vadimonia sponsi:  
Optavitque reum sponfor non posse reverti,  
Sponforemque reus timuit ne solveret ipsum.

Once Death was strove for, 'twas a generous strife;  
Not who should keep, but who should lose a Life  
Was their Dispute, contending to deny  
Each other the great Privilege to die.  
The *Surety* fear'd the guilty Friend's Return,  
The guilty Friend did his own Absence mourn.

(e) 1 Kings, XX. 39.

Mr. Creech.

expose

expose it at Pleasure for no Publick Advantage, but only to hinder another from suffering what he deserves. Besides, the End of Punishments would be frustrated by this means, for the design of them is either to amend the *Delinquent*, or to deter *Others*; But the *Surety* is not the *Delinquent*, as having not by any Act of his, derived the Guilt upon himself: And as for *Others*, they will not be deterr'd from offending, by seeing an Innocent Man suffer, but will either be moved with Compassion, or struck with Admiration of such Love and Constancy, as does not refuse even Death, for the sake of a Friend (a). (1)

It appears therefore that *Bail* can be no farther admitted in Criminal cases, than as a security to the Magistrate, whose Duty it is to prosecute, that the Damages of the *Delinquent* shall be made Good, or his Fine paid, or if He be absent, that He shall make his Appearance, so that nothing in the mean-time may be Decreed against him, as if he were Convict, or if he be in Prison, that he may not be forc'd to Plead in Chains. And even in those Cases, the best way is for the Magistrate to let the *Surety* know before-hand, what security he expects from him, that so he may Consider whether his Circumstances will permit him to Venture so much upon the Honesty of his Friend.

The Obligation that *Hostages* lie under, hardly ever taking place but in Leagues and Civil Government, will be discuss'd more conveniently hereafter. B. 8. c. 8. s. 6.

XIII. Another usual way of *Security*, is to give the *Creditor* some certain Thing in *Pawn*, till the Debt be paid; the design of which is, not only that the *Debtor* may be incited to a more speedy Payment for want of his Goods (b), but that the *Creditor* (2) in Case of Failure may have something Equivalent, and being in Possession of the *Pawn*, need not be at the Trouble and Expence of going to Law. And therefore the *Pawn* ought to be as much or more Worth than the Debt it self. And since it is Design'd for the *Security* of Debts which bear either a *Vulgar* or *Eminent* Price, 'tis necessary that the *Pawn* shou'd have the same Faculty. So that we cannot approve of the *Egyptian* Custom (c) (3) of *Pawning* the dead Bodies of their Parents, altho' whoever refus'd or neglected to Redeem them was prosecuted with the utmost Ignominy, and deny'd Burial after Death. And for the same reason it seems inhuman to seize upon the dead Body of a *Debtor*, that so his Relations might be shamed into a Payment of that which otherwise they were not oblig'd to.

By the way, 'tis worth observing, that in the Kingdom of *Pegu* a Man may *Pawn* his Wife and Children to his *Creditor*; but if the *Creditor* lies with either the Wife or the Daughter thus

pawn'd to him, he loses his Debt, and is liable to no other Punishment (d).

XIV. Things given in *Pawn* are either such as yield Increase, or such as do not; as for the former, 'tis usual to allow the *Creditor* the Profits, or a certain Proportion of them, in lieu of *Interest*. As for those which do not yield Increase; they generally bargain, that if they be not redeem'd by such a time, the *Creditor* shall have the Property of them: And this is not naturally unjust, especially if the *Pawn* does not exceed the Value of the *Debt*, and the *Interest* of it; or if, provided it exceeds it, the *Overplus* be return'd to the Owner. Tho' this the *Roman* Lawyers never allow of (4), for thus needy necessitous People might quickly be stript of all they were worth through the Avarice of their *Creditors*, being often forc'd to leave in *Pawn* much more than the Value of the *Debt*.

But it is reasonable, that, if the *Pawn* be not redeem'd by such a time, it should be look'd upon as sold at a fair rate stated then, or some time before, by some honest Man (5).

In short, as the *Creditor* ought to restore the *Pawn* upon Payment: so while he has it in his Custody, he ought to look after it as carefully as his own; and if it may be the worse for using, he ought not to put it to any Use, unless leave be expressly given him by the Bargain. And therefore if it receives any Damage, or happens to be lost through his Fraud, or want of, at least, common Diligence, he is obliged to make it good.

XV. It is a receiv'd Opinion, that a *Pawn* deposited can never become ones own by *Prescription* (6): and the reason is, because the Redemption of a *Pawn* is such an Action as cannot be exercis'd often, but once only. Besides *Prescription* was first introduc'd to put an end to Sutes, which would not otherwise be determined, and to settle Property which would otherwise be uncertain. But, in the case before us, there can be no Question in whom the Property of the *Pawn* is, when I possess it as another's, and it evidently appearing upon what account he left it with me, I cannot presume that he had ever relinquish'd it.

But yet the Case may so happen, as that the *Debtor* may fairly be debarred the Power of Redemption; as (e) if when he would have redeemed it, he had been hindred, and has now passed it over in Silence so long as to create a Presumption that he never designs it; or if it be very much to the *Creditor's* Disadvantage to have the Payment continually put off, it cannot be thought unjust in him to dispose of the *Pawn* as his own; especially if by length of time the Value of the Money has been changed, so that the *Creditor* would receive

(a) *Add. Anth. Matth. de crimin. ad l. 48. D. d. tit. 14. c. 2. f. 13, &c.* (1) *V. Grot. L. 2. c. 21. l. 11. n. 2.*  
 (b) *Vid. Lib. 13. t. 7. l. 35. f. 1. de action. pignorat, &c.* (2) *V. Instit. L. 3. t. 15. Quibus modis re contrahatur obligatio, f. 4.* (c) *V. Diodor. Sic. L. 1. C. 93.* (3) *V. Herodot. in Euterp. & Lucian. de Luctu. p. 306, 307. Ed. Amst.*  
 (d) *Gaspar. Balb. itinera* (4) *V. C. L. 8. t. 35. De pactis pignorum, & de lege Commissor. in pignorib. r. scind.*  
 (5) *V. D. L. 20. t. 1. De pignorib. & hypothefis, &c. l. 11. f. 1. & l. 16. f. 9.* (6) *V. C. L. 4. t. 24. de pignoratitia, Act. l. 10.* (e) *Grot. l. 3. c. 12. f. ult. puts this case.*

less than he lent, should he admit of a Redemption. As suppose a Man had lent another 1000*l.* 100 Years ago, and had received in Mortgage a Farm, which was then worth the Money; in the mean-time the Value of Money has sunk half in half, and therefore now if the Creditor be forced to receive back his 1000*l.* he would receive only enough to purchase half the Farm, whereas, at the time of Contract, it would have purchased the whole.

XVI. The Roman Lawyers distinguish between a Pawn properly so called, and a Mortgage (1); the former is the actual Delivery of some Movable, the latter is the bare assignment of something Immovable for Security of the Debt: For barely to assign over Movables as Security, without putting them into the Custody of the Creditor, would be ridiculous; for they might be remov'd away, and so not answer the End for which they were assigned. This

way of Mortgage is very useful among Subjects of the same State; for it being absolutely necessary that they should frequently borrow of one another, and as necessary that the Payment should sometimes be put off for a considerable time, there would not be Movables enough for sufficient Security; and it would be too hard to oblige the Borrowers immediately to part with their Immovables, as their Houses or Land (a). And therefore it suffices to assign such an Immovable for Security, as can't be taken away, and of which the Law at any time can give Possession.

In the State of Nature such Mortgages are needless; for if the Debtor refuses Payment, the Possession of the Mortgage assign'd in Security must be detain'd by force of Arms. Whereas in that State, without such a particular Assignment, it is lawful to seize on any thing that belongs to the Debtor.

(1) V. Instit. L. 4. t. 6. De actionib. f. 7. XXIV. 3. Prov. XX. 16. & D. L. 20. t. 1. l. 6, 7. D. de pignor. &c. Diodor. Sic. l. 1. c. 79. G. lib. 8. t. 17. L. 8. & authent. Agricultores quæ res pign. oblig. poss.

(a) Compare Exod. XXII. 26, 27. Deut. XXIV. 6. Job. XXII. 6.

(a) Compare Exod. XXII. 26, 27. Deut. XXIV. 6. Job. XXII. 6. XXIV. 3. Prov. XX. 16. & D. L. 20. t. 1. l. 6, 7. D. de pignor. &c. Diodor. Sic. l. 1. c. 79. G. lib. 8. t. 17. L. 8. & authent. Agricultores quæ res pign. oblig. poss.

## CHAP. XI.

## By what means Obligations founded upon Compact may be dissolved.

WE come now to see by what means Obligations thus founded upon Compact may be dissolv'd. The most natural way is the Performance of the Covenants (1): for that being done, the Obligation ceases of course. And here we may observe, that some Obligations are so inherent in a Person, that they cannot be perform'd by any other (2): Whereas some may be done by Proxy, it being all alike to the Party concerned by whom they be perform'd. Of such a Nature are all those Contracts which relate to common mercenary Work, such as may be done as well by one Man as by another; as also those which concern Consumable Commodities, which if we do but get our selves possess'd of, it is indifferent by what Hand they come to us. In such Cases, altho' it be most natural for the Debtor himself, or some other, by his Order, to pay and perform according to Agreement, yet the Creditor ought to acquiesce, if any other Man discharges for the Debtor; I say, for the Debtor, for whosoever pays upon his own account and not the Debtor's does not release him (3). But in case of Suretiship, if the Principal discharges the Obligation, he releases both himself and the Surety (4). Whereas if the Surety pays the Debt the Principal is indeed releas'd from the Creditor, but at the same Instant becomes indebted to the Surety, even altho' this Payment was made without his Knowledge.

II. But if a Man pays a Debt for another without either being his Surety, or having his Order for it, can he recover what he has thus paid of his own Head? In which Case we must distinguish whether he made this Payment against the other's Will, or only against his Knowledge. In the former Case 'tis plain he cannot recover it; For how can any one impose an Obligation upon me against my Will, which ought to be founded upon Consent? But because no Body is presum'd to throw his Money away, we ought to consider further, whether he design'd what he thus paid as a Gift to the Creditor, or not: If he did; the Debtor is not concern'd in it: But if he did not design it as a Gift; we ought to suppose, that he did it to transfer the Creditor's Right and Title against the Debtor upon himself. And altho' the Creditor, at the Payment, knew not of his Design, but receiv'd the Money as paid in the Name of the Debtor: yet if he who paid it cannot recover it of the Debtor, the Creditor ought in Equity either to refund what he thus receiv'd, and still preserve his Action against the Debtor, or else to give up his Title to the other; especially if he may be presum'd to have made his Payment in Hopes it would have been acceptable to the Debtor. Upon which account the Roman Law allows him an Action for Business done (a). But since the Debtor may put in his Exceptions, that it was not acceptable to him, and that he

(1) Tollitur omnis obligatio solutione ejus quod debetur, Instit. L. 3. t. 20. Quib. mod. tollitur oblig. princip. (2) See above in B. 1. c. 1. f. 19. (3) Nam quod quis suo nomine solvit, non debitoris, debitorem non liberat. D. L. 5. t. 3. l. 31. princip. (4) Item si reus solverit, etiam ii, qui pro eo intervenerunt, liberantur. Instit. ubi supr. (a) V. L. 3. t. 5. de negotiis gestis, l. 43. & ult.

is not willing to owe this other Person such a Kindness, his best way would be to suppose that his *Creditor* has given up his Title to him, and to deal with him accordingly. But if a Man should lay out any Expence upon another's Goods without his Knowledge, he may keep the Goods as a Pledge till the Expences be repaid him, unless the Improvement is capable of being taken away from them.

III. No Payment, or Satisfaction of any Obligation ought to be made but to the *Creditor* himself, or whom he has order'd to receive it in his Name (1), and if I pay Another by mistake, the *Creditor's* Title nevertheless stands good; but then I may recover of the Other what I thus paid him (2). The *Creditor* is here presum'd to be capable of managing his own Concerns (3), and to have a perfect Understanding of the Affair in hand. For otherwise it would be to throw Money away, rather than to make Payment of it.

IV. Besides, the very thing must be paid that was bargain'd for, and not another in its stead (4); it must be paid entire, not mangled (5); not partially, nor piecemeal; at the Time and Place (6) appointed (7); especially if it be the *Creditor's* Interest to have it paid *here* rather than *there*, and at such a time rather than at another; for the Time is part of the Price (a). Yet any of these Conditions may be superseded by a new Agreement, which the *Creditor* is sometimes forc'd to comply with, through the Poverty or Knavery of the *Debtor*, being willing to receive part rather than nothing, at another Place rather than no where, and after the time expired rather than never. Tho' sometimes Equity requires that the Payment be put off and accepted in parcels, when it can't be perform'd immediately, or all at once. Thus the *Athenians* having made a Vow to sacrifice to *Diana* as many Goats as they should kill Enemies; when they could not procure so many in the whole Country, they decreed to sacrifice 500 every Year (b). Sometimes too there is no other way of ending the Sute than by forcing the *Debtor* to pay an Equivalent.

'Tis manifest that the *Creditor* only can remit the Debt, and not his Servant or Steward without his express Order. But if the *Debtor's* Steward transacts with the *Creditor*, and compounds for less than the whole, the Gain does not redound to the Steward but to his Master; and it would be Theft and Purloining in the Steward, if after having compounded with the *Creditor*, he should bring the whole Debt in his Accounts, and put what he got by Composition in his own Pocket.

The *Creditor* is suppos'd to be satisfied, if he

accepts of a *Pawn* as Payment, or takes it in Trust till Payment be made, or if it be sold, and the Price receiv'd in lieu of the Debt. And if a Man owes Money by several different Bonds, and pays part, the Payment ought in favour to be apply'd to the most burthensome (c). The way which *Vitellius* (d) took to pay his Debts was very scandalous; when he went to *Germany* he was so intangled, that his *Creditors* would scarce dismiss his Person upon any Security; who a little after, when he was made *Emperor* and return'd to *Rome*, hid themselves. But he order'd them to be brought before him, and told them, *That he had restor'd them Safety for their Money*, and demanded back the Bonds and Instruments of Contract.

V. The Obligation is sometimes released by *Compensation*, which is by opposing Debt to Debt (e), or when a Man ceases to owe me, because I apparently owe him as much of the same kind. For since *as much* (especially in *Consumable Commodities*) is *the same*, and where the Debts are mutual, if I receive, I must immediately refund as much: therefore to a bridge such needless Payments 'tis most convenient for each Party to pay himself by retaining his own (8); especially since there is no Paying and Receiving without some trouble in it: And it would be very imprudent in me to pay first, when I need not do it, and so to put it in the other's Power to be behind hand in his Payment to me (f).

But this *Compensation* does not take place, but between those that are *Creditors* and *Debtors* to each other; for if I have so much due to me from a *Third Person*, I cannot obtrude that upon my *Creditor* for Payment, unless this *Third* and he be join'd in such a *Partnership* as to have all their Obligations and Rights in Common; for then their Goods may be look'd upon as one and the same Patrimony. Nay if they be *Partners* in one sort of Commodity only, *Compensation* will take Place, if one be my *Debtor*, and the other my *Creditor* for that Commodity; for so far they are to be esteem'd the same Person. So, if I owe Money to him who is my *Debtor's* Heir; or, if the *Creditor* of him, whose Heir I am, is indebted to me, *Compensation* may take place. And thus I may oppose Debt to Debt, altho' my *Creditor* is against it; For with what Face can he demand me to pay him, when he declines paying me?

Since this way of *Compensation* cannot be put in Practice, but between those who are mutually in Debt to one another, it follows, that I cannot oppose to my *Creditor* what he owes another, whose Agent I am, without his express Orders. For tho' a Man intrusts me with the entire Ma-

(1) V. D. L. 46. t. 3. De solutionib. &c. l. 49.

(2) V. D. L. 12. t. 6. De conditione indebiti, l. 65. f. 9.

(3) V. D. L. d. l. 1. 15. (4) V. D. L. 12. t. 1. De rebus creditis, l. 2. f. 1. (5) *ibid.* l. 21. (6) V. D. L. 13. t. 4. De eo quod certo loco dari oportet l. 9. (a) V. *Martial.* l. 6. ep. 30. (7) V. D. L. 46. t. 3. De solut. & liberat. l. 70.

(b) *Xenophon* *de* ἀνακ. ἢ Κόρυ. p. 178. Otherwise concerning the time of payment that of l. 105. of D. B. 46. t. 3. De solution, &c. us'd to be observ'd. (c) V. D. *ubi supra*, l. 1. 4. 97. (d) V. *Xiphilin.* ad ann. 69.

(e) V. D. L. 16. t. 2. De Compensation. l. 1. Compensatio, est debiti & crediti inter se contributio. (8) V. *Grot.* L. 3. c. 19. f. 15, &c. (f) L. 2. L. 3. D. d. l. Dolo facit qui petit quod redditurus est.

nagement of his Affairs, I am not therefore to reckon his Things as my own, and by that means make *Compensation* for my Debts; for perhaps he had rather have another Man his *Debtor* than me. Nor if I trust my Affairs to another, do I thereby take his Debts and Obligations upon my self; Thus *v. g.* should *Caius* enjoyn me to exact his Dues of *Seius*, whose *Debtor* I my self am; neither can *Seius* without *Caius's* leave *compensate* his Debt with mine, and under that Pretence refuse Payment, (for What has *Caius* to do with my Debt?) Neither can I take the Debt upon me instead of *Seius*. So one that is indebted to a *Minor* cannot make *Compensation* of that which the *Guardian* owes him: nor can the *Guardian* release his Debt by opposing to it that which his *Creditor* owes the *Minor* (a).

On the other Hand, if one that is bound for another, be call'd upon for the Debt, he may oppose by way of *Compensation*, not only what the *Creditor* owes to him, but also what he owes to the *Principal Debtor*; and this even against the Knowledge and Will of the *Principal*: For since the *Creditor* cannot refuse such a *Compensation* from the *Principal* himself, Why should not the *Surety* have the Advantage of it? And it would not be fair in the *Principal* to be against it, since he is oblig'd to repay what the *Surety* thus lays down for him.

VI. But in Consumable Commodities *Compensation* does not regularly take place, but in those of the same kind, and that too, not 'till the time of Payment is come or past (b); and therefore things of a different sort or quality can't be paid by *Compensation*, as a Bushel of Wheat for a Bushel of Oats, or a Hoghead of *Rhenish* for a Hoghead of *Port* Wine; nor things of a different *Species*, as this Horse for that Ox; nor of a different *Kind*, as a Sheep for a Goose; nor a *Species* for a thing indefinite of the same kind, or for an indeterminate Quantity, as *Bucephalus* for a Horse, or a Vessel of Oyl. Yet the *Roman* Lawyers admit of *Compensation*, where the Particulars are not assign'd, but the same sort and quality is owing on each side, as if I had promis'd you a Horse in general, and you happen to be Executor to one that leaves a Horse to me in Legacy. But, yet even in the former Cases, each Party may rate their Debt, and then pay them by *Compensation*. And yet, where Debts are thus reciprocal, the Obligation is rather suspended than taken away, by withholding what I owe another, till he pays what he owes me. But *Work for Work*, or *Work for Goods* will not admit of *Compensation* at the very Instant that it ought to be perform'd; for that would frustrate the very End and Design of such Contracts.

But if each Party release the other, the Obligation ceases upon another Principle, *viz.* *Mutual Disagreement*; so also if I cease to be

oblig'd, because another, who ought first to perform his Part, omitted it, it is not by reason of *Compensation*, but because the Condition, upon which the Obligation was founded, does not appear. But if my Work has been neglected by the Party that had undertaken it, I may rate it and so bring it into *Compensation*. Nay I can oppose to a Debt an equivalent Damage, or a Fine adjudg'd to me for any Injury done by my *Creditor*. But if two Persons be at Law, and while the Cause is depending strike up a Bargain, neither can oppose the Law-sute, or the Charges of it to the other (c); *v. g.* suppose I am at Law with another for an Estate, and during the Sute, sell him a House, he can't impute to me as Payment the Estate, or the Expences he has been at about it; For the Estate does not as yet appear to be his, and the Nature of the thing shews, that the Bargain was made without any regard to the Cause depending.

As for that sort of *Compensation* which cancels former Favours by subsequent Injuries, *Seneca* discourses largely of it (d). So also equal Injuries may, by *Compensation*, be put up on both sides, provided the Right of the Magistrate be not infringed.

VII. The Obligation ceases also when the *Creditor*, or he who has a Title to it, forgives it; for 'tis evident any Man may recede from his own Right, and when the Right has been made over to another, there too the Obligation ceases upon that other's forgiving it. And as at first I cannot stand oblig'd, if the other Party refuses to accept of it: so neither can I continue bound, if he thinks fit to cancel the Bond. But this only in case no *Third* Person is injur'd by it, for otherwise he alone cannot release me, altho' I was immediately oblig'd to him only.

This *Release* is perform'd either *expressly* or *tacitly*; to the former belongs what the *Roman* Law calls *Acceptilatio* (1), an *Acquittance* or *Discharge*, by which the Person acknowledged himself to have receiv'd what indeed he had not; as also the *Stipulatio Aquiliana* (2), which by a sort of *Novation*, brought the *Debtor* to Articles of Agreement, and then releas'd him by a *Discharge*; all which tedious Forms and Circumstances the Law of Nature knows nothing of, but makes the Obligation to cease upon the bare Consent of the Party signified.

Besides, the Obligation is presum'd to be remitted, if I designedly deliver up, (not in Trust or such like) the Instruments or Deeds, without which the Debt cannot be made out (e); but if I have several Instruments, and each of them is capable of proving the Debt, then the Obligation is not suppos'd to be cancelled upon the Delivery of one only.

As for what the *Roman* Law observes, that by Delivery of the Deeds the *Creditor* is judg'd to enter tacitly into Compact not to demand

(a) V. D. *ibid.* L. 23. (b) V. l. 7. D. h. t. (c) As *Grotius* well observes, l. 3. c. 19. f. 19. (d) *Epist.* 81. & de *Beneficis.* l. 6. c. 4. &c. (1) *Item per acceptilationem tollitur obligatio*, Instit. L. 3. t. 30. f. 1. (2) *ibid.* f. 2.

(e) Lib. 2. t. 14. L. 2. D. de *Pañis.*

the Debt; that Nicety is unknown to the Law of Nature, which supposes the Obligation cancell'd, not only by real Payment but by the bare Remission of it.

The Obligation is suppos'd to be tacitly forgiven, if the *Creditor* directly or indirectly hinders the Discharge of it: Thus if I bargain with a Man to do any certain Work, and am myself to call upon him when I would have him perform it, my not calling upon him is presum'd to be a *Release*, as is also my substituting another to do it for him.

VIII. But as the former Methods take place, where one Party only is oblig'd, so where both are concern'd, if nothing be yet perform'd, the Obligation may cease upon each Parties dissenting and receding from the Bargain (1); for 'tis natural that the contrary to that which causes the Obligation should be capable of making it void, provided it be not of such a Nature as, when once contracted, never to be rescinded; for no doubt a positive Law may, in certain Cases, forbid that what has been once agreed upon should be retracted, altho' nothing yet be perform'd in it. But if Part has been perform'd, and one Party done something of his Duty, then 'tis plain bare *Dissent* is not sufficient to take away the Obligation (a); which, in this Case, cannot be cancell'd, unless he who perform'd releases the other, or has amends made him some other way (b).

IX. Moreover an Obligation is released, or rather broke off by the *Perfidiousness* of either Party; so that if *one* does not perform his Part, neither is the *other* oblig'd to make good his (2): For when a Man takes upon him any Duty, not absolutely and *gratis*, but upon the Prospect of the other's doing something on his side, the Obligation to make good his Undertaking is only conditional, as if he had said, *I'll do this, in case you will first do that*. Now whatever is founded upon a Condition falls of Course, if the Condition does not appear (c). And therefore the superstitious Exactness of the *Indian*, if it be true, was more than he was oblig'd to; who when another had taken away his Wife against all Right and Reason, would not however break off with him, because he had taken a solemn Oath, that he would never, upon any account, do any Harm (d). But this holds only where the Non-performance lies on his side, who ought to perform first. How far, or whether the Fear left, after I have done my Part, the other should not perform his, frees me from the Obligation, has been discours'd of before (3).

But if one Party has performed in part, and the Contract happens to be broke off before Completion, How shall he have right done him? In this Case we must distinguish according to the variety of Circumstances. For if I have perform'd what I ought, and the other refuses

to perform his part, I have a Right to force him to it by any lawful means: But if after having perform'd part, I begin to be tired and neglect to make an end of it, I cannot oblige that other to make any Allowance for my partial imperfect Performance, 'till I finish the whole according to the agreement; Nor can that *Trite* saying be objected here, that *no one ought to grow rich at the loss of another*, for no regard is to be had to the loss which a Man by his own fault brings upon himself. And if He whom it concerns to have my part of the Covenant fulfilled, is the occasion, why it is not, it is the same thing to me as if it was fulfilled. Nor if he should afterwards repent of his breach of Faith, and be willing to compleat his Contract, shall I be oblig'd to comply with it. For one violation entirely breaks off the Contract, and frees the other from his Obligation; thus should I hire a Servant for a Year, and pay him his Wages before-hand, and for no fault of his should turn him off before the End of the Year, I should not be able to oblige him to return me part of the Wages proportionable to the Remainder of the Time. Nay if each Party has perform'd equally, yet even then, neither can break off the Bargain before the Time appointed: And if one should give back, the other would have a right to force him to compleat it; or to make as much amends, as it was his Interest to have the Compact exactly perform'd.

X. Obligations also expire when the Person, in whom they were founded, changes. Thus the Magistrate, having promis'd Protection to the Subject, is no longer oblig'd to it, than he continues in his Office; and the Subject, having sworn Allegiance to the Magistrate, is freed from the Obligation, if either *he* ceases to be a Subject, or the other to be a Magistrate. But such an Alteration in the subject matter as would have prevented the Obligation, had it existed at the making of it, will not be sufficient to dissolve it afterwards, provided the Party be not thereby render'd incapable of performing it: For unless Provision has been made at first for such Accidents, the Right, which was irrecoverably given, shall continue firm, altho' perhaps *the other* be a little burthen'd by it. For he enter'd into Contract freely and of his own Accord, and may thank himself for not having foreseen those Inconveniencies, that might probably have been prevented. Thus when a People have given up their Liberties to an Arbitrary Power, altho' afterwards they change their Minds, and show a greater inclination for another Form of Government, yet they can not therefore shake off their Allegiance. And thus many, if they had known the Inconveniencies of a Married State, would never have embrac'd it; who yet having enter'd into the Bond, whatever happens, must endure it.

(1) *Eæ obligationes quæ consensu contrahuntur, contraria voluntate dissolvuntur*, Instit. ubi supr. §. 4.

(a) V. L. 18. 1. 5. 1. 2. 1. 3. *D. de rescind. vendit.* (b) V. 1. 58. *D. de Pactis, ubi supr.* (2) V. Grot L. 3. c. 19. §. 14. (c) Not those that defend themselves, but those who are the Aggressors break the Truce. *Thucyd.* l. 1. c. 123. Ed. Oxon.

(d) *In Philostr. L. 3. c. 9. de vita Apollon. Tyanæi.*

(3) B. 3. c. 6. §. 9.

XI. *Time* puts a Period to those Obligations which were limited to a Day; and if the Parties desire to have them continued, they must Covenant again *de novo*, which needs not always be done expressly, but may sometimes be tacitly perform'd (a). But such an Obligation as is void after such a time, and yet has no room to exert it self in before the time expired, is absurd: As if I should make my self indebted to you 100*l.* for three Years, yet so as that you shall have no right to demand it before the time be lapsed; for vain is the Obligation that has no Effect before it expires, nor leaves any behind it after.

But it is another Thing if I Covenant, that unless you demand it within the Compass of three Years, it shall not be due: For that will be a Condition annex'd to the Obligation, which not appearing the Obligation will cease. Thus 'tis usual for a *Surety* to bind himself for such a term only, to oblige the *Creditor* to demand his Money betimes, and while the *Debtor* is able to pay, lest otherwise he should remain bound for ever.

XII. By *Death* those Obligations expire which were founded in the Person of the Deceased; for the *Subject* being gone, the *Accident* must necessarily follow, and the Performance be render'd Impossible in Nature (b). But yet in *Japan* the *Bonzy* persuade Men, That those who give them Money here shall receive ten-fold in the other World: And upon this Account give their *Creditors* a Note under their hand, which they keep carefully, in order to be buried with them (c). But generally the Obligation that lay upon the Deceased is communicated and continued to the Survivors; and this, either when the Survivor takes it upon him, of his own accord, to preserve the Reputation of the Deceased, or for other Reasons; or when the Goods of the Deceased being made over to the Heir, the Incumbrance also goes along with them.

But if a Man dies, and leaves not enough to satisfy his Debt, the *Creditor's* Action seems to die with him; for what can any one do to a dead Carcass (d)? Tho' among the *Egyptians*, the *Creditors* used to bury the Bodies of their *Debtors* in their Houses, which afterwards the Heirs of the Deceased, if they were able, redeemed and interred Honourably. Among whom too, it was usual for the Children to

pawn their Parents dead Bodies, but if they did not redeem them again, they were treated with the greatest Ignominy, and after Death were deny'd Burial (e).

XIII. By *Delegation* a Man substitutes his *Debtor* to his *Creditor* to make Payment for him (1); or I make over to my *Creditor* the Debt another owes me: And here the *Creditor's* Consent is necessary, but not the Consent of the third *Debtor* (2), whom, in this case, I can make over unknown to him, and against his Will: For 'tis the same thing to whom a Man pays, but not the same, from whom he is to demand a Debt.

XIV. There is no need to say much of *Confusion*; for since the same Man cannot be his own *Creditor* and *Debtor*, it follows, if a Man becomes Heir to his *Debtor*, his Action ceases, not finding an Object to exert it self upon.

XV. *Novation* seems to belong Peculiarly to the positive *Civil Law* (3), and not to the *Law of Nature* and *Nations*; for Old Obligations may be alter'd by Consent of Parties, as suppose that the Loss of a Thing, through the Delay of the *Debtor*, should not be imputed to him, that no Penalty or Usury be demanded for Delay, that Pledges be restored, Sureties releas'd, the *Creditor*, for the future, declaring himself willing to depend Entirely upon the Credit of the *Debtor*; but those, that deal according to the Simplicity of the *Law of Nature*, need not here suppose a new Obligation super-induc'd upon the former; for indeed nothing is here transacted, but only the *Creditor* gives up part of his Right, or several Pretensions are blended into one: But that one Action should enjoy one Privilege more than another, is entirely owing to some positive Law, for in the *Law of Nature* those Things that are equally due, may be equally demanded. But, as for what the *Roman Law* delivers concerning such a *Novation* as is got by a Contest at Law, (and which they call *necessary*, as they call the other *voluntary*;) may be apply'd in some Respects to the *Law of Nature*; for he that casts his Adversary, has an Action against him for what the Court adjudges, let the Merit of his former Cause be what it will: So when any Controversy is decided by War, let that be as it will, after the War is at an End, not only the first Pretensions may be demanded, but also that which was determined by the Peace.

(a) Vid. L. 19. t. 2. l. 13. f. ult. D. Locati, &c. (b) Vid. Val. Max. l. 2. c. 6. f. 10. & Pomp. Mel. l. 3. c. 2. says of the old Gauls, 'The Management of their Concerns, and the Demand of their Debts were put off to the other World.'  
 (c) Vid. Bern. Baren. de relig. Japon. p. m. 35. (d) To which the Law of Solon has Regard, Which forbids the the Dead to be used contumeliously. Vid. Plut. Solone, p. 180. Vid. l. 47. t. 10. Add. l. 1. f. 4, 6. & l. 27. D. de injuriis, &c.  
 (e) Vid. Diod. Sic. L. 1. c. 92, 93. Lucian. de luffu, p. 306, 307. Herod. Euterpe. (1) Vid. D. L. 46. t. 2. De Novationib. & Delegation. l. 11. (2) See Mr. Barbeyrac's Second Note upon this Section. (3) See Mr. Barbeyrac's First, Second, and Last Notes upon this Section.

## C H A P. XII.

### Of Interpretation.

SO much for Pacts in general and partly in particular: Let us now proceed to the *Interpretation* of them, for since in all Obligations certain *Signs* are made use of, to express the Minds of the Parties, and the Laws and Heads of the Contract; and since these *Signs* may sometimes be taken in different Senses, 'tis highly Necessary to have some Rule to find out that which is True and Genuine. Now altho' we design to treat hereafter of those Pacts which presuppose Civil Government; and most of what we have to say upon this Head has Relation to such an Establishment (r); yet since it would not be so convenient either to divide the Matter, or to reject the whole to the End of the Book; it will not, I hope, be thought so much against Method, to treat of all together in this place, as *Grotius* (a) has done before me, who has handled this Subject with the utmost Nicety.

II. If then we consider for what End Obligations are made, we shall find that every Man is bound to that which he intended, when he enter'd into the *Obligation*. It is here suppos'd that he enter'd into it freely and of his own Accord, and that the Matter is such as he lay under no Constraint to perform it otherwise: And therefore I don't see how a Man can possibly be obliged farther than he himself intended; in this Sense is that of *Cicero* (b) to be taken; *In Obligations Regard is to be had not so much to the Expression as to the Intent of the Party*.

Farther; such is the Nature of Man, that his internal Actions are not in themselves visible to another, and may differ from his external *Signs* and Actions: And yet we lie under a Necessity to distinguish clearly what every Man is obliged to, or what may lawfully be demanded of him; for there would be no such thing as *Obligation*, if any one might free himself, by affixing what Sense he pleased to his *Signs*, and by pretending that he meant different from what others went away with. And therefore right Reason dictates that he, to whom the *Obligation* is made, should have a right to compel him, from whom 'tis due to the Performance of it, in that Sense which the right *Interpretation* of the *Signs* made use of, importeth. For though the Man himself is chiefly concerned in what he meant, yet others must act by *Signs*; for else the Matter would be to no End or Purpose, which in Morality is absurd. Consonant to this

was the old Form us'd in making Leagues (c), *Sine dolo malo, utique ea hic hodie rectissime intellecta sunt; Without any Fraudulent Design, according to the Sense which the Words at present bear.*

The true End and Design of *Interpretation* is, *To gather the Intent of the Man from most probable Signs*. These *Signs* are of two sorts; *Words*, and other *Conjectures*, which may be considered separately, or both together.

III. As for *Words*; the Rule is (2), *Unless there be reasonable Objections against it, they are to be understood in their proper and most known Signification; not so much according to Grammar, as to the general Use of them* (d).

When *Tiberius* (e) had us'd a Word, which was not *Latin*, *Capito* said, that, in Honour of the Emperor, it ought to pass current for the future, although no Body before him had made use of it: But one *Marcellus* reply'd, *That Cæsar might, if he pleased, naturalize Men, but Words he could not*. *Procopius* (f) having said, *That the Emperor had rais'd an Army, partly among his own Subjects and partly among the Allies*, subjoin'd, *that formerly by the Name of Allies were meant only the Barbarians, who were not Slaves; for they were never conquered, but had obtain'd the Privilege of Citizens, with Arms in their hands, and were so called from the Alliances which they made. But now there is none but who may have a Title to this Name: The way of the World is not to keep Words strictly to that Sense which they did Originally bear; for Men change at Pleasure the Things themselves, little regarding by what Names they were first called* (g). The *Locrians* (h) arriving at the extrem Part of *Calabria*, found that Country possess'd by the *Sicilians*, who alarm'd with their unexpected Arrival, receiv'd them and struck up a League in these Words; *That the Locrians should preserve an Amity with the Sicilians, and permit them to enjoy the Country in Common with them, as long as they should tread upon that Earth, and wear those Heads upon their Shoulders*. These Terms being agreed upon, the *Locrians* came to take the Oath, having first put *Earth* in their Shoes, and fastened the *Heads* of Garlick upon their Shoulders, so as not to be seen. But when they had taken the Oath, they threw the *Earth* out of their Shoes, and the *Heads* of the Garlick from their Shoulders, and watching their Opportunity fell upon the *Sicilians*, and drove them out of the Country. The *Bæotians* (i)

(1) See Mr. *Barbeyrac's* Note upon this Section (a) L. 2. c. 16. (b) *Offic.* l. 1. c. 13 (c) *Leg.* l. 1. c. 24

(2) See Mr. *Barbeyrac's* 1st Note upon this Sect. (d) *Usus, quem penes arbitrium est & jus & norma loquendi*, *Hor. Quint. Instit. Orat.* l. 1. c. 6. (e) *Dio. Cassius*, l. 59. (f) *Hist. Vandal.* l. 1. (g) The Signification of the Word *Sophister*, in Process of time, changed like Money, *Themist. Orat.* 23. p. 287. Edit. *Paris.*

(h) *Polyb.* l. 12. c. 4. (i) *Thucyd.* l. 5. c. 42. Edit. *Oxon.*

made a League with the *Spartans*, and one of the Articles was, that they should deliver up *Panaetum*, which they did indeed deliver up, but first demolish'd it.

*Leucippus* (a) having borrowed of the *Tarentines* the Use of a Place for a Day and a Night, and not being willing to restore it, when they demanded it by Day, he put them off to the next Night; and when by Night, to the next Day.

When *Mahomet* took *Eubœa* he told a certain Person that his Head should be safe, but immediately cut him in two in the middle.

A Petit Prince of the *Indies* fled to the King of *Persia* for Protection, and when his Sovereign demanded him by his Ambassador, the *Persian*, during the Audience, order'd him to be put in a Basket and hung upon a Tree, and then deny'd that he was upon his Land (b). Thus a certain Person deny'd positively that he had laid Hands on a Priest, for he had only cudgell'd and kick'd him. Thus *Temures* having artied with the Garrison of *Sebastia* that no Blood should be shed, nevertheless ordered all the Prisoners to be buried alive. But these Quibbles, as they are too gross and frivolous, so, as *Cicero* observes, instead of taking it off, they rather bind the Perjury upon the Conscience (c).

IV. As for *Terms of Art* which are above the Reach of the common People; the Rule is; That they be taken according to the Definitions of the Learned in each Art. The *Logicians*, says *Cicero* (d), use not the same Words as other Men: they have Terms of their own, as indeed all other Arts have: v. g. the word *Army*; suppose it had been stipulated between two Crowns, that one should not pass through the other's Territories with an *Army*, what number of Soldiers would come under that Denomination? *Grotius* (1) defines an *Army* to be such a Number as dares invade a foreign Country, or face an Enemy in the Field; for we find in all Histories the open Actions of an *Army* oppos'd to what is done by Stealth in the manner of Robbers: yet it cannot be so universally defined, how great a Multitude constitutes an *Army*, as to hold good at all Times, and in all Places: For both the Enemy's Strength, and our own, must be considered. If we have to do with a poor State, a small Force may be esteem'd an *Army*, which yet against some flourishing Kingdoms would be deem'd little better than a handful of Foragers. And therefore when *Vegetius* (e) describes an *Army* to consist of Legions and Auxiliaries, and a competent Number of Horse to carry on a War, he does not describe an *Army* in general, but as it was then amongst the *Romans*; for an *Army* may

be compos'd of only natural born Subjects, or of Allies and Foreigners only; or it may consist of only Foot, or only Horse. *Cicero* (f) tells us that *Crasus* denied any Man to be rich, who was not able to maintain an *Army* at his own Charge, which he (2) defines to consist of Six Legions and a great Number of Auxiliaries. *Polybius* (g) says, the *Roman Army* generally contain'd 16000 *Romans*, and 2000 Auxiliaries; tho' sometimes it did not amount to that Number. In the *Digests* (h), he who has one Legion under his Command, is said to be General of an *Army*. Besides, another Question might be mov'd upon this Word; As, whether the aforesaid Article be violated, if one marches a great Number of Souldiers through the other's Territories, not in a Body but in separate Parties? Now since a Man may be said to have an *Army*, either if he has all his Forces united together in one place, or has them so dispersed as to be able to draw them together upon short Warning, it ought to be farther considered for what End this Article was made; for if it was only for our own Security, 'tis plain the Article is not violated, by the *Army's* marching in small Bodies; but, if it was for the Security of a Neighbour, such a Passage as this breaks the Article. And the same may be applied to a *Fleet*; if in any Treaty it be provided that no *Fleet* shall be suffered to pass in such a part of the Sea; for here not only the Number of Ships, but their Bigness and the maritime Strength of the People concern'd is to be consider'd (i). And so in respect of a *Fort* prohibited to be rais'd within such a Distance; the Word may signify either a high and regular Fortification; or any fortified Place whatsoever, although consisting of low pitiful Buildings. And therefore, if the Design of the Article be to prevent any fortified Place from giving Umbrage to our Territories, 'tis plain that it is against the Treaty to throw up so much as a little Bulwark of Earth, with small Huts to lodge Souldiers in (k).

But if *Terms of Art* happen to be differently defined by different Persons, to avoid Quarrels, it will be convenient to express in common Words in what Signification the Word under Debate shall be taken.

V. When a single Word or Sentence is capable of several Significations, Conjectures are necessary to find out the true. Both of these Cases the *Rhetoricians* call *Ambiguous*. But the *Logicians* are more nice, who, if the Variety of Significations lies in a word, call it *Equivocal*, if in a Sentence, *Ambiguous*. An Example of the former we meet with in *Tertullian* (1), who tells us that the Word *Woman* in 1 Cor. XI.

(a) *Strabo*, l. 6. p. 183. Edit. *Genev.* (b) *Olearius*, itin. *Perf.* l. 4. c. 30. (c) *Off.* 3. c. 32. *Fraus enim adstringit, non dissolvit perjuriam.* (d) *Qu. Acad.* l. 1. c. 7. (e) *Ubi supra.* (f) *De re militari*, l. 3. c. 1. (g) *Paradox.* 6. (2) In the same place. (g) L. 6. (h) *Lib.* 3. t. 2. l. 2. f. 1. *D. de his qui not. infam.* &c. (i) To this belongs that of *Florus*, l. 1. c. 11. n. 10. Ed. *Græv.* The Spoils of *Antium* are in Being, which *Mæmus* fix'd in the *Forum* having taken the Enemies *Fleet*, if it may be called a *Fleet*. For there were six Ships with Sterns, and that Number then was enough to enter into an Engagement with. *Add. Alber. Gent. de jure belli*, l. 3. c. 20. (k) *Add. Alber. Gent. d. l. 21.* (1) *De uelantibus Virginibus*, c. 2.

s, &c. ought to be extended to *Virgins* also. Although sometimes it is oppos'd to *Virgin*, as in *Cicero* (1). *To-morrow she will be a Woman*. *Cicero* (a) gives this Example of the latter: A certain Man had bequeath'd a Legacy in these Words; *Hæres meus vasorum argenteorum pondum centum novercæ, quæ volet, dato. Let my Heir give his Mother-in-law 100 weight of Plate at pleasure*. Upon this the Lady demanded the finest and best wrought Plate: But the Heir interpos'd that the Choice was left to his *Pleasure*. The Ambiguity had been avoided by the Addition of the word *His* or *Her*. The *Roman Law*, in such a Case (2), gives the Legatee the *Option*, and indeed there is Reason for it. For had the *Option* been design'd to be left at the Discretion of the Heir, there had been no need of the Clause at *Pleasure*. For if a thing is enjoin'd me at large (3), and I have several ways of satisfying the Obligation, 'tis left to my self to choose which way to do it. But when a Clause is added concerning the Choice, 'tis designed in favour of the Party which is to receive, that the Other may not obtrude some pitiful, worthless Thing upon him (b).

As for the famous Decision of the Duke of *Offona*, Viceroy of *Naples*, who decreed the whole Inheritance to the Son against the Priests, who were left Heirs with a Clause *To give the Son what they would*, Strictness of Justice does not plead in behalf of it, so much as the odious Covetousness of that sort of People which are always hankering after other Mens Estates.

Another Instance we have in the Answer *Charles V.* gave the *French Ambassador*, when he demanded the Dukedom of *Milan*: *That which pleases my Brother the French King, pleases me also*. Which the Ambassador in great haste gave his Master Advice of, as if he had gain'd his Point (c).

VI. Besides, when we meet with a \* *seeming Repugnancy* in the Terms, Conjectures are necessary to work out the genuine Sense by reconciling, if possible, those Terms that seem to be repugnant. But if there be a clear evident Repugnancy, the latter Contract vacates the former (d): For no Man can Will Contradictions, and it is the Nature of Acts, which depend upon the free Will of the Agent, or over which no Man has acquir'd a Right, to be disclaim'd by a contrary motion of the Will. And this Change of the Will, in order to annul an Act is sometimes requir'd on one side only, as in making Laws, Wills and Testaments, &c.

and sometimes on both sides, as in Contracts, which, unless the Law interposes, can't be dissolv'd without the Consent of both Parties. From hence, by the way, it appears how *Lycortas* might have excus'd his Neglect, in not mentioning, when he went to renew the League between the *Acheans*, and the King of *Egypt*, which, of the many Leagues that are between them, he would have renew'd: for he might have said, that those which were never broken needed not to be renewed, and in the renewing of those which had been broken, he ought to be presum'd to mean the last (e).

For an Instance of two Laws, that seem to thwart one another; One enacts, *That a Statue be erected in the Gymnasium in honour of the Person that kills the Tyrant*; Another says, *That no Woman's Statue shall be plac'd in the Gymnasium: Now a Woman kills the Tyrant* (4). In this case, I should judge in favour of the Woman. For the Reason of the first Law was, that the Youth, which is train'd up to Valour in the *Gymnasium*, should by such sort of Honour be stir'd up to imitate brave Actions: The Reason of the latter is because the Vertues proper to Women are not generally the Object of Men's Imitations. But, in this case, since a Woman has out-done her Sex, she deserves the rather to have her Statue put up in the *Gymnasium*; for such Bravery in a Woman would be a greater Incitement to Emulation in the Men (f).

But sometimes the same Law seems to clash with it self. As for Instance; the Law says, *That a Woman, who has been debauch'd, may choose either to marry the Man who has injur'd her, or to have him put to Death. Here is a Man that has debauch'd Two, whereof one chooses his Death, the other demands him in Marriage*. In this Case, the Reason of the Law will decide the Business: For here the Law by permitting the Woman to choose the Death of the Man, did not suppose that many such would desire it; but the Good of the poor Woman was herein consulted, lest she should for ever continue without a Husband; for the Man, after the Heat of his Love was over, might cast her off, as not likely to deny others those Favours, which she had so unlawfully granted him: nor would it be easy to find one who would willingly marry her that had been deflowred by another. And therefore she that demanded the Man in Marriage ought to be prefer'd: For this answers best the Design of the Law which had the Convenience of the Woman, rather than the Death of the Man in

(1) Apud Quintil. Instit. Orat. l. 6. c. 3. (a) De Invent. l. 2. c. 40. (2) Vid. D. l. 33. t. 5. De Electione vel Optione legata, l. 2. princ. & f. 1. (3) Vid. L. 23. t. 3. De jure dotium, l. 10. f. 6. (b) Add. Auth. ad Herren. l. 1. c. 13. Quint. Instit. Orat. l. 7. c. 9. (c) Marsaler Legato, l. 2. c. 39. \* *ἰβάρνοσφεία*. (d) Lib. 1. t. 4. l. 4. D. de const. Princip. V. Jur. Canon. cap. 3. de rescriptis. Liv. l. 9. c. 34. 'Where Two Laws thwart one another the new one abrogates the old. (e) Vid. Polyb. excerpt. leg. 41. (4) Quint. Instit. Orat. l. 7. c. 7. (f) There is another Example in Cicero de Invent. l. 2. c. 49. One Law says, 'Whosoever kills the Tyrant let him be rewarded as a Conquerour at the Olympick Games, and let him demand what he pleases of the Magistrate, and let the Magistrate grant his Request. Another Law runs thus, 'Upon the Death of the Tyrant, let his Five nearest Relations be put to Death. Alexander, who had exercised Tyranny over the *Phereans* in *Thessaly*, being kill'd by his Wife *Thebe*, She, for her Reward, demands her Son whom she had by the Tyrant. Some were of Opinion that by the Law the Son ought to be put to Death.

its Eye; and after this Rate one of them, at least, will be provided with a Husband, whereas otherwise both will be forced to remain single. Besides, when there is as much to be said on the one side as on the other, the more favourable Sentence ought to prevail (a).

But sometimes the words clash in some particular Case, as in this Instance: There is a Law (1), *That a Man, who has behaved himself honourably in the War, shall have whatever he demands; here are Two such, who both demand the same Virgin; since both cannot be satisfied, which must be preferr'd?* I answer, he that made the Demand first. But if both demanded together they must draw Lots; for tho' the Law gives an unlimited Liberty of demanding, yet it must be supposed to be restrain'd to those things which can conveniently be granted. Another Example is propos'd by *Philostratus* (b) in the Life of *Secundus*. *He that raises a Sedition, is to be hang'd; he that quells it, to be rewarded: the same Man both raises a Sedition and quells it, and demands his Reward.* In which Case *Secundus* with good Reason argues thus, *Provided you first suffer Punishment for raising the Sedition, you shall then, if you please, receive the Reward for quelling it.* In such Cases as these, where Words are evidently Obscure, we are forc'd to have recourse to *Conjectures*.

These *Conjectures* are sometimes built upon such good Grounds, as that the genuine Sense forces it self upon us even against the receiv'd common Signification of the Word. To this Purpose is that Distinction of the *Rhetoricians* between the \* *Letter* and the *Design*. As for Instance; *The Law makes it Capital for any Foreigner to presume to mount the Walls* (2): *But in a Siege a Foreigner mounted the Wall and beat down the Enemy that was ready to scale it.* Now the *Letter* is against the Foreigner, the *Design* for him; according to which, no doubt, Judgment ought to be given; for the *Design* of the Law was to prevent any Foreigner from mounting the Walls as a Spy; which Reason in the present Case ceases (c).

But we must take notice that sometimes a *Repugnancy* is suppos'd, when indeed there is none, viz. when Words are taken in a larger Signification than the Speaker design'd them. A notable Instance of this we meet with in *Josephus* (d): where King *Zedechias* would believe neither *Jeremiah* nor *Ezechiel*, because he thought they contradicted one another; for the one asserted that he should be carried away into *Babylon*: the other, that he should never see *Babylon* with his Eyes. The two Prophets

were very consistent with each other; for he was carried away to *Babylon*, but his Eyes were first put out.

VII. *Grotius* has assign'd three *common places*, from whence we may trace out the Design, where the Words are obscure or ambiguous, viz. The *Subject-matter*, the *Effects*, and the *Circumstances*.

As for the former 'tis in the Mouth of every *Civilian*, That *Words ought to be understood according to the Subject-matter of them* (3); as if a Man promises to defend you in the Possession of the Goods you buy of him, his Promise is not suppos'd to extend to any extrajudicial Violence (e). I fancy this Rule may be applied to the Vow of *Jephtha* in *Judges* XI. 31. and to that of *Agamemnon* in *Cicero* (f), who having vow'd to offer up to *Diana* the most Beautiful Creature that should be born that Year, sacrific'd *Iphigenia*, who indeed was the most beautiful which that Year produc'd: But he who talks of Sacrificing is presum'd to mean a *Subject* fit to be made a Sacrifice of (g).

So if a Truce be made for Thirty Days, it must be understood of *natural* Days consisting of Twenty four Hours: not of *artificial*, or the space of the Sun above the Horizon. And therefore it was a frivolous Quibble of *Cleomenes*, who had made a Truce with the *Argives* for so many Days, but the third Night finding them sleeping and unprovided by reason of the Truce, set upon them, and slew some, and took others: and when he was upbraided for his Perjury denied that the Nights were comprehended in the Treaty (h). In vain also did *Mycerinus* King of *Egypt* endeavour to convict the Oracle of Falshood; for the Oracle foretold that he should live no more than six Years: but he order'd Candles to be lighted up, and revell'd by Night as well as Day, as if by thus using the Night as Day he could make Twelve Years out of Six (i).

Thus the Word *Arms* denotes sometimes the Weapons of War, sometimes the Warriors themselves, according as the *Subject-matter* of the Discourse directs. For if it be an Article that neither Party shall use *Arms* against a Third, 'tis plain Souldiers or an Army, is meant by it: but if upon the Surrendry of a Garrison it be stipulated that they deliver up their *Arms*, not the Souldiers, but the Weapons are suppos'd by it (k).

The *Plataenses* having promis'd to restore the *Theban* Captives, ought to have restor'd them alive, not dead (l). For the Treaty was concerning living Men and not the Carcasses of them (m).

(a) Though most of the Declaimers in *Seneca*, l. 1. contr. 5. seem to be of a contrary Opinion.

(1) See *Seneca's* 31st Controversy. (b) *De vitis Sophistarum*, l. 1. in fin. \* *ὅτι πῶς ἂν διαβοῖται.*

(2) *Pergrinus, si murum ascenderit, capite puniatur*, *Quintil.* l. 7. c. 6. (c) *Add.* l. 39. t. 4. l. 15. *D. de Publicanis*, &c.

(d) *Archcol. Jud.* l. 10. c. 10. (3) *Vid. lib.* 45. t. 1. l. 10. *D.* (e) *L.* 19. t. 2. l. 15. f. 4. *D. locati*, & l. 39. t. 2. l. 43. *D. d. omni insecti*, &c. *L.* 4. t. 49. c. l. 17. *de act. empt. & vend.* (f) *Off.* 3. c. 25. (g) *Add.* *Everhard. loc. legal.* 40. which is about the *Subject-matter*.

(h) *Plut. Apophth. Lacon.* pag. 223. \* Such another Trick the *Thracians* used against the *Dartians*, *Strab.* l. 9. p. 277. (i) *Herodotus, Euterpe.* (k) *Add.* *Alber. Gent. d. l. c. 20.* (l) *Thucyd.* l. 2. init.

(m) *Hector erat tunc cum bello certaret, at idem tractus ab Aemonio non erat Hector equo*, *Ovid. de Trist.* l. 3. El. 11. v. 27. 28. *Sic Pericles cum quibusdam hostium ita Pactus legitur ut ipsi ferrum deponerent; postea eosdem pacti violati insimularunt; argutus eos non deposuisse fibulas ferreas quas in laciniis vestimentorum gerebant. Lex est, qui nocte cum ferro deprehensus fuerit, alligetur; cum anulo ferreo inventum magistratus alligavit*, *Quint. Inst. Orat.* l. 7. c. 6.

It was a wretched Fetch of *Labeo's*, who having by the League a Title to half of *Antiochus's* Fleet, cut every Ship in Two, and so depriv'd the King of his whole Navy (a). Thus the (b) *Campanians* struck up a League with their Enemies, and one Article was that they should have half their Arms restor'd them: but they cut each Weapon in Two, and so deliver'd them half.

*Xiphilinus* (c) tells us of two Souldiers, who having got a Hoghead of Wine amongst their Plunder, and being commanded to divide it, cut it in Two with their Swords. *Rhadamistus* swore to *Mithridates* that he would not either by Sword or Poyson do him any Harm; but presently after, he smother'd him in his Bed (d).

VIII. Secondly, The *Effects* and the Consequence do very often point out the genuine meaning of the Words: For where Words, if they be taken literally, are like to bear none, or at least, a very absurd Signification; to avoid such an Inconvenience we must a little deviate from the receiv'd Sense of them (e) (1). And therefore it was absurd in the *Athenians* (f), having promis'd to relinquish the Territories of the *Bœotians*, to deny the Ground that they had encamp'd upon to be the *Bœotians*. With the same Cavil did *Alexander* elude the Conditions that *Darius* propos'd to him. *Darius* had offer'd him all the Land that lay between the *Euphrates* and the *Hellespont*; to which *Alexander* reply'd, *He offers very liberally all on that side the Euphrates, Where is it then that he speaks to me? I am already beyond the Euphrates: And therefore the whole of the Dowry he offers is less than what I am already Master of: drive me hence, that I may be assur'd that what you offer is your own* (g). As if it was the same thing to possess a Place by Force of Arms, and to possess it peaceably, and with the Concession of the former Master.

*Lewis XII.* agreed with the *Pope's* Legat, that the Bishopricks, void by the Death of the Bishops in *France*, should be at the King's Disposal. But a *French* Bishop happening to die at *Rome*, the *Pope* immediately nominated a Successor, and the *King* as soon another; which occasioned great Differences. In this Case, were I Judge, I should not scruple to pronounce in favour of the *King*; for to render an Office vacant, 'tis no matter in what Place the Incumbent dies: and if such a Cavil had been admitted, the King's Right might have been invaded several ways (h).

At *Bologna* it was enacted, that *Whosoever*

drew Blood in the Streets, should be severely punish'd (i). Upon which Law a Barber was indicted for opening a Vein in the Street, and it had like to have gone hard with him, because it was added in the Statute, that the Words should be taken precisely, without any Interpretation. In *Quintilian* we have this Case; *A poor Man and a rich Man were Friends: The rich Man in his Will made another Friend his Heir, but bequeath'd to the poor Man as much as he, in his Will, had bequeath'd to him. The poor Man's Will is produc'd; by which it appears that he had made the rich Man Heir of all; and therefore he demands the whole Inheritance. He that was the written Heir was for giving only so much as the poor Man was worth* (k). And indeed this is to be said for the written Heir, that if he did not obtain the Cause, his being made Heir would have had no Effect. As for the Interpretation of the Laws of the Land, that of *Cicero* (l) must every where take place. *All Laws*, says he, *ought to be referr'd to the Benefit of the Commonwealth, and ought to be interpreted according to the publick Advantage, not according to the Letter; for no one would have the Laws regard'd for the Sake of the Laws themselves, but for the Sake of the Common-wealth.*

IX. Besides, Thirdly, It gives great light to the Interpretation of obscure Passages to compare them with others that have some Affinity with them; as to consider, what the same Author says in another Place, where he handles the same matter; or to compare them with what goes before and follows in the Context. For in a doubtful Point the Author must be suppos'd to be consonant to himself: And therefore, if in one Place he has express'd his Mind clearly, we ought to presume that he is still of the same Mind in another Place, unless it expressly appears, that he has chang'd it (m). Thus if two Men should bargain for Wheat without mentioning the Quantity, it would be an imperfect Bargain (n): But if by their former Dealings it appear'd, that such a sort and such a quantity was thought of and design'd, it is as good, as if it had been actually express'd (o). This may be Illustrated from *Homer* (p) in the Duel between *Menelaus* and *Paris*. They had agreed that the Conqueror should enjoy *Helen*; *Paris* being worsted provided for himself by flight, and *Agamemnon* proclaim'd *Menelaus* Conqueror, and that therefore *Helen*, according to Articles, ought to be his. And the Poet makes *Jupiter* of the same Opinion, who declares himself (q),

(a) Val. Max. l. 7. c. 3. tho' Livy l. 38. c. 38. says nothing of the cutting of the Ships. (b) Polyœn. l. 6. c. 15.

(c) Epit. Dion. in Caracalla, ad ann. 217. (d) Tac. Ann. XII. 47. (e) There is an Example of this in the

League whereby *Lewis XII.* of *France*, took the City *Bologna*, and his petty Prince *Bentivoglio*, into his Protection;

which he afterwards cavilled at, in a manner very unbecoming a King. Guicciard. Hist. l. 5. p. m. 134. & p. m. 146.

(1) Cicero. dicit nullam esse Legem quæ aliquam rem inutilem, aut iniquam fieri velit, De Invent. L. 2. c. 47.

(f) Thucyd. l. 4. c. 98. (g) Q. Curtius, l. 4. c. 11. (h) V. Marsel. Legat. l. 1. c. 38. (i) Everhard loc. legal. 8.

ab absurdo. (k) Declam. 332. (l) De Invent. L. 2. c. 38. Which was the chief Reason why the *Falcidian* Law

and *Pegafian* Decree assigned the Heir a *Dodrans* over and above; for so the Heir and Legatee were both provided for.

(2) In all the Editions of the Original, our Author has it *dodrantem*; 3 parts instead of one in 4, *quartam partem*.

See Mr. *Barrbeyrac's* 5th Note upon this Section. (m) The meaning of the Author is to be gathered from his

other Writings, from his Practice, his Sayings, his Design, his Life. Cic. de Invent. l. 2. c. 40. (n) D. L. 45.

t. 1. De verb. oblig. l. 115. princip. (o) De verb. oblig. L. 94. D. eod. Ziegl. ad Grot. d. l. f. 7. (p) Iliad. r. & Δ.

(q) Iliad. Δ. v. 13.

ἄλλ' ἦτοι νίκη μὲν ἀρηϊφίλῳ Μενελάῳ.

*Brave Menelaus gains the Victory.*

Besides, he that imposes the Conditions must be the best Interpreter of them; for he on whom they are imposed, has no Power of adding to them. But the Conditions (as *Hector* express them) had no Relation to Slaughter or Death, but to Victory only; for *Helen* was to be adjudged to him that prov'd the better Man, but the Conqueror, and not he that slays the other is such; for a brave Man may fall by the Hands of a Coward. On the other side, it might be argued, that in Decrees, Laws, Leagues, and Pacts, a latter Condition takes place of a former; and that the last Condition, that *Agamemnon* had added, was *καταπέφνη*, expressing the Death of the Conquer'd (1), and so *Priamus* seems to have understood in saying,

*Jove and the Gods eternal only know  
Which of the Two is doom'd to Shades below (2).*

Besides, the former Condition is included in the latter, for he that kills conquers, but not vice versa. And therefore the Condition which *Hector* propos'd, *Agamemnon* did not annul, but explain'd (3): did not change, but added to it that which was of the greatest Moment, that the Victory should consist in the Death of the Adversary; for that is undoubtedly Victory, whereas the other may bear a Dispute. *As therefore where Laws are really repugnant, the Judges embrace that which is evidently clear in Preference to that which is obscure: So we look upon that Pact to be better and more valid, which is decisive of the Controversy, and liable to no Exception (a).*

X. But that which helps us most in the Discovery of the true meaning of the Law, is, the Reason of it, or the Cause which moved the Legislator to enact it. This ought not to be confounded with the Mind of the Law; for that is nothing but the genuine Meaning of it, for the finding out of which, we call in the Reason of it to our Assistance. And this is of greatest force when it evidently appears that some one Reason was the only Motive that the Parties went upon, which is no less frequent in Laws than in Pacts. And here that common Saying takes place, that *The Reason ceasing, the Law it self ceases*: But if several Reasons concur together, and only one ceases, the others do not immediately expire, or become less able to support the Efficacy of the Law. Nay sometimes the general Reason of the Thing seems to draw one way, and the Absolute Will of the Legislator another, and, in such a Case, the Will of the Legislator must be deem'd by the

Subjects a Reason, which if it be but clearly signified, altho' not altogether so congruous to the Laws of Prudence, yet suffices to create an Obligation. From these premises may be rightly infer'd, that a Present made in Prospect of Marriage (4) may be revoked and demanded back, if the Marriage does not succeed; especially if it sticks on that side to whom the Present was made. Tho' generally in such Presents as pass among the Living, the Reason of them has not the force of a Condition (unless it be expressly mention'd) so as to make the Fact null, where that does not appear. And therefore the *Olynthii* were not unjust in refusing to restore the Land which *Amyntas* King of *Macedon* had given them, when, being defeated by the *Illyrians*, he had lost all Hopes of defending his Kingdom (b).

Yet in some Cases, the Law it self may sustain the Place of a Condition (c). And therefore *Cicero* (d) to the interdict which (5), amongst others, had these Words in it, *From whence you or your Family, or your Agent, &c. rightly argues: altho' one Servant be not a Family, yet if that one Servant dispossesses me, 'tis plain I ought to be restor'd from the Reason of the Edict (6).* Nor is there any Difference whether my Agent, or any Body else in my Name, dispossesses another: He adds, the Reason is the same in this Case, whether your Agent (as the Word signifies one that manageth all your Concerns in your Absence with full Power, as your Attorney or Substitute) or your Neighbour, or Client, or Freed-man, or any other disturb me upon your Account and Intreaty (e).

Another Instance of a Case which may be decided from the Reason of the Law (f); *The Law is, that those, who in a Storm, forsake the Ship, shall lose all; and the Ship and the Lading shall be theirs that stay in it. But in a very dismal Tempest all forsake the Ship, except one sick Man who is not able to get out and escape: the Ship by chance comes safe to Port; the sick Man seizes it as his: the Owner puts in his Plea against him.* Now the Reason of the Law was, that those who had expos'd their Lives to save the Ship, should have some Encouragement; but this the sick Man can't pretend, who neither stay'd in the Ship upon that account, neither contributed any Thing to the saving of it.

XI. Besides, the same Word admits of sometimes a more loose, sometimes a more strict Interpretation, which may happen upon several accounts. Sometimes the Name of the Genus is peculiarly apply'd to one of the Species; as in the Words *Adoption* (7) and *Cognition* (8). In the Names of Animals, where the Word is not of the Common Gender, the Masculine includes the Feminine, and vice versa. Sometimes Art gives a Term a larger Signification than common

(1) *Homer. Il. 3. v. 281.* (2) *Homer. Il. 3. v. 309.* (3) *Ibid. v. 91, 92.* (a) *Plut. Symp. l. 9. q. 13. p. 743. A.*  
 (4) See above in B. 4. c. 9. f. 4. towards the End. (b) *V. Diod. Sic. l. 15. c. 9* (c) *Vid. Cod. L. 8. Tit. 56. de revoc. donat.* (d) *Orat. pro A. Cæcina. 19.* (5) *V. Instit. L. 4. t. 15. & D. L. 43. t. 16. De vi & de vi armata l. 1. princip.* (6) *V. Cicero. ubi supr. c. 19. & 20.* (e) *Add. Lib. 8. t. 3. l. 12, 13. & L. 27. de legibus.* (f) Which is put by the *Aut. ad Herren. l. 1. c. 9.* (7) *V. Instit. L. 1. t. 11.* (8) *V. L. 1. t. 15. Instit. De legitima agnatorum inst. l. 1.*

Use: As *Death* in the *Roman Law* is extended even to Banishment, which in popular Use signifies only the Separation of the Soul from the Body. Hither may be referr'd the Ambiguity in the Words, *Mine, Thine, Yours, &c.* which *Martial* (a) plays with;

*Carmina Paulus emit, recitat sua Carmina Paulus  
Nam quod emis, possis dicere jure tuum.*

You Verses buy, your Verses you recite,  
For what you buy, that justly is your Right.

XII. Moreover, in Promises and Pacts, as also in Privileges, some things are *Favourable*, some *Odious*, and others of a middle or *mixt Nature*.

Those are *Favourable* which carry an Equality along with them, or which equally oblige each Party; and which tend to promote the common Advantage, and the greater and the more extensive the Advantage is, the better Title have they to *Favour*. Those also are favourable which make for the Preservation of Societies, and without which some Act would be to no End or Purpose. Besides, to avoid an Inconvenience is more *favourable* than to gain a Convenience (b); and greater *Favour* is allow'd to that which makes for Peace, than that which makes for War; and a defensive War is still more *favourable* than an offensive.

On the other side, those are *Odious*, which lay the Burthen on one Party only, or on one more than the other; that also which carries a Punishment along with it; or makes any Act of no Effect; or changes any Thing in former Constitutions; and such as tends to the Destruction of Friendship and Society.

Those that are of a *mixt Nature* (as suppose former Constitutions are changed, yet for the Sake of Peace) according to the Greatness of the Good, or the Change, are sometimes *Odious*, sometimes *Favourable*; yet, *ceteris paribus*. *Favour* ought to take place (i).

XIII. Upon these Distinctions *Grotius* builds the following Rules.

1. In Cases that are not *Odious*, Words are to be understood according to the full Propriety of popular Use; and if in popular Use there be several Significations of the same Word, the largest is to be taken. Thus sometimes the *Masculine* is to be taken for the *Common Gender*; as if leave be given to kill any Game in such a Forest, except *Bucks*, under that Name *Does* also ought to be comprehended (2). In such Cases too an *indefinite* Word is to be taken universally; as if it be stipulated in a Treaty, that the Captives shall be return'd on both sides, it must be understood of all and every one of them. So *Cicero* (c) argues in the aforefaid Interdict, that

the Words, *From whence a Man has been ejected*, ought to be extended even to him who is hindered from coming to his own (d). For this Sense is not repugnant to the Nature of the Words; and in *Favour* a Man ought to be put in Possession of his own; for to dispossess is to hinder one from continuing in Possession (e), but a Man continues in Possession altho' he sometimes goes out upon necessary Occasions. And therefore it is the same thing whether a Man actually turns me out of my House, or, while I am out upon necessary Business, hinders me from coming in (f) (3). From the force of this Rule it is that, in a doubtful Case, if it be a Matter of *Favour*, the Year begun is look'd upon as compleat, where another's Right is not injured by it (g). And against this did *Caligula* (h) offend in denying those, whose Ancestors had obtain'd the Freedom of *Rome* for themselves and their Posterity, a Title to it, unless they were their Sons, affirming that *Posterity* ought not to be understood beyond that Degree (i). Yet I am afraid *Dido* made use of too *favourable* an Interpretation, who when she had purchased so much Ground, as she could cover with an Ox's Hide, cut the Hide into thin Pieces and so seiz'd upon more Ground than she had really bargain'd for (k). By the same Trick did *Ivorus* buy as much Land as he could encompass with the Hide of a Horse, which he afterwards cut into several small Thongs, and encompass'd Land enough to build a City upon (l).

2. In a Matter of *Favour*, if he that speaks be learned in the Law, or speaks by the Advice of those that are, his Words are to be taken in the most comprehensive Signification; so as not only to import as much as they do in common Use, but to include that Signification also which is used amongst the Lawyers, or which the Civil Law has impos'd upon them.

3. On the other hand; Words shall be taken in a stricter Sense than the Propriety requires, if otherwise Injustice or an Absurdity would follow.

4. Altho' it be not absolutely necessary for the avoiding Injustice to take the Words in a stricter Sense than their Propriety demands, yet if there be a manifest Advantage in such a Restriction, we ought to step at the narrowest Limits of their proper Signification, unless Circumstances persuade otherwise.

5. In an *Odious Matter* a figurative Speech may be admitted to avoid a Grievance; thus in a Donation, or when a Man recedes from his Right, Words, altho' deliver'd at large, are usually confin'd to those things only, which were suppos'd to be then thought of. And therefore *Cicero* (m) argues right, that tho' a Man bequeaths to his Wife all the Money he

(a) L. 2. Ep. 20. Id. l. 6. Ep. 12. Jurat capillos esse, quos emit, suos Fabulla; nunquid, Paule, pejerat? (b) Quint. Inst. Orat. l. 7. c. 4. p. 539. Ed. Lugd. Bat. (1) See Mr. Barbeyrac's 1st Note upon this Section. (2) See Mr. Barbeyrac's 1st and 2d Notes upon this Section. (c) Orat. pro Cæcina, &c. (d) Add. L. 43. t. 16. l. 3. f. 8. D. de vi & vi armata. (e) Add. l. 3. f. 7. D. h. t. (f) Add. L. 19. t. 2. l. 29. D. locati, &c. (3) V. D. ubi supra. Leg. l. f. 24. (g) V. Buffier's Hist. Franc. l. 19. p. 39. (h) Suet. c. 38. (i) Add. L. 1. t. 6. l. 4. D. de jure immunitatis. (k) Just. l. 18. c. 5. Virg. Æn. l. 1. v. 371. & Cerda ad h. l. (l) Apud Saxonem Gramin. l. 9. & Polyd. Virg. Hist. Angl. l. 5. (m) In Topicis, c. 3.

has, yet his Debts are not therefore bequeath'd unto her; for there is a great deal of Difference between ready Money, and such as is due upon Bonds. Thus *Aurelian*, when he set out on his Eastern Expedition, promis'd the People Crowns of two Pound Weight, if he return'd Conqueror: And when the People expected Crowns of Gold, which *Aurelian* (1) was neither able nor willing to bestow, he gave them only Crowns of Bread (a). Nay though a Man expresses himself univ'ersally, if afterwards a particular Enumeration follows, the Law won't allow any thing to be made over, but what was particularly express'd. And when one Nation has stipulated to send another Auxiliary Forces, it is suppos'd that they are to be sent at the Expence of him to whom they are promis'd, unless it was expressly otherwise agreed between them. And thus a League made for the Defence of a Dominion, when the Lord is in Possession of it, does not extend to the Recovery of it when he is ejected (b). Sometimes the *Odium* of the Person justifies a *strict* and almost quibbling Interpretation: Thus the Lady that betray'd the Capitol, and had bargain'd for her Pains to have what the *Sabines* carried upon their left Arms, meaning their Bracelets, was buried under their Shields (c).

XIV. *Grotius* applies these Rules in a few Examples: As thus, *It is demanded, if a Reward be propos'd for him that first gets to the Goal, and two come in together, whether it be due to both or to neither?* Indeed the *first*, in this Case, may signify either him who out-runs all the rest, or him whom none out-runs: And therefore if the Reward was only a Wager between the Parties, and both come to the Goal together, they must draw Stakes. And the same holds, if two Spectators, as is usual, had laid a Wager on this or that Man's Head. But if the Reward was propos'd by a third Person to encourage their Industry, then those who come in together ought to divide it, if it be capable of Division; or else to enjoy it both together; or, if that cannot be, to draw Lots for it, or to run again; for 'tis hard that both should be deprived of the Reward, because neither was worse than the other: Besides, the Rewards of Vertue ought not to be confined to so *strict* an Interpretation; And therefore it would be generous in the Patron to give the whole Reward to each that perform equally (d). But what *Augustus* gave the Robber *Coracotta*, (who having heard that such a Sum of Money was laid upon his Head, surrender'd himself,) proceeded rather from the Greatness of the Emperor's Soul, than that it was due from him (e).

XV. In the Treaty which put an End to the second *Punick* War, there was a Clause, *That the Carthaginians should not wage War, either in Africa, or out of Africa, without leave of the Roman People* (f). Ought this to be understood of an offensive War only, or of a defensive also? Certainly only of an offensive War; for otherwise that Clause would be *Odious*, as inconsistent with the very Being of the State of *Carthage*. Besides, 'tis hard to retrench One's natural Liberty, so far as not to permit him to defend himself against an Injury (g). Nor was it the Design of the *Romans* by this Clause to expose the *Carthaginians* to the Insults of their Neighbours, or to render them entirely dependent upon their Arms for Protection, but only so to tie them up, as that they should not enlarge their Territories, or increase their Strength by War. Indeed when the *Romans* made such a League with *Antiochus*, they inserted this express Clause (h); *That if any Nation, against whom Antiochus by these Articles is debarr'd from waging War, should set upon him first, he should then have liberty of Warring against them* (i).

XVI. The *Romans* promis'd the *Carthaginians*, that *Carthage* should be a free City: and a little after demanded of them that they would Demolish it, and build another at a greater Distance from the Sea; pretending that the Spot of Ground, upon which the City stood, was not *Carthage* (k). Here tho' the Freedom, which the *Romans* promis'd, can't be understood of a full entire Liberty, that having already suffer'd no small Diminution; yet, at least, so much Liberty ought to be understood, as that they should not be oblig'd, at another's Command, to destroy their native Country, and betake themselves elsewhere. Indeed Liberty, or a Privilege of being govern'd by one's own Law, is the Attribute of a People, not of a City, as it consists of Walls and Houses (l); yet since it was said that *Carthage* should be free (not the *Carthaginians*, by which way of speaking the *Romans* might have colour'd over their Cheat) the natural meaning of the Words intimate, that the People should enjoy their Liberty in the City *Carthage* that then was, and also that the Buildings themselves should be secure. *Polybius* (m) relates, that the Senate had promis'd, that *They* should have their Liberty, their Laws, all their Lands, the full Possession of all their Goods both publick and private; and that the *Carthaginians* presently suspected why there was no mention made of the City. But indeed 'tis evident, that the *Romans* here were guilty of more than *Punick* Perfidiousness.

XVII. There are other *Conjectures* founded

(1) See above in B. 3. c. 5. f. 10. and Mr. *Barbeyrac's* 1st Note upon it. (a) Which were called *Siligineæ*. *Panis Siligineus* White Bread. *V. Fl. Vopiscum in Aurel. c. 35.* (b) *V. Guicciard. Hist. l. 15. p. m. 433. b.* (c) *Tarpeia. V. Plut. Romulo, & Liv. l. 1. c. 11.* (d) *V. Liv. l. 26. c. 48.* (e) *Dio. Cass. l. 56.* (f) *Liv. l. 30. c. 37. Polyb. l. 15. c. 18.* 'The like Article we find in the Peace which *Flaminius* gave to King *Philip*, *Liv. l. 33. c. 30.* (g) *Add Livy, l. 42. c. 41.* (h) *Add Livy, l. 42. c. 23.* (i) *Polyb. Exc. Legat. 35. c. 4. Livy, l. 38. c. 38.* has it thus; *If any of the Allies of the Roman People set upon Antiochus, let him have Liberty to repel Force by Force: provided he takes no City either by the Right of War, or by Treaty.* (k) *V. Appian. de Bello Lybico.* (l) As *Nicias* says in *Thucyd. l. 1. 7. c. 14.* 'Men make up the State, and not Walls and Ships without Men in them.' *Add Just. l. 2. c. 12. n. 14.* (m) *Exc. Legat. 35.*

upon something else than the Signification of the Words in which the Thing is express, which make it necessary sometimes to *enlarge*, sometimes to *restrain* the Meaning. Yet it is observable, that we have oftner Reason to *restrain* than to *enlarge* it. For the want of any one Cause is enough to hinder the Effect of a Thing, whereas all must necessarily concur to produce it: Thus, in such Acts as create an Obligation, the Meaning must be *restrained*, if it appears that any one of the Causes be absent, whereas to *enlarge* it, there must be a Concurrency of them all.

And this *Enlargement* is not so easily admitted here, as when I just now said, that in a Matter of *Favour*, the words may bear another, tho' less receiv'd Signification than usual: For there (since the only Use of words is to express ones Mind) such a Sense of the Words, not being entirely dissonant to common Use, might probably have been in the Mind of the Speaker. But, the Case before us supposes us to make use of Conjectures, to prove that the Mind of the Speaker is such as his words won't admit of, and therefore we ought to be very certain of it.

Nor can a Law extend to a Case, which proceeds upon a Reason only like that which the Law is founded upon, for the reason ought to be exactly the same. Nay even that is not always enough, for sometimes the bare Will of the Legislator determines it self at Pleasure, even against or without Reason, and yet is sufficient to produce an Obligation.

To justify then such an *Enlargement*, we ought to be sure that the Reason, under which the Case in Debate comes, was the only Cause and Motive that induc'd the Legislator to enact the Law; and that this Reason has been consider'd by him so generally, as that he would have apply'd it to the present Case, had he foreseen it, because otherwise the Law would have been useless or unjust.

Hither may be referr'd what the *Rhetoricians* say about *Reasoning*, when a Thing, for which there is no Provision made by any particular Law (1), is inferr'd, by a Parity of Reason, from a like Case which is provided for; or, as (a) *Quintilian* has it, *When a Thing not written is gather'd from a Thing written*: which he illustrates by these Examples: *To take a Plow in Pawn is not lawful, he takes the Plowshare: the Exportation of Wool is prohibited, he exports Sheep. He that slays his Father must be sew'd up in a Leathern Bag, he has slain his Mother. A Man ought not to be drag'd out of*

*his House to Justice, he drags him out of his Tent* (b).

Hither too may be referr'd the Case defended by *Lucian* (c); the Law is, *Whosoever kills the Tyrant shall be rewarded: A certain Man climbs into the Citadel to kill the Tyrant, but missing him kills his Son, and leaves the Sword in the Body: The Tyrant coming in and finding his Son slain, out of Grief falls upon the same Sword and dies: He that slew the Tyrant's Son demands the Reward, as the Slayer of the Tyrant.* *Erasmus* (2) takes the other side, yet certainly the Reason of the Law is for having the Reward given, not only to him who slays the Tyrant with his own Hand, but to him also who is the immediate Occasion of it (d). Since there is no doubt but the Legislator would have decreed the Reward to him also, had such a Thing come into his Mind.

The Law says, that whosoever kills his Wife shall be put to Death; but a certain Man, being willing to get rid of his Wife, and at the same time to escape the Law, kept his Mule Three Days without Water, and the Fourth Day pretending to ride out for his Diversion, put his Wife upon the Back of the Mule; who as soon as he came to the River, ran eagerly into it, and threw the Woman, who perish'd in the Waters (e).

Thus the Brethren of *Joseph* vainly thought, that they should be guilty of a less Crime in throwing him into the Pit, where he must die of Hunger, than if they had actually cut his Throat (f).

It was stipulated between two Neighbouring Nations, when there was no other sort of Fortifications, that such a Place should not be Walled in; which therefore ought not to be enclos'd with so much as a Pile of Earth, if it evidently appear'd, that the Reason why Walls were prohibited, was to render it incapable of holding out against Force.

A Man leaves his Estate to *Titius* after the Death of the Child his Wife was then big with: He thought his Wife had been with Child, but it proves otherwise: And therefore *Titius* has a fair Title to the Estate; for 'tis evident, that the reason why the Deceas'd did not absolutely make *Titius* Heir was, because he thought he might have a Child; and therefore had he known that no Child would have been born, he would have made him such without any Condition (g).

*It would have been too hard*, says *Lysias* (h), *for a Lawgiver to have crowded into his Law all the words of the same Signification, and there-*

(1) *V. D. L. 1. t. 3. De legib. 1. 12, 13, & 27.* (a) *Inst. Orat. 1. 7. c. 8.* (b) *V. D. 1. 9. t. 2. ad Leg. Aquil. 1. 7. f. 7.* (c) *In Declam. quæ inscribitur Tyrannicida, Tom. 1. p. 693, &c. Edit. Amst.* (2) In the Answer which he has made to *Lucian's* Declamation, *Tom. 1. p. 914, &c.* (d) Is there any difference whether you kill him your self, or afford the Cause of his Death? *ibid.* (e) As *Seneca* expresses it, *Herc. Oetæo, v. 859, 860.* 'Whatsoever kills, is Weapon sufficient.' (f) *Joseph. Archaeol. Jud. 1. 2. c. 3. Gen. XXXVIII. 21, 22.* (g) *Add. L. 5. t. 2. l. 28. D. de iust. test.* 'In a Law many Things are excepted, though not express; the Letter is Narrow, but the Meaning Extensive; but some Things are so plain as to need no Exceptions, *M. Senec. 1. 4. contr. 27.* What? was this provided for by the Letter? by no Means? Upon what therefore do we proceed? the Design. Which could it be apprehended without Speaking, there would be no need of words, but because it cannot, Words were found out not to hinder, but to declare the Design, *Cic. pro Cæcili. c. 18.* Every thing is not express in Writing, but some are evidently supposed to be tacitly excepted, *Id. de Invent. 1. 2. c. 42. Lysias, Orat. 10. c. 2. contr. Theomnest.* (h) *Orat. 1. contr. Theomnest.*

fore what he has exprest of one, he is suppos'd to have understood of all the Rest. Thus, the Law in *Exod. XXI. 33.* is rightly extended to every tame Animal, and the Word *Pit* to every Ditch (a)

XVIII. Besides, It is of great Use to enlarge the Meaning so as to leave no room for any sort of Cavils, and so to prevent the Quirks, that crafty designing Men have found out to evade the Law (b). Of these Cheats the *Roman* Lawyers make four sorts, One by a Comutation of Things (c), Another by a Comutation of Persons (d); a Third by Comutation of the Contract (e); the Last in the way of Contracting (f).

*Licinius Stolo* (g) having made a Law that no one should possess above 500 Acres, he himself, nevertheless, purchased a Thousand, and to palliate his Crime, made over half to his Son: For which Reason he was accus'd by *Popilius Læna*, and was the first that fell by his own Law: teaching us that no Man ought to prescribe to others but what himself is willing to perform. By the *Voconian Law*, no Man can bequeath above half his Goods to a Woman; and therefore when a certain Man had made Two Women joint Heirs, his Relations impleaded the Will (h).

The *Rhodians* had a Right to Tribute from the Isle of *Pharos*, but when the Receivers came to demand it, the Queen of the place detain'd them under some Pretence of Ceremony, 'till she had cast Moles into the Sea and join'd *Pharos* to the Continent; and then she drove them away, as having Commission to levy Taxes upon Islands, but not upon the Continent (i).

The *Athenians*, when a certain Harlot, by name *Læna*, i. e. *Lioness*, had slain the Tyrant; for fear of prophaning the Temple with the Statue of a Harlot, they erected the Effigies of the Animal whose name she bare (k).

The *Rhodians* because it was unlawful to pull down a Trophy, did therefore hide the Trophy, that *Artemisia* had erected to their Disgrace, by building a House over it (l).

When the *Spartans* demanded to have the *Athenians* Decree, which hindred the *Megarenses* from trading with them, abolish'd: and *Pericles* objected that the Law forbad any Decree of the People to be pull'd down; one of the Commissioners reply'd, *We do not desire you to pull it down but to turn it out of Sight, and that none of your Laws forbid* (m).

The King of *Portugal*, for certain Reasons, forbid the Clergy the Use of Mules, but they pleaded their Privileges; upon which the King commanded all the Smiths, upon pain of Death, not to shoe any Mule; and so the Clergy quitted them of their own accord (n).

*Tiberius*, because it was esteem'd unlawful to strangle Virgins, order'd them first to be defil'd by the Executioner, and then to be strangled (o). The *Corinthians* were forbidden by the Law to give away their Ships, and therefore they sold them to the *Athenians* for Five Drachms a Piece (p).

By a Decree of the Senate, no Slave could be Evidence against his Master, and therefore *Tiberius*, a crafty Evader of the Law, gave each of the Slaves their Liberty, that he might make use of them against *Libo*, without breaking the Decree of the Senate (q).

*Tiridates* refus'd to lay aside his Sword at *Nero's* Command, but put a Lock upon his Scabbard (r).

*Robert Carncroffe* a wealthy *Scotchman*, bought his Preferment of the King, who then wanted Money; and yet by a Trick eluded the Law against *Simony*; for he laid a great Wager with the King, that his Majesty would not give him such a Preferment (s).

In the Reign of *Philip II.* of *France*, the Bishop of *Beauvais* appear'd in the Field against *Otho IV.* but to avoid shedding Blood, he fought with a Club, not a Sword: But did such a Quibble excuse the Prelate, or rather aggravate his Guilt (t).

XIX. But sometimes the Meaning of the Words are to be restrained, and altho' General Terms be made use of, yet they ought to be taken with some Exception or Limitation (r);

(a) 'It was impossible for those that make Laws, to provide particularly against all sorts of Crimes: For, after all their Care, Knavery would find out Evasions; and the Law would be so voluminous and confus'd, that instead of Uncertainty we should lie in entire Ignorance. They therefore took care to have general Heads, and to have regard to Equity. And therefore we frequently find things, which are not exprest in the Letter of the Law, but yet come under the Force of it, *Quint. Decl. 331. Add. Lib. Decl. 31.* (b) As also to answer any Cavils whatsoever, *V. l. 29. l. 30. D. de leg. ubi supr. & D. L. 10. t. 4. l. 19. ad exhibend. & Lib. 35. t. 1. l. 76. D. de condit. & demonstrat. & l. 48. t. 6. l. 33. f. 1. D. ad L. Jul. de adulr.* (c) *Lib. 14. t. 6. l. 3. f. 3. & l. 7. f. 3. D. de Scro Macedon.* (d) *Lib. 24. t. 1. l. 5. D. de donat. inter vir. & ux. Add. Liv. l. 35. c. 7.* (e) *L. 5. f. 5. D. cod.* (f) *L. 8. f. 14. D. ad Scrum Vellei.* (g) *Val. Max. l. 8. c. 6. f. 3. Idem refert Plin. L. 18. c. 3.* (h) *Quint. Decl. 264. Fraudes circa eludendam legem Papiam Poppæam memorat Suet. August. c. 34. & Tib. c. 35. in fin. & Tac. Ann. XV. 19.* 'The Trick that the *Romans* used to let fall the private Sacrifices, which otherwise would pass over to the Heir, as an Incumbrance, with the Estate, *Salmasius* gives an Account of *ad Plauti Bacchi, Act. 4. Sc. 9. voce coemptioalem senem.* (i) *Amm. Marcellinus, l. 22. c. 16.* (k) *Lastan. de falsa rel. c. 20.* (l) *Vitruv. de Architect. l. 2. c. 8.* (m) *Plut. Pericle.* (n) '*Sulpitius* who had been against the Law to restore the Banish'd Citizens, having afterwards changed his Mind was for it, but would not own that it was the same Law he was before against; for he was not for the Return of the Banish'd, but of *Thaëses* who were forced from their Country: As if the Controversy had been what Name they ought to have been call'd by, or as if all, who were forbidden the Use of Fire and Water, did not come under the Denomination of Banish'd, *Auctor ad Herenn. l. 2. c. 28.* (o) *Vid. Tac. Ann. V. c. 9. & Suet. Tiberio, c. 61.* (p) *Herod. Erato, p. 230. Ed. H. Steph. Add. L. 44. t. 7. l. 54. D. de obligat. & action.* (q) *Tacitus Ann. II. cap. 30.* Though *Dio* ascribes the Trick to *Augustus*, *lib. 55.* *Critias* used a more impudent Cavil against *Thebanes.* *Xen. Gr. rer. l. 2. p. 275. Edit. H. Steph.* 'It was a poor Trick to avoid the Name of *Aleatōres*, which was branded by the Laws, to call themselves *Tesserarii*; between which there is much the same Difference as between a Thief and a Robber; as *Amm. Marcell. says, l. 28. c. 9.* (r) *Xiphilin. Epit. Dion. (s) Buchan. rer. Scot. l. 14.* (t) *Buffier's Hist. Franc. l. 8. (r) Cicer. de Inventione, l. 2. c. 47.*

either, 1<sup>st</sup>, Because of some Original Defect in the Will of the Speaker; or, 2<sup>dly</sup>, Because of some Accident which happens inconsistent with his Design.

I. An Original Defect is in the Will; *First*, *When an Absurdity proceeds from it*: For no Man in his Wits can be supposed to Will Absurdities: And I am mistaken, if upon this Principle, that noted Dispute between *Protagoras* and *Euathles* (a) may not be decided; for altho' they agreed in general Terms, that the Master should have no Right to his Reward 'till the Scholar had gain'd a Cause: Yet when the Master had sued for his Reward, and the Judges had given Sentence in favour of him, the Scholar ought, by no means, to have defended himself by that Exception: For, when they enter'd into Contract, that was not thought of: And it is absurd for any one to make such a Pact as should cut him off from any Possibility of obtaining what might be Due to him by it. Something a Kin to this is that which they tell of *Aristides*, who had promis'd a Penny to him that should tell him the Truth: To whom, says a Sophist, *You will not give me the Penny*. What must *Aristides* do in this Case? If he gives it, he gives it to one that did not tell the Truth; but if he does not give it, he refuses it to one that did. In such Cases as these, that Rule of the *Civilians* ought to be apply'd; that *In a general Discourse the Person of the Speaker is always excepted*. And therefore *Epimenides*, the *Cretan*, cannot be prov'd a Liar from his own Saying, *Κρητες ἀει ψεύσαι*, the *Cretans are always Liars* (1): Nor can I approve of that of *Lucretius* (b).

*Denique, nil sciri si quis putat, id quoq; nescit  
An sciri possit, cum se nil scire fatetur.*

He that says nothing can be known, o'rethrows His own Opinion, for he nothing knows, So knows not that. — Mr. Creech.

For he that says *nothing can be known*, professes himself to know this one Thing, *That nothing can be known* (c). In the Schools we have this Example of an Inconsistency (d), *A Man dream'd that there was no Credit to be given to Dreams*. Now whatever *Genius* had infus'd this Dream into him design'd so much Credit should be given to this, as that none should be given to any other (e).

Besides, *Secondly*, The Will is thought to be Originally defective, *When the Reason ceases, which alone Fully and Efficaciously moved the Will*; for if the Reason of the Law be added, or if we be sufficiently satisfy'd of it, the thing is no longer consider'd Simply, but as it comes under the Reason. An Example of this we

have in the Law (f) that forbids Patrons to lay an Oath upon their Bond-men not to marry, or to breed up Children; where it is added, that *Altho' in the Law no Person is excepted, yet it is to be understood of those only who are capable of having Children; and therefore if a Man should lay such an Obligation upon an Eunuch, he would not come under the Penalty of the Law*. For the Reason of the Law was, lest the Patron, out of Covetousness (2), should put a Stop to Propagation; which Reason, in the case of an *Eunuch*, ceases.

But, *Thirdly*, The Will is originally Defective, *If there be a Defect in the Matter*: for the Matter which he is about, is always suppos'd to be in the Mind of the Speaker, although his words seem to be of a larger Extent. Thus, if an Estate be given to a Man and his Heirs Male, his Grandsons by his Daughter are not supposed to be meant by it; for the Nature of such a Settlement interposes, which plainly excludes Women, and the Descendants of them.

XX. Yet as to the *second Head Grotius* remarks (3), *That under the Reason may be comprehended some things which do not actually exist, but are consider'd in a Moral Possibility only; and when this happens no Restriction must be admitted*.

The Meaning is, that a Covenant where the Parties had a certain Reason in view, as suppose the avoiding Danger, or an Inconvenience, does not only hold good in those Cases where such Inconveniences would have follow'd, but in those also where they may probably be suspected: for Instance, should two Nations enter into a Treaty that no Army or Fleet should pass within such Limits, altho' the Reason of this Article be that one should not actually do the other any Harm, yet it won't be lawful to send an Army or a Fleet thither, although there be no Design of Injuring the other. And thus, if the Law forbids that any should walk the Streets with Torches; tho' the Reason of the Law be to prevent any Mischief from them, yet it would be no Excuse for a Man to say that he would use them so carefully as to do no Harm with them.

'Tis also a Question whether Promises carry this Tacit Condition along with them, *That things continue in the same Posture as they are?* Which in general is denied; for since this Condition is *Odious*, as being apt to render the Act null, it ought not easily to be presum'd, if it be not actually added; unless it appears plainly that the present Posture of Affairs was included in that one only Reason which we have been talking of. For thus, we frequently read in History, that Ambassadors have return'd Home without opening their Commission, upon such Revolutions, amongst those to whom they were

(a) Apud *Gellium*, l. 5. c. 10. *Diog. Laert.* l. 9. *Apul. Florid.* l. 3. *Sext. Emp. adversus Math.* l. 2. (1) See *Titus* l. 12. (b) *L.* 4. v. 471, 472. (c) 'He acts absurdly who says he is silent; for by saying he is silent, he is not silent; and so destroys his own Assertion, *Apul. Apol.* p. 529. *Edit. in Usum Delph.* (d) *Laet.* l. 3. c. 6. (e) So in the Example propos'd by *Gellius*, l. 9. c. 16. this Restriction ought to be made, *That the Law may not deprive Brave Men of their Reward.* (f) *Lib.* 37. t. 14. *L.* 6. f. 2. *D. de jure patronat.* (2) *Vid. Instit.* l. 3. t. 8. *De Succession. Libertorum.*

(3) *L.* 2. c. 16. f. 25.

sent, as may be presum'd to make void the whole Reason of their Embassy (a).

XXI. 2. That an Accident is Inconsistent with the Design of the Person, may be made to appear; either *First*, From Natural Reason; or *Secondly*, From some Sign of the Will.

In order to make this Discovery from *Natural Reason*, Aristotle (b) thinks that the *Understanding ought to be endued with a true sense of Equity, and the Will with an hearty Inclination to judge according to Equity* (c). And he rightly defines (d) (1) *Equity to be a Correction of the Law, where it is deficient, by reason of its being too universal; or, in other words, a Dextrous Interpretation of the Law, shewing that such a particular Case ought not to be brought under it, because an Absurdity would follow: Which may all be apply'd to Wills and Pacts, mutatis mutandis.* And here Grotius (e) well observes, that *Equity has no Place in the Law of Nature, since that Law does not speak more universally than the Nature of things requires.* But yet that the Law of Nature, not as it is in it self, but as it is generally express'd by Men, may want the Assistance of an *Equitable Interpretation*: for Instance, when that Law says, that *Every Man ought to have his own*; we must in Equity qualify it with this Condition, that *He be in his Senses, and that no superior Right interposes.* For since, in Laws especially, all Cases cannot be foreseen, or by reason of their infinite Variety express'd (f) (2); it is therefore necessary for them, whose Duty it is to apply particular Cases to the general Decrees of the Law, to have a Liberty of excepting such as are so peculiarly circumstantiated, that the Legislator himself would have excepted them, had he been present, or had he foreseen such Cases (g).

There is an Example in Cicero (h); it was a Law among the *Rhodians*, that if any Ship of Strength should be found in the Haven, it should be confiscated. A great Storm, notwithstanding all the Seamen could do, drives a certain Ship into the *Rhodians* Haven; the Questor seizes upon it, and the Owner pleads from the Reason of the Thing that it ought not to be confiscated. Again,

The Law forbids the Gates to be opened at Night, in time of War; Nevertheless a Man opens them and receives in some Allies, who, if they had been kept out, would have been cut in Pieces by the Enemy, which was encamp'd hard by (i).

However this Liberty must not be indulg'd too far, lest any one should rashly make himself Judge of the Legislator's Design; for sometimes he Wills and Commands that the very Letter of the Law should be put in Execution (k). And therefore we ought to have Reason very evi-

dently of our side, when we act Counter to it; as we certainly have, when we find that the precise adhering to the Letter is unlawful; *i. e.* repugnant to the Law of God, or Nature: For to such no Man can be oblig'd; indeed no Man in his Senses can be presum'd willing to oblige another to it (l).

Sometimes *Equity* is taken in another Sense, as when any Cause is said to have the Benefit of *Equity*, or the Rigour of the Law is allow'd to be softned in favour of the Criminal; for even private Men are said to have Recourse to *Equity*, when they don't so rigidly insist upon their Right against their Adversaries, but remit something of it.

Lastly, Causes are sometimes said to be left to *Equity*, when the Civil Law takes no Cognizance of them, or when the Nicety of the Law is not regarded, but the thing is left to the Arbitrage of honest Men.

XXII. Moreover a general Law ought to be *restrain'd*; if, although it be not absolutely unlawful to stick to the Letter, yet upon weighing the Thing in Candour and Prudence, it appears to be too grievous and burthensome, either in respect of the Condition of human Nature absolutely Consider'd, or in regard of the Person and Thing in Debate compar'd with the End of it. For some Things seem intolerable to Mankind in general, others to some certain Persons: some Business is such, as to take much Pains about it, would be Folly. And an Exception against those is still the more reasonable, if the Law be not only positive, and the matter of it such, as makes it probable, that the Legislator would not, at the great Inconvenience of the Party, demand the Observance of it; but also if the Neglect of it does not tend to the Dishonour and Contempt of the Authority that enacted it (m).

And therefore, without doubt, 'tis a foolish piece of Superstition in the *Abyssines*, so to weaken themselves by fasting in Lent, as, for want of Strength and Courage, not to be able to resist the Inroads of their Enemies; inasmuch that their Country has sometimes been over-run at that time without Resistance (n).

Thus a Man that lends a Thing for a certain Time may demand it back before the Time expired, if in the mean-while he happens to be in great want of it himself; for by the Nature of such a *beneficial Act* no Man can be presum'd willing to oblige himself to his great Inconvenience.

So if a Prince has promis'd to assist his Ally with Forces, he may be lawfully excus'd, as long as he is in danger at Home, and wants those Forces for his own Defence: For since every Prince is, in the first place, oblig'd to protect his own People, all the Promises, which

(a) *Vid.* Tac. *Hist.* L. 2. *ab init.* Where Titus upon Galba's Death returns back. (b) *Nicom.* l. 5. c. 10. (c) *V. D.* L. 47. t. 2. *de furtis* Leg. 61. f. 5. (d) *Nicom.* L. 5. c. 14. *Add.* Id. *Magn. Moral.* l. 2. c. 1, 2. (1) See Grotius's *Treatise de Equitate.* (e) *Ad Campanella Pol.* (f) *Xen. Hipparch.* 'To commit to Writing every thing that ought to be done, is as difficult as to know all future things. (2) See above, *Scit.* 17. towards the End. (g) *V. L.* 1. t. 3. Leg. 3, 4, 5, 6, 10, 11, 12, 13. *D. de leg.* (h) *De Invent.* l. 2. c. 42. (i) *Ibid.* c. 32. (k) According to Leg. 12, f. 1. *D. L.* 40. t. 9. *qui & a quibus manumissi*, which is very hard, but so it is written. *Add. lex.* *Wisigoth.* l. 2. t. 1. c. 12. (l) *Grot. ad Hest.* c. 4, 16. 'Circumstances are such as render the observing of the Law a Breach against the chief Laws of Nature. *Add.* *V. Max.* l. 3. c. 7. n. 1. c. 8. n. 6. (m) *Add. Grot. ad Mat.* c. 12. v. 3. (n) *Fr. Avarer. Desc. Ethio.* c. 13.

he makes to Foreigners, are understood to extend no farther than the Safety of his own Kingdom admits.

And thus a Grant of Immunity from Taxes and Tribute ought to be understood of ordinary annual Taxes only, not of those extraordinary Subsidies, which the urgent Necessity of Affairs may require, and which the Publick can't subsist without. From hence it appears, that *Cicero* (a) is too free in saying, that *such Promises are not to be kept, as are useless to the Persons to whom they are made; nor if they be less beneficial to him, than prejudicial to the Maker.* For whether a Thing be useful or not to the Person to whom it is promised, it is not always for the Person promising to judge; unless he has Authority over him, or has him plac'd under his Care. Nor is any Prejudice or Burthen redounding to the Person promising, sufficient to release him from his Promise (for the Performance of every free Promise has some Burthen going along with it,) but such and so much as, according to the Nature of the Act, ought in reason to be presum'd, excepted. As in the Example brought by *Cicero* (b), *If you had promised to appear immediately as Advocate for another, and in the mean-time your Son falls dangerously ill, it would not be a Breach of Duty not to perform what you have promis'd* (c).

XXIII. But, *Secondly*, There are also some Signs of the Will from whence it may be certainly collected, that a Case ought to be excepted from the general Expressions of the Law; as when the Words of the Legislator in another place, though not directly opposite to the Law now supposed to be before us (for that would be a Contradiction) yet by some peculiar Incident and unexpected Event of Things, happen to oppose it in the present Case: or, which amounts to the same Thing, when there are two different Laws, which don't interfere, and which easily may and ought to be observed at different times, but can't both of them be satisfied, when by some Chance they call for our Obedience at the same Instant (d): In this Case, we must observe some Certain Rules to know which Law or Pact ought to give Place to the other, where both cannot be fulfilled. *Grotius* lays down these,

1. *That which is only permitted gives Place to that which is commanded* (e). For a Permission includes a Liberty, but a Command carries along with it a Necessity of Acting.

2. *That which ought to be done at this present time, is preferable to that which may be done at any other time*: Or when, at the same time, I lie under two Obligations, whereof one can't be satisfied but at this Instant, the other at any time hereafter; the former shall be perform'd,

the latter put off to some other Opportunity. From whence it follows, that no Man can be enjoy'd two Things which cannot both be perform'd together, and which neither of them admit of Delay. From hence we may give an Answer to the Enquiry of *Plutarch* (f) why it was not lawful for the *Flamines Diales* to bear any other Magistracy? For since the Duties of the Priests were certain and settled, and the Duties of other Magistrates uncertain and not settled, the same Man being both Priest and Magistrate, would not have been able to provide for Business of so different a Nature, if they happened to interfere in the same nick of time: So that one must necessarily have been neglected for the Performance of the other. It seems that those Priests had not found out the Secret of making an Honour and a Gain of the Priesthood, and yet of throwing the Duty and Burthen of it upon their Curates.

2. *An Affirmative Precept gives way to a Negative* (g); or when an affirmative Precept can't be satisfied but at the Expence of a negative one, then the Performance of the affirmative shall be defer'd or put off, till it ceases to clash with that other which is negative. The reason of this is taken from the Nature of the affirmative and negative Precepts: For the Obligation of these is perpetual, uniform and equally binding; whereas those presuppose an Opportunity of being put in Execution; which is presum'd not to offer it self, if it can't be done without the Violation of some Law: And therefore things, in such a Posture of Affairs, are esteem'd morally impossible. Hence it is that no Man can injure another, or break his Word, to promote the Advantage of a Friend, or to get wherewithal to be grateful, or generous: For 'tis a strange sort of Piety to steal Leather, and then give the Shoes in Alms to the Poor. *Mahomet* in the *Alcaron* forbids any one to give Alms of Ill-gotten Goods. However, I can't say, that *Schach Abas* King of *Persia* was in the right in disposing of no Money so freely to charitable Uses, as that which he had raised from the Stews; for this, said he, was paid willingly, whereas the other Taxes were extorted with Sighs and Groans from the Subject: Yet, methinks, it was not so decent to pitch upon Money rais'd after that manner for such Uses (h). To this Head, in some respect, belongs what *Leo* of *Modena* (i) tells us of the *Hebrews*, that whatsoever was forbidden the Men, was also forbidden the Women; but as for the affirmative Precepts, the *Rabbies* declar'd, that none of those which were confined to a certain time, oblig'd the Women, by reason of the Weakness of their Sex, and their living under the Government of their Husbands.

(a) *Off. 1.* (b) *d. l.* (c) *Add. Sen. de Benef. 1. 4. c. 35.* (d) *Char. de la Sageſſe, l. 1. c. 37. n. 5.*

(e) A Command is of greater Force than a Permission; for that which is commanded, is necessary; that which is permitted, voluntary. *Auth. ad Heren. L. 2. c. 10. & Idem de Invent. l. 2. c. 49.* The Law which forbids is more powerful than that which permits. This is reserved in the Power of the Magistratè: and one who forbids can do more than all who allow: For that which permits leaves us to our Liberty, whereas that which forbids binds us under a Penalty (f) *Quest. Rom. in fin. p. 291. C.* (g) That Law which forbids, seems by some sort of Exception, to correct that which commands, *Cic. de Invent. l. 2. d. l.* (h) *Olearius, Itin. Pers. l. 5. c. 31.* The Law which forbids is of greater Authority than that which commands; for every Law that forbids is therefore stronger, because it corrects that which permits or commands, *Mar. Victorin. in exp. in 2. Rhet. Cic. (i) De Rit. Hebr. p. 5. c. 5. f. 1.*

4. *In Covenants and Laws, which are in other respects equal, that which is particular and applicable to the present Case takes place of that which is general.* For Generals must be reduc'd to Particulars before they can be apply'd (a). As for what *Grotius* subjoins, *That a Prohibition, which has a Penalty annex'd, ought to take place of that which has none; and that which has a greater, of that which has a less* (1), is not so clear. For a Prohibition, that has no Penalty, either fix'd or arbitrary, annex'd to it, is of no Force at all. And that Rule of *two Evils to chuse the least*, can't properly be apply'd to Moral Evils or Sins: For when it happens that one of two Prohibitions must needs be violated, then that whose Violation is of least Concern is suppos'd to be permitted; for Example, one Law is, *That no Man shall appear abroad in Arms on a Holy-day*: another *That no Man shall stay at Home upon hearing the Signal of a Tumult*. In this Case the latter is to be look'd upon as an Exception to the former: as if the Law had been, that no Man should appear abroad in Arms on a Holy-day, unless he be commanded by the Magistrate in Case of a Tumult.

5. *When two Duties happen to interfere at the same Point of time, that which is the more honest and profitable is to be prefer'd* (2). For the other Obligation is only upon Condition, that it can consist with an Obligation of greater Moment.

6. *When two Covenants, One upon Oath, the Other not, can't be performed both together, the former ought to take place of the latter: unless the latter was added as an Exception and Limitation to the other*; for an Oath added to a Covenant excludes all such Restrictions and tacit Exceptions, as are not necessary from the Nature of the thing, and which, if there be no Oath, may be more easily admitted (b).

7. *An Obligation imperfectly mutual* (3) gives place to one that is perfectly mutual, and binding on both sides: Thus what I owe upon Contract ought to be paid before what is due from me upon free Promise, or upon Gratitude, or any such respect, if both can't be perform'd together. And therefore *Phocion*, when he was ask'd a Large sum for a certain Sacrifice, reply'd: *Ask the rich, for I should be asham'd to give to you, and not to pay this Man* (pointing to *Callides* the Usurer) *what I owe him* (c).

8. *The Law of Generosity gives place to the Law of Gratitude, ceteris paribus*: altho' each implies an imperfect Obligation. For the Debt of Gratitude has more Favour to plead in its Behalf than that of Generosity; for that requires that we should give because we have receiv'd; whereas this is built upon no such Foundation. And therefore, in this Case, be-

cause the Necessity of Gratitude interferes, the Object of Generosity is suppos'd to be wanting. And this holds so far, that even Generosity towards our own Relations, unless it be due upon some closer Obligation, gives place to the Duty of Gratitude.

9. *Where the Laws were made by subordinate Powers; that of the Inferiour, yields to that of the Superiour, if both can't be obey'd.* Thus we ought to obey God rather than Man (d). And the Command of a King carries more weight with it, than that of the Master of a Family.

10. *The more noble, useful, or necessary the Matter of one Law is, than that of another, the greater Weight ought the Law to have with us.*

11. *The closer Tie there is between any Person and us, the more ought Obligations due to him, outweigh those due to others, ceteris paribus* (e) (4).

*Cicero* (f) has a Passage very pertinent to the Matter in hand: *Contrary Laws*, says he, *admit of a Dispute when two or more seem to clash. As thus; one Law says, That whosoever kills the Tyrant, shall be rewarded as a Conqueror at the Olympick Games, and may demand what he pleases of the Magistrate, and the Magistrate shall grant his Request. Another Law enacts, That upon the Death of the Tyrant his five nearest Relations shall be put to Death. Alexander, who had exercis'd Tyranny over the Phereans, was slain in the Night by his Wife Thebe, and she, for her Reward, demanded her Son, whom she had by the Tyrant. Some were of Opinion, that the Son, by the Law, ought to be put to Death. The thing may bear a Dispute; Now, in such Cases, it ought to be consider'd which of the Laws conduce to greater, i. e. to more honest, more profitable, and more useful Ends. And that ought to be observed which has the greater Ends to support it. Then we ought to consider which Law was made last, for the last is of greatest Obligation. Then which of the Laws commands, which permits only; for that which is commanded is Necessary, that which is permitted, Voluntary. Then which Law is penal, and which is enforced with the greater Penalty; for that ought to be the most observed, which can be violated with least Impunity. Then which commands, which forbids; for that which forbids is often an Exception to that which commands. Then which seems design'd to bind in general, which in part only: Which to include in common several Things, which some particular one only; for that which binds in part, or some certain particular Thing only, seems most capable of being apply'd and brought into Court. Then by the Law what ought to be done immediately, and what admits of Delay; for that which can't be put off, ought to be obey'd first.*

(a) 'The more particular a Law is, the more does it seem to make to the Case in hand, *Cic. de Invent.* l. 2. d. 1. (1) *Cicero* d. 1. (2) *Cicero* d. 1. (b) 'Medea in *Euripides*, v. 743.

having desired *Ageus* to entertain her, and not to deliver her up, when her Enemies should demand her, would needs have it confirm'd by Oath: which *Ageus* approved of, for so, says he, it will be the safer for me, if I can make such an Excuse to your Enemies. (3) This Distinction is explain'd in *B. 3. c. 4. f. 9.*

(c) *Plut. Phocione*, 745. C. D. (d) *Aff. IV. 19.* (e) *Gal. VI. 10. 1 Cor. VIII. 13. 1 Tim. V. 8. Cic. Off. 1. c. 14. 15.* Where he talks of the Degrees of Society. (4) These three last Rules are included in the Fifth, and are omitted by our Author in his Abridgment *De Offic. Hom. & Civ. L. 1. c. 17. f. 13.* (f) *L. 2. de Invent.*

## C H A P. XIII.

*Of the Way of deciding Controversies in the Liberty of Nature.*

BY the Law of Nature every Man is oblig'd to perform, and to pay of his own accord, what by any Title is due from him; and if any one has designedly damag'd or offended another, the same Law moreover obliges that the Delinquent should seriously repent, and give Security to live in Peace and Friendship for the Future. And as this Repentance, where it is not extorted by Force, but proceeds from the Principle and Consideration of Justice, is a sufficient Indication of the Offender's Amendment: So on the other side, after such Satisfaction is made, and Security given, the Party injured, ought to forgive him, and to live peaceably with him for the time to come. And if a Man through Passion and a Desire of Revenge refuses it, he must be answerable for the Breach of the Peace and the Consequence of it (a). For it is inhuman and brutish, not to be satisfied with any thing less than the Blood of the Offender: And when a Misunderstanding is once begun to continue it on for ever. It was a cursed Speech of *Cato's* (b), who, when he met a young Man just flusht with the Ruin of his deceased Father's Enemy, took him by the hand; and *Thus*, said he, *ought we to appease the Ghosts of our Parents; not with Kids or Goats, but with the Tears and Destruction of their Enemies.*

2. But all Men are not of such a happy Temper, as to be willing, of their own accord, to perform their Duty: And, besides, several Controversies may arise concerning the Certainty and the Quantity of a Debt, and the rating of a Damage, the Competency and Exercise of certain Rights, the fixing Boundaries, the Interpretation of Pacts, and other Pretensions; and yet *in the Liberty of Nature* no Man can take Authority upon him to determine and compose such Controversies (c). Indeed *Hobbes* (1) makes every Man his own Judge in a State of Nature (2); by which he can mean nothing else, but that he, who has no Superior to govern him, may manage his Business as he pleases, and appoint means for his Preservation according to his own Discretion. For if another Man should take upon him to judge of my Affairs, yet, since he has no Authority to determine me by his Opinion, it will depend intirely upon my Will and Pleasure whether, or how far I shall be concluded by him; and so ultimately the Management of my Actions

will lie in my own Breast; which yet I ought to govern according to the Rules of Nature.

As to what remains; tho' every Man may, in that State, either neglect or defend his own Right, either put up or return an Injury; yet he can't, in his own Cause, give Sentence to as to oblige him, with whom he has the Controversy, to stand to it. For tho' he designs never to justly, nay, though he protests upon Oath, that he decrees what seems to him to be right, yet since the other may have as great a respect for his own Opinion; if they happen to disagree, nothing can be done by reason of that Equality, which is Essential to the State of Nature (d).

3. But yet the Law of Nature by no means allows, that every Man should immediately fly to Arms, and put the Controversy to the Decision of the Sword, before milder Methods have been attempted (e). And therefore the Parties ought first to endeavour by some friendly Debate, between themselves or their Agents, to compose the Difference (f). Indeed even after Arms have been taken up, and each Party, by the Calamity of War, has been induced to hearken to gentler Accommodations, we generally find that the Difference is at last adjusted by Treaties and Negotiations. If the Thing and the Temper of the Parties admit of it, the Dispute may easily be decided by *Lot* (g). But if neither a Debate is able to put an End to the Controversy, nor either Party thinks fit to trust that to Chance which each, in Reason, thinks to be on his side; the only thing they can do, is to pitch upon an *Arbitrator*, and each bind himself to stand to his Award (3). And here *Grotius* (h) well observes, that in a doubtful Case, altho' each Party ought to come to Terms, rather than go to War, yet the *Plaintiff* is more oblig'd to it, than the *Defendant*; for the *Defendant's* Plea is the more favourable even in the Law of Nature.

4. From the Design of appealing to an *Arbitrator*, it appears how He ought to be qualified. For therefore Recourse is had to Him, because a Man's Judgment, by reason of that natural Affection which every Man bears to himself, is suspected to be partial in his own Cause (i). Upon which account, the *Arbitrator* must take care not to sacrifice Right to Affection, nor to be bias'd in Favour of one more than the other,

(a) *C. Pontius* in *Livy*, l. 9. c. 1. argues excellently to this Purpose. (b) *V. Plutarch* in the Life of *Cato* the Elder, p. 344. E. (c) In which Sense that of *Thucydides*, l. 1. may be admitted; *They that may use Force have no need to go to Law.* (1) *De Civē*, c. 1. s. 9. (2) How far this is true, may be seen in B. 2. c. 2. s. 3.

(d) 'Almost all wicked Men think fit to be Judges in their own Case, *Arist.* Pol. 3. c. 9. No Mortal ever thinks an Injury against himself small, most think them greater than really they are, *Sallust.* *Catil.*

(e) 'There being two ways of contesting, one by Argument, the other by Force, and that being proper to Men, this to Brutes, Recourse is to be had to the latter, when the former is refused, *Cic.* Off. l. 1. c. 11. *Add.* *Justin.* l. 8. c. 1. n. 4. &c. When, without trying to compose Matters amicably, Arms are taken up, then that of *Ovid* takes place: *Injusto rigidum jus dicitur ense.* *Trist.* L. 5. El. 10. v. 43. (f) *Vid.* *Grot.* l. 2. c. 23. s. 7.

(g) *V. eund.* d. l. s. 9. (3) *V. Grot.* d. l. s. 8. (h) *D. l. s. 11.* (i) *V. L. 2. t. 1. l. 10. D. de jurisdict.* *Plut.* de adulat. & amic. discern. Every one is the greatest Flatterer of himself.

any farther than the Merits of the Cause incline him. And if he behaves himself thus impartially, he ought not to regard the unjust Repentments of him that is cast. *Bias* (a) used to say, that *He had rather judge between those that were his Enemies, than his Friends; for, in the latter Case, let him judge how he would, one of his Friends would turn his Enemy: whereas, if both were his Enemies, one probably would become a Friend.* And therefore it is manifest, that a Man, who has any Interest in the Success of either Party, ought not to be an *Arbitrator* between them; for fear he should not be able to observe so exactly that Indifference and Impartiality which he ought (b).

From hence it follows, that there ought to be no Pact or Promise between the *Arbitrator* and the Parties, whereby he may be prejudiced in Favour of either of them (c). Nor ought he to expect any other Reward for his Sentence, than the Satisfaction of having judg'd Right (1). Absurd therefore was the *Arbitrage* which *Maximilian*, and the *Venetians* submitted to *Leo X.* whilst each of them privately tamper'd with him to declare of his side (d).

Now altho' the contending Parties enter into Compact with the *Arbitrator*, about taking upon him his Office, ( for as no *Arbitrage* can be exercised without the Consent of the Parties, so no one can be forced to be *Arbitrator* against his own Consent; ) yet it is not from the Force of that Compact, that he becomes obliged to judge according to what he thinks is agreeable to the Laws of Conscience and Equity: or they to stand to his Award. For the Law of Nature, which can receive no Enforcement from any Compact, obliges him to judge according to Justice; and they are obliged to submit, without any Reserve, to his Determination, because otherwise the Design of going to an *Arbitrator* would be frustrated, and there would be no End of such Appeals.

For suppose they should agree to submit themselves to his *Arbitrage*, not absolutely but upon Condition, that he should decree according to Justice, How would they ever be able to decide the Matter? For the Parties, being supposed to be in a perfect Liberty of Nature, are as yet, equal; and each has Power to enquire whether the *Arbitrator* has perform'd the Condition, in judging according to Justice. And therefore if, after the Sentence be given, it should seem unjust to either Party, or should really be so, another Controversy would arise about it; which, since neither this *Arbitrator*, nor the Parties could be able to determine, it

would be render'd necessary to apply to another. And if with this other they enter into the same conditional Compact, and a Doubt should arise about the Justice of his Sentence also, they would be forced to apply to another for Relief, and so on *in infinitum*.

From hence it follows, that the Pact, which the Parties enter into when they consent to stand to the Award of an *Arbitrator*, ought to be conceiv'd simply, and not upon Condition that he pronounces Sentence according to Justice; for else, as was said before, there might be an Appeal from one *Arbitrator* to another, and from him to a Third, and so on without End. Besides (e), that there can lie no Appeal from the *Arbitrator* is plain, because there is no superior Judge to receive it, which obtains even in Civil States, where the Parties, by Consent, pitch upon an *Arbitrator*, provided the Cause be such as it does not concern the Government to intermeddle with: And if any Country admits of such an Appeal, it is by reason of some positive Law. Indeed, in some Places, those extraordinary Judges, who have Causes laid before them, to be examined and decided out of hand, without the tedious Forms of Law, come under the Name of *Arbitrators*. And from these nothing hinders but that an Appeal may lie to a Superior.

But when we say that the Parties ought, right or wrong, to stand to the Sentence of the *Arbitrator*, it must be understood with some Restrictions: For tho' I can't fly off, because he decrees otherwise than I expected: yet his Sentence shall not bind me, if it manifestly appears that he tamper'd with the other Party, and received Bribes of him, and concerted Matters with him to my Disadvantage. For he, who evidently takes part with either side, ceases to bear any longer the Person of an *Arbitrator* (f).

If it be thought fit to refer a Cause to more than one, 'tis best to have an uneven Number; for else they may divide into equal Votes, and to leave the Business undecided.

5. Moreover *Grotius* (g) would have it consider'd, whether the *Arbitrator* be chosen as a Judge, or as having Authority more at large of giving Sentence, not according to the Rigour of the Law, but according to Reason and Equity. For sometimes both Parties appeal to the Law; and there the *Arbitrator*, as if he were a Judge, ought to weigh the Merits of the Cause, and to determine according to Law. Sometimes one Party only insists upon the Rigour of the Law, and the other, in Favour and Compassion,

(a) Diog. Laert. l. 1. f. 87. Au. Gell. l. 1. c. 3. (b) Arist. Pol. l. 4. c. 12. 'An Arbitrator is every where to have a Trust reposed in him. Upon the same Principle depended the Answer that *Amasis* King of Egypt gave the *Aleans*, when they were to be *Arbitrators* in the Olympick Games, and had sent to him to advise them, how they might perform the Office with greatest Justice; Let none of the *Aleans*, said he, be concern'd in the Games. Hither may be refer'd that scandalous Decree of the Roman People, who in the Controversy between the *Aricinians* and the *Ardeates*, adjudged the Land to themselves. Livy, l. 3. c. 72. Add Just. l. 8. c. 3. n. 15. (c) Compare Hobbes de Cive, c. 3. f. 14. (1) *Nec aliud tibi sententia tua pretium, quam bene judicavisse*, Plin. Panegy. c. 80. n. 1. (d) Guicciard Hist. l. 11. about the End; and l. 12. p. m. 345. (e) V. L. 4. t. 8. l. 18. l. 32. f. 15, 16. D. de receptis. From hence may be brought a Reason of that in *Quintil.* Declam. 372. One Decree cannot make void another. If any one pitches upon those to be Judges in his Case, whose Opinion he was not otherwise obliged to stand by, after having made the Choice, he ought to submit to their Determinations. Lucian. Abdicat. t. 1. p. 715, &c. Ed. Amst. Every one makes him, whom he has chosen, the chief Judge of his Cause. Plin. No. Hist. Praef. f. 47. (f) V. L. 17. t. 2. l. 76, &c. D. pro Socio. (g) V. Grot. L. 3. c. 20. f. 46. n. 2. d. l. desires

desires a Mitigation of it ; or, in other Words, appeals to Equity: Where by *Equity* I don't mean that dextrous Interpretation of the Law, mentioned in the foregoing Chapter, which even a subordinate Judge ought to make use of: but an Abatement of the Rigour of the Law, upon the Dictates of Humanity, Charity, Compassion, &c. which none but the supreme Judge, or an *Arbitrator*, chosen on purpose, has Authority to apply.

If it be doubtful under which of these two Qualifications the *Arbitrator* is chosen, he ought to suppose himself tyed up to those Rules, which a Judge would be oblig'd to follow; for it is for want of a Judge and Judicature that he is called in: And, in a doubtful Case, we ought to take that side which is clearest (1). Besides, an *Arbitrator* can't so easily act unjustly, if he has a limited, as if he has an absolute Power delegated to him. Indeed to persuade a Mitigation of the Rigour of the Law is properly their Business who voluntarily, without entering into any Engagements, interpose, as common Friends, between the contending Parties.

Now as he that judges between Fellow-subjects, judges according to the *Municipal* Laws of the Place: so he who judges between those who acknowledge no common *Municipal* Laws, ought to judge according to the Law of Nature; unless the Parties submit their Cause to the positive Laws of some particular State.

6. The same *Grotius* (a) observes also, that an *Arbitrator*, chosen by the supreme Authority, ought to take Cognizance of the Merits of the Cause, and not of the Possession; for it belongs to the Civil Law to determine that; whereas, by the Law of Nature, the Right of Possession follows the Property. Concerning which my Opinion is that, altho' by the Law of Nature and Nations, it does not seem necessary, that if a Man be turned out of Possession he should immediately be put in again, before the Merits of the Cause be heard, especially if can be immediately determined; yet, in many Cases, the *Arbitrator* ought to make Enquiry who was in Possession, that he may know whom it chiefly concerns to make out his Title. For the *Plaintiff* ought to have very clear Proofs to support his Pretensions, whereas it is enough for the *Defendant* to confute the Arguments of his Adversary, tho' sometimes it may be convenient, over and above, to show his own Title also. However it is not sufficient for the *Arbitrator* to give Judgment concerning the Possession only, for that is generally out of Dispute, and seldom brought before him; but his Business is to examine into the Merits of the Cause, and by a final Determination to put an End to the Sute. But while the Cause is depending no Innovations ought to be made; and, if the *Plaintiff* can't make out his Pretensions, Judgment ought to be given for the Party in Possession.

7. But *Mediators*, who interpose between contending Nations, either preparing or actually engaged in War, and endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommodation are not properly *Arbitrators* (b). These having so pious a Design in Hand cannot be obstinately Rejected, without the greatest Inhumanity, even altho' they should appear to be more intimately allied to either Party. For the other still has Liberty either to accept or refuse what they offer: And it is the chief Business of a Friend, where he cannot join in the Quarrel, to endeavour to bring it to an amicable Composition. Besides, it is frequently the Interest of a Prince to prevent War from breaking out between Nations; for some Sparks of the Fire, kindled in his Neighbourhood, may possibly reach him; and, besides, it may be dangerous for him to have both, or either of the Parties entirely ruined; and therefore, as he values his own Safety, he ought to endeavour might and main to hinder the Flame from coming to a Head. And the more earnestly ought *Christians* thus to labour in composing Differences, because even the *Alcoran* (c) (how senseless soever it be in other things) does wisely in commanding, that if Two *Mahometan* Nations go to War, the rest shall interpose, and force the Aggressor to make Satisfaction, and after that, oblige both to live in Friendship and Amity for the Future.

'Tis certain, that if it be the Interest of several to have the Quarrel made up, they may enter into Compact jointly to labour for Peace; and, if their Endeavours should prove unsuccessful, they may then mutually prescribe to one another how far each shall make himself a Party in the War. But this only, in case none of them has any Pre-engagement upon him to assist either of the Parties, in case of a War; for such an Obligation can't be limited by a Treaty made afterwards with a third Person.

Moreover, two or more, whom it concerns to have an End put to the War; after having weighed the Pretensions of each side, may lawfully agree upon what Terms a Peace ought to be concluded, and then offer them to the Parties with a *Manifesto*, that they will join Forces against him that refuses them. For a Prince does not, by this means, obtrude his *Arbitrage* upon another against his Will: nor decides another's Quarrel by his own Authority, (both which are Encroachments upon the Liberty of Nature;) Nor are those Terms offered to the Parties, so as if they were oblig'd to comply with them. But since, by the Law of Nature, a Man may join Forces with him who, he thinks, has receiv'd an Injury, especially if the Consequence of it is likely to redound to his Damage; by such a Method, as this, he openly declares for Equity and Peace, that he is desirous others would act fairly, and that he

(1) *Semper in obscuris, quod minimum est, sequimur.* D. L. 50. t. 16. l. 9. (a) D. l. f. 48. (b) F. Guicciardin. Hist. l. 4. where it is debated whether Hercules Duke of Ferrara, should perform the Part of an *Arbitrator*, or *Mediator* between the *Venetians* and the *Florentines*. (c) *Cap. de Clausuris.*

is not willing to enter into a War, before the adverse Party has ejected the Proposals of Peace (a).

And this sort of *Mediation* is the more commendable, if it puts an End to a War, that would prove destructive to one or both Parties; yet he, who makes himself a *Mediator*, should take Care that he be able to compel by Force, that Party which refuses to stand to his Determination (b).

8. How the Form and Process of a Debate, before an *Arbitrator*, is to be manag'd, common Sense will best direct, according to the different Circumstances of the Thing; for it would be impertinent to give tedious Directions how each Party ought to open his Cause, how to state the Question, how, after the Arguments on both sides have been weighed, the Sentence ought to be pronounced: we need only observe, that if the Pretensions on one side cannot be made out but by Deeds, and they happen to be lost, the *Arbitrator* has nothing to do, but with the Consent of the other Party to give him his Oath; I say *With the Consent of the other Party*; for else, in the Liberty of Nature, no Man is obliged to put the Issue of his Cause upon another Man's Conscience. It is also in the Power of the Parties to refer themselves to the Decision of a *Lot*, or a *Duel*, as has formerly been practised among many Nations.

However, I do not see how the Loss of my Deeds can extinguish my Right; indeed I cannot have Justice done me in the Civil Court, being not able to produce sufficient Evidence; but, in the Liberty of Nature, 'tis enough to justify me in the Prosecution, if I be fully convinced of my Right, tho' I be not able to make out my Pretensions to another (c).

9. This *Arbitrators* have in Common with *Judges*, that, in the Examination of Matters of Fact, they ought to shew themselves equal to the bare Affelevation of each Party, *i. e.* when they contradict one another, to believe neither. But when Deeds (d), Arguments and undeniable Instruments can't be produced, they must then give Judgment according to the Testimony of *Witnesses* (e).

And these *Witnesses* ought to shew themselves indifferent towards either Party, and not to let Favour, or Hatred, or Revenge weigh more with them than their Conscience (f). *Tbuanus* (g) relates, that heretofore in *Great Britain*, an *English* Man could not be a *Witness* against a *Scot*, nor a *Scot* against an *English* Man, by reason of the Enmity between the two Nations: But *Cambden* (h) tells us, that this obtain'd only between the bordering *Scots* and *English*; so that if never so many *English* Men should, with their own Eyes, see a *Scot* commit Murder, their Testimony would signify nothing, unless some *Scot* or other testified the same Thing.

And therefore as my Adversary may refuse to admit of my near Relations as *Witnesses* (i); so may I except against my professed Enemies. Indeed sometimes Relations are excused upon a Principle of Humanity, for fear they should be forced to offer Violence, either to their Affections, or to their Conscience. And therefore the *Roman* Law never obliged the Client to be Evidence against his Patron, nor the Patron against his Client (i): But besides this, there was another very good Reason why Servants should not be allow'd to give Evidence against their Masters (2); for, as *Cicero* (k) says, *If that which is done in our own House, and among our selves, were permitted to be publicly exposed and brought against us, the Master would be the Slave and the Slave Master*. Indeed *Theodoric* (l) forbid the Abuse of this Law by an Edict; for some bought up other Peoples Servants, who were conscious of their Crimes, lest they should be brought as Evidence against them. Lastly, It is very reasonable, that no Cause should stand or fall by the Credit of any one single Witness (m), not only because one may more easily be deceived, or corrupted than many, and there is no Falshood so impudent, but may get the Assistance of one Witness (n), but also because an able understanding Judge may discover the Witnesses to be false, by opposing to one another the Examinations of several (o), whereas one may easily be consistent with himself; and altho', by this means,

(a) *V. Livy, l. 44. c. 19. at the End. Justin. l. 6. c. 6. n. 1.* (b) *V. Vell. Paterc. l. 2. c. 50. Livy, l. 9. c. 14.*  
 (c) *V. Conestag. de Unione Lusitan. l. 5. p. m. 222.* To this Purpose is that of *Quint.* Decl. 312. *The Condition of Man is Miserable, since it seems necessary to have a Witness for every thing we do: Truth has so little Power, and Faith so little Effect, it scarce seems sufficiently proved, which is attested by two.* (d) *V. Suet. Galb. c. 7.* (e) For as *Isa* says, *Orat. 7. Arguments are better than Witnesses.* And in *Orat. 3.* he shows, that in Matter of Inheritances particularly, *Deeds are preferable to Witnesses.* *Philo. Jud. de Decal. p. 764. 4. If Arguments and Writings be wanting, the Controversy must be decided by Witnesses.* *Add Lex. Wisigoth. l. 2. t. 4. c. 3.*

(f) ——— cum sint premia falsi  
 Nulla, ratam debet testis habere fidem. *Ovid. Trist. l. 3. El. 10. v. 35, 36.*

*Add Lex. Wisigoth. l. 2. t. 4. c. 12.* (g) *Lib. 1.* (h) *Ad. ann. 1585.* (i) *V. Aristot. Pol. L. 2. c. 6.* (j) *Plut. Remulo. Lex. Wisigoth. l. 5. t. 7. c. 11.* (2) Unless for Incest, as *Cicero* says, *Orat. pro Milone, c. 22.*  
 (k) *Pro Rege Dejotar. c. 11. Lucian. in Asino. t. 2. p. 80. Ed. Amst. Servants must needs know both the good and the ill things of their Masters. There is such another Passage in Lyfias, Orat. de sacro Olive trunco. Plaut. Bacch. Act. 4. Sc. 6. v. 20, 21. I know I am a Slave, and therefore I am ignorant of even that which I know.* See a Passage in *Isocrates Dupex, de fide questionum, p. 634, &c.* And *Aristot. Rhet. ad Alex. c. 17.* Hither may be refer'd the History or rather the Fable of *Avicenna* in *Gabril. Sionit. de urbibus & moribus Oriental. c. 3.* *Add Lex Wisigoth. l. 5. t. 4. c. 14* with which may be compared *ibid. l. 3. t. 4. c. 10.* and *l. 6. t. 4. c. 3.* and *Capitalare Caroli, l. 7. c. 280. Editum Regis Theodor. c. 48, 49.* (l) *Edict. c. 101.* And therefore *Aristotle d. 1.* does well call it a foolish Law, *If the Accuser brings a Multitude of his Relations as Witnesses, the Accused shall be found guilty.*  
 (m) See *Numb. XXXV. 30. Deut. XVII. 6, and XIX. 15.* (n) *Plin. Nat. Hist. l. 8. c. 22.* (o) *V. Susan Hist. v. 51. L. 4. t. 20. De Testib. l. 9. f. 1 & L. 28. l. 18. l. 20 D. de Quest.*

some Crimes must remain unpunish'd in this World, and some must lose their just Right, who perhaps have but one Witness to support it, yet this Inconvenience is not so great, as if every one's Life and Fortune lay at the Mercy of any one Man's Impudence and Villany; for 'tis better that a few Guilty Persons should escape Punishment, than that many Innocent should suffer (a).

Yet *Selden* (b) observes, that against a *Gentile* the *Jews* admitted of one Witness as sufficient. And *Grotius* (c) takes notice that one Witness was enough, not to condemn, but to inform the Court, and, in pecuniary Matters, to put the *Defendant* to his Oath. At this Day, among the *Moors*, the Evidence of two honest Men is sufficient, but if the Witnesses be suspected, then twelve Persons are required; for they think as much Credit may be given to twelve, let them be ever so profligate, as to two, be they ever so honest (d) (1). The *Hebrews* admitted none to be Witnesses, but such as were of good Reputation; Madmen were excepted against, and Children, till they were thirteen Years of Age; and Thieves even after they had made Restitution; those too who lived by Gaming, and *Publicans* who exact more than their due, and such as deal in those things which deserve Stripes: Among the *Turks*, those who have made a Pilgrimage to *Mecca* are equivalent to three Witnesses (e). Add to this, that *One Eye-witness is worth ten that has the Fact by Hear-say only* (f). And therefore their Testimony is of no Weight which is built upon the Authority of others.

But though the Oath of a Witness creates a great Presumption of the Truth of what he asserts, yet, in the Law of Nature, nothing hinders but that a sworn Witness may be convicted of Perjury; and, if he be so convicted, the Sentence founded upon his Testimony comes to nothing (g): Yet it seems absurd, that the Party concern'd should be permitted to make void the Evidence by swearing on the other side; for this would not only lay open a great Gap for Perjury, but by reason of contradictory Oaths, the Controversy would remain as uncertain as before. And therefore it is according to its usual Silliness and Impiety,

that the *Alcoran* (h) commands him who accuses his Wife of Adultery, and has no Witness to prove it, to swear four times, and the fifth time to imprecate the Curse of God upon himself, if what he affirms be not true: and on the other side, it allows the Woman to be clear, if she denies the Charge four times upon Oath, and the fifth time with an Invocation of the Curse of God.

10. As for putting the Sentence of the Judge in Execution, we need not say much; for in a State of Nature, if a Man does not, of his own accord, perform what is due to me, I may by all the Power that my self have, or my Friends can supply me with, force him to it. How far we may carry such violent Proceedings shall be shewed more fully hereafter when we come to discourse of War. Only here we may observe, that in such an Execution, I not only acquire the Property of the thing adjudged to me, when by any Method whatsoever I have got Possession of it: but moreover, if I cannot get Possession of the thing it self, I may seize upon any thing of the same Value, the very Charges of the Execution being reckon'd in, so as to become the rightful Owner of it (i). Indeed the Goods of a Debtor, who becomes such either by his own Contract, or by the thing it self, or by his Injustice, are look'd upon, in the Law of Nature, as tacitly mortgaged for the Debt; and, if it be not discharg'd, may be justly seized for it; nor is the bare Detention of the thing enough for the *Creditor*, for that frequently has more Trouble than Profit in it; but he must also have full Liberty to dispose of it as he pleases; for my Right is not satisfied, if instead of the thing, with the Property of which I ought to be invested, I receive nothing but the Custody of another Man's Goods; yet, in such a Case, I ought to signify with what Design I make such Seizure, whether in order to extort from the *Debtor* my Dues the sooner, or to take the Goods thus seized upon in part of Payment: Indeed it seems but reasonable to give the Debtor Liberty to receive his Goods, upon Payment of the Debt. But this way of Execution is proper to the State of Nature, and has no Place in a Civil Constitution (k).

(a) Val. Max. l. 4. c. 1. f. 10, 11. (b) De Jure N. & G. Sec. Heb. l. 7. c. 6. (c) Add Deut. XIX. 16.

(d) What Qualifications are necessary for Witnesses, may be seen in L. 22. t. 5. l. II. III. f. 1, 2, 3, 4. IV, V. IX. XIV. XXI. XXIII, XXIV. D. de Testibus. (1) See above in B. 3. c. 6. f. 16. (e) V. Chr. Richer. de moribus Turcarum.

(f) *Plaut. Trucul. Act. 2. Sc. 6. v. 8.* 'The Ears are less faithful than the Eyes. *Lucian. de Domo.* 'In a well regulated Common-wealth the Laws take Care, that what is given upon Hear-say shall not go for Evidence. For such a Testimony is naturally liable to Corruption. *Philo Jud. de Corrupt. Linguarum*, pag. 340. B. C. Edit. Paris. 'The Eye is apprised of the Things themselves, and in a manner intermeddles with Business, and perceives all by Light, by which every thing is illustrated and discovered: but the Ear has less Credit as having to do not with the Things themselves, but with Rumours which do not always mind the Truth, *Id. de Judice.*

(g) 'The *Attick* Laws allow, that, after the Sentence, an Action of Perjury may be brought against the Witness; as is plain from *Demosth. Orat. in Evergum*, in the Beginning. Add. *Plat. de leg. l. 11.* about the End.

(h) *Cap. de Lumine.* (i) For as *Grotius* observes, l. 2. c. 7. f. 2. 'Expletive Justice when it cannot get the thing it self, demands an Equivalent, which morally speaking is the same. (k) V. L. 41. t. 2. l. 5. D. de acquir. poss. l. 47. t. 8. l. 2. f. 18. D. de vi honorum raptorum, & L. 4. t. 2. l. 13. D. quod metus causa, & L. 48. t. 7. &c. L. 7, 8. D. ad l. Juliam de vi privata.

O F T H E  
LAW of NATURE  
A N D  
N A T I O N S.

B O O K the S I X T H.

C H A P. I.

of MATRIMONY.

**I**T follows in course that we examine the Original and Nature of *human Government*, and that we observe what Precepts of the Law of Nature and of Nations do presuppose it. But in as much as Government cannot otherwise be conceiv'd than between several Persons, and since the Holy Scriptures inform us, that in the Beginning GOD Almighty created one only *human Pair*, the Original Parents of our Race; it may seem necessary, before we proceed in our Enquiry about *Civil Power*, to consider the Relation of *Matrimony*, which being the Source of Private Families, does by Consequence supply *Matter* for the composing of all Sovereignties and States. For as the Body of Man is made up of divers Members, each of which consider'd by it self, hath likewise in some sort the Appearance of a Body, so States are form'd out of lesser Societies, of which some are call'd *Simple* and *Primary*, others *Compound*, and as it were *Collegiate*. Of the first sort are three, according to the threefold *Power* of a *Husband*, of a *Father*, and of a *Master*. And these bear the Name of *Simple*, not because they consist of no more than two Persons, as some maintain (a), but because they are not compounded of inferior Societies. For why may not one Father have more Children, and one Master

more Servants, and yet the Societies, thus constituted be as truly simple, as if each Father had but a single Child, each Master but a single Servant (b).

II. To go on then; so soon as Man was rendered obnoxious to Mortality, lest the Duration of so noble a Species should be confined to a single Age, or should require the constant Miracle of new Creations to preserve it in Succession, it pleas'd the most wise God to provide against these Inconveniencies, by enduing the two different Sexes with a Natural Power of Propagating their Kind (1). And lest they should forbear so necessary a Work, either out of Negligence, or upon Apprehension of the great Pain of *Bearing*, and the great Trouble of *Educating* their Off-spring, he implanted in each Sex a most passionate Love, a most ardent Propension towards the other; with a most deep and tender Affection for their Common Issue; that so they might not only willingly, but joyfully contribute their Service to the Preservation and the Continuance of Human Race (c).

III. The first Point of Enquiry concerning *Matrimony* must be, whether Men, in all respects fit for such a Condition, lie under any Obligation of entering upon it. For about this Action, as likewise about others, to which Men

(a) Vid. Joh. Frid. Horn. *de Civitate*, l. 1. c. 1. f. 2. (b) In beginning thus with *Matrimony*, Plato himself *de Legib.* l. 4. p. 835. Ed. Wech. is our Guide and Director. Let us hear his Managers of the Question. LL. l. 4. Athen. Come, tell me by all that's Good, what Point ought first to fall under the Legislator's Care? Will not Nature teach him to settle, before all things, by good Laws the Affair of Generation and the Origin of Mankind? Clin. Yes no doubt. A. But the Affair of Generation takes its Rise from the Union and Community of Wedlock. C. It doth so. A. Why then if Nuptial Laws be in the first place establish'd, they cannot but have a good Influence on all the future Regulations of the State. (1) See Mr. Barbeyrac's Note upon this Sect. (c) My Lord Bacon, *De Augment. Scient.* l. 7. c. 2. observes, that amongst Animals the Pleasure of Generation is greater than that of Feeding.

Men are inclined by a Natural Appetite, as Self-Preservation, and the Love and Education of Off-spring, many have rais'd a Scruple, as if they were not under the Care and Cognizance of the Law of Nature. For say these Authors, what need was there of a farther Engagement to such Performances, as the Sensitive Appetite, and Instinct did with sufficient Strength incite and drive us to before? But indeed their Dependance on natural Instinct, is so far from proving them to be uncommanded by the Law of Nature, that it rather argues a more peculiar and more earnest Care in *Nature* to have them observ'd, with the utmost Strictness, as the immediate Causes of the Safety and Welfare of Mankind: whilst distrusting, as it were, the bare Force of Reason, she assists and seconds it with so violent an Instinct, that Men cannot, without great Difficulty, bend the contrary way (a). Where should we find a Person who would venture the common Vexation of Children, were he not led to desire them, as well by a Natural Inclination (b), as by the sober Advice of Reason (c): especially since the means of obtaining them are such, as would appear both tedious and despicable to a wise Man, unless attended with some delightful Charm (c)? We acknowledge that there is a great Difference between *Instinct* and *Reason*, and that in most Cases those Powers take quite contrary Roads, and that therefore the Licentiousness of the former is to be bridled, and controll'd by the Authority of the latter; which to compass and effect is an Argument of a great and worthy Soul. But altho' *Instinct* hath not in it self the Force of an *Obligation*, yet it many times happens, that we may, by some superior Engagement, be *obliged* to undertake a Performance, which bare Instinct before inclined us to (2).

And hence we may infer the Falseness of that Position (d), which asserts that a Mother, who kills her Child to avoid publick Infamy, and so stifles her Instinct of Natural Affection by another Instinct of Aversion to Shame, is not guilty of a Sin against the Law of Nature. For the Infant's Life was guarded by that Law,

as well as by the Instinct of the Mother; and it was her Duty to have known, that her Disgrace was an Evil which ought not to have been weigh'd against the Death of an Innocent, brought into the World by her free Consent. If the Care of her Reputation was dearer to her than the Pleasure of being a Mother, she ought to have consider'd this before she chang'd her pure and spotless Condition. But afterwards, it would be barbarous Injustice to conceal the Sin of the Parent by sacrificing the Child.

When Marriage is once contracted, in as much as the Gift of Fruitfulness is not conferr'd by human Power (e), a greater or a less Number of Children equally answers the Obligation of *Nature*. Nor should the Wife's Barrenness raise any Scruple in the Husband, as if he had been wanting in his Duty to the World (f).

IV. To carry on our Enquiries as clearly as may be, this in the first Place we take to be most evident, that all those impure Pleasures are repugnant to the Law of Nature, which aim at no other End than the Satisfaction of Brutal Lust (3). For the more warmly the Appetite of Love stirs in human Breasts, the more is Nature and Reason concern'd to provide, that the Irregularities of its Motions do not prejudice that *comely Order*, which is the very Life of Society; and that it be rather made to contribute to the Maintenance of Decency and Peace. Whence appears the most detestable Sinfulness of those Pollutions which we so justly call *Unnatural*.

But the Sin of Uncleaness is not confin'd to those gross Degrees; many grievous Violations of *Chastity* there may be in what we are wont to term the ordinary way of Nature; and these happen as often as we pursue our Pleasure, without regarding the only just End of it, the due Conservation of our Race. It hath indeed been asserted that many Nations of old thought it a Part of Natural Liberty, to prosecute an amorous Entertainment, without being (g) tied by the Rules of Matrimonial Strictness. But 'tis sufficiently manifest, that if all Men should

*Providit ille maximus mundi parens,  
Cum tam rapaces cerneret fati manus,  
Ut damna semper sobole repararet nova.*

————— *Calibem vitam probet  
Sterilis juvenus; hoc erit quicquid videt  
Unius ævi turba.*

Senec. *Hypol.* v. 465, &c.

The wise Creator knew the World was frail,  
And order'd quick Succession to repair  
Still with new Race the Breaches made by Fate.

————— Let our barren Youth  
Experience their mistaken Chastity,  
And all you see must prove a short-liv'd Crowd,  
A People of a single Age.

(a) *Add.* Oppian *Cyneget.* l. 3. v. 107, &c. *Halieut.* l. 1. v. 702, &c. (b) *Vid.* Euripid. *Medea.* v. 1090, &c. *Hippol. coron.* v. 616, &c. (1) See Mr. Locke's *Essay of Human Understanding*, B. 2. c. 21. s. 34. (c) *Add.* Val. Max. l. 7. c. 2. s. 1. *Extern.* Montaigne *Essais*, l. 3. c. 5. p. m. 137. *Cartes de Passion.* Art. XC. (2) See Mr. Barbeyrac's Second Note upon this Section. (d) *Vid.* Grafwinkel. *ad Grot.* l. 1. c. 1. s. 11. (e) *Genes.* XXX. 1, 2. (f) *Senec.* l. 2. *Contr.* 13. *Fruitfulness doth not come at our Pleasure, nor at the time fix'd for it in our Account: Nature is absolutely at her own Disposal; and not tied up by human Laws: Sometimes she hastens and outruns our Wishes, sometimes she proceeds slowly, and disappoints them with her Delay. Nature doth not work by Form, nor is Chance confin'd to Rules and Prescriptions. The Law may appoint a set Day, but Nature takes no notice of the Limitation.* (3) See Mr. Barbeyrac's 1st, 2d, and 3d Notes upon this Section. (g) Thus Mr. Selden, *De J. N. & G. Sec. Heb.* l. 5. c. 4. shews from the Jewish Rabbies, that before the *Mosaical Law* it was allowable for a Woman, not yet married nor betroth'd, to bestow herself, either *gratis*, or upon Consideration of a Reward, without the Confinement of Cohabitation. Whereas the succeeding Institution absolutely forbid circumcised Persons to use any Community of Bed, without entering on a married State: though if this were practis'd between a circumcised Person and a Heathen it was, in some Cases, adjudg'd lawful. To which Purpose they cite *Deut.* XXIII. 18. Lest.

should make a constant use of this irregular freedom, human Society could not long subsist, either in a graceful or in a quiet Condition. And therefore, according to Bp. Cumberland's most true Rule (1), *That in which it is impossible for all Men to agree, cannot be according to right Reason.*

Nor was the Command of Natural Law, as to this Point, so quite worn out amongst those very Nations, which allow'd a publick Security to such Practices, as that they really approv'd of what they permitted, or absolv'd the Actors from all Marks of Disgrace. 'Tis a famous Aphorism of Ulpian, that a *Whore is Vile*, or Wicked, *by her Professon*; and the Romans thought it a sufficient Punishment to these loose Ladies, to make them shew their License in Publick before the Magistrates, and thus to stand infamous on Record (a). The Principle, then, on which those States and People proceeded, who conniv'd at such youthful Disorders, was, by the means of these publick Traders in Lewdness, to preserve and guard the private Chastity of Virgins and of honest Matrons. In warmer Climates, the Extravagance of wild Gallants (b) might have injur'd the most sacred Modesty, had it not been diverted by a Tribe of forward Nymphs, who were proud of their Addressees, and met them in their irregular Designs. This, however, is manifest, that the same Nations which extenuated rather than defended these Immoralities, as no more than harmless Failings, and pardonable Slips of Youth, did yet, at the same time, assert in the highest Degree the just Honour of the Marriage-Bed, and esteem'd Faithfulness to it, as a Mark of singular Sanctity and Goodness.

V. A diligent Observer of Human Nature will easily discover how extravagantly Unreasonable it is, that Mankind should be propagated by Chance-Beds, without Confinement, and Rule. Such a Life, they tell us, the Peo-

ple of *Attica* led before the time of *Cecrops*, cohabiting like a Herd of Beasts, under no regard to Decency or Distinction. Whoever was made a Mother by so wide a Provision, presented her Medly-Off-spring to any one of the many Fathers who would be pleas'd to own and to accept it. When *Cecrops*, by the institution of Matrimonial Laws, had banish'd this barbarous Custom, he pass'd, in Fables with the Common People, for a kind of an *Hermaprodite*; either because he taught them to know their Fathers, as well as their Mothers; or because, by the conjugal Tie, he incorporated, as it were, Two into One (c). Who is there that can pretend to be insensible, how little Difference would be left between Beasts and Men, should the Ordinances of Marriage be universally cancell'd and repeal'd? Indeed the Beasts would then have the Advantage of the Comparison (d). They are frequently observ'd to use some sort of *Constancy*, in their way of Love, and some Semblance of Conjugal Fidelity. And if the fair Mistress raise a Quarrel in the Herd, 'tis only at certain Seasons of the Year, when they feel a Warmth beyond their ordinary Temper. But Men would be perpetual Rivals; and Human Race would be confounded and destroy'd by so wild a Method of its Preservation. Again, How miserably weak and helpless would be the Condition of the breeding Mothers? Or, if they weather'd out that Danger, How great would be the Trouble, how high the Charges of Education, above their single Strength or single Fortune? It is plain, the Men would not be over-forward to assist them under either of these Burthens; not in the First, unless they knew themselves to have been the Cause of their Pain; not in the Second, unless they could be assur'd, that the Child, to be provided for, was their own. And 'tis not likely, that they should be able to obtain any Certainty in these Points, without

*Levit. XIX. 29. Genes. XXXVIII. 14. &c. Add. Grot. ad Genes. XX. 9.* The Reason given by *Maimonides* for this Prohibition is, that the Contentions and other Evils, usually occasion'd by these irregular Liberties, might be avoided, and that Good of certain Notes and Distinctions of Families procur'd. 'Tis not necessary to appeal to the Testimony of Heathen Writers, yet see *Epicet. Enchir. c. 47. Plaut. Curcul. Act. I. Sc. I. v. 33, &c.*

PH. *Quin leno hic habitat. PAL. Nemo hic prohibet nec vetat, Quin quod palam est venale, si argentum est, emas, Nemo ire quinquam publica prohibet via, Dum ne per fundum septum facias semitam. Dum te abstineas nupta, vidua, virgine, Juventute, & pueris liberis; ama quod lubet.*

PH. 'As I take it, here lives my worthy Procurer. PAL. 'We have a fair Market; if you bring Money in your 'Pocket, you are free to buy any thing but prohibited 'Goods. No Body hinders you from travelling in the 'High-way, so long as you don't break Hedges and In- 'closures: and in the same manner so long as you re- 'frain from Wives, Widows, Virgins, Youth and Free- 'men's Sons, you may e'en love as you list.

(1) Of the Law of Nature, c. 5. s. 46. (a) Tacitus of *Vistilia*, *Ann. L. 2. c. 85.* That Youth in *Quintilian* (*Decl. 14.*) was arriv'd at the highest Pitch of Impudence, who forms a publick Accusation against his Miss, for giving him a *Potion* that suppress'd his Love. Amongst other of his Rants, this one, *I had just enough to furnish my self with a moderate and sparing Measure of unforbidden Joys, sufficient for the Necessities of Life. Therefore instead of a Wife I was content with a Mistress, and with a single Mistress, which is a most certain Sign of Frugality and good Management in Pleasure.* (b) *V. Cicer. pro Caelio. c. 17, &c. Epicet. Enchir. c. 47. Add. Mufon. in Stobaeus, Serm. VI. Grot. in Math. V. 27.* The *Mahometans* allow Fornication with their Maids; which the more Vertuous *Indians* do, in all Shapes and on all Accounts, detest. *Plutarch (de Virtut. Mulier.)* reports, that among the People of *Cbios*, for the Space of seven hundred Years together, there was no mention made of Adultery, or any other unchast Practice; though the Island was Famous for Beauties.

(c) *Athenæus, l. 13. c. 1.* (d) *Quintil. Inst. Orat. l. 9. c. 2.* 'Tho' *Dido* in *Virgil*, complains of her late unhappy Match, yet her real Thoughts could not but break out, and she declares in the midst of the Lamentation, that a Life absolutely without Marriage, was the proper Condition of Beasts not of Men.

*Non licuit thalami expertem sine crimine vitam Degere more fera? Æneid. 4. 550.*

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the regular Restraints of Marriage. For what *Aristotle* (1) reports of a Nation in *Africa* (a), where the Wives are held in Common, but the Children distinguish'd and appropriated, by the Likeness of Features, is, at best, a very deceitful Method. Tho' indeed *Theocritus* (b) makes the Tokens of an Adulteress *τίκτα ἑποφ' ἐοικότερα πατρὶ, Children unlike the Husband*; and *Horace's* Wish for the *Roman* Chastity is *Laudentur simili prole puerperæ, 'Let the Women 'deserve Commendation, for picturing the 'legal Father in the Child.*

Lastly, since without Matrimonial Prescriptions, we cannot well suppose any such thing as Families, nor without Families any publick States; and since therefore the whole Order and Harmony of Civil Life is founded on these Regulations, it is most clear that were Men entirely releas'd from such Bonds, they must live in an unfociable, separate Condition, little better than Brutal. And therefore *Horace* shew'd his true Judgment in deriving the Calamities of his Country:

*Fœcunda culpæ secula nuptias  
Primum inquinavere, & genus & domos:*

*Hoc fonte derivata clades  
In patriam populumque fluxit. L. 3. Od. 6.  
[V. 17. &c.]*

First those Flagitious Times  
(Pregnant with unknown Crimes,)  
Conspired to violate the Nuptial Bed;  
From which polluted Head  
Infectious Streams of crowding Sins began,  
And thro' the spurious Breed and guilty Nation  
ran.

My Ld. *Roscommon.*

To all which Considerations we may add, that without a Successor, in way of Marriage, no Man could be born to an Estate or Inheritance; and should we take away these Advantages, Human Life would be deprived of its chief Ornaments, if not of its necessary Supports. 'Tis remarkable what *Justin* (c) relates of the *Partheniæ* amongst the *Spartans*; they were born, as the Irony of their Name imports, from promiscuous and irregular Embraces, and being grown up to a Sense of their Shame and of their Poverty, fearing to starve at home thro' Defect of Paternal Fortunes, they were necessitated to leave their Country, and ramble abroad in a Body, to force a Maintenance and a Seat (d).

VI. In as much then as it appears evident, beyond Dispute, that in order to the keeping

up a comely and a regular Society amongst Men, it is necessary, that the Propagation of Human Kind should be settled and limited by Matrimonial Constitutions, we are in the next place to enquire what Obligation particular Persons, of proper Years and Abilities, have, to engage in a married State. And here we may first take a View how the Matter before us hath been order'd, by the Laws of various People and Governments, and then how far it seems to be determin'd by the bare Law of Nature. It was the Doctrine of the ancient *Jews*, as *Mr. Selden* (e) informs us, that by the Divine Precept of *Encrease and Multiply*, all their Males were bound to Marry before they had compleated twenty Years; unless upon account of some Natural Defect; or because they had devoted themselves to a Life of Chastity, and constant Study of the Law. And this Command they said extended to all the Posterity of *Noah*. They added, that he who buried his Wife, without seeing a Son and a Daughter, (and those as *Perfect by Nature* as their Parents) had not yet fulfill'd the Precept. But that in case a Man's Son and Daughter were dead, and had left Children of both Sexes, the Grandfather was then free. That, otherwise, upon Defect of Issue of either Sex, Men were oblig'd to contract new Marriages, so long as their Age would give them leave. And therefore, that if a Man had either taken a barren Wife, or one that was not yet old enough to be a Mother, he did not answer the Law, unless he took another immediately capable of *Bearing*. *Leo Muinensis* (f) observes farther, that altho' the bringing of a Son and Daughter into the World, seem'd to be sufficient for the full Observance of that Divine Command, yet a Man, of convenient Age and Strength was still bound to seek a married Life, for the avoiding Fornication (g). But whether this Injunction extended to Women as well as to the Men, was a Point not very well settled and agreed amongst them. It is most probable, that their Judgment was to this Purpose, that the Women were not indeed oblig'd to any determinate Time, because it is not in their Power to marry when they will; but that upon the first fair Offer made them, they stood engag'd to contribute their Assistance to the World. 'Tis a Saying amongst the same Doctors, that *He who neglects the Precept about the Multiplication of Mankind, ought to be look'd upon as a Murderer* (h).

Many other Nations have, in their publick Institutions, declar'd themselves to the same Purpose (i). *Plutarch* recites a Law of *Ly-*

(1) *Pol. B. 2. c. 2.*

(a) Who perhaps are the same that *Nicol. Damascen.* (*de Mor. Gent.*) calls *Limyrnii*.  
(b) *Idyl. 17.* (c) *L. 3. c. 4.* (d) *Servius* (*ad 3. Æn. v. 551.*) & *Lactantius* (*de fals. relig. c. 20.*) vary somewhat in the Relation of this Story. Hither may be refer'd most of the common Arguments urged against *Plato's* Community of Wives. *Add Stob. Serm. LXV.* 'Cabas, King of *Persia*, having by a Publick Ordinance, commanded the promiscuous Use of Wives and Women, his Subjects rose in Rebellion and expell'd him the Kingdom. *Procop. Hist. Pers. l. 1. c. 5. Agath. l. 4.* (e) *De J. N. & G. Sec. Heb. lib. 5. c. 3.* (f) *De rit. Hebr. p. 4. c. 2.*  
(g) *Plato* (*de LL. l. 11.*) delivers the like Opinion, and adds, *One of each Sex is the least Number of Children that ought to pass for sufficient.* (h) Yet the Sect of the *Essenes* amongst them utterly forswore the Use of Women. *Vid. Plin. N. H. l. V. c. 17. Solin. c. 38.* (i) *Varro, in Leg. Mænia apud Nonium in Eunuchare.* *He that destroys his Country, his greater Parent, is most inexcusably guilty: And this every one does, so far as in him lies, who either disables himself from being a Father, or defers to act as such.* See the Sayings of *Musonius, Hierocles* and *Antipater* in *Stob. Serm. LXV.* *Add. Arrian in Epictet. l. 3. c. 7. J. Pollux l. 3. cap. πρὸς ἀγαμύων,* mentions Suits at Law carried on at *Athens* and *Lacedæmon*, against *Celibacy* and late *Marriage.*

curgus, by which it was Enacted, that Old Bachelors should be excluded from the solemn Sports and Dances of the Women; and that in the Winter Season, they should go naked up and down the Forum, singing a Song in Dishonour of themselves, the Burthen of which was, that *They own'd themselves to be thus justly punish'd, for disobeying the Ordinances of their Country.* And that, besides all this, they should have none of these Honourable Marks of Respect and Duty paid them, which the younger Spartans were otherwise oblig'd to pay to the elder. Upon this last account *Dercyllidas*, a Famous, but Unmarried General, desiring a younger Person, according to Custom, to resign his Seat to him at a publick Solemnity, the Youth refus'd, with this smart Reason, *Because, says he, you have brought no Son into the World who might hereafter give place to me* (a).

At Rome the Censors sometimes impos'd a Mulct (for that Reason call'd *Uxorium*) upon such Men as had grown old in a single Life (b). And good *Metellus* speaks home to the Business, in *Gellius*, *Could we, my Country-men, says he, do altogether without Wives, we need not give our selves these unnecessary Troubles. But since Nature hath so order'd Matters, that Human*

*Life can neither be very free and easy with them, nor possibly subsist without them, we ought rather to consult our perpetual Safety, than our present Conveniency* (c).

It follows from the same Principles, that it is sinful and unjust to emasculate Persons; at least, without their Consent. *Domitian* forbid the Performance of this Operation by an express Law (d). After which, those who had so ridiculous a Design on themselves, or on others, were oblig'd to ask leave of the Emperor, or the President of the Province (e). Upon what Account the Eastern Monarchs were so fond of employing Eunuchs in their nearest Offices, may be seen in *Xenophon* (f). To whose Reasons, we may add this one farther, that the Prince could, without Envy or Offence, make himself Heir to these Childless Favourites, and so ingross all they had got in his Service (g). Amongst the Jews, an Eunuch was not permitted to be a Judge in any Case; upon the Opinion of their excessive Spitefulness and Cruelty. And, in the Indies, 'tis a common Saying, that *To castrate Beasts makes them more Tame and Humble; but the same Experiment tried on Men makes them more Insolent and Intolerable* (h) (1).

(a) Μὴ μάλιστα ἀγαπῶ, &c. Phocylides.

To live unmarried is to die unmourn'd:  
Add to your Race; see Nature's Gift return'd.

Plato de LL. l. 4. p. 835. Every Man, who arrives at the Age of thirty Years, ought to chuse him out a Wife; considering with himself, that Mankind is by a kind of Natural Desire prompted to a Pursuit of Immortality; there being no Person who is not Ambitious of keeping a perpetual Name and Memory with succeeding Ages. Now the Way by which human Race obtains an endless Duration, is by leaving an uninterrupted Course and Series of Posterity. It cannot but be highly criminal, for a Man to rob himself of Immortality through his own Default: yet whoever neglects the Affairs of Marriage and Issue, voluntarily throws away his Title to this unvaluable Benefit. Cicero (de Finib. &c. l. 3. c. 20.) observes, that in order to a Man's living as his Nature directs and enjoins, it is convenient, that he apply his Mind to the Choice of a Partner, and the Desire of Posterity. Philip Baldæus (de Idolat. Ind. Gent. p. 2. c. 3.) reports of the People of Benjin, that they look on it as the basest Reproach to want Children: such a Person (they say) is not worthy to see a Man first in a Morning.

(b) Valer. Max. l. 2. c. 9. Festus in Uxorium, & ibid. Jos. Scal. Plutarch reports the same in his Life of *Cæmilus*. (c) *Posidonius* called the *Myrians*, who admitted no Women amongst them, & *Cælius*, Men without Life. Strabo, l. 7. p. 205. Of the *Lex Papia Poppææ*, see Lips. ad Tacit. l. 3. Ann. c. 25 & *Jacob Godofred*. Which Law the Christian Emperors repeal'd, probably by Advice of the Church-men. Vid. L. 8. t. 58. C. de infirmis. pen. calibat. & *Sozomen* l. 1. c. 9. The Speech of *Augustus* in *Dion. Cassius*, l. 56. is remarkable on this Subject. *Ælian*, (P. H. l. 6. c. 6.) recites a Law of the Spartans, enacting, that 'If a Man had increas'd the Common-wealth with three Children, he should be releas'd from keeping Watch; with five, from all publick Duties and Charges. See likewise a long Passage of *Hierocles* in *Stobæus*, Sermon. LXXIII. (d) Vid. *Sueton*. *Domit*. c. 7. *Statius*, IV. Sylv.

Qui fortem vetat interire Sexum. Forbids the nobler Sex to feel Decay.

Add *Martial*. l. 6. Ep. 2.

(e) Vid. *Casaubon*. ad *Sueton*. & *Justin*. *Mart*. *Apol*. 2. Add *Deuteron*. XXIII. 1. *Joseph*. *Antiq*. *Jud*. c. IV. 8. L. 9. t. 2. l. 27. f. 28. D. ad L. *Aquil*. *Novell*. 142. & ib. *Dion*. *Godofred*. l. 4. f. 2. l. 5. D. ad L. *Cornel*. de *Sicariis*. *Euseb*. *Evangel*. *Præp*. l. 6. c. 8. In Syria and *Osroene* many castrate themselves like the Priests of *Cybele*. But King *Abgarus* commanded the Hands of all those, who had abused themselves in this manner, to be cut off: after which Order, the infamous Practice ceased in that Country. *Quintil*. *Instit*. *Orat*. l. 5. c. 12. For my own Part, when I contemplate Nature, there is no Man who seems not more fair and comely to me than our Eunuchs; who are thus abused, purely to render them more Beautiful. Providence can never be so negligent of its Work, as to let Infirmary pass for Excellency: nor can that which would be Monstrous, if produced by Nature, be Handsome if procur'd by Art. Let this Cheat, this feigned Alteration of Sex, delight the Votaries of Lust; yet Vice and Immorality will never be able to gain such an Empire, as to make that Good, which they make Costly and in Request. How *Hermotius* revenged himself on *Panionius*, who had thus dismembred him, See *Herodot*. *Uran*. (f) *Cyropæd*. l. 7. p. 116. Ed. H. Steph.

(g) *Heliodor*. *Æthiop*. l. 8. in fin. The Eunuchs are the Ears and the Eyes of the Persian Courts; who having neither Children nor Kinsmen to engage their Minds, depend entirely on Him that employs them. *Claudian*. in *Eutrop*. l. 1.

Eunuchus nulla pietate movetur,  
Nec generi nativæ carvet.

— An Eunuch feels no Tie  
OF Duty, Nature, or Progeny.

(h) *Heliodor*. l. 9. Eunuchs have ever a great deal of Jealousy in their Temper; and therefore they make the best-keepers of Women: being then employed to hinder others from Pleasures, which they are themselves incapable of enjoying.

(1) See *Grotius* upon *Deuteron*. XVI. 18.

Some observe that *Eunuchs* were first made in those Countries, where Poligamy was permitted: the Number of Men being superior, or at least equal to the Number of Women. Others maintain that they owe their Original to the Right of War; when a Conqueror sparing the Lives of those he overcame, thought fit to put them into this unmanly Condition, that having lost the Springs of private Interests and Affections, they might, with the more Security be trusted in his Service.

VII. If we consider barely the Force of *Natural Law*, we shall conclude, that in as much as *Matrimony* is the great Source, and the main Foundation of a *Social Life* (1), Men are so far bound to enter upon it, as they stand engag'd to all Duties necessary for the attaining of that End: yet Nature lays this Injunction on us in the manner of an Affirmative, Indefinite, Unlimited Command; so as not to oblige necessarily all Men, and at all times; but requiring due *Occasion* before it exacts our Performance. Now in fixing the *Occasion* of Matrimony, we are not to rest in the Fitness of Age and of Ability, but are likewise to suppose that the *Match* offer'd us, is answerable to our Birth and Condition, and that we have both competent Wealth to maintain, and competent Prudence to govern a Family (a). The Laws of the *Islanders* prohibit Marriage to Persons of extreme Poverty (b). Sometimes too it happens, that the Condition of the present Times, or the strict Care of a Function incumbent on us, will not give us leave to think of changing our State of Life (c). And therefore it is not only unnecessary, but senseless and ridiculous, that those young Fools should run a Marriage-hunting, who have neither Means nor Wit to keep a Family from starving, and who, at the best, are only able to stock the Nation with a young Succession of Beggars. Those, again, deserve not only Excuse, but Commendation, who decline a married State, that they may with more Ease and Opportunity improve and cultivate their Minds, for the publick Service of the World. For since the two great Uses of Matrimony are the Preservation of Race, and the avoiding those fouler Lufts which would stain and disgrace Human Society; so long as neither of these Ends is like to be prejudic'd, we ought not to blame a Resolution of single Life in such Persons as probably foresee, that they shall be able thus to do more good to their Country and to Mankind, than in another Condition. If therefore a brave and generous Soul should either be insensible of the idle Strings of Love, or able easily to master and suppress them (d), and, at

the same time, capable of benefiting the World otherwise than by advancing its *Stock* and *Breed*; we cannot, in reason, imagine, that Nature lays any Obligation upon him to let the Charms of the fair Sex hinder or divert his worthy Designs (e): Especially since there are so very few, who can pretend to this Gift of Chastity: so that the World is in no Danger of coming to an untimely End by their Resolution. Much less ought those Persons to fear Reproach and Censure, who having serv'd Mankind by a former Marriage, decline a second Engagement for the sake of their Children. Tho', on the other side, the Law of *Charondas*, in *Diodorus Siculus*, l. 12. c. 12. seems a little too hard, excluding all those Men from the publick Councils of the State, who had brought a Mother-in-law into their Family. The Reason he gave for so severe a Decree was this, *He esteem'd it impossible, that a Man should be able to advise well for the Interest of his Country, who had been so far from consulting the Good of his own Children. If his first Marriage prov'd successful, he ought to rest satisfied with that Happiness; if unfortunate, he could not be reckon'd in his Wits, for running on a second Danger.* But indeed, a second Marriage does not always prove injurious to the Children of a former Bed. And as to the other Part of the Objection, it may be easily retorted. We have something like it in the old Greek Epigram,

Ἐπις ἀποξ γήμας, πάλι δούτεα λέιτεα διώκει,  
Ναυηρὸς πλωεὶ δὲ βυδὸν ἀργαλέον.

*He that escapes one Wife, and ventures on,  
Courts a new Ship-wrack, when but half undone.*

To which *Harry Stephens* has given this Ingenious Answer,

Ὅστις ἀπαξ γήμας πάλι δούτεα λέιτεα διώκει,  
Ὅυχ' ἔλος μομφῆς ἀξίος ἔδειμῆς.  
Ἐὶ κακὴ ἢ πρῶτη, τάχα δούτερον ἢ κακὴ ἔσται,  
Ἐὶ δ' ἀγαθὴ, ἀγαθὴν ἐλπίδα κ' ἴσ' ἔχει (f).

*When a stout Widower tries the second Hit,  
'Tis hard to blame his Memory or Wit.  
This may be Good, if one was Bad before;  
If Good, kind Heav'n may have as Good in store.*

On the other hand, it sometimes falls out, that besides the general Ordinance of Nature, a Man may be oblig'd by a particular Reason to enter on a married State. As, for Instance, suppose a Royal Family should be reduc'd to one only Person, that Person is highly and peculiarly bound to seek an honest and lawful way of

(1) Cicer. de fin. bonor. & mal. Lib. 3. c. 20. Add. Plat. de Leg. Lib. 4. p. 835.

(a) Plin. l. 1. ep. 14. When I reflect on the common Custom of the World, and the Laws of our State, which command us, in Marriage, to have a considerable regard to Wealth and Fortune, I think it is very proper to mention, that the young Lady's Father is Master of a very fair Possession. And besides this, the Hopes of a very fruitful Bed ought, in my judgment, to go a great way in determining our Choice, and to be reckon'd amongst the chief Conditions of a Bride. Add Orat. M. Hortali. Tacit. An. l. 2. c. 37.

(b) Arngrim. Jon. Descrip. Island. c. 8. (c) See 1 Corinth. VII. 26. (d) ἐξενήσῃ τῷ μὲν ἐξῆσθαι, as Philostratus speaks, Apoll. T. l. 8. c. 3. A Lover of Abstinence from Love. (e) Add Arrian in Epictet. l. 3. c. 22. p. 311, 312. Ed. Wolfii. Corn. Nep. Epamin. c. 10. (f) Add Charon. de la Sageffe, l. 1. c. 42, & 46. f. 2, 3. Bacon's Essay 8. encreasing

encreasing his Race, to hinder the Confusion which must follow in the State, upon Default of Succession; and because, as *Euripides* (a) says, *Male Children are the Pillars of great Families*. And what we have thus settled, in regard to the Obligation of *Matrimony*, seems more agreeable to the Nature and Condition of Men, than the Rule which Bishop *Cumberland* (b) lays down, and so largely insists on, that *Since the Earth is now well stock'd, Men are left at their liberty, to choose either a married, or a single Life*.

VIII. From these Considerations, Judgment may be made, how far the Laws of particular States have Power to streighten or to loose the Natural Necessity of Marriage: And this, in the first Place, is evident beyond Dispute, that a Civil Legislator may, by Vertue of his Sovereign Authority, constrain all his Subjects, who are capable by Nature, and have means of procuring a sufficient Maintenance, to engage in *Matrimony* by such a time. But to compel a Man to marry for the Propagation of a Race of Beggars, is equally Impolitick and Inhuman. Yet it looks more mild, in this Case, to enforce an Ordinance rather by Rewards to the Compliers, and Subtraction of Benefits from the Recusants, than by direct and positive Punishments. Of this sort was the famous *Jus trium liberorum* (i) amongst the *Romans*; and that *Spartan Law* mentioned by *Aristotle* (c) enacting, that *He who had increas'd the State with three Children, should be free from the Trouble of keeping Watch; and he that had one above that Number should stand farther exempted from all kinds of Burthens*. After the same manner *Strabo* (d) informs us, that the *Persian Kings* propos'd a yearly Prize to those who had been Fathers of most Children.

It is no less evident, that a Prince or State would act most ridiculously, as well as most unjustly, should they in general forbid *Matrimony* to all their Subjects: Or should they allow this Privilege to the First born only of every Family, and enjoin strict Celibacy to all the rest (e). For it is impossible, that in so great a number, All should be able to lead a Life of Severity and Continnence. Nor would these Constitutions be a more merciful way of retrenching the exuberant Flood of Subjects, than the cruel practice of *exposing Infants* so common in ancient *Greece*, or the other of *procuring Abortion*, which *Aristotle* (f) himself adviseth.

But if it appear upon common Reason or Experience, that any particular Office in a *State*

can be more conveniently discharg'd by an Unmarried, than a Married Person, the Civil Laws may fairly restrain such an Employment to men that are content to live singly, and may oblige them to quit the Honour, when they change their Condition. Provided still, that the Number of Men, privileg'd to forbear *Matrimony* by the Gift of Continnence, be sufficient to fill these Offices with a Constant Supply. For it must not be suppos'd that the design of such an Ordinance, is either to Licence Irregular Lusts, or to do Violence to any Man's Natural Temper; in as much as no Man is compell'd to act in this Capacity, who judgeth himself unfit for the Service. And it must be a farther Proviso, that as to the great Business of Posterity, due Care hath been taken of it another way, so that it may not suffer by these Restraints.

In the same manner, it is lawful to forbid an Ambassador, a General, or a Soldier, when sent on a Long or Dangerous Adventure, to carry his Wife with him, in the Expedition (g).

Farther, since the Natural Obligation to *Matrimony* is undeterminate, and admits of some Latitude, the Civil Legislator may fairly fix the Age of the Persons, who shall be thus join'd together; or assign a Period taken from some other Consideration. Thus in the *Lex Papia Poppæa* amongst the *Romans* it was order'd, that *No Woman under Fifty, should marry a Man of Sixty, and no Man under Sixty, a Woman of Fifty*: Which we find afterwards repealed by *Justinian* (h). So *Plato* (i) limits the time of a Man's being a Father, from Thirty to Fifty-five years of Age, and of a Woman's being a Mother, from Twenty to Forty (k). Amongst some People, it was unlawful for a Man to Marry, before he had given some signal Proof of his Valour upon the Enemy. As *Strabo* tells us of the *Carmanians*, no one of whom was permitted to have a Wife, till he had taken off the Head of an Enemy, and presented it to his Prince (l).

And, what is more, though Persons are Naturally free to Marry whom they please, yet a Government, if it seem for the Interest of the State, may in some Cases restrain and limit this Privilege: for instance, it may be order'd, that no Subject shall Marry a Foreigner, none of the Nobility a Plebeian. *Arrian* in his History of the *Indians* reports, that the several Orders of the People were forbid Marrying one into the other. A Husband-man could not give his Daughter to an Artificer, nor an Artificer return the Compliment in the same manner (m).

(a) *Iphigen. in Taur. v. 57.* (b) *De Leg. Nat. c. 6. s. 9.* (i) *Vid. J. Lips. Excurs. in Tacit. Ann. III. 25.*  
 (c) *Polit. l. 2. c. 7. Ælian. Var. Hist. Lib. VI. c. 6.* (d) *L. 15. p. 504. Ed. Cas. Herodot. L. 1. p. 36. Ed. H. Steph.* (e) *Vid. Dig. Lib. 23. t. 2. De ritu nupt. Leg. XIX.* (f) *Polit. VII. c. 16.*  
 (g) *Vid. l. 1. t. 16. D. de Offic. Procons. Tacit. Ann. III. 33, 34.* Pliny (*l. 6. c. 22.*) reports of the People of *Taprobane*, 'That, in their Choice of a King, they do not only require, that the Person be good and merciful, but likewise that he be advanced in Age, and without Children: and if after his Admission, he happens to obtain Issue, they depose him from the Government, lest the Kingdom should become Hereditary. *Solin. c. 66.*  
 (h) *Vid. Sueton. in Claud. c. 23. & Cod. Lib. V. t. 4. de nuptiis, Leg. 27.* (i) *Plato de Rep. Lib. V. p. 657. Ed. Wech.* (k) *Add Aristot. Polit. VII. c. 16. & Michael Piccart, ibid. Tacit. Germ. c. 20.* (l) *Strab. l. 15. p. 500. Add Abrah. Roger. de Bramin. p. 1. c. 11.* (m) We find the same account in *Hieron. Ofor. de Reb. Gest. Emmanu. l. 2. & Montagne, L. 3. c. 5. p. 630. Ed. Paris. 1657. Fol.*

Lastly, it may be enacted by Civil Powers, that Marriages shall not be contracted but with the intervening Consent of Publick Authority; especially between Persons of considerable Figure and Importance in the State. The force of which, and of the like Laws may amount to this Effect, that all Matches contrary to such Injunctions, shall either be declar'd Void, or shall be divested of certain Privileges, with which they would be otherwise attended. Thus, in *Livy* (a), we find the *Campanians* petitioning, 'That they might have the Liberty of marrying *Roman Dames*, and that, if they had formerly been so happy, they might still keep them, unmolested; and that the Children, already born to them, might be acknowledged for their just and lawful Heirs. And, in *Dionysius Halicarnassens* (b), we meet with a Decree of the Senate, upon the Commencement of a War with the *Latines*, 'Giving leave, on both sides, to the *Latine Women*, that had married *Romans*, and to the *Roman Women* that had married *Latines*, either to tarry with their Husbands, if they thought fit, or else to return into their proper Country, leaving behind them their Male Issue, and carrying with them their unmarried Daughters. The Effect of which was, that almost all the *Roman Dames* quitted their Husbands, and return'd to the City: whereas all the other Women, two only excepted, prefer'd their *Roman Husbands* to their *Latine Friends* (c).

IX. We are, in the next Place, to enquire by what Heads of Conditions, with regard to the Law of Nature, the Matrimonial Covenant is compleated; and likewise what Right accrues to both the Persons from such an Union. And here we suppose before-hand, that all Human Persons, whether of one Sex or of the other, are naturally equal in Right; and that no one can claim the Sovereignty over another, unless it be obtain'd by the free Act of one of the Parties. For though, in Strength of Body and of Mind, we are allow'd to have the Advantage of the *Fair Train*, yet this Superiority is not, of it self, sufficient to justify us in setting up for their Masters and Governours. Therefore whatever *Right* a Man holds over a Woman, in as much as she is by Nature his *Equal*, he must acquire, either by her Consent, or by the Sword, in a just War. Yet since it is most natural, that Marriages should be founded on mutual Good-will; the former way seems more

proper for the winning of Wives, the other for the procuring of Slaves. And therefore, in those Countries where it is usual to marry their fair Captives, the Men lay aside the severe Authority of Masters, for a more gentle and more agreeable Sway (d).

If then, we suppose all Mankind thus plac'd in a Condition of Natural Equality and Liberty, it may happen that a Woman as well as a Man, shall desire Issue peculiarly for herself, over which she may preside and command. Now to accomplish this End, it is necessary, that a Covenant pass between a Man and Woman, for their *Mutual Assistance in serving Posterity*. If this Covenant be *Simple*, not join'd with any Agreement about constant Cohabitation, but respecting barely the Procreation of Children, it conters on neither Party any Sovereignty or Right over the other, except they may challenge, on either side, the *promised Assistance*, with regard to *Posterity*. And, in this Case, if it was expressly intimated in the Covenant, that the Woman desir'd Issue properly for her self and her own Management, the Children shall be under the Government of the Mother. Such a kind of simple and irregular Marriage we may call *Amazonian*, if any Credit is to be given to the Stories of those warlike Dames (e). In the same manner, when *Thalestris* courted *Alexander the Great* (f), and (as some tell us) the Queen of *Sheba* King *Solomon*, the Off-spring could not fairly be reckon'd spurious, but, in their way, honest and legitimate. So Travellers report of the Inhabitants of the Kingdom of *Congo*, that their main Strength consists in Companies of Women, who live by themselves in certain Territories assign'd them by the Prince; and at set times chuse some that they like best among the Men, for the sake of continuing their Breed: If the Child prove a Boy, they send him back to his proper Father, if a Girl they keep her in their own Train, and educate her under the Severity of Martial Discipline (g).

Now though it must be confess'd, that this kind of Coupling is Barbarous, at least, if not Beastly; yet, amongst the most Civiliz'd Nations, there are often to be found Instances of Marriages, in which either both Parties are declar'd *Equal*, or else the Husband is oblig'd to submit to the Supreme Civil Authority of the Wife. As when a Queen, who enjoys a Crown in her own Right, takes a Husband,

(a) L. 38. c. 36. (b) L. 6. init. (c) Senec. de Benef. l. 4. c. 35. *I promised you my Daughter in Marriage, afterwards you appear'd to be a Foreigner; under that Character I may not enter into such a Relation with you: The same Law which lays this Prohibition on me, protects me from the Censure.* (d) Add Deuteron. XXI. c. 10. &c. (e) Vid. Arrian. de expedit. Alexand. l. 7. Procop. H. G. l. 4. Palæphat. de fab. narr. l. 1. c. 33. Jormand. de Reb. Getic. c. 8. Steph. Clerc. Quest. Acad. 2. Justin. l. 2. c. 4. Diodorus Siculus, l. 2. c. 45. reports, 'That the Sovereign Dames oblig'd their Husbands to perform all the Servile Employments, even those which, in other Places, belong particularly to the Maids: He tells us the same of a People in *Lybia*, whom *Hercules* utterly destroyed, thinking it a Reproach to Mankind, *That a Nation should be suffered to continue where the Government was in the weaker Sex*, l. 3. c. 53 & 55. (f) Vid. Curtium, l. 6. c. 5. (g) Vid. Edvard. Lopez de Regno Congo, l. 2. c. 9. Add. Franc. Alvarez. Descrip. Æthiop. c. 133. Isaac Voss. de Nilo, c. 19. Michael Glycas, Ann. pag. 11. tells of the *Agileans*, 'That amongst them the Women bear Rule over the Men, and are very Communicative of themselves, without any Danger of their Husband's Jealousy: that they Till the Ground, build the Houses and perform all the nobler Labours of the other Sex.

and yet retains her Superiority in the Government (a).

X. But we may take our leave of these irregular Matches, and proceed to examine those, which appear more suitable to the Condition of Human Nature. This then we take for granted, that the Matrimonial Covenant ought to begin at the Man, not at the Woman, that the Courtship should be us'd not on her side, but on his: this method agreeing best with the Genius and Character of both Sexes. For tho' it be in many Places usual, for the Relations of the Woman, to make the first Offer to the Man, yet this is only to direct his Aim in the Attack, and to fix a particular Mark for his Addressees.

This Principle being suppos'd, it is clear, that the Man, when he makes his Suit, is desirous of such Issue as shall be true and genuine, not spurious or adulterous. And therefore we ought to abhor, as contrary to Reason and Nature, the licentious Practice of many Nations in this Point. Travellers tell us, that the King of *Calecut* hath Two Wives, each of whom is constantly waited upon, with all Familiarity, by Ten of the Idolatrous Priests; and that the King esteems it an Honour to be thus abus'd; though he hath the Prudence, not to let his own Illegitimate Race succeed to the Crown, that Dignity being reserv'd for his Nephews (b). Indeed the Women are in that Country, for the most part, held in common (c); whence it comes to pass, that the Fathers neglect the Care of their Children, and all Inheritances descend by the Mother's side (d). *Buchanan* (e), to the Discredit of his own Country, reports a Law of *Evenus*, or *Ewen*, the Third King of *Scotland*, by which it was order'd, that the first Night of a Nobleman's Marriage should be the King's Fee; and that the Noblemen, besides taking the same Liberty with the Commoners Wives, should again command their Company whenever they pleas'd.

Till *Milcolomb* the Third, at the Intreaty of his Queen *Margarite*, chang'd this scandalous Indulgence, into a Fine of half a Mark, to be paid by the Husband, in lieu of parting with his Bed the first Night (f). At this time of Day, in the Kingdoms of *Pegu* and *Arraca*, at the Nuptial-feast, one of the Guests prevents the Bridegroom in his Addressees to the Bride; yet it is Capital for him to be catch'd a second time, using the same Freedom (g).

We may conclude farther, that nothing is more repugnant to that Decency and good Order which ought to be kept up in the World, than to lead a wandring desultory Life, without any fix'd Abode, without any certain Seat of one's Fortunes and Concerns (h). The Education of the common Off-spring is then certainly carried on with most Convenience, when the Parents unite their Assistances to so good a Design; and their Minds are by these sweet Pledges knit together in a stronger Band of Affection (i). Besides a constant Cohabitation, cannot but afford vast Delight and Satisfaction to an agreeable Couple: and then the Husband is by this means much more secure of his Wife's Chastity, than if they dwelt at a distance. Such Matrimony, then, as is regular and perfect, conformable to Natural Reason and to Ends of Civil Life, besides the Covenant of Fidelity to the Bed, doth imply an Agreement on the Woman's side, that she will constantly dwell with the Man, and unite in the strict Society of a Family; as well for the Education of the Children, as for mutual Aid and Pleasure (k). The Custom amongst the *Chinese*, for the Women to bind their Feet so very streightly, that they cannot go without great pain, seems to have been first introduc'd on this politick Account, that being disabled from gadding abroad, they might be oblig'd to fix with the greater Application on the Care of Domestick Affairs (l).

From what hath been observ'd before, it appears

(a) See the Articles of Marriage between *Philip* and *Mary* in *Thuan.* l. 13. ad ann. 1553 & 1554. Those of *Mary* Queen of *Scots*, *ibid.* l. 20. ad ann. 1558. & l. 37. ab init. *Add. Marian. Hist. Hispan.* l. 24. c. 5. *Diodor. Sic.* l. 1. c. 27. mentions a Decree that pass'd among the *Egyptians* in Honour of *Isis*, importing, 'That the Queen should enjoy a greater Degree of Power and Dignity than the King; and that, amongst private Persons, in the Nuptial Writings, the Wife should be invested with the Command, and the Husband be obliged to obey.' *Add. Guicardini.* l. 6. p. 178. where he speaks of the Government of *Castile* administr'd with joint Authority by *Ferdinand* and *Isabella*. (b) *Vid.* *Aloyf. Cadamust. Navig.* c. 75. we meet with the like Account in *Ludov. Rom. Navig.* V. c. 7. (c) *Vid.* *Pet. de Valle, Itiner.* P. 3. Ep. 7. (d) The Practices of the *Colchians*, reported by *Basbequius*, in his third Epistle, are very filthy. (e) *Rer. Scotic.* l. 4. (f) *Id.* l. 7. *Polydor. Virg. Hist. Angl.* l. 10. *Comp. Sueton. Caligul.* c. 40. & *Boxhorn. Not.* (g) *Ludovic. de Bartheima, Itiner.* p. 2. c. 11. Of the Inhabitants of *Camictu*, see *Paul. Venet.* l. 2. c. 38. (h) *Xenophon* had reason to call a Man's Home or his Fire-side the sweetest and the most sacred Possession that he enjoys. *Cyropæd.* l. 7. p. 116. Ed. *H. Steph.* *Add. Aristot. Oecon.* l. 1. c. 3.

(i) *Genes.* XXIX. 32. *Lyfias, Orat.* 1. c. 2. 'So soon as she bore me a Child, I admitted her into the full Trust and Care of all my Affairs; judging this the firmest Band that could unite and engage us to each other.'

*Conciliat animos conjugum partus fore.*

*Senec. Herc. Oet. ver.* 407.

'Children are, commonly, the means of uniting and endearing a married Pair.'

(k) *Demosthen.* in *Near.* 'The Reason of our taking Wives is to obtain Issue, and to see our Family Affairs under a faithful Directress.' *Add. Xenoph. Oeconom. & Columell. de R. R.* l. 12. *prefat.* (l) *Comp. Martin. Hist. Sin.* l. 3. c. 28. *Plutarch. Præcept. Conjugal.* 'As Physical Humours and Qualities are said to diffuse themselves whole through the entire Mass, so ought the Bodies, the Wealth, the Friends and Acquaintance of a married Couple, to be thoroughly mixt and blended together. When the *Roman* Lawgiver forbade either of the Pair to give any thing to the other, the meaning was not to exclude them from a Participation of Benefits, but to shew that they ought to hold all things Common between them. *Quintil. Declam.* 249. 'Ye know that Marriages are the things which hold a Common-wealth together, which preserve Race and Issue, and confirm and regulate the Descent of Patrimonies and Inheritances, and maintain Domestick Safety and Peace. Without this Security at Home,

pears why the Husband, and not the Wife, ought to have the Priviledge of chusing their seat of Residence; for it is He that admits her into his Family, of which he himself is the Head and the Director. Though no Man, commonly speaking, will be so hard as not to ask his Wife's Consent in this Point; especially if she brought him a considerable Fortune.

It is farther evident, that without a Breach of the Matrimonial Contract, the Wife cannot, against the Husband's Consent, ramble abroad, lodge a-part, or deny him reasonable Favours, unless upon extraordinary Occasion.

Upon the same Principles is founded that Presumption in Civil Law, that Children born in Lawful Wedlock, are really the *Husband's*, unless there appear some very strong Argument to the contrary, sufficient to overthrow the Favour of the Presumption (a). The English Laws are particularly complaisant to the Fair Sex, obliging the Husband to own a Child, born after he hath been absent many Years, provided he hath been all the while within the Bounds of the Island (b). And they ground this Indulgence on two Reasons, first, Because the Wife hath solemnly given her Faith, that she will be True, which she is presum'd not to have broken; and, secondly, because it is in the Husband's power to secure his Wife's Honesty; and what Right, or Power, any Person enjoys, he is always suppos'd duly to exercise (c).

And hence, the Opinion of the Vulgar is not altogether unreasonable, when they fancy, that the Wife's Dishonesty casts some kind of ignominious Blemish on the Husband: as if, either out of Folly or Meanness of Spirit, he had neglected to use his Authority (d). *Domitian* struck a Gentleman's Name out of the List of Judges, for receiving his Wife again, after he had put her away upon an Accusation of Adultery (e). Some give another reason why a Mark of Shame should be fix'd on this Misfortune; and that is, because it looks disgraceful in a Husband not to be Master of those

good Qualities which might engage his Wife's Affection, and secure her Fidelity. A Man that lies under this unhappy Censure, and cannot conveniently redress the Wrong which he suffers, would do well to consider *Euripides's* wife Aphorism, that

Εν σοφείᾳ τὰ δ' ἐστὶ θνητῶν  
 Λαυθόνειν τὰ μὴ καλὰ.

*It is a great Part of Human Wisdom, to cover those things with Secrecy, which look ill if they come abroad (f).*

*Charron's* (g) Remark will not, in all Cases, hold strictly good, that 'tis a vulgar Error and Folly to upbraid a Man with his Wife's Dishonesty; as if this were to make him suffer for the Crime of another, which 'tis not in his Power to prevent.

It may not be amiss, on this Subject, to throw in an Occasional Observation, that those Marks of Reproach, which the Common People fix on the Heads of such unfortunate Husbands, are no new Invention, nor confin'd to the Customs of our Western World: For we read that the Emperor *Andronicus* caus'd the largest of the Stag's Horns, he met with, to be fastened on the Gate of the Market-place, on Pretence to shew the Vastness of the Beasts he had kill'd in Hunting, but really as a silent Rebuke to the Immorality of the City, and the Lightness of the Dames (h). But as *She* cannot properly be call'd an Adulteress who suffers in her Honour by Compulsion and Force (i), so to keep a Wife who hath been thus injur'd doth not, in it self, appear any way foul or reproachful (k).

XI. We are farther to examine, whether by the mere Law of Nature, from the Principal Contract of true and perfect Matrimony, there ariseth any proper Sovereignty or Dominion of the Husband over the Wife. Indeed in holy Scripture it is expressly said, that the *Will* or Desire of the Wife *shall be to her Husband*, and

' Home, who would venture to travel into foreign Parts, or so much as take a Journey to a distant Estate; to go on publick Embassies, or to engage in military Expeditions? See *Montagne's* Essays, lib. 3. c. 5. p. 630, 631, 632. Edit. Paris. fol.

*Juvenilis ardor impetu primo furit;  
 Languescit idem facile, nec durat diu  
 In Venere turpi, seu levis flammæ vapor:  
 Amor perennis Conjugis castæ manet.*

Senec. Octav. v. 186, &c.

' The Fire of Youth in Love's dishonest Joys,  
 ' At the first Blaze is Fury, Flash and Noise;  
 ' But spends in Smoak, and what it gave destroys.  
 ' Whilst the chaste Passion of a lawful Dame  
 ' Burns with a gentle, but an endless Flame.

(a) See above, lib. 4. c. 11. f. 10. & vid. Gell. l. 3. c. 16. Plin. Hist. Nat. l. 7. c. 5. (b) See *Chamberl.* present State of England, P. 1. c. 16. (c) 'Tis a Saying of *Gyges* in *Herodot.* (Clio p. 3. Ed. H. Steph.) Every one ought to keep an Eye on his own Concerns. *Plato* observes (in *Alcibad.* l. 1. p. 441. Ed. Weck.) 'That the Wives of the Spartan Kings are publicly watched and overseen by the *Ephori*, least any Heir should be obruded upon the Crown, who is not truly of the Race of *Hercules*. Whereas in *Persia* the King seems, in Excellency of Nature, so much above his Subjects, that there is no Danger of counterfeiting his Strain: And therefore his Wives are under no Guard, but that of their own Reputation. (d) *Add. Cartes. Pass. Art.* 169. (e) *Sueton. Dom.* c. 8. So by the Attic Law, 'A Man was reckon'd base and scandalous who kept his Wife, after he had discovered her Dishonesty, *Demosthen.* in *Nær.* *Add. Dig. lib.* 48. t. 5. ad *Leg. Jul. de Adulter.* leg. 2. f. 6. & leg. 29. princ. In *Tacitus*, (Ann. lib. 2. c. 85.) 'Labeo the Husband of *Vistilia* was cited to give an Account why he had forborn to see the Law executed upon his Wife, after she had been openly convicted: and he could not otherwise excuse himself than by pretending that the Sixty Days, which the Law allow'd him for considering time, were not yet expired. (f) *Eurip. Hippol. Corn.* *Add. Plutarch. de Anim. Tranquil.* p. 467. E.F. (g) L. 1. c. 39. n. 11. (h) *Nicer. Acominat. de Imper. Andronic.* l. 2. (i) *Vid. Gartian. Cauf.* 32. Qu. 5. c. 2, &c. (k) Yet we are to commend the Proceeding of *David* in the 2 *Samuel* XX. 3.

that *He shall rule over her* (a). But this being enjoind the Woman by way of Punishment, seems to bear the Face of a *Positive Institution*. To discover, then, how the Law purely Natural directs in this Point, we may first observe, that to be bound to follow the Will of another in some certain Business, is not altogether the same thing as to be subjected to his Dominion; because the former may result from a *simple Pact*. For there are many Pacts, especially of this kind, *I give you this to do such, or such a thing; I do this, provided you will do so, or so for me;* in which it was at first in the Power of either Party to chuse, whether he would enter into the Agreement or not. Yet the Covenant being once consented to on both sides, one Party must follow the Will of the other, (as to this particular Business;) and not *vice versa*. Whence it appears, that how far soever the Wife may be oblig'd to submit to the Husband's Will in the Affairs proper to Matrimony, yet it doth not presently follow, that he must needs have the sovereign Command over her, in other Actions and Concerns.

Again, the End of Marriage is not like that of Common-wealths, the Defence and Security of Men; (for how weak an Union, as to any mutual Safety, is that which consists only of two Persons?) but is directed wholly to the Propagation of Human Race. Therefore as a Common-wealth cannot be understood without a sovereign Ruler, so it should seem that Marriage, without any Superiority of Government, might subsist well enough under the common Force of Contracts, assisted with the Engagements of Friendship and the Charms of Love. It must be confess'd, that a separate Family hath somewhat in it much like a *State* or Community, which not regularly allowing of more than one Head, the Wife when she is admitted into it, ought, one would think, to yield a full Submission to the Lord and Director of the Society. But it may be urg'd, in answer to this Objection, that a *Family*, if increas'd with a numerous Train of Servants, hath two Ends and Designs, one common, the other proper. The common End consists in mutual Defence and Security, arising from the united Strength of so many Persons. In this respect, tho' some supreme Sway be necessary, yet, in as much as the Wife is but little concern'd in that Affair, the Unity of the Family may be very well kept up, altho' she be join'd to her Husband by no severer Bands than those of Affection and the Matrimonial Covenant. Thus we find the Patriarch *Abraham* exercising a Sovereignty over his Domesticks, and yet

treating *Sarah* with the kind *Equality* of a Sister (b). Tho', at the same time, her dutiful Behaviour towards him is highly commended in the holy Scriptures; and it is said particularly, that she call'd him *Lord* (c). The proper or peculiar End of Marriage seems likewise attainable, without any Inconvenience, although neither of the Parties should bear any such absolute Authority over the other, as must include the Power of Life and Death, and of the most vigorous Restraints; but the Ties of Friendship and the Obligation of the free Contract, may very well serve to hold Man and Woman together. Yet this Contract, (the Husband having the better Part in the Terms and Conditions, and the additional Advantage of his Sex,) seems to be form'd in the manner of those Leagues and Covenants which we call *Unequal*; so that the Wife is bound to *Obedience*, and the Husband rather to *Protection* (d). Not that it is repugnant to the Law of Nature, for a Wife to be subjected to her Husband in the way of strict *Political* Government. For the fear of supreme Authority, and the Endearments of Conjugal Affection are really no more destructive of each other, than the Sovereignty of the Prince extinguisheth the Love of the Subject. And this full Political Authority, as it may be acquired by any Husband, by means of a new Covenant annex'd to the Matrimonial Agreement, so we find it in some Nations, allow'd to all Husbands in general, by Virtue of a publick Custom or Constitution. *Cæsar* (e) tells of the Ancient *Gauls*, that they had the Power of Life and Death, as well over their Wives as over their Children. Amongst the *Germans*, the Husbands were impower'd to execute the Punishment of Adultery; not as an Indulgence to their Rage and Resentment, but as an Effect of their just Power and Command (f). How the Case stood at *Rome*, *Gellius* thus informs us from a Speech of old *Cato's*. *A Husband (except after a Divorce,) is a Judge, a Censor, and a kind of Sovereign Prince over his Wife: if she acts any thing perversly, or scandalously, he sets a Mult upon her; if she drink Wine to Excess, if she commit any Dishonesty with another Man, he condemns her to a suitable Punishment.* Again, says that grave Senator, *should you apprehend your Wife in the Act of Adultery, you might kill her without farther Process or Trial; on the contrary, should she find you guilty of the same Crime, she hath no Right to touch you with a Finger.* *Tacitus* (g) hath recorded a later Instance of this ancient Custom. He reports that *Pomponia Græcina* (Wife to the famous

(a) *Genes.* III. 16. *Ephes.* V. 22, &c.(b) See *Genes.* XVI. 2, 5, 6. XXI. 10, 11, 12.(c) *1 Pet.* III. 6.(d) *Martial*, L. 8. Ep. 12. v. 3, 4.• *Inferior matrona suo sit, Prisce, marito,  
Non aliter fuerint femina virque pares.*Should Manly Empire not controul the Fair,  
Husband and Wife were an unequal Pair.Plin. *Paneg.* c. 83. *Many worth by Men have been hindred from being Chief in the State, by their not being Chief in their own Families.* (e) *De B. G.* l. 6. c. 19. (f) *Tacit. Germ.* c. 19. What he says of their Power over their Servants see afterwards, *cap.* 3. f. 4. (g) *Ann.* XIII. 32. *Add.* Euripid. *Medea*, v. 230, &c. *Varen. Descrip. Japon.* lib. 13. *Lex Wisigothorum*, L. 4. t. 4. c. 3.

*Plautius*, who triumph'd for his Victories in Britain, being accus'd as a Favourer of foreign Superstition, was remitted to the Judgment of her Husband: And he, according to the old Institution, calling an Assembly of her Relations, took supreme Cognizance of her Life and Honour. We must not omit the most remarkable Practice of the *Sacca*, a People of *Scythia*, among whom, as *Ælian* (a) tells us the Story; 'When a Young Man seeks him out a Wife, he is oblig'd, in the first place, to engage her in single Combat; and if he gets the better, he leads off his Captive in Triumph, and ever after acts the Sovereign over her: if the Victory fall on her side she is the Queen, and he the Slave. And this Contention is not design'd to endanger the Lives of the Combatants, but only to determine the Mastery between them.

What Power the Husband hath over the Goods of the Wife, is likewise to be adjusted, either by the Contract and Agreement of the Parties, or by the Decision of the Civil Laws. These Engagements are to be strictly obey'd in the several Points which they have settled; as for Instance, Whether the Woman shall bring a Portion at Marriage; Whether or no the Couple shall join Purfes, and mix their Effects in the Common Stock, Whether the Husband shall have an absolute, or a limited Disposal of his Wife's Fortune; and the like Questions.

Amongst the *Japoneſe* the Women marry without Portions: indeed, the Maids Parents, if of the wealthy Sort, send a Sum of Money as a formal Present to the Bridegroom on his Wedding-day, but he presently returns it in the same ceremonious manner; the reason they alledge for their Custom is, that they may not give the Women an Occasion of Insolence and Pride. And there they have this mortifying Proverb, *That a Woman, so long as she lives, hath not so much as a House that she can call her own*: Before Marriage she is a Dependant on her Father's Family, in Marriage on her Husband's, in Widow-hood on that of her Children (b). It was a Custom with the old *Thracians*, that the fairest of the Maids should be expos'd to publick Sale, and be given in Marriage to the highest Bidder: on the other side, that those whom Nature had been less kind to, should expend their Fortunes to buy themselves Husbands (c). The *Assyrians* likewise dispos'd of their Virgins in the way of Sale (d).

Where the Civil Laws have not defined these Matters, or where the Parties live in a State of Natural Liberty, the Husband and Wife may settle any such Point as they please, by particular Contract.

XII. For the further Illustration of this Subject, it will not be amiss to examine the

Doctrine laid down by *Hornius* in his first Book *de Civitate* (e): First of all, he rejects the Opinion of those who assert, that the Husband hath, by Nature, a Sovereignty over the Wife. And thus far we approve his Censure, if the Persons, against whom he disputes, did maintain the Husband's Sovereignty to be the free Gift of bare Nature, without any intervening Contract, or without the Wife's voluntary Submission. For this indeed would be repugnant to the Natural Equality of Mankind; and a Fitness or Ability to govern cannot, of it self, confer a Right of Government.

Hence he proceeds to affirm, *That there can be no Sovereignty, publick or private, of one Person over another, but that which ariseth from the exprefs Appointment and the most solemn Intervention of Almighty GOD*. Now as to this Position, we cannot but observe, that when Enquiries are thus made into the Origine and Fountain of Dominion, what we search for is the nearest, the immediate and the second Cause; the first and universal Cause of all things being ever presuppos'd. And therefore, though it appear most evidently, that God hath commanded such an Order to be introduc'd among Men, yet the main Question will be still behind, what Contracts are required to put Men in a way of conforming to the divine Precept. For he must have little Knowledge of Letters, who can imagine, that when we say God is the Author of such or such a Moral Institution, we mean that he produceth it, as He did at first the Heaven and the Earth, without the Intervention of any thing formerly created. That God expressly order'd the making of the *Jewish* Tabernacle, is no manner of Reason why we should not say, that the Workmen were the next and the immediate Cause of the Fabrick. Thus although it be enjoin'd by the Divine Oracle, that the Woman shall be in Subjection to the Man, yet to make him actually and immediately her Sovereign, it is necessary, that she promise Obedience to him by her own free Covenant. To say the contrary would not be less ridiculous, than to pretend, when God bids us *Have Dominion over the Beasts of the Earth*; there is no need of our using any outward means to obtain it, as by Hunting, &c.

The Argument, this Author afterwards makes use of, is certainly most trifling and childish. *The Wife*, says he, *hath no such thing as Conjugal Sovereignty, and therefore she can confer no such thing on the Husband*. As if, by the Agreement of several Persons, a new Moral Quality could not be produc'd, which did not actually exist before. To constitute a *Dominion*, it is by no means necessary, that it must be first really possess'd by one Party, and then translated on another; (as Physical Sub-

(a) *V. H. l. 12. c. 38.* (b) *Bern. Varen. Descrip. Japon. c. 12.* (c) *Solin. c. 15.* Thus *Scythians* in *Xenoph. Exp. Cyr. Lib. 7. f. 20. Edit. Wells, Oxon.* If you have a Daughter, I'll fairly buy her after the Custom of Thrace. Add. *Heraclid. de Polit. Mela, lib. 2. c. 2.* (d) *Ælian. V. H. l. 4. c. 1.* *Herodot. Clio.* Add what the Roman Laws deliver concerning the Prohibition of Donations between Husband and Wife, *Lib. 24. t. 1. D. de donat. inter Vir. & Uxor.* (e) *Cap. 1.*

stances cannot be given away, unless they had before a full and *formal* Being: ) but this Superiority then ariseth, when any Person divests himself of that Power of resisting Another, which his Natural Liberty gives him, and engageth his Faith, that he will submit, in all things, to the Will of him whom he thus chuseth for his Governour.

Farther, although, in Holy Scripture, the *Subjection* of *Eve* be said to have been enjoin'd her as a Punishment for seducing her Husband; yet it doth not hence appear, that the Husband's Sovereignty, after the *Fall*, hath not for its nearest and immediate second Cause the Agreement between Man and Woman. For, since a necessity of Obedience, doth not always include an unhappiness of Condition, (as the most blessed State of the Holy Angels is not impair'd by their yielding the strictest Service to God,) the Punishment attending the Woman's Inferiority seems to be this, that she bears the Yoak unwillingly, with inward Grudgings at her Station, and a Natural Desire of Command. And therefore it is no Contradiction to say, that the Superiority of the Husband naturally springs from the Consent of the Wife; and that GOD Almighty in way of Punishment to the Woman, hath made her Subjection troublesome and uneasy.

The following Distinction looks but like an impertinent Niceness, *Whatever Will, or whatever Voluntary Pact we can now conceive in the Woman, belongs purely to the Act of contracting Marriage; and consequently is to be understood of that Consent and Approbation by which she acquiesceth in the future Government of such a particular Husband.* This is no more than to say, that the Husband's Sovereignty is not produc'd by the Consent of the Wife, but being before establish'd by GOD's Command, the Wife voluntary enters under it. As a Traveller doth not build his Inn, but freely makes use of it when he findeth it built to his hands.

It is sufficient in the whole to observe, that the *Dominion* of one Person over another, consider'd as a *Moral Entity*, doth not exist without the Concurrence of some human Act, and cannot be understood without Subjection and Obedience: And that the Woman, for this reason, lies under no Obligation to obey, before she hath by her own Consent, submitted to the Rule and Authority of an Husband. And though that she should thus submit herself, be indeed agreeable to the Divine Will, yet this doth not hinder, but that her own Covenant and her Subjection consequent upon it, are the *immediate* and *nearest* Cause productive of the *Husband's* Power.

XIII. Nor can we grant what the same Author maintains, that the Husband, besides the Command of the Family, and of Conjugal Affairs, is invested with an absolute *Power of Life and Death, in which Right the Summ of his Authority consists.* For though this Power be meant as it is unrestrain'd by *Civil* Constitutions, and as it amounts not to a licentious Excuse of Murther and Parricide, but to a lawful Authority of inflicting condign Punishment on Capital Crimes: yet, that *every Sovereignty as it is seated in a proper Person, not precariously obtain'd, nor circumscribed by a Superiour, doth import the Power of Life and Death,* is an Assertion that we should not be inclin'd to assent to, without very good Proof. Certainly the *End* of Matrimony requires no such absolute Authority. And if it be objected, that all grievous Enormities ought to be brought under Human Cognifance, we will only ask, who shall punish a Sovereign Prince, or who the *Father of a Family*, living separate from all *Civil* Government? We confess, that if the Wife prove guilty of Intolerable Wickedness, she may (in this Natural State,) be expell'd the House as an Enemy, and may be kill'd by the Right of War. And we have already (a) granted, that even this most strict *Political* Power, is not repugnant to the Nature of Marriage, though we are very far from allowing it to be essentially necessary.

XIV. We are oblig'd here to explain that common Maxim of the Lawyers, that *Consenting and not Bedding, makes a Marriage* (b). Which will bear these two Senses, that a *Couple*, whatever Freedom or Familiarity they may use, cannot be Husband and Wife, unless they have pass'd their mutual Consent to live in Wedlock (c): or, that so soon as both Parties are come to an Agreement, the Matrimonial Contract ought to be esteem'd perfect, even before the Ceremony of the *Bed*. Our Judgment on the Point is this, that as it is requisite to the full transferring of Propriety, that the Thing be plac'd under the power of Another, in such manner, that he may dispose of it at his pleasure; so to make a Wife it seems necessary, that the Woman deliver her self as it were into the Possession of the Man, for the common Ends of Matrimony: but it is by no means essential to this Agreement, that the *Bed* begin it. It is said *Rebecca became Isaac's Wife* after he had brought her into his Mother *Sarah's* Tent (d). And I question whether we ought to call it Adultery, when a Woman betroth'd to a Man in his Absence, but not led home to his House, nor given into his Possession, is Bedded by another Person: altho' we suppose, that the former

(a) Sect. 11. (b) Lib. 35. t. 1. l. 15. *D. de Condir. & Demonstrat. & de Regul. Jur.* l. 30. Or, as *Quintilian*, Decl. 247. expresseth it, *Familiarities and Meetings without proper Rights can never make a Wife, Vid. Can. 5. caus. 27. quæst. 2. & Cod. Lib. 5. t. 5. l. 8. de incest. & inutil. nupt.* (c) And therefore *Aeneas* pleads for himself in *Virgil*.

*nec Conjugis unquam  
Prætendi tædas aut hæc in fœdera vini.* *Æn.* 4. v. 338, 339.

(d) *Genes.* XXIV. ver. ult.

Engagement, as made by Proxy, had, in the Eye of the Law, the full Force of consummated Marriage. On the other side, it would be absurd to say, that *Tobias's Wife* had not a Title to that name the three first Nights (a). Or that our Women are not *Wives* when the Priest hath perform'd the solemn Office, 'till the Evening Diversions of the Bride-Chamber.

According to the Opinion of the *Jews* (b), Consummation, as well as Consent, was, before the *Law*, required to the completing of Matrimony. Yet, by their *Law*, Consent alone render'd a Marriage Valid (c). *Grotius* (d) observes, that no Proceeding was made in the Nuptial Affairs, 'till the Solemnity had been usher'd in by the hearing of *Divine Service* in a publick Assembly: which most religious and most decent Institution, the *Jews* probably receiv'd from ancient Tradition, and do still observe; and from them, it was admitted into the Christian Church. For this Reason, tho' at the settling of the Contract, they obliged the Man to swear to preserve the Virgin's Honour, till the Day of Marriage; yet, for the greater Security, they shut her up from him in the *Apartment of the Women*, till the time of that *finishing Ceremony* (e).

XV. We are in the next place to enquire, whether by the Law of Nature, the Matrimonial Bond be limited to a single Man, and a single Woman? or, which is the same thing, whether *Polygamy* be naturally allow'd? *Polygamy* is of two sorts; either when one Woman promiscuously admits of many Men, or when one Man is at the same time join'd in Marriage to many Women. To the former kind belongs the famous *Platonical Communion of Wives*: a Custom propos'd by *Plato* in *Idea* (f); but really practis'd by many Nations. *Diodorus Siculus* (g) reports, of the *Taprobanians* in *India*; 'That the Men did not confine themselves to strict Wedlock, but possess'd the fair Sex in Common, and educated the Children, (in whom they reckon'd themselves All concern'd,) with Care and Love. Nay, the Nurses often chang'd their little Infants, so as to hinder them from knowing their own Mothers (h). *Cæsar* (i) tells us of the Ancient *Britains*, *Ten or Twelve of them together*

*have Wives in common amongst them; especially Brothers with Brothers, Fathers with their Sons. But, every Woman's Children are attributed to him, who first married her, when a Virgin.* Where it is plain, that great Author cannot mean, that one Woman had, at the same time, Ten or Twelve Husbands, as Mr. *Selden* (k), amongst others, imagines; but that so many Men having each of them married his proper Wife, afterwards agreed upon that friendly way of possessing them (l). *Lycurgus*, as *Plutarch* delivers, 'Endeavouring to prevent the Vain Womanish Passion of Jealousie, thought this the best Expedient, to allow Honest Men the Freedom of each other's Bed: laughing at those who resent, in so high a manner, these petty Injuries, as to pursue their Revenge by Murthers and War. He look'd on it as no indecent Custom for a Man, step'd into Years before his Wife, to recommend her to the Arms of a Young and Virtuous Friend, and when there appear'd Hopes of having a Child, by so good a Father, to challenge the Blessing to himself. On the other side, a good and upright Man, who esteem'd a Married Woman for her own Virtue, and for the Comeliness of her Children, was encouraged to beg of her Husband, without Ceremony, the Favour of a Night's Lodging; *That he might transplant into his own Garden some Slip of so Goodly a Tree.* Indeed *Lycurgus* was of Perswasion, that Children were not so much the Propriety of the Parents, as of the whole Commonwealth: and therefore he would not have them begotten by the first Comers, but by the best Men that could be found. He censur'd the Lawgivers of other States, who whilst they spent no Pains or Charge in promoting and improving the Breed of their Dogs, and of their Horses; yet, being themselves Old and Infirm, shut up their Wives from other Men. Whereas a little Reflection would have taught them, that the Virtues and Vices of Children, their Success or Mis-carriage do chiefly redound to those who have the Care of their Education. And this Institution of the *Spartan* Founder, the Historian judgeth to have been set on foot, *φρασεως*

(a) See *Tob. VIII. 10.* (b) *Vid. Selden de J. N. & G. l. 5. c. 4.* (c) *Deuteron. XXII. 23, 24. Add. l. 8. C. de Incest. & inutil. Nuptiis.* (d) *Add Matth. I. 18.* (e) *Comp. Genes. XXIV. 67. Deuteron. XXI. 13.* (f) *Vid. l. 5. de Repub. & Marci. Ficin. in Prefat.* (g) *L. 2. c. 58.* (h) *Add. Diod. Sic. l. 2. c. 58.* Of the *Ithyophagi*, l. 3. c. 15. Of the *Hyllophagi*, l. 3. c. 24. Of the *Nomades*, c. 32. which are likewise mentioned by *Strabo*, l. 7. Of the *Garamantes*, *vid. Plin. l. 5. c. 8. Solin. c. 43.* Of the *Troglodyte Agatharbid.* c. 30. *Pompon. Mel. l. 1. c. 8.* Of the *Agathyrse*, *Herodot. Melpom. p. 161. Ed. H. Steph.* Of the *Gindani* and *Nomades*, *ibid.* Of the Inhabitants of *Thule*, *Solinus* reports, (I know not with what Credit) that *They hold their Women in common, and are Strangers to fixt Matrimony*, c. 35. (i) *De B. G. l. 5. c. 14.* (k) *Lib. 5. cap. 11.* (l) The same Custom is mention'd, though not so distinctly, by *Xiphilin. Epit. Dion. in Ner. in Bonduica's Speech*; and again in *Sever. Strabo* reports somewhat like this of the *Sabaens*: 'Their Possessions (says he) lie in common to all of the same Blood and Family, but the Eldest bears the chief Sway. One Wife serves them All: he that comes first hath Admission to her Bed, placing his Staff before the Chamber-door: But the Nights she passeth with the Eldest. They punish Adulterers with Death, and such they esteem every Intruder into another Family, *lib. 16. pag. 538.* *Vid. l. 11. p. 353, 354. de Messaget. & Tapyr.* Of some Inhabitants of the Kingdom of *Calecut*, *Ludovicus Romanus* (*Navig. l. 5. c. 8.*) informs us, 'That every Woman is at the same time married to Seven Husbands, who lodge with her by turns. When she is brought to Bed, she presents the Child to which of the Seven Fathers she pleaseth, and no Appeal lies from her Determination, *Vid. & Pet. de Valle Itiner. p. 3. Ep. 7. Joan. Boem. de Mor. Gent. l. 3. c. 7.* reports of the *Lithuanians*, from *Aeneas Sylvius*, 'That the Women, by Consent of their Husbands, have their Sparks, whom they call Assistants of their Bed; whereas on the other side, for the Husbands to use the like Liberty, would be accounted highly Infamous.

καὶ πολιτικῶς, Agreeable to Nature and to Policy (a).

The Stoicks (b) too were of Opinion, that Wife Men ought to communicate their Beds, as well as their other Possessions: because by this means All esteeming the Children their own, would love them with equal Tenderness; and there would be left no room for Jealous Fears, no Suspicion of Adultery or Dishonesty (c). The borrowing and lending of Wives, amongst the Romans, is a Practice much talk'd of by Authors (d). Solon, in his Laws, permitted an Heiress, whose Husband prov'd impotent, to call in the Assistance of his nearest Kinsman (e).

Yet we are not to make the least Doubt but that all these Licentious Indulgences are repugnant to the Law of Nature (f). For the Natural and Regular End of Marriage is, the obtaining of Children, whom we may, with Certainty, call our own. But what room can there be for Distinction in this wild and confus'd Mixture? Again, the Business of Nature not requiring so numerous a Concurrence, all these additional Helps and Services proceeded, not from Necessity, but from Lust. Besides, a most material Objection against these Irregularities is, that the kind and endearing Titles of Relation are sunk and extinguish'd in them. Plato proposeth by way of Remedy to this grand Inconvenience, that the Civil Laws shall supply the Defect of Natural Kindred; that all Persons shall esteem their Seniors in Age, as their Parents; their Juniors, as their Children; their Equals, as their Brothers and Sisters. But this is a most idle and vain Expedient; for to have no certain Father, no certain Child, &c. is, with regard to mutual Affection, the same thing as to have none at all. 'Tis well urg'd by Lactantius (h): *If all, says he, are concern'd in every Child, who can love a Child as his own, when he must needs be Ignorant, or at least Doubtful, whether it be his own, or no? On the other side, Who would reverence a Man as his Father, when indeed, he is uncertain to whom he owes his Being? Whence it comes to pass, that he must take a Stranger for his Father, and his Father for a Stranger.* And, it was a good Answer to one, admiring there should be no such thing as Adultery heard of in Sparta, That their very Matrimony was Adultery. Farther still; The main Difference betwixt the Conjugal Union of Mankind, and the wild Freedom of coupling amongst the Beasts is, that the Wife engageth her Faith to be true to the Husband's

Bed. Which Engagement, if he voluntarily release, and madly betray his own Honour to new Rivals, he is unworthy the Name, not only of a Husband, but of a Man; and is to be look'd upon as a most vile Disturber of Human Decency and Society. As for the Excuse of *Lycurgus*, and others of those Ancient Lawgivers, that so fair a Soil as a Young Wife ought not to lie fallow, under the Neglect of an unactive Husband, their most ready and most Honest way of preventing such Mishaps, had been to prohibit Marriage between Persons of improper Years. And then for the Point of *Jealousy*, by it they must mean, either that senseless Passion, which torments a Man's Head without good Suspicion or Reason, or else a due and proper Vigilance and Caution, in order to the preserving a spotless Bed: the former kind of Jealousy, the most foolish, and the most miserable Disease of human Minds (i), their Community of Wives could not cure; and the other being the just Effect of Reason and Prudence, it ought by no means to have taken away (k). Nor shall I ever be perswaded, that to lay all Possessions in common, and to give each Man the Privilege of calling every Thing *his own*, is the surest Method of preserving Peace and Friendship in the World. Every one must indeed acknowledge, that it is much more for the Publick Benefit to have a State fill'd with healthy and vigorous, than with diseas'd and weakly Subjects; and at the same time, that the Parent's Constitution hath a considerable Influence on the Child's. Yet did this Rule hold true more generally then it doth, it were by no means worthy of so high regard, as that in consideration of it, we should dissolve the sacred Ties of Marriage, and shake the main Foundation of all good Order amongst Men (l).

XVI. The other kind of *Polygamy* (1), and that which more properly claims the Name, being the joint Relation of many Wives to one Husband, hath been the Practice of many Nations, in ancient and in modern Time. The *Mosaical* Law was so far from forbidding this Custom, that it seems in several places to suppose it (m). And GOD, by the Prophet *Nathan*, reckons amongst the peculiar Favours and Blessings, he had bestow'd on *David*, that *He had given him his Master's Wives into his Bosom* (n). Mr. *Selden* (o) assures us that the *Jews* esteem'd it lawful for a Man to marry as many Wives as he pleas'd, provided he could maintain them, and yield a Supply in all things answerable to their Relation. Yet it was the

(a) The same Law is mention'd by *Xenophon. de Reb. & Leg. Lacedamon.* (b) In *Diog. Laert. Zen.*  
 (c) *Add. Thom. Campanell. de Civit. Solis.* (d) *Vid. Plutarch. Num. & Cat. Min.* So *Cato* is commonly said to have lent his Wife *Marcia* to *Q. Hortensius.* *Vid. & Lucan. l. 2. v. 328.* (e) *Plutarchi Solon.*  
 (f) *Comp. Matt. XXII. 25, &c.* (g) *L. 5. de Repub. p. 658. A. Ed. Wech.* (h) *Div. Instit. l. 3. c. 20.*  
 (i) *Vid. Oppian. Cynaget. l. 3. v. 237, &c.* (k) *Vid. Senec. Herc. Oet. v. 233, &c. Vid. Bayle Nowwell. Lettres contre Maimbourg. Lett. 17. f. 2, 4, 5.* (l) The Argument which some are not asham'd to bring from our ways of promoting the Breed in Horses, is too filthy and scandalous to deserve a Refutation. *Add Aristotle's Discourse against Plato on this Subject, Polit. 2. c. 2.* It is a worthy Saying of his in the same Work, *l. 7. c. 16. For Persons, who are truly and properly Man and Wife, to seek another Partner, and another Bed, ought to be reckon'd amongst the vilest and most infamous of Offences.* (m) *Vid. Grot. lib. 2. c. 5. f. 9.* (n) See *Deuteron. XXI. 15. XVII. 16, 17. & sic. Ambrosii, apud Gratian. Caus. 32. quest. 4. c. 3, 7.* (o) *2 Sam. XII. 8.* (p) *De Uxore Hebr. c. l. 1. c. 9.*

Advice of their Sageſt *Rabbies*, that for the avoiding the Inconveniencies of *Number*, no Perſon ſhould exceed *four*, except the King. He that acted contrary to this Rule, was adjudg'd Guilty of notorious Impudence, and of Diſobedeince to the Inſtitutions of his Anceſtors. The *High-Prieſt* was allow'd one only Wife at a time, tho' he was not hindred from marrying another, in caſe of the Death, or Divorce of his firſt. By the Prohibition of *Deuteron. XVII. 17.* They were perſwaded, that their King ought not to go beyond Eighteen. If the Men of their Nation liv'd in a Country, where *Polygamy* was not tolerated, they thought them oblig'd to conform: as particularly in the *Roman Empire*, the Laws of which expreſly reſtrain'd them from the uſe of ſuch a Liberty (a). As for the modern *Jews*, we are inform'd by *Leo Mutinenſis* (b), That *thoſe of them who live in the Eaſt, ſtill keep up their ancient praſtice of Polygamy, whereas in Germany, they are not allow'd this Privilege, and in Italy very rarely; and only in Caſe a Man hath liv'd with his preſent Wife many Years without Iſſue* (c).

*Tacitus* (i) obſerves of the ancient *Germans*; They are almoſt the only People amongſt the *Barbarians*, who are contented with ſingle Marriages. Indeed ſome few Perſons of extraordinary Merit, are advanc'd to the Favour of more Ladies than one; but then they are courted to this Liberty, not out of Luſt, but upon account of their ſingular Virtues and Worth. Thus *Cæſar* (d) tells us of *Arviſtus's* two Wives, choſen out of different Nations.

The *Grecians*, according to their regular Frame and Conſtitution, admitted but of one Wife; yet we find in one of the *Athenian Decrees*, an Exception to this purpoſe, That to encrease the number of Men, at preſent deficient, it ſhall be lawful for any Perſon to have Children by another Woman, beſides her that is, in a more ſtrict ſenſe, his Wife (e). And hence *Athenaus* (f) urging the Improbability of the common Story, that *Socrates* had two Wives, inasmuch as this was contrary to the primitive Ordinance of *Cecrops*, and was not objected to him by the Comedians, who handled him ſo reproachfully on other Occaſions; at laſt concludes, that if the matter of Fact were really true, it muſt proceed from a particular Order of State, diſpenſing with the ancient Strictneſs, by reaſon of the preſent Scarcity of Subjects. In *Gellius* (g), among the ſeveral Cauſes alleged, why *Euripides* ſhould get the Title of the *Woman-Hater*, this is brought as one, that he had two Wives together, (*The Athenian Government at that time allowing it,*) who

made him quite weary of Matrimony, and quite out of Love with the Sex. Amongſt the *Spartans*, we find in *Herodotus* (h), that when their King *Anaxandrides* refus'd to put away his Wife, on the account of Barrenneſs, he was compell'd by the Authority of the *Ephori*, to admit another to his Bed, who did not lie under the ſame Imperfection. Every Body knows, that the *Romans* were content, each Man with his ſingle Wife (i). Yet *Sueton* (k) reports, that it was once in *Julius Cæſar's* Head, to introduce a Law, to give Men Licence to marry what Sort, and what Number of Wives they thought fit, for the better ſtocking the Common-wealth. *Socrates*, the Eccleſiaſtical Hiſtorian (l), reports of the Emperor *Valentinian*, that whiſt his Wife *Severa* was living, he admitted to the ſame Honour the moſt beautiful Lady *Juſtina*; and publiſh'd an Order through his whole Dominions, permitting every Man to follow his Example; To have two lawful Wives. *Paulus Diaconus* (m) gives the ſame Relation; and *Zonaras* mentions the Emperor's Two Wives, though he ſays nothing of the Law enacted on the Occaſion. But in as much as the other Hiſtorians, *Ammianus*, *Zozimus*, and *Oroſius*, together with the *Chriſtian Fathers*, who ſo often diſcuſs the Queſtions concerning Matrimony, are abſolute ſilent in this Point, *Baronius* (n) concludes the Double Marriage of *Valentinian*, and the Law in Juſtification of it, to be perfect Forgeries.

*Mahomet*, in his new Inſtitution, allow'd of *Polygamy*; Craftily accommodating his Doctrines to the Temper of the People, whom he intended to deceive. For as the Force of Love is ſtronger in the Men of thoſe Eaſtern-Parts, ſo the Women, either by their Natural Genius, or by the Power of Education, live in ſuch perfect Subjection to their Huſbands, that their Jealouſies and Quarrels are ſeldom conſiderable enough to diſturb the Peace and Union of the Family. Yet the wealthier Men ſhut up their Wives in ſeparate Houſes, or confine them to diſtinct Towns, to prevent Diſſention (o). *Boccaline* (p) will have this Indulgence to have been a Device, to diſpoſe Men the better for a Life of Slavery; whiſt dividing their Riches amongſt ſo large a Progeny, they muſt continually grow weaker, and more abſolutely at the Command of the Government. A Thought very ingenious indeed, and of refin'd Policy; and ſuch as probably never enter'd into *Mahomet's* Head, who died ſo long a time before the Eſtabliſhment of the *Turkiſh* Tyranny and Empire. As for the *Indians*, Travellers inform us,

(a) L. 8. C. de Jud. &c. Add. Selden. de J. N. & G. l. 5. c. 6. (b) De Rit. Hebra. p. 4. c. 2. f. 2. (c) Here Mr. Selden obſerves, that in the firſt Edition was added, *Indulſu tamen Romani Pontificis impetrato*, 'Yet not without procuring the Indulgence or Diſpenſation of the Pope; which words are omitted in the Paris Edit. 1637-

(1) Tacit. de Mor. German. c. 18. (d) De B. G. l. 1. c. 53. n. 4. (e) Diog. Laert. Socrat. (f) L. 13. c. 1.

(g) L. 15. c. 20. (h) Terpſichore, p. 190. Ed. H. Steph. Vid. Potter. Archæol. Græc. l. 4. c. 11. p. 599.

(i) Vid. Cod. lib. 5. t. 5. l. 2. de Inceſt. Nupt. & lib. 9. t. 9. l. 18. C. ad L. Jul. de Adult. (k) C. 52.

(l) L. 4. c. 26. (m) L. 11. (n) Tom. 4. ad A. Chr. 370. 3. 125. (o) Richer. de Morib. Turc.

(p) Ragg. di Parnaff. Cent. 2. c. 63.

that the chief Reason why several of their Princes have refused to imbrace the *Christian* Faith, hath been because, amongst other Conditions, it was required of them, to admit no more than one Woman to their Bed (a).

XVII. Whether or no this Practice be repugnant to the Law of Nature, is a Point not fully settled amongst the Learn'd. It shall be our Business to propose fairly the Arguments on both sides, leaving the decisive Judgment to be pass'd by the Reader. Those then, who maintain *Polygamy*, as we now understand it, to be in itself agreeable to Natural Law, argue in this manner. 'The regular end of Matrimony, that is the Certainty of Off-spring, and the Benefit of mutual Assistance, is as well answer'd under these Allowances, as under the strictest Confinement. It is an Idle Objection, which some make, That at this rate the Conjugal Faith will not be reciprocal, a Condition which Reason it self requires essentially necessary to every Covenant. For Mutual Faith doth by no means suppose, that the Performances on each side must needs be equal. Nor doth the true Intent of Matrimony demand, that the Man should confine his Desires so straightly as the Woman. The Reason why one Woman ought to take up with one Man, being the great Danger of the Uncertainty of Issue; which Hindrance doth not lie in the way of the other Sex. Yet is not the Husband less oblig'd to make good his Faith to every Wife; which Performance consists in the yielding her all due Conjugal Help, Kindness, and Support. As for the main End of Marriage, the obtaining of Children, one Man is, in this respect, equal to many Women; at least to such as are Moderate and Virtuous (1). And therefore it is chiefly Lust and Intemperance which makes Women so averse to *Polygamy*. Indeed, if a Wife, at her first Contract with her Husband, binds him under an Engagement to admit no Partners with her of his Bed; (as *Laban* (2) bound *Jacob* in Behalf of his Daughters:) such a Covenant is faithfully to be perform'd (b). Where no such Condition is made, there the Wife ought to rest satisfied with a competent Share in the Husband (c). Nor doth she in this Case suffer any Injury; for she can have no more Right over her Hus-

band's Body, than what she obtain'd by the Matrimonial Compact: But in that Compact she receiv'd a right only to a part of the Man, and voluntarily agreed to this imperfect Possession. And therefore she hath only Reason to complain of her Husband, when, as *Plautus* (d) says, *he lets his own Field lie fallow, to plough another Man's*. Nor doth this Allowance of *Polygamy*, as some Object, reduce the Women into the Condition of Slaves. Nor is it any Crime, to place the weaker Sex in an inferior Degree to the stronger, to whom they owe their defence and support (e). The Reasons alledg'd on the other side, taken from the fatal Effects of Jealousie, the danger of Domestick Quarrels, the Hatred of the Rival Mothers, transmitted to their various Race; do not amount to a Proof, that *Polygamy* is Naturally Unlawful; but then the same Inconveniencies appear, as in all, so especially in second, Marriages, which no one will upon this account term unlawful. Nor are the Troubles and Misfortunes of this kind equal in all Places, but they are chiefly to be discovered in those Countries, where either the Women have too high and commanding Spirits, or the Men too low and servile. In many Nations the Wives, either by their Natural Disposition, or by Custom and Education, pay a more strict and quiet Obedience (f). And besides, it is no difficult Task, for a Man of tolerable Prudence and Discretion, to keep the Family-peace amongst several Women (g).

XVIII. Those, who deny *Polygamy* to be agreeable to the Law of Nature, chiefly insist on the Seventh Commandment in the *Decalogue*, *Thou shalt not commit Adultery*; which must be acknowledg'd to affect the Man, as well as the Woman. And therefore, say they, if the Prohibition lies on both Parties, the Husband must be guilty of Adultery, whenever he receives into the Covenant of Marriage, or into the Possession of his Bed, another Woman, against the Consent of *Her* to whom he first plighted his Faith, and gave the power over his Body (h).

In return to this Argument, *Antonius Matthæus* (i), the Civilian, affirms, that Adultery cannot be committed, either by *Polygamy*, or between a married Man and an unmarried

(a) Add. *Abrab. Roger. de Bramin.* p. 1. c. 13. & *Alex. de Rhodes Itinerar.* p. 2. c. 11. Add. *Nouv. Memoires de la Chine*, Tom. 2. l. 4. & *Will. Bosman's Voyage to Guinea*, Lett. 19. & *Mr. Bayle's Nouvelles d'Auril.* 1685.

(1) Especially if they imitate *Zenobia* Queen of the *Palmyrenes*, who would not admit the Embraces of her Husband upon any other Account, than the obtaining of Children. *Trebell. Poll. in XXX. Tyran.* cap. 30.

(2) *Gen.* XXXI. 59. (b) *Add. Lib.* 45. t. 1. l. 121. f. 1. *D. de Verb. Obligat.* (c) See *Genes.* XXX. 15, 16. *Herodot. Thalia*, pag. 120. Ed. *H. Steph.* 'The Persian Wives take their Turns and Courses with their Husbands.

(d) *Afinar. Act.* 5. Sc. 2. *Add. lib.* 48. t. 5. l. 13. f. 5. *D. ad L. Jul. de Adult. & ad eam Grot. in Flor. Sparf. ad Jus Justinian.* Women are seldom so very ambitious of Honour, as to be satisfied with the Excuse which *Ælius Verus* (in *Spartian*) gave his Lady, when she complain'd of his Mistresses: *Give me leave, says he, to satisfy my Inclinations by some other means: A Wife is a Name of Dignity, not of Pleasure.* *Add. Plaut. Mercat. Act.* 4. Sc. ult. *Gratian. Caus.* 32. Qu. 6. c. 2, &c. (e) 'Tis a Saying of *Euripides* in *Supplic.* That Women who are Wise, will transact every Thing by Men. (f) *Vid. Benzo. Hist. Nov. Orb.* p. 1. c. 37. (g) The Reasons urg'd by *Dionys. Gouffred.* (ad *Lib.* 1. t. 9. l. 7. *C. de Judeis*, &c.) will be found, upon Examination, very slight and trivial.

(h) *Gratian. Caus.* 32. quæst. 5. cap. 15, 16, 23. *Vid. Bacler. ad Grot. l. 2. c. 5. f. 9.* *Hobbes* hath made some kind of Reply to this, in his Sixth Chapter *de Civæ*, f. 16. and in his 14th Chapter, f. 9. which we shall elsewhere take occasion to examine in *lib.* 7. c. 1. (i) *De Crimin. ad L. Jul. de Adult.* c. 1. f. 13.

Woman (a), but only with another Man's Wife (b). Nor will he allow every Violation of the Marriage Covenant to be the Sin of Adultery: for we never call him an Adulterer, who maliciously forsakes his Wife, who refuseth to give her Maintenance and the like; yet such a Man, without doubt, breaks his matrimonial Faith. 'He adds, altho' it be unjust in the Husband, to require a stricter Chastity of his Wife, than he practiseth himself (1); yet this by no means proves the Sin on both sides to be equal. For every one knows, that the Wife is, upon many Accounts, oblig'd to a much severer Degree of Moderation and Purity; in regard, as well to the Modesty of the Sex, as to the Danger of confus'd Amours, and of a supposititious Breed; as likewise to prevent the Scandal her Lightness would bring, not only on her own Family, but on the Government, under which she lives. For if it be reckon'd so very Disgraceful to be born of Parents, one of whom is a Native, the other a Foreigner, in so much that in most Countries a name of Reproach is fix'd on Persons of this motly Race; how much fouler an Infamy would it prove, as well to the whole State, as to particular Men, should it be left uncertain, whether the Subjects are born in Adultery, or in Lawful Marriage. In *Leviticus* (c) Adultery is defined, *The coming to another Man's Wife, the polluting another Man's Bed.* Nor can it on any account appear probable, that a Law against Adultery, directed to a People, who actually used *Polygamy*, should forbid this Practice, without declaring as much in exprefs words. Those Expressions of Holy Scripture (2), and of the Primitive Fathers (d), which seem to make the *coveting*, or desiring another Man's Wife, to be Adultery, are to be understood in the same sense, as when he that *hates his Brother* (3), is stil'd a Murderer.

Others chuse to answer thus, 'The Commandment alleg'd doth indeed bind Men, as well as Women: and therefore for one Husband to dishonour another's Bed, is no less sinful, than for a Wife to defile the Bed of her proper Husband. But then *Polygamy* doth not make the Husband Guilty of this Trespas against his Neighbour. It is true, if in the Original Contract between the Parties it was expressly provided, that the Man should transfer the whole power over his Body to the Woman, then in case he brings an Usurper to her Bed, whether under the Name of an Harlot, or of a Wife, he certainly violates his Faith given in the former Matrimony. But we have no such Charge of Perjury to lay against him, if at the first Marriage he reserv'd to himself the Liberty of adding a second Consort, as a Partner to her whom he

then receiv'd. Nor can he be said to defraud her, in as much as he bargain'd to allow her only a Share in himself. To this it is reply'd, That we must not suppose the Woman would thus consent to her own Loss and Injury, unless either compell'd by Force, or Fear, or moved by Weakness and Defect of Judgment; neither of which Causes are able to found a Right in the Man. But the Assertors of the other Opinion will not grant, that there is any Injury in the present Case. 'All the Right and Title, say they, that one Person can have to the Body of another, must arise from Covenant, and from the Consent of that other Party. And consequently, if so much be perform'd, as was fairly covenanted for, there ought to be no Complaint of injurious dealing. It is no good consequence, to say, that because, in just and true Matrimony, the Husband receives the full and perfect Possession of the Wife, therefore the Wife obtains the same absolute Title to the Husband. Nor will such an unequal Covenant prejudice the Natural Equality of Mankind. For to salve this, it is not necessary, that the mutual Performances amongst all Persons should be exactly alike: if so, it would be repugnant to the Law of Nature, that one Man should be born a Prince, another a Subject, and both by Virtue of an antecedent human Covenant, not made by themselves, but by others. Will any one be so extravagant as to maintain, that 'tis a Breach of Natural Equality, unless the Wife be allow'd her turn of Governing, as well as the Husband? And there is the same Difference observable in the Care of the common Off-spring: how little trouble doth this bring to the Father, in comparison to the Grievous Pains undergone by the Mother. Would it not be a most ridiculous Proposal, for the Women of State to desire a part in the supreme Administration? and yet we must not say, that the Men are guilty of Injury and Tyranny for excluding the fair Sex from this honourable Privilege. Should any People be of such a Temper, as to desire the Establishment of a Stricter Government, (which the bolder Patrons of Liberty are wont to call, the Treatment of Slaves,) if they too freely indulge the Reins, to the new Power, they act foolishly and transgress that *Ruling Prudence*, which is the best-lov'd Sister of *Natural Law*. So that to commiserate the Condition of the Wives in *Turkey*, &c. is as absurd and impertinent, as to bestow our pity on Husband-men and Artificers, condoling with them, that they should be so unfortunate, as to live in more uneasy Circumstances, than the Nobility. The Reason why a Husband cannot honestly admit another Man to partake of his Bed, is built upon a different Bottom. On the whole it may be concluded, that a

(a) S. 12. (b) L. 6. f. 2. D. h. t. (1) D. lib. 48. t. 5. l. 13. f. 5. ad Leg. Jul. de Adulter. coer. (c) Levit. XVIII. 20. XX. 10. (2) Matr. V. 28. (d) Produced by Gratian, cap. 3, 4, & 1. quæst. 4. caus. 32. & c. 5. quæst. 6. caus. eadem. C. 4. X. De eo qui cognov. Consanguin. Uxor. sue. (3) 1 John III. 15.

'Woman lies under no restraint of Conscience, 'from agreeing to this Kind of Matrimony, in 'a Country where the Practice is publickly 'receiv'd. Especially, since if it were in any 'degree Vicious, yet the bare Force of the 'weaker Sex could never prevail to the beat- 'ing down a publick Custom: nor would all of 'them join in the Attempt: some being ever 'more kind and friendly than others, and more 'unwilling to engage against the Men (a). The 'Example of the Heathens, and of the *Ma- 'bometans* (who are allow'd Four Wives, and 'as many Concubines as they can maintain,) 'may indeed be of no great Force in the Ar- 'gument, because it appears, that those People 'are guilty of many Violations of the Law of 'Nature; but the *Polygamy* of the Fathers, 'under the *Old Covenant*, is a Reason, that 'Ingenuous Men must confess to be unanswer- 'able. As to the Saying of the Apottle, *1 Cor.* 'VII. 4. it doth not seem to reach the pri- 'mary design and use of Matrimony, but only 'the secondary and indiret End, *the avoiding 'Fornication*: which End belonging in the 'same degree to the Man and to the Woman, 'Humanity and Equity enjoin, that the same 'Provision should, in this respect, be made for 'both Parties; and, then it follows, that 'the Husband ought not to deny his Wife 'Conjugal Favours. But the communicating 'his Favours to Others besides Her, doth not 'here seem to be Forbidden.

XIX. However it be, this is very clear and cer- 'tain, that the most decent, the most proper, and 'the most peaceable way of Wedding is, for *One 'to live contented with One*. This then is, with-

out all doubt, to be esteem'd the highest, and the 'most perfect kind of Matrimony; and the Laws 'and Conditions of it are most religiously to be 'observ'd, as well by the Husband, as the Wife '(b). It is worth remarking, that where several 'Wives are allow'd to one Man, he seldom fails 'to single out a *Beloved*, whom in all respects 'he prefers to the rest (c). Thus Nature it self 'seems out of *Multitude*, to lead us into *Unity*. 'Tis a wise Observation that of *Salust* (d), *The 'Relation*, says he, *of a Son-in-law, is but slightly 'esteem'd amongst the Numidians, and the Moors: 'and the Reason is, because they marry each as 'many Wives, as they think agreeable to their 'Fortune and Grandeur; some Ten, some more, 'and their Princes with a far wider Liberty. 'Thus the Mind is divided and distracted with 'Number, and All are despis'd because All cannot 'be lov'd* (e).

*Grotius* (f) assigns these Reasons for the Re- 'ception of *single Marriage* amongst *Christians*; 'that the *Wife, bestowing herself entirely on the 'Husband, may receive the equal Return of his 'whole Heart and Affection: that the Family- 'Affairs may be carried on with more Regularity 'under a single Mistress; and that many Mothers 'may not create Feuds and Quarrels amongst the 'Children*. To which we may add, that after 'the Sufficient Multiplication of Mankind, '*Polygamy* ought, amongst all Nations of tole- 'rable Civility, to be restrain'd on this politick 'Account, that by too great a number of Chil- 'dren the nobler Family must in time be re- 'duc'd to Poverty, the meaner to Beggary, and 'the *State* oppress'd with an Idle Swarm of the 'baser Populacy; which if not vented and

(a) *Isaiah* IV. 1. (b) *Euripid. Andromach.* v. 464, &c.

————— Ne'er will I commend  
More Beds, more Wives than one; nor Children curs'd  
With *Double Mothers*, Banes and Plagues of Life.  
Let each Good Man possess his Single Bride,  
And check the Intrusion of a Rival Dame.

*Isocrates Nicocl.* p. 59, 60. *Edit. Paris.* I cannot but greatly condemn those, who having entred upon a Married State for their whole Life, neglect afterwards to stand to the Agreement; but giving a loose to their Pleasures, injure those dear Partners, from whom they expect nothing but Kindness and Comfort. In other Bargains, they are wont to practise Justice and Honesty, and yet make no scruple to violate the Nuptial Contract, which ought to be so much more strictly observ'd, than all others, as it is of more sacred Obligation, and of nearer and more important Concern, *Plaut. Mercat. Act. 5. Sc. 1. v. 81. Plutarch. de Præcept. Conjugal.* They say, that a Cat upon smelling certain Essences or Perfumes is driven to Madness. Did the same Effect hold in Women, ought not Men to abstain from using such Perfumes, rather than cause so great Misfortunes for the sake of a worthless Pleasure? Why, the Dishonesty of a Husband is as likely a mean to throw his Wife into Distraction, as the most offensive Smell could be: and consequently, it is most unjust, on the account of an idle Satisfaction, to bring so grievous Affliction on an innocent Person; and not rather to preserve the Nuptial-Bed uncommunicate and unstain'd. *Clytemnestra* in *Eurip. Electra*, v. 1035, &c.

Women are Fools: 'tis own'd; and by a Woman:  
But when Men take Advantage of the Folly,  
Slight Home, and scout Abroad for lawless Love;  
No wonder if the Dames return the Wrong,  
Seek out new Mates, and practise as they're taught.

(c) *Genes.* XXIX. 29. *Deuter.* XXI. 15. *Esther* II. 17. *Cant.* VI. 7, 8. (d) In *B. Jugurth.* (e) To the same purpose *Amm. Marcellinus* (l. 23. c. 12.) speaks of the *Parthians*, *Their Affection grows cool and languid, by the unbounded Variety they make use of in their Pleasures.* (f) *De Verit. Rel. Christ. Procop. Hist. Vandal.* l. 2. *Be Ye concern'd for your Children, say the Barbarians, who are chain'd to the Necessity of a single Bed: As for Us who, if we please, can have Fifty Brides together, we are in no Fear of wanting Posterity,* *Eurip. Androm.* ver. 177, &c. *Claudian de Bello Gildon.*

————— *Connubia mille:*  
*Non illis generis nexus, non pignora cura;*  
*Sed numero languet Pietas.*

————— A Thousand Nuptial Bands they wear,  
Blood is no Union, nor their Race their Care;  
But Love expires in Number. —————

thrown off, (as it cannot always be) will at length overturn all Order and Government, and sink the Common-wealth under its own weight (a). We are told that the *Turks* themselves, in the Point of Marriage, do not now take the same Liberty as they formerly us'd, and as their Law allows: the Cause of which Alteration is not, perhaps, so much the Increase of *bestial Lust* amongst them, as their Experiences of the Inconveniencies and Mischiefs attending *Polygamy*.

XX. Another Controversy, no less warmly managed is, whether Matrimony, by the Law of Nature, be a *Society*, or Partnership, capable of being dissolv'd, and consequently, whether *Divorces* be, by the same Law, allowable? And here we shall take the same Course as before, to lay down the Strefs of what both Parties urge upon the Point, leaving the considerate Reader to pass Judgment for himself. First of all, it is taken for granted, that according to the common Nature of *Covenants*, one Party cannot recede, unless the other hath either broken the Agreement, or else yielded his Consent to this Release. It will therefore be repugnant to the Law of Nature, for either of the married Couple, to depart from the other unconsenting, only for the Improvement of Condition, or Satisfaction of Humour, without being able to alledge any Breach of the matrimonial Pact on the other's side. Nor, can the Indulgence of the *Roman Law* (b), in some Cases of Partnership, be brought to justify a Desertion of this kind. For, besides that, the relinquish'd Party is most certainly *endamaged*; an Union enter'd into upon account of Gain, may much more easily admit of separation, than this most strict and sacred Tie between Man and Wife. For, in Marriage the Parties acquire a *Right* over the Bodies of each other, which ought not on either side, to be taken from them against their Will. And indeed, tho' there should be a mutual Consent of the Parties, yet it would be both indecent and unsafe to allow the dissolving of Marriage, without very weighty Cause: in as much as this Liberty of frequent Divorces most exceedingly shock the Strength, and Credit of Families; and the Grace and good Order of the whole Common-wealth (c) (1). And the same reason will hold in *Esponsals*, which although no farther Progress hath been made in order to their Consummation, yet ought not to be broken-off by the Act and Motion of the Parties contracted, unless some extraordinary Occasion fall out; or some of those Conditions are found defective, on the supposal of which the Validity of the Covenant dependeth (d).

*Dionysius Halicarnassens* (e) exceedingly commends the Institution of *Romulus*, by which he order'd one sort of Marriage, solemnized with the greatest Ceremony, to be incapable of Divorces. *This Law* (says the Historian) engaged the *Wives* (who had no Refuge, nothing to trust to in Case of a Rupture,) to yield a ready Compliance to the Temper of their Husbands: and it obliged the Husbands, on the other side, to use their *Wives* as a necessary Possession, which they could not, on any Account, throw-up, or desert. And one may reckon among the chief Causes of the Decay and Corruption of the *Roman State*, their too frequent Practice of Divorces, either upon so slight Pretences, or upon none at all (f). *Ammianus Marcellinus* reports of the *Saracens* what seems very agreeable to their barbarous Customs. *They give Wives*, says he (g), *to serve a present Turn: and to make some Shew and Semblance of Matrimony, the Woman presents her Mock-husband with a Spear and a Tent; at the fix'd Day, she may if she pleaseth break up and seek a new Mate.* *Varenius* (h) informs us, that the *Dutch*, now and then, contract this Kind of Marriage in *Japan*; having liberty to release themselves at their leaving the Island. The like is practis'd in many other Parts of the *Indies*, and the Kingdom of *Persia* (i). How vile doth the *Roman Liberty* appear in *Juvenal* (2)?

*Cur desiderio Bibulæ Sertorius ardet?  
Si verum excutias, facies non uxor amatur.  
Tres rugæ subeant, & se cutis arida laxet,  
Fiant obscuri dentes, oculique minores;  
Collige sarcinulas, dicet libertus; & exi;  
Jam gravis es nobis, & sæpe emungeris; exi  
Ocius, & propera; sicco venit altera naso.*

These Truths with his Example you disprove,  
Who with his Wife is monstrously in love:  
But know him better: for I heard him swear,  
'Tis not that she's his Wife but that she's fair.  
Let her but have three Wrinkles in her Face,  
Let her Eyes lessen, and her Skin unbrace;  
Soon you will hear the saucy Steward say,  
Pack up, with all your Trinkets, and away;  
You grow Offensive both at Bed and Board;  
Your Betters must be had to please my Lord.  
Mr. Dryden.

For really, as *Claudian* (k) observes,

*Fœmina cum senuit, retinet connubia partu;  
Uxorisque decus matris reverentia pensat.*

A *Matron* for her fruitful *Bed* we praise:  
And the *Wife's Charms* the *Mother's Awe* repays.

(a) It is a most barbarous Way which the People of *Angola* in *Africk* use, to get rid of their vast Stock of Men, occasion'd by *Polygamy*, when they sell their superfluous Numbers to the *Americans* for Slaves. (b) *Lib. 17. t. 2. l. 14 pro Socio.* (c) *Vid. Val. Max. l. 2. c. 9. f. 2.* (1) See *Mr. Lock's Treatise of Civil Govern. p. 2. c. 6. f. 2, &c.* and *Algern. Sidney's Discourse upon Government, Ch. 2. f. 4.* (d) *Add. Gell. l. 4. c. 4.* (e) *L. 2. p. 95. Ed. Lipsi.* *Vid. Lipsii Comm. in Tacit. Annal. lib. 4. c. 16.* (f) *Senec. de Benef. l. 3. c. 16. Who is now ashamed of breaking the Nuptial Union, when so many Ladies, of Eminence and Quality, reckon their Years not by the Number of Consuls but of Husbands; and are Divorc'd in Hopes of marrying, and marry in Hopes of being divorc'd?* (g) *L. 19. c. 3.* (h) *Japon. c. 13.* (i) *Olear. Itin. Pers. l. 5. c. 22. Petrus de Valle Itin. P. 2. Ep. 17.* (2) *Sat. 6. v. 142, &c.* (k) *In Europ. l. 1. v. 72, 73. Add. Martial. Lib. 10. Epig. 41.*

And how scandalous was that Law of *Charondas*, mentioned by *Diodorus Siculus* (a), giving Liberty to Husband, or Wife, after a Divorce, to chuse a new Partner, provided they did not pitch on a younger than the former?

Besides all this, to put away a Wife looks Heinous in the Eyes of all the World, and loads the Woman with so much Reproach, that it would appear most Base and Unworthy to proceed in so severe a manner, unless upon some extraordinary Grounds and Provocation. And this may extend it self as well to the Business of Contracts, as of the more solemn and perfect Marriage. Thus when *Radigis*, in *Procopius* (b), having espous'd the celebrated *Brittia*, broke off the Match without being able to alledge any Crime on her side, the Historian tells us, *She, unable to bear the Scandal, bent all her thoughts and resolutions on Revenge. For Modesty and Chastity are so highly priz'd and so nicely regarded by these Barbarians, that a Woman turn'd off and deserted, most infallibly loseth her Reputation, though her Virtue be really safe and unstain'd.* It was a wise and rational Choice, when the Daughters of *Pollio* and *Agrippa* standing for the place of Governess over the *Vestal Virgins*, the former Lady was prefer'd on this account, because her Father and Mother had liv'd in a long and peaceable Marriage, without Separation; whereas *Agrippa* on the other side, had filled his Family with Jealousies and Dissentions (c).

XXI. We are further to examine, whether we may apply that to Matrimony, which holds good in all other Covenants, that in case the Heads and Conditions, especially the chief of them, are broken on either side, the injur'd Party hath the power of receding from the Agreement. And here we may venture to take the Affirmative part, if the Question be put concerning the Necessary and Essential Terms of the Contract. Thus the principal Design of Marriage is the procuring of Children, in order to the effecting which, it is requisite, that there be the nearest and the most familiar Communication between Husband and Wife. And therefore if we regard barely the Law of Nature, either Person may quit and renounce the Relation, in case the other prove guilty of base Desertion, or of Voluntary and Obstinate (1) Unkindness, as to the Affair of the Bed. This last Omision would bear an Action of Law amongst the Ancient *Jews* (d); and the *Conjugal Debt* as well as others might be recover'd by Procces in open Court.

Again, the Intent of Marriage is not only that we may obtain Children, but that we obtain such as shall indeed be our own. 'On this account, says *Josephus*, *Moses* absolutely forbade Adultery; thinking it would be every way more happy, that the Husband should keep the Possession of his Bed secure and undisturbed, and that the Production of genuine Issue would be alike advantageous to private Families, and to the publick State. (*Antiqu.* III. 10.)

Nay, and after this End hath been provided for, every honest Man is willing to keep his Bed to himself, and doth not think it either decent or safe, to take Passengers a-board, tho' the Vessel be first laden to his Desire. Very few Husbands have so high Notions of Courtlines and Complaisance, as to be concern'd at *Ovid's* Censure, that,

*Rusticus est nimium quem ledit adultera Conjux,  
Et notos mores non satis Urbis habet* (e).

He that won't lend his Bed's a stinging Clown,  
Unpractis'd in the freedom of the Town.

It is therefore to be esteem'd a just Cause of Divorce, if a Wife voluntarily expose her Honour to another Man. As on the other side, if she be overcome by the Usurper, in the way of Force and Violence, we can on no pretence call her Virtue in Question (f). And though it be commonly reckoned a more Heinous Crime, to assault her Chastity thus, by main Strength and Power, than to ensnare or betray it by Flattery and Charm; yet the Truth is, the former indeed offers the more grievous Injury to the Wife, but the latter to the Husband (g).

It appears then, that the Reason why *Adultery*, and *wilful Desertion*, are accounted sufficient Causes of Divorce, doth not arise from any particular Positive Law of God, (as if these two Exceptions were added to that Ordinance which makes the Bond of Marriage perpetual,) but from the common Nature of Covenants, which is such, that when one Party hath broken the Agreement, the other is no longer oblig'd to keep it. And the force of these Causes is so extensive, as to justify the injur'd Person, not only in refusing to cohabit with the perfidious Wretch, but likewise in passing to a second Marriage; whatever the *Canonists* urge to the contrary. Indeed those grave Professors, when they are to gratify a Friend in this point, do not

(a) L. 12. c. 18. p. 83. Ed. Rhodom. (b) Hist. Goth. l. 4. (c) Tacit. Ann. 11. c. 86. *Publius Syrus*, Many Marriages are next to many Curses. A Woman that marries often, displeaseth often. (1) Vid. *Plutarch Amator*. p. 769. & in *Solon*. p. 89. *Aristot. Oecon.* Lib. 1. c. 4. *Diog. Laert.* in *Pythag.* *Lactant.* lib. 5. c. 23. *Gratian. Caus.* 3. Quæst. 5. c. 1. &c. & 1 Cor. VII. 15. (d) Vid. *Selden. de Uxore Hebraica*, l. 3. c. 6, 7. *Montaigne's Essays*, L. 3. c. 5. (e) *Amor.* 3 & 4 v. 37, 38. *Martial*, L. 6. Ep. 90.

*Machum Gellia non habet nisi unum,  
Turpe est hoc magis, uxor est duorum.*

One Spark serves honest Gellia at a time;  
But her two Husbands are a fouler Crime.

Add. *Abbr. Roger de Bramin*. p. 1. c. 13. (f) Add. *Valer. Max.* l. 6. c. 1. f. 2. *extern. Liv.* l. 38. c. 24. *Xenophon* in *Hieron.* p. 578. L. 48. t. 5. l. 13. f. 7 & 39. *princ. D. ad L. Juliam. de Adult.* *Ælian. V. H.* l. 12. c. 47. (g) *Lib.* 11. t. 3. l. 1. f. 3. *D. de Servo Corrupto.* To inveigle and perfwade is more than to force and compel.

scruple to find out a way of eluding their own Decrees, by declaring the former Marriage to have been originally null and void; an Evasion which they can ground on many plausible Scruples.

But altho' Marriage be chiefly enter'd into upon the Design and Hopes of Children, yet the bare Inability of either Party (otherwise fit for a Conjugal State) towards promoting this End, doth not seem a sufficient Ground of Separation; in as much as it is a thing surpassing all human Power to bestow the Blessing of *Increase*. Yet *Carvilius Ruga*, the first Man of the *Romans*, that put away his Wife, (523 Years after the Building of the City) is reported to have taken his principal Motive from the Oath, which the Censors required of every married Man, in this Form, *Se habere Uxorem liberorum quærendorum causa, That he engaged in that Condition on the account of Issue* (a).

XXII. But the chief Point of the Controversy on this Head is still behind, and may be thus stated. According to the true and regular way of contracting Marriage, the Wife consents to a constant Cohabitation with the Husband, promising, according to her best strength, to assist and comfort him, as well with Sweetness of Converse, as with the Participation of Business and Cares; and engaging farther to be guided and directed by him, as the Lord and Governour of the Family. In requital for which, the Husband, on the other side, is obliged to protect and defend his Wife, to treat her with Honesty and Civility, and to pay her many other friendly Regards of the same kind (b). Now the Question is, whether the signal and enormous Violation of these inferior Duties gives a full and fair Reason for a Divorce. And here, if we regard barely the Law of Nature, many venture to hold the Affirmative. For since a Father hath the Power of discarding an undutiful Son, who, at least in natural Consideration, seems more nearly related to him than a Wife; why may not he banish his Wife, as a Rebellious Member of the Family, when her Manners are intolerable, and her Amendment desperate? Especially if we reflect on the Remark of *Fulgentius*, that a *Wife, the nearer she is join'd to a Man by the Law, the more certainly she proves to him, either Honey, by the sweetness of her Temper, or Poyson, by her froward and malicious Disposition; being really, either a continual Comfort and Refuge,*

*or a perpetual Plague and Torment.* An honest Man, says old *Simonides*, can have nothing in this World better than a Good Wife, nothing worse than a Bad one (c). On the other hand, in case the Husband treats his Wife with unreasonable Severity, and denies her the Respect due to her Sex and her Relation, so as to shew himself, not so much a kind Partner, as a troublesome and vexatious Enemy, it should seem very Equitable, that she might be reliev'd by a Divorce (d).

Another Scruple immediately ariseth upon this, whether it be allowable, by the Law of Nature, on the account of Intolerable Manners, or of Barbarous Treatment, entirely to dissolve the matrimonial Bond? Or, whether the other Conjugal Duties, as the Propagation of Race, &c. may not still be continued, tho' the cohabiting in the same Family be broken off? In as much as the former Covenant bearing a regard to Children, seems to be Essential to Matrimony, the latter only Additional. Thus much then is certain, that several Pacts may be made between the same Parties, under this Condition, that in case one of them should be violated, the others shall nevertheless stand Good. Nay one and the same Pact may be divided into many Heads, and Provision may be made, that although one of the Heads be transgress'd, yet the Parties shall proceed in performing the rest. If the Marriage was contracted under such a Form, it seems reasonable, that the Wife, although she hath by her unpeaceable Carriage forfeited her Title to a continual Cohabitation, yet may still lie under the Force of that part of the Covenant, which obligeth her to consult Succession. But, because it is by no means probable, that she, who is unfit for the first of these Privileges and Duties, should with any Convenience be admitted to the other; that a Man should desire Issue by the same Woman, whom he is constrain'd to hate; and not rather entertain an absolute Aversion to the *Body*, which lodgeth so froward a Guest: it is the common and regular Practice for the Parties to contract, by one and the same Agreement, for their living together and for their mutual Care of Posterity: and thus the two Conditions are, in so close a manner, united and interwoven one with the other, that in case either be broke, both Naturally fall asunder. It is therefore contrary to the Law of Nature, that the Reason before alledg'd should cause a separation

(a) Vid. Gell. l. 4. c. 3. Valer. Maxim. lib. 2. c. 1. f. 4. (b) Homer. Il. 9. v. 340, &c.

The Wife and Good will cherish and defend  
The Partner of their Bed, their nearest Friend;  
Their second Self

(c) V. Fulgent. Mythol. lib. 1. Simoniden inter Poet. Lyric. Edit. H. Steph. p. 227. Euripid. Orest. v. 602, &c.

Bless'd is the Man, and sweetly runs his Life.  
Where smiling Fortune ties the Nuptial Band;  
But he whom inauspicious Hymen joins,  
Wretched abroad must prove and curs'd at home.

(d) Add. L. Theod. lib. 5. t. 17. l. 8. C. de Repud.

from Bed and Board, and yet continue some part of the Marriage-Obligation, so as to hinder the Parties from disposing of themselves another way. Unless such a separation be enjoin'd, only for a time, as a Punishment to obstinate Perverseness, and to try, whether there is any probability of Reforming. For it is absurd to say, that the Tie of a Covenant remains in Force, whilst no part of the Debt, arising from that Covenant can, or ought to be discharged. And though we should acknowledge, that the Party, who gave Occasion to this Mischief, is justly enough punished, yet the Innocent Party is in the mean-while injured, suffering thus for the Fault of another, and being oblig'd to live in a State of Celibacy, probably inconvenient, perhaps intolerable.

Thus far then, in the Consideration of *Natural Law*, the Man and the Woman are upon the same Ground. And for this Reason *Plutarch* (1) calls that Order of *Romulus*, *σφοδρὸν*, very hard and severe, which forbid a Woman to desert and turn-off her Husband, yet gave the Husband leave to discard his Wife, either upon her poisoning the Children, counterfeiting the Keys, or committing Adultery (2). Amongst the *Athenians* we find either Party might upon sufficient Cause, separate (2) from the other: though they distinguish'd these two kind of Divorces by different Names. For a Man to put away his Wife was term'd, *σπέρμασιν*; for a Woman to quit her Husband, was *ἀπολείπειν*. The Reason of this Variation in Terms is manifest; the Woman was receiv'd into the Man's Family, and therefore she could not properly, *ἀποπέμψαι*, send him away, move him out of the House, tho' she might, *ἀπολείπειν* forsake him, and retire to a place of Ease and Security.

We have only this to observe farther, that upon whatever Reasons Divorces are tolerated in a Common-wealth, it is highly expedient, that the Cause be heard and approv'd by the proper Magistrate; and that a Point of so very great weight and moment be not left to be decided by the private Conscience and Discretion of the married Pair. For, the Reason which *Bodinus* (b) offers to the contrary, *Because this publick way of proceeding must ne-*

*cessarily impair the Credit and Character of one of the Persons*, doth not seem to conclude with any Force to the purpose (c).

XXIII. With Regard to the *Divine Law*, either as Originally declar'd, or as renew'd by our *Saviour*, the Difficulty is much greater. This is evident, the *Jews* thought Divorces, not only permitted, but commanded, (in case the Wife displeas'd her Husband,) by the 24<sup>th</sup> Chapter of *Deuteronomy*. And farther, there is a place in *Philo Judæus* (d), which seems to imply, that *Barrenness* was judg'd a sufficient Cause for the like Separation. Nor are we to doubt but that the thing was frequently practis'd in that Nation, although their sacred and profane History, for more than 700 Years, have recorded none, or very few Instances of this kind. For it is not indeed the Custom to register, in publick *Annals*, Matters which are done according to general Use, but such only as appear singular and extraordinary. In *Isaiab* (e), and *Jeremiab* (f), amongst the many ways of representing and reproving the People's Sins, we find Similitudes taken from a *Divorce*, as an Action very well understood by the *Vulgar*. *Josephus* (g) takes notice of it, as a thing very unusual, and differing from the ordinary Law and Practice, that *Salomé*, Wife to *Costobar*, Præfect of *Idumea* and *Gaza*, should send a Bill of Divorce to her Husband; whereas, regularly, it was not allowable for the Woman to leave the Man, unless he put her away: excepting only one Case, when the Husband falsely reported, that his Wife did not prove a Virgin at their first Familiarity; here the Woman had her Choice, whether she would stay, or depart; and the Husband, if she chose the former, was oblig'd to keep her (h). *Josephus* (i) reports the same of *Herodias*, *Aristobulus's* Daughter, the Lady who was the Subject of *St. John Baptist's* Reproof (k).

But, that our *Saviour* absolutely took away this ancient Liberty of *Divorce*, is the Judgment of most Divines; grounded on *Matth. V. 32. XIX. 8, 9, &c. Mark X. 4, 6, 12. Grotius* (l) is of Opinion, that it was, from the Beginning most pleasing to God, that the Bond of Marriage should be perpetual; but, whereas the *Old-Covenant-Men* were not oblig'd to this

(1) In the Life of *Rom.* p. 89. See Mr. *Dacier's* Note upon the place. (a) *Euripid. Andromache*, v. 672, &c.

Whether the Man from a Disloyal Dame,  
Or the Chast Dame from an Injurious Man  
Suffers Reproach; each finds a just Relief.  
Him his own Strength can vindicate; and Her  
Parents and Friends combin'd protect from Wrong.

(2) *Potter. Archeol. Græc.* lib. 4. c. 12. (b) *De Repub.* l. 1. c. 3. (c) *Add. Plat. de LL.* l. 11. p. 974. Ed. *Wech. Charon de la Sageffe*, l. 1. c. 46. n. 12. *Selden de J. N. & G. l. 5. c. 7.* (d) *De Leg. Special.* p. 782. B. Ed. *Paris. Herodot.* lib. 5. p. 190. Ed. *H. Steph.* the whole Passage runs thus. Men who take Wives, being uncertain of their Fruitfulness, if, finding them afterwards to be Barren, they do not dismiss them and force them to lead a separate Life, are very excusable; in as much as being won by a long Familiarity and a Course of mutual Love, they cannot easily do Violence to those Affections which are so deeply rooted in their Minds. But they who chuse Women of known Barrenness, seeking only like Beasts to satisfy their lustful Inclinations, are to be reckon'd amongst the most impious Offenders, as contradicting and opposing GOD Himself, who hath established the Laws of Human Succession. (e) *Ch. 1.* (f) *III. 1. 6.* (g) *Antiq. L. 15. c. 9.* (h) *Vid. Phil. Jud. de Special. Leg.* p. 789. D. Ed. *Paris.* (i) *Ant. Jud. L. 18. c. 7.* (k) *Matth. XIV. Mar. VI.* (l) *L. 2. c. 5. f. 9.*

Strictness, our Saviour under the New Covenant, ratified by an express Law what was before most Agreeable to the Divine Will. Mr. Selden's Explication (a) of the same places of Scripture is to this purpose. 'There were amongst the Jews two Sects, the *Sammeans*, and the *Hillelians*, who maintain'd contrary Notions on the Point before us. The former asserted, that a Man ought not to quit his Wife, unless upon some discovery of Baseness and Dishonesty; The latter, that any Dislike taken of the Woman, was enough to justify a Divorce. Our Saviour then, as an Arbitrator, between the two disputing Parties, declares in Favour of the *Sammeans*; that it was not Lawful upon slight Pretences, to dissolve an Union instituted by GOD himself; but only upon the Commission of foul and scandalous Crimes, comprehended, according to the Genius of the Hebrew Language, under the General Term of *Fornication* (b). He adds, that amongst the most ancient *Christians*, *Adultery* was not esteem'd the only lawful Cause of Divorce: as appears from *L. 8. C. de Repudiis*, enacted by the most Religious of all the Emperours. 'Till by the Superstition and the Corruption of the *Papal See*, the Bond of Matrimony was declar'd Indissoluble during the Life of the Parties. *Buxtorf* (c) hath endeavour'd to make out, contrary to the Current of the *Jewish Writers*, that in the Words of *Moses*, *Deuteron. XXIV. 1, 2, 3, 4.* this one Prohibition only is contain'd, 'That a Man shall not receive again to his Bed a Wife which he hath once put away: But that the Custom it self, of putting away Wives, is in that place, neither approv'd by *Moses*, nor plainly condemn'd; but left as it were indifferent. And (says he) the Observation of our Saviour, that this Permission was given by *Moses*, *Because of the hardness of their Hearts*, sufficiently makes it appear, that the *Mosaical* Indulgence doth not amount to an Approbation, but signifies only a bare Toleration, or Connivance, exempting from *Civil Punishment* (d).

XXIV. Mr. *John Milton* (e), provoked, as it should seem, by the Misfortune of his own Family, hath, with great Pains, endeavour'd to make out, that even, by the Principles of the *Christian Religion*, an intolerable Disposition, a Disparity, or Contrariety of Mind, is a sufficient Reason for Divorce: Nay, that Persons, so unhappily pair'd, are indeed under an Obligation to separate. We hope we shall not seem tedious, if we venture to run over his chief Arguments. In the first place, then, he lays down this Assertion to build upon; *God, in the first Ordaining of Marriage, taught for what End he did it, in Words expressly implying, the apt and chearful Conversation of Man with Woman, to comfort and refresh him against the Evils*

*of solitary Life: not mentioning the Purpose of Generation till afterwards; as being but a secondary End in Dignity, though not in Necessity.* Now this Bottom we take to be False. When God was pleas'd to give Man a *Help-meet for Him* (1), and afterwards commanded the Primitive Couple to *increase and multiply* (2), He did not hereby ordain two different Ends of Marriage; but the latter words seem design'd to describe the *chief Fruit* arising (through the Divine Benediction) from the *Mutual Assistance* first mention'd. And indeed, if the bare Delight of Conversation, had been the principal Intent of the Creator, what need was there of a Difference in Sex? For take away the Procreation of Offspring, together with the Pleasures, which by the Appointment of Nature, sweeten and recommend it, and Men alone would have been more agreeable Companions, and more able Assistants to each other. And thus we see, that Boys and old Men, those who have not felt the Passion of Love, and those who are past it, agree in preferring the Converse of their own Sex, to all the Charms and all the Entertainments of the Fair. But Mr. *Milton* seems to dream of some more delicate and more refin'd Pleasures; and frames the *Idea* of a Wife suitable only to the Genius of a Wife and Learned Husband: he would have her able to be the Companion of his Studies, or to refresh him with her Wit, when he comes from severer Meditations, to compose his Cares with sweet Discourse, and charm away a melancholy Fit. Whereas although there is no considering Man, who would not infinitely prefer the Pleasure of the Mind, to the short and empty Gratifications of Sense: yet, it is so very difficult, to find a Woman of this Philosophical and Elevated Temper, that there is scarce any Man Eminent for Wisdom and Learning, who might not sue for a Divorce, on this pretence. And therefore, if there be any Person of so mortified a Spirit, as to think the continuing of his Name and Race, so mean and worthless a Design, and who feels no Pains, that the Fair only can cure, he should on all Accounts be advis'd to lead a single Life: For, 'tis no wonder, if Coldness and Gravity prove so ill Companions for Charms and Beauty. Lastly, whatever the Assertors of these Opinions pretend, 'tis impossible they should give any other Reason, why the Conversation of Women was rather instituted as a *Help* for us, than that of Men like our selves; except, that *Nature* hath wisely fix'd in the difference of Sex, sweeter Engagements, and more peculiar Propensions. It may then, on the whole matter, be the safer way not to endeavour the bringing this high and *Platonical* Strain of Notions into practice: (but, considering the ordinary Temper and Capacity of the Female Sex,) to judge *Her* a very convenient and

(a) *De Uxore Ebraea*, l. 3. c. 22. (b) *Vid. Val. Max.* l. 9. c. 2. (c) *De Sponsal. & Divort.* (d) Add the excellent Dissertation of *Grotius* on this Point, on *Matr. V. 31, 32.* (e) In his Book of the *Doctrine and Discipline of Divorces.* (1) *Genes. II. 18.* (2) *Ibid. I. 28.*

proper Partner, who is able to sustain a Share in the Concern of Children, both as to their Birth and Education, and in the Care of directing the Family; altho' she be able to afford little Assistance in deep Speculations and in studious Enquiries. *Juvenal's* Advice hath something in it besides *Satyr*.

*Non habeat matrona, tibi quæ juncta recumbit,  
Dicendi genus, aut curtam sermone rotato  
Torqueat enthymema, nec historias sciat omnes,  
Sed quedam ex libris, & non intelligat: odi  
Hanc ego, quæ repetit volvitq; Palæmonis artem,  
Servatâ semper lege & ratione loquendi,  
Ignotosque mihi tenet, antiquaria, versus,  
Nec curanda viris Opicæ castigat amicæ  
Verba: solacisimum liceat dixisse marito.*

Sat. 6. v. 488, &c.

O! what a Mid-night Curse has he, whose side  
Is pester'd with a Mood-and-Figure Bride!  
Let mine, ye Gods! (if such must be my Fate;)  
No Logick learn, nor History translate;  
But rather be a quiet, humble Fool:  
I hate a Wife, to whom I go to School.  
Who climbs the Grammar-tree, distinctly knows  
Where Noun, and Verb, and Participle grows;  
Corrects her Country-neighbour, and a Bed,  
For breaking *Priscians*, breaks her Husband's head.

Mr. *Dryden*.

*Strabo* (a) reports of the *Brachmans*, that they never communicate their Philosophy to their Wives: least, if they prove wicked, they should divulge some Secrets which ought to have been conceal'd from the Profane; or, if they happen to be good, they should desert their Husbands. For the equal Contempt of Pleasure and Pain of Life and Death, is no good Principle to fit a Person for a State of Subjection (b).

This Remark will hold good in General of Mr. *Milton's* Arguments, that they prove just nothing at all, in case it be apparent, that our Saviour declar'd *Adultery*, to be only the sufficient Cause of *Divorce* (1). To seem hard in some particular Instance, is no Objection against the express words of a Law. We are not presently for repealing those Human Constitutions, which appearing Useful and Beneficial to the Common-wealth in General, do yet turn to the Prejudice of one, or two, private Persons: because these are look'd upon as Inconveniencies which 'tis impossible to avoid.

The only Point he gains is this, that if the Saying of *Christ* will bear another Interpretation, it should seem more agreeable to the Gospel Clemency and Goodness, to follow a milder

Sense, than that which is at present receiv'd. The whole Strength of his Reasons may be thus represented in short. 'Incorrigible Disability of Mind, or Stubbornness of Temper, rendering a Woman unfit to live in Society with such a particular Man, and hindering the chief Benefit of Matrimony, mutual Help and Refreshment, is a much weightier Cause of Divorce, than any Natural Defect, any Distemper, any Uncleanliness of Body, which yet were allow'd as lawful Pleas by the Jewish Dispensation (c). No Partnership can oblige Persons concern'd, in Contradiction either to the chief End of its Institution, or to the Intentions and Hopes of both, or of either Member. Now it was the Design of the wife Creator, not to give Man a Domestick Torment, but a kind Help to join with him, not only in the bringing of Children into the World, but in the Education of them, and in the whole Business of Life; which End intolerable Sowreness of Temper doth plainly pervert and destroy. It looks absurd and unreasonable, that the *Canon-Law* should without Scruple, declare *Impotency* a sufficient Cause of dissolving Matrimony, and yet allow no Regard to the Manners and Dispositions of the Parties: especially since the former may immediately be discover'd, whereas 'tis usual craftily to disguise and conceal the latter, 'till the poor Man runs ignorantly into the Snare, whence he can never be releas'd. It is against the Law of Charity, nay, it is most barbarous and inhuman to confine and chain down a Man to such Miseries as are not to end 'till his Death; and which would admit of an easy Cure, did not the Severity of this positive Ordinance stand in the way: in as much as God Almighty, in his Laws and Commands, seems to have mercifully accommodated himself to the Infirmity of human Nature. The Holy Scriptures prescribe Matrimony, among other Reasons, for the avoiding of Temptations to Incontinence. But now the Man who can find in Marriage no Rest or Comfort to his Mind, who is perpetually teiz'd and disturb'd, by an untoward Partner, must needs be assaulted with stronger Temptations, than if he liv'd in Celibacy. For his Heart will be ever full of Discontent; and because his Wife is so unpleasing an Object, he will seek to bestow his Love and himself elsewhere. *Maimonides*, amongst the Reasons of the Law about Divorce, assigns this for one, that the Peace and Tranquillity of particular Families might, by this means, be the more surely preserv'd (d). Which Reason affecting *Christians* as much as *Jews*, it cannot seem probable that

(a) L. 15. p. 490. Ed. Gen. Casaub. (b) Euripid. Hyppol. Coron. v. 640, 641.

— From a Woman wife above her Measure  
Protect me Heaven. —

(1) Vid. lib. 5. c. 12. f. 21. (c) Deuteron. XXIV. 1. (d) So Bodinus, De Repub. l. 1. c. 3. affirms, Never was any Law more just and holy than the Divine Ordinance of Divorces, either to curb the Pride of Women, or to restrain the Anger and Violence of Men.

'GOD design'd to lay a heavier Yoak on the former than on the latter (a). We are commanded in Holy Scripture to remove from us all Obstacles of Piety: amongst the chief of which we may fairly reckon the Forwardness of an incorrigible and inseparable Companion. It is repugnant to Nature, that two Minds directly opposite, and admitting of no Possibility of Union, should be tied together in a Bond never to be broken. The Christian Emperours (1) have declar'd it as their Judgment, that the Plotting of either Party against the Life of the other, is a good Reason of Divorce: and how many Men's Lives have been unhappily shortned by these continual Grievs and Discomforts? Marriage is a Society: But human Societies, inasmuch as they are held together in a Moral Bond, consist rather in the Union of Souls than of Bodies. Should we say otherwise of Marriage, we should degrade it below the coupling of Beasts, in which we frequently observe some sort of Affection and Good-will in the Mates to each other. When, therefore, the Soul doth not find in Matrimony that sweet Agreement which it sought, so ill-match'd a Pair live rather in the Misery and Hardship of a Prison, than in the Comfort of Society. Solemn Oaths, if either in themselves improper, or tending to the Prejudice of a Third Party, are capable of a Dispensation; and hath not the Marriage-Covenant as good a Right to the same Favour? Nor will it signify any thing to answer here, that unhappy Matches are laid on Men by Divine Providence, for the Tryal and Exercise of their Patience. For Diseases and other Calamities are most certainly sent from Heaven; and yet the Application of human Remedies was never forbidden in such Cases.

After this, he holds a long Dispute, concerning the Permission of Divorce among the Jews. For, says he, if it be in the Nature of the Fact Adultery for either Party after a Divorce to marry again, it follows that Moses establish'd Adultery by a solemn Law. But to imagine this of Institutions which had God for their Author, would not only be absurd, but most profane and impious.

He likewise reprehends those Authors who affirm, that the Jews had not a Law of Divorce but rather a Dispensation. A Dispensation, he observes, is of two Kinds, either properly so called or improperly. The latter is rather a particular and exceptive Law, absolving and disengaging from a more general Command, for some just and reasonable Cause: as that mention'd Numb. IX. 6, &c. and Deut. XXV. v. 5. and that in Leviticus, of marrying the

'Brother's Wife, upon his Decease without Issue. A Dispensation, properly so called, obtains only in particular Cases rarely happening, and therefore not specified in the Law, but left to the Decision of Charity, and to the Prudence of the Judges: As upon extreme Hunger, it was lawful for David and his Followers to eat the Shew-bread (2): so that this sort of Dispensation, is nothing else but the interpreting a Law according to Equity.

Here 'tis worth our Notice that he confounds Dispensation and Equity with each other; whereas there is really a wide Difference between them. But, as to the Argument, this is certain, whoever will maintain the Jewish Divorces to have proceeded in the way of Dispensations, it lies on him to prove, that there was then extant some general Law, declaring Matrimony not to be reverfible upon account of Manners and Temper; which Law must either have been a Branch of Nature's Ordinances, or a Divine Positive Institution. As for those words in Genesis II. 24. (3) and those two shall be one Flesh, some are of Perswasion, that they express indeed a most strict Partnership, and such as to break off on a slight account, could neither be decorous nor advantageous to Mankind. But it doth not hence follow, that the Knot cannot be untied upon Reasons which subvert the very End and Design of Matrimony: As it would be ridiculous thus to argue, GOD joins Man and Wife together, therefore it is not in the Power of Man to join himself to whom he pleaseth; or, therefore no human Covenant ought to intervene. But what ought to be infer'd is rather this; God joins the Parties by the Mediation of their Deed and Covenant; therefore it is his Will they should not be separated, unless that Covenant be on one side or the other transgress'd.

Mr. Milton proceeds to enquire into the Opinion of those who assert, that Divorces were by the Divine Law permitted only, and not approved. This he takes to be an irreverent Reflection on Almighty God; in as much as it betokens Infirmity in a Governour, to allow his Subjects in any Practice, to which he does not really give his Approbation. And why must the Jews alone have been so notorious for Hardness of Heart, as not to be able to comply with the suppos'd Primitive and General Ordinance, when so many Christian Nations and Ages have yielded a ready Obedience to it?

On those Words of our Saviour, from the Beginning it was not so, some thus descant: 'In the State of Innocence Human Manners were more perfect and excellent, than to give occa-

(a) Varenus Descript. Japon. cap. 12. reports of the Japonese, Divorces are very frequent in this Nation, though the nobler Persons still keep the rejected Wife in their Family, and take care of her Maintenance and Support. On this account, the Women apply their Endeavours to discover their Husbands Temper and Humour, by which means they may in all things gratify and please them, and be ever laying new Engagements on their Minds. And being once thrown off, they dissemble the Injury, and make not the least Complaint, that by the Sweetness of their Conversation, and Readiness of performing all kind Services, they may recover themselves in their Affections. (1) See the Law already quoted in Sect. 22.

(2) 1 Sam. XXI. 6. Matt. XII. 3, &c.

(3) See Mr. Le Clerc's Comment upon the place.

sion to any signal Trouble and Disagreement: and therefore the necessity of applying Divorce as a Remedy to unhappy Marriages, is a remarkable Evidence of the impair'd Condition of our Nature.

To conclude; Mr. *Milton* farther censures those who alledge, that this liberty of Divorce was therefore granted to the *Jews* by *Moses*, because they had been accusom'd to it in *Egypt*. For now, when the weight of the *Egyptian* Yoak was still upon their Shoulders, must needs have been the most proper time of teaching them to forget the Customs of that Country. As we see so many strict and excellent Laws given them against *Idolatry*, which they had seen practis'd every Day, during their Servitude and Confinement.

But these Matters we leave undetermin'd, as not tending directly to our main Purpose.

XXV. The necessary Qualifications required by the Law of Nature, in Persons rightly contracting Matrimony, are a Fitness or Ability, both *Physical* and *Moral*. By the former we understand such a Constitution of Body as is capable of attaining the chief End of Marriage, the Procreation of Issue (a). Therefore such Persons as labour under a perpetual and incurable Impotency, such as *Eunuchs* and the like, ought not to aspire to the Conjugal Honour. It was certainly an Unnatural Custom in *Egypt*, to allow the *Eunuchs* Wives, because they laid claim to some inferior Degree of useless Pleasure (b). And here a Doubt may arise, whether we can properly call it *Matrimony*, when an ancient Couple are link'd together without any Prospect of a Blessing from the Bed. *Dionysius*, in *Plutarch* (c), when his aged Mother desired him to bestow a Husband upon her, replied, *It was in his Power to do Violence to the Laws of his Country, but not to the Laws of Nature* (d). Yet in most Common-wealths these sort of Matches are tolerated; in as much as the other End of Matrimony, mutual Assistance and Comfort, will hold as strongly here as in any other Case (e). Perhaps we shall not speak improperly if we call these *Honorary Marriages*, as we term those Offices *Honorary*, in which a Title only is conferr'd, without Action or Business. *Nero*, when he deserted his Wife *Octavia's* Bed, excused himself with saying, *Sufficere sibi Uxoriam Ornamenta* (f), *He was contented with the bare Ornaments and Badges of Marriage*; in Allusion to the *Triumphalia Ornamenta* (g), sometimes bestow'd on Persons without the real Solemnity of a Triumph.

The Case of *David* and *Abisag* (g) seems to fall under this imperfect Matrimony. Tho' *Solomon*, in all Appearance, esteem'd the Marriage good and valid; in as much as he gave Capital Judgment on *Adonijah*, for begging her for his Wife; because this Attempt of marrying the King's Widow (which in the *Jewish* Constitution was accounted unlawful,) shew'd he was driving on some Design against the publick Peace and Establishment (h).

XXVI. It is farther supposed in *Matrimony*, as in all other Covenants, that the Parties contracting it, have sufficient Use of Reason; that there is no Error, no Flaw (2) in the Essentials, and that no unjust Fear is on either side occasion'd. In this last Point, the *Jewish* Civil Laws were very particular; by them, if the Woman was compell'd by Force or Fear, the Espousals were revers'd, but not on the other side, if the Man alleg'd Compulsion; because there could not be the same Presumption of any Violence or Fright offer'd him: And if the Conditions had displeas'd him, he might afterwards have rejected her (i). In like manner, if there were a Mistake, either as to the Person, the Object of Consent, or in any Quality, either relating to Matrimony it self, or serving as a Condition on which the Consent was built, (especially in case of Guile or Deceit used on either side) the Contract is manifestly void. Thus a Wife pretending Virginitie, and afterwards discover'd defective, was by the *Divine* Law, not only turn'd away from her Husband, but made liable to severe Punishments. Tho' the barbarous Nations appear not to have been over-curious in this Point of Purity (k). Thus, again, if a Man, in the Covenant of Marriage, expressly inserted a Clause, importing that he took such a Woman for his Wife only in case she were of Noble Blood, of such a Fortune or the like; he shall not be oblig'd to Consummate the Match till the supposed Condition be made appear. But if, neglecting to enquire into the Truth, he shall have proceeded to Consummation, he shall by this Act be judged to have tacitly renounced the conditional Clause; and therefore if things do not afterwards come up to his Hopes, he hath no good Reason for *Divorce*. For the Contract did not run in these Terms, *If you do not bring me such a Fortune I'll Divorce you, but, if you do not bring me such a Fortune, I'll not Marry you*; which are manifestly different. He, then, who, in the Affair of Matrimony, thus feels the Charms of the Portion more than of the Lady,

(a) Zozim. l. V. To put a Virgin in the Marriage-Bed before the proper Age, is no less than to do an Injury and Violation to Nature. (b) Gro. ad Deuter. c. XXIII. v. 1. Genes. c. XXXIX. v. 1. (c) In Apothegm. p. 175. E. Ed. Wech. (d) Quintil. Declam. 306. p. 464. Ed. Lugd. Bat. There may be some kind of Unchastity even in Marrying. Idem Declam. 2 p. 23. in fin. An old Husband is (often) the most humble instance of Slavery; and is the more charm'd and overcome with the Magick of the Fair Sex, the colder his own Powers are in the Reception of it. Comp. Val. Max. l. 7. c. 7. s. 4. (e) V. Lib. V. t. 4. l. 27. C. de Nuptiis. (f) Sueton. Ner. c. 35. (g) Sueton. August. c. 38. (h) Kings I. (i) Gro. ad Reg. d.l. v. 11, 17. (2) See above in L. 3. c. 6. f. 11. (i) Selden. de Uxore Ebræa, l. 2. c. 4. (k) See the Customs of the Barbarians, Diod. Sic. l. 5. c. 18. of the Armenians and Lydians, Strab. l. 11. of the Babylonians, Herodotus Clio, of the Thracians, Idem Terpsich, of the Adrimachide and the Nasomones, Idem Melpomen. See Aristippus's fowl Fancy in Diog. Laert. l. 2. Add Boxborn's Notes on Sueton. Calig. c. 40. towards the End. Justin. l. 18. c. 5. n. 4. Paul. Venet. l. 2. c. 37. of the Inhabitants of Tebeth and Cathay. Constantine the Great abolish'd the like Immodesty amongst the Phanicians; as we are told by Sozomon, Hist. Eccles. l. I. c. 2. l. V. c. 9.

is very ridiculously Senseless, if he let the Business be finish'd before he hath good Security for that which was his chief Aim (a). Much less shall it be lawful to break off a Match, or to forbear consummating, when a Man hath caught at the Bait of a supposed Fortune, without bargaining for any particular Summ. And therefore the *Ephori* in *Sparta*, did very justly in fining the Gentleman, who having been contracted to *Lysander's* Daughter, in her Father's Life-time, refused her, when that Great General was found to Dye in so Poor a Condition (b).

What we have been offering, holds good only in *Natural Law*. For it is in the power of Civil States to Enact, that no such Clause, belonging indirectly to Matrimony, shall hinder or defer the due Consummation of it.

XXVII. A *Moral Ability* of contracting Matrimony is wanting in Women, already dispos'd of to other Men. For the Right of the Husband over his Wife continues so long as he doth not actually renounce it. Therefore to marry an other Man's Wife, not duely loos'd and separated from him, is not only unlawful, but void and ineffectual: because it was not in the Woman's power to make this second Engagement, whilst the first continu'd in force; and to cohabit with this new Husband, is to live in constant Adultery. For the same reason, in Countries where *Polygamy* is prohibited, a Man cannot without Sin proceed to another Marriage, whilst he is held by the Bonds of a former.

By the *Jewish Law*, it was Criminal for a Man to take his Wife again whom he had put away (c). The reason of which Institution no doubt was to prevent the frequency of Divorces on slight and petit Occasions, by cutting off all Hopes of Re-union, when Passion should grow cool (d). Yet some, from *Jerem. III. 12.* collect, that it was lawful to receive again the dismiss'd Woman, provided she had not contracted a new Marriage.

It is remarkable in the *Turkish Alcoran*, that a Man is allow'd to take home his Wife, even after he hath three times dismiss'd her, but not unless she has been, in the mean-time, married to Another, and been discarded by him likewise. The *Mahometans* esteem this as the Highest Infamy and Reproach; and therefore the famous *Bajazet* thought he could not bestow a heavier Curse upon *Tamerlane*, who sent to defie him to War, than by replying, *if he doth not come as he threatens, may he fetch his Wife back after he hath three times sent her off* (e). It is another Precept of the *Alcoran*, that a Man who puts away his

Wife; shall fix a certain Time, during which, it shall be unlawful for her to chuse a new Husband: that he may thus use Deliberation in determining whether or no to take her again into Favour.

*Josephus* (f) mentions a *Jewish Ordinance* forbidding a Man to marry *Her* whom he hath perswaded to leave her former Husband; since this Irregularity could not but breed high Discontents and Troubles. On the same good Reason are those *Christian Canons* founded, which deny an Adulterer, the liberty of marrying the Woman whom he thus defiled (g). In this Point *Euripides's* (h) Observation seldom fails,

— *The Wretch that stains Another's Bed,  
And takes the Vile Adulteress to his own,  
Condemn'd to wed her for his Punishment;  
Is wildly vain, if he expects she'll prove  
In her new Vows more Chast than in her old.*

XXVIII. Persons allied within such a Degree of *Blood* or *Affinity*, are likewise under a Moral Incapacity of contracting Marriage (i); in so much that it is not only from the Beginning unlawful to strike such a Match, but this Engagement tho' actually concluded, is never esteem'd Vicious and Defective. This is an Opinion generally receiv'd by all Nations of Manners and Civility; yet to assign a solid reason for it, such as shall flow, like other Precepts, from the Social Nature of Man, seems at first sight, a Point of no ordinary difficulty. Some Enquirers are content to fly to the Abhorrence of Human Affections in this Case. 'All Persons, say they, who are not Corrupted by Ill Education or Wicked Habits, do find in their very Senses, a Repugnancy and Aversion to such Impurities; which is a plain Argument that those things are prohibited by the Law of Nature. But indeed this Repugnancy of Affections is not equally to be discover'd amongst all People, nor always, even amongst those who pretend to the Art of Culture and Refinement: and when Authors urge it for a Reason, it would not be altogether absurd to answer them, that the Abhorrence may perhaps arise not so much from any in-bred Principle, as from long Use and Custom, which often counterfeit Nature. Nor in our Searches after *Natural Law*, is it very safe to rely upon the bare Judgment of our Senses and Affections; since at this rate we might conclude, that those things are by the same Law Commanded towards which our Senses and Affections are carried on with a vigorous Inclination; whereas, on the contrary, it is manifest that those Acts

(a) Especially since the Managers of Matches usually answer the Character which we find in *Libanius* (*Progymn. p. 6.*) They come arm'd with a great many studied Flourishes and fine Sayings, and by lessening what's present, and magnifying what's absent, easily prevail on the kind and credulous.

(b) *Vid. Elian. V. H. l. VI. c. 4.* (c) *Deuteron. XXIV. 4.*

(d) *Grotius (ad. d. l.)* gives this Reason, *Because such a Practice looks like lending One's Wife to another Man, and might yield Shelter and Countenance to the most scandalous Debaucheries.* (e) *V. Laonic. Chalcondil. l. 3.*

(f) *Jud. Antiqu. l. IV. c. 8.* (g) *Gratian. Caus. 31. qu. 1. c. 1, 2, &c.* (h) *Electra. v. 921, &c.*

(i) *Vid. L. 38. t. 10. l. 4. s. 3, 4, 5. D. de gradibus & affinitibus.*

to which we are so violently prone, Reason and Nature do really disallow.

*Plutarch* (a) enquiring why the *Romans* did not take Wives from amongst their near Relations, thus proposeth his Reasons after his doubting manner. *Was it that they might spread their Kindred more widely, and encrease the number of their Alliances; giving Wives to some, and taking them from others? Or did they it, to avoid Conjugal Discords; which, should they arise between Persons allied by Blood, would destroy, not only the Love between Husband and Wife, but the very principles of Natural Affections* (b)? Or because, they knew the weaker Sex, to stand in need of many Defenders, were they therefore unwilling to marry their Kinswomen, that they might be ready to Assist and Protect them, if injur'd by other Husbands (c)? The first of these Reasons, *The spreading and improving of Alliances*, is confirm'd by the Approbation of *St. Augustin*, and of *Bp. Cumberland* (d). But on this way of arguing we may observe, that as an Act less Useful or Profitable, is not always unlawful, so the Profit here alledg'd is not attainable by this only Method: in as much as a far greater Advantage may result from the quite contrary Practice; that is, if the nearest Relations would still Match themselves to each other, their Estate and Wealth would be hindered from passing out of the Family. And on this account in the Divine Law, *Numb. XXXVI. 3.* Women possess'd of an Inheritance in *immovable Goods*, are commanded to take Husbands only from amongst their Kindred; lest the Land should run out of one Tribe into another. Yet in case they would quit their Title to the Inheritance, they were allow'd to marry any Persons, of their own Nation. The Women of the Tribe of *Levi* were not concern'd in this Injunction, as being incapable of holding Land (e). In *Peru*, during the Command of the *Incas*, it was provided by Law, that every Man should chuse his Wife out of his own City, and his own Family: after the Marriage was concluded, a House was built for the new Couple, at the Common Charge, and the nearest Relations presented them with

Furniture (f). It was one of the *Attic Laws* (i), that *Heiresses* should be taken in Marriage by their nearest Kinsmen, to preserve the Riches of their Ancestors in the same Line (g). But the seeming Hardship of this Ordinance was sufficiently made amends for by another, which commanded that if the Circumstances of such a young Woman were but very mean and inconsiderable, the next of her Kindred should nevertheless be obliged to wed her, or else to give her a Fortune suitable to her Birth and Quality (h).

XXIX. In order to the settling of these Questions, it is, in the first Place necessary, we examine how it comes to pass, that altho' the Propagation of so noble a Creature as *Man*, be in it self a Work of Honour and Credit, yet amongst all civiliz'd Nations, as well the *Instruments*, as the *Act* of this good Service, should be garded with so tender a Sense of Modesty, as nothing but a Face harden'd by Habitual Wickedness can Conquer or Suppress? To which Purpose we have a most Remarkable Story, recorded by *Plutarch* (i) and *Polyænus* (k), of the *Miletian Virgins*, who being, by some strange and unknown Cause, driven to a mad Desire of Hanging themselves; and their Distemper admitting of no Stop nor Remedy; it was at length Decreed by a solemn Law, that the Bodies of those who dispatch'd themselves, in this desperate way, should be carried naked through the Common Market. And by this means, whilst the Fear of Death could make no Impression on the Frenzy, the Sense of Shame restor'd them to their Wits. It is farther Remarkable, that whatever Nations, in Ancient or Modern Times, have entertain'd a Custom of going naked, or of performing in open View, the secret Affairs of Marriage, have been censur'd and condemn'd by the rest of the World, as Wild and Barbarous (l). Now the reason of all this, is not so easy to come at. For as to the immediate Instruments of this Work of Nature, they lie under no scandal of Deformity, and they serve to a Great and Worthy Design: And therefore, the *Egyptians* and *Athenians* paid religious Regards to them,

(a) *Quæst. Roman.* 108. p. 289. D. (b) For Instance, because there often happen Quarrels between the Husband's Mother and his Wife, therefore a Man (according to this Argument) ought not to marry one that ow'd a Natural Reverence to his Mother; that is, his Sister. (c) *V. Augustin De Civitate Dei*, l. XV. c. 16. cited by *Gratian. Caus.* 35. qu. 1. c. 1. (d) *De Leg. Nat.* c. 8. f. 9. (e) *Vid. Grot. ad Matth.* I. 16.

(f) *Garcilasso de la Vega Comment. Reg.* l. IV. c. 8. (i) *V. Sam. Petit. in Leg. Attic.* L. 6. T. 1. (g) Many Suits of Law falling out amongst the Pretenders to these Heiresses, the young Women got the Title of *Ἐπίδαμοι*. (h) We find a Law of *Charondas* much to the same Purpose, in *Diod. Sic.* l. 12. c. 8.

(i) *De Virtute Mulier.* p. 249. C. (k) *Strategem.* l. 8. c. 63. (l) Thus *Pompon. Mela* reports of the *Mossynians*, that their Love-Affairs are promiscuous and open. And *Apollonius Rhodius* in *Argonaut.* l. 2. has left this Character of the same People;

The Manners and the Notions they pursue,  
Are the Reverse of ours; in publick View  
What we perform, or at the crowded Barr,  
They act by Stealth, and make a silent Care:  
But what our Modesty at Home conceals,  
Their Tribes proclaim, and every Street reveals.  
Like Beasts, beyond the Power of Shame to move,  
Stretch'd on the Ground they pursue their Common Love.

*Vid. Diod. Sic.* l. XIV. c. 31. & *Xenophon. Exped. Cyr.* l. V. Of the *Massagetsans* *Herodot.* in *Clio*, towards the End; of the *Nesomones* in *Melpomen*.

in their mysterious Worship (a). The Act it self as it is agreeable to Nature, so is it of absolute Necessity, and every way proper for the producing of so brave and generous an Effect. And therefore, Why should the Exercise of it before Others, create more Shame in a Man, than Eating and Drinking, since the Human Species can no more be preserv'd without the former Means, than the Individuals without the latter? Nor will Plutarch's Distinction satisfy the Doubt. *There is no Pleasure* (says he (b),) *which we can more innocently enjoy, than that which we receive from Food and Nourishment. All Men are agreed on this Truth, as they shew by their Daily Practice. For they Eat in full Company, and in open View; whereas in their Love-Affairs, they seek the shelter of the Night: Because in these latter Ceremonies, to be Publick and Communicative, is esteem'd as Brutish and Unnatural, as to be Private and Secret in the former.* As to this Point of Openness and Secrecy, it was a severe Return which a Scotch Lady, in the Emperour Severus's time, gave Julia Augusta when reproach'd by her for the Custom of holding Wives in Common amongst the Britains, *We* (said she) *obey the Necessities of Nature much better than You Roman Dames: for we do that openly with the Best of Our Men, which You do privately with the Worst of Yours* (c).

Neither do they throughly clear up the Matter, who have recourse to the Holy Scriptures, where the Natural Shame is Recorded to have been the immediate Consequence of the Fall. For the chief Question still returns, Why the Passion of Shame, should fix on these Parts, for its peculiar Residence, when our Hands, and our Tongues are as readily dispos'd to aid our Sinful Lust, and Disorderly Desires? Nay in as much as the Primitive Transgression came by the Act of Eating, one might imagine that this Opinion of Impurity should rather fasten upon the Mouth as its Original and proper Seat.

XXX. The Author of the Treatise *de Principiis justis & decori* touching on this Subject now before us, in the first Place lays down this for a Principle; *Every thing which causeth Shame is not a Sin, nor forbidden by the Dictates of Natural Law* (d). He instanceth in Poverty, mean Cloaths, innocent Mistakes, Deformity, and the like; which frequently put us to the Blush, tho' we can by no means lay any Moral Turpitude to their Charge. He proceeds to observe, that the reason why we would avoid such things, is because they are the

' Tokens of some Infirmity or Imperfection; from which Censures every Man desires to keep himself at as great a distance as possible. In the same manner, altho' to discover the Secrets of the Body be not, in it self, Sinful, yet a Man ought not certainly to use such a freedom in open view, whensoever it would prove an Offence and Blemish to Natural Honesty; which is very often the Case. A Man hath then only good Reason to be ashamed, when he possesseth or discloseth such Imperfections, as may make Others justly despise him, whilst appearing thus below the Character which he sustains. To be Ignorant of a Point of Learning is no Blemish in him who hath wanted the Benefit of Education; but one who hath made a long pretence to study, and yet can shew no Fruits of his proficiency, may well be ashamed of the Neglect. Plain Behaviour fits decently enough on a Countryman, but would be a faulty Stiffness in a Person of Breeding. Thus then, he who uncovers in Publick Sight those parts of the Body which the Custom of the Nation bids him conceal, is an Offender against Natural Honesty and Decorum (e). But he may take the same Liberty in a Country where the Men go Naked, as suppose in the Caribbes, without the Imputation of Obscenity or of Sin (f). Thus it is accounted Impudence to do some things in the Presence of Strangers, without desiring particular leave, which we make no scruple of practising before our Equals and our Acquaintance (g). Thus, a Teacher of Anatomy lays open such Objects to our View, as it would not be Decent for him so much as to Name, were he not engag'd in his proper Business and Exercise. The same judgment we are to make of the Point before us. For altho' a Nation, which doth not censure these unseemly Freedoms, must needs have cast off all Modesty (h), and this not without a grievous Sin in their Fore-fathers, from whom the loose Opinion is deriv'd; yet the Custom being once firmly establish'd, and such a way of living exempted, by Universal Consent, from all Marks of Disgrace, the whole People may then openly appear in the same manner, and yet contract not the least Guilt. In as much as they do not apprehend, or acknowledge in this Practice, any Imperfection or Infirmity deserving Shame; more than we do in the Custom of our Women to go with their Faces Unveil'd, which in some Countries would be reckon'd a scandalous breach of Modesty (i). We may

(a) Vid. Diodor. Sic. l. 1. c. 88. (b) Conviv. Sapient. p. 158. F. (c) Xiphilin. Epir. Dion. in Sever. Add. Montaign's Essays, l. 2. c. 12. & Charron de la Sageffe, l. 1. c. 22. (d) P. 59. &c. (e) A Woman in this Case, as Herodotus expresseth it, L. 1. p. 3. Ed. H. Steph. when she throws off her Garments, lays aside her Modesty with them. (f) In some Parts of Abyssinia, the Women go quite naked, without having any irregular Influence on the Men. Franc. Alvarez. Descript. Ethiop. c. 32. Add. J. Leri. Hist. Amer. c. 8. & Rochefort Descript. Inf. Antill. p. 2. c. 9. If I mistake not, amongst some of the Indians, to go with the Waist cover'd, fell under the same Penalty as Adultery. (g) And since Claudius did not put out the wise Edict, which was so long under his grave Deliberation, (Suet. Claud. c. 32.) we still make a Scruple of offending the Company with some kind of sounds, which we reckon not quite so improper Musick when we are alone. Add. Diogen. Laert. in vitam Metrol. l. VI. (h) Since amongst all civiliz'd People, it hath been, even in Death, a Care *εὐχόμενος καθεῖν* to fall in a decent and modest Posture. (i) Plato, (in Diog. Laert. 3.) speaking of unwritten Laws, proceeding from Custom, instanceth in *Τὸ μὴ γυμνὸν πορεύεσθαι εἰς τὴν ἀγορὰν*, not to appear naked in Publick Places.

farther observe, that even in those Nations where the appearing *Naked* is prohibited, the most secret Parts are sometimes disclosed without Sin, as when they are recommended to the Care of Physicians, or when Surprise, or Necessity, in regard of Time, or of Want, hinders their Concealment; or when Children are wrapt in their Swadling-Cloaths. Because, in all these Cases, the Mark of Impudence ceaseth; the Discovery being made without any lascivious Design (a).

In another part of his Work he repeats the same Argument; 'the uncovering of the secret Parts, (says he) is not in it self, foul or indecent, but is only rendred such by means of the Circumstances; which Circumstances are taken, either from the Lust of others, or from their Honour or Worth, or from our own Reputation, which we are oblig'd to support and preserve. But in as much as the external Tokens of Reverence and Respect are capable of great Variation, many Actions are, (by the same People,) construed as an Affront to our Neighbour, or a Discredit to our Selves, which upon the Change of Circumstances, would appear Harmless and Inoffensive. Upon the Approach of our Saviour, we find *St. Peter* (b) hastning to gird on his Fisher's Coat, whereas he was not asham'd to work Naked with the Companions of his Business. Because the Dignity of *Christ*, and the Honour *St. Peter* ow'd Him, required a grave and modest Appearance and Carriage; which, in the Opinion of civiliz'd Nations, are inconsistent with Nakedness (c). We transact many things in secret with Decency and Convenience, which if perform'd openly would be reproach'd as Infamous; neither do we reckon it Dishonourable, to let the Company know on what account we retire. Lastly, many Actions pass unblamed in *Men*, which would look inexcusably Impudent in the other Sex.

From *St. Paul's* manner of Speech *2 Corinth. XI. 17.* he infers, 'That when upon the Formality of begging Pardon, or desiring leave of Others, we say, or do a thing fairly and civilly, which would otherwise be rude and indecent; the Impropriety here doth not affect the thing absolutely consider'd in it self, but depends wholly on the Circumstances, which if taken away, leave no Ground for Censure:

for all that is here done, is that the other Party waves and remits the Reverence, which was owing to him. He judiciously inserts this Caution, *provided, that by the general Custom of the Nation, all Men are allow'd to indulge each other in these petit Liberties.* For otherwise particular Persons do by no means wipe off the Blemish, when they give themselves a mutual Dispensation in such Points: As a Company of Wild Sparks could not avoid Shame and Reproof, should they, by joint Consent, go naked in a Place of Manners and Civility. Lastly, He makes no Doubt but that our first Parents, before they sinn'd, had, in respect of Shame, the innocent Insensibility of Children: but that immediately after their Offence, this guilty Passion seiz'd upon their Mind, by which they apprehended their Nakedness to be Indecent, as we, when we grow up to Years of Reason, make the same Judgment (1). His Inference from the whole is this, 'That no Degrees of Marriage are forbidden by the Law of Nature; tho' to abstain from some is most agreeable to Natural Honesty (d).

XXXI. For our part, tho' we do not think this way of arguing ought altogether to be condemn'd, yet we chuse to fix the *Shame*, now under our Examination, principally on these two Reasons. First, because Man is a Creature of high and proud Conceits, fondly desirous of Honour and Grace, and abhorring any thing that seems to lessen him in these respects. Now, through those Out-lets of our Body, Nature casts off the useless Relicks of what we Eat or Drink; and these Relicks we have a great Aversion to, not only upon account of that *Uncomeliness*, but in as much as they seem to upbraid us with our mean Condition, whilst the greatest Delicacies of Taste, by being once receiv'd within us, are so vilely chang'd and corrupted. And hence our lofty Imagination engageth us to be very industrious in concealing so manifest Tokens of our Infirmary (e). *Nature* (says *Tully* (f)) *seems to have had a most kind regard to the Dignity of our Body, by exposing only those Parts to sight, which appear beautiful, comely and agreeable; and by covering and concealing those which would be foul and offensive, if laid open to view, and serve us only for the meer Necessities of our Being. This exquisite Diligence, which Nature hath shown in the Human Fabrick, Men have imitated*

(a) A *Pigmy* might well be asham'd of his Size amongst a People of larger Dimensions; yet in his own Quarters he is not affected with the Disgrace,

— *Ubi tota Cohors pede non est amplior uno,* Where the whole Troop make but a Foot in height.

*Sr. Tho Herbert* (Travels p. 21) reports of Women amongst the *Casars*, that if you give them any thing, they uncover All, in way of Civility. (b) *John XXI. 7.* (c) Hence amongst the *Romans*, Sons grown up to the Condition of Men, never bath'd with their Parents, nor Sons-in-Law with their Fathers-in-Law. *Val. Max. l. 2. c. 1. f. 7.* So in *Livy L. 3. c. 26.* The Deputies command *L. Quintius*, whom they found stripp'd at his Country Work, to hear the Orders of the Senate in his *Gown*. In the same manner, within our own Houses and in private, we are not asham'd of the meanest Apparel, which yet we could not appear in at a Wedding, or solemn Meeting, without great Indecency and Offence. See *Matth. XXII. 12.*

(1) See *Mr. Le Clerc* upon *Genes. III. 7.* See *Mr. Barbeyrac's* Note upon this Section. (d) Compare *Montaign's Essays l. 1. c. 35.* & *Charron de la Sageffe, l. 1. c. 6. & 14.* (e) See *Corinth. XII. 23, 24.*

(f) *Offic. l. 1. c. 35.*

in their modest Customs and Manners (a).

Our second Reason is, since our Affections being depraved and corrupted by the *Fall*, our irregular Lusts endeavour violently to make a Sally through those Passages; and since the due Restraints, and the legal Methods of *Propagation*, are the very Hinges on which Human Order and Society seem to turn; *Nature* to preserve her own Dignity, and to cut off, as much as possible, all Occasion of loose Desires, hath invented this Passion of *Shame*, engaging Men carefully to cover and to guard those weak Places, least lying continually open, they should tempt and invite the Enemy; and restraining the Pursuit of unlawful Pleasures, whilst Modesty confines the Exercise of those which are lawful, to the Privacy of Darkeness and Retirement. Hence our first Parents, after the perfect Harmony of their Affections was disorder'd and impair'd, when they found the unreasonable Inclination of Sense, vigorously striving to force a way through those defenceless Parts of the Body, could not but conceive the deepest Shame at this wretched Discovery of their own Imperfection; which, in some measure, to disguise and conceal, they had recourse to the Shelter of Apparel (1). That this Original *Shame* of Nakedness should, amongst many Nations, seem to have been quite subdu'd and effaced, was probably the Effect of Necessity; when Men being driven on uninhabited Coasts, and having worn out their present Garments, found no Supply of new ones, nor yet wanted them, by reason of the kind Temper of the Climate. Thus their *Shame* dropt off by Degrees with their Cloaths; or perhaps they express'd, for a little time, some Marks of it in wearing a thin Covering round their Middle, which soon left them quite Naked.

It's farther observable, that our *Shame* is ever encreas'd to a high Degree, by the Presence of those Persons to whom we naturally owe a Reverence, or towards whom we ought to carry our selves with Gravity and Caution: such as are especially our Parents and our Children. So that he who cannot be hereby deterr'd from daring to offer, under these awful Restraints, the open Freedom and Familiarity of the Conjugal State, is fairly judg'd to have an invincible Forehead, and to be well prepar'd for the Commission of the greatest Villa-

nies, being possess'd with harden'd Impudence, *The most violent Distemper of Human Minds*, as it is term'd by the wise Tragedian (b).

XXXII. This Shame or Modesty may be assign'd as one of the principal Causes, why we esteem Marriages between Kindred, in a direct Line, to be forbidden by the *Law of Nature*: especially since there never did, and probably never will any such Case happen, as shall render these Matches *necessary* for the Preservation of Human Race (c) (2). And with regard to this restraint, we are to expound the Reason urg'd against those Marriages by *Grotius* (3): *The Son, (says he,) being Superior by the Law of Matrimony, could not pay to his Mother, if at the same time his Wife, that Reverence which Nature requires; no more could the Daughter, in the like Case, to her Father; because, altho' the Conjugal Pact would keep her still his Inferior, yet so near a Familiarity must needs prejudice her Natural Duty* (4). For take away the force of this Original Modesty, and it will not appear so very absurd, for a Mother to marry her own Son: since it is agreeable enough, that a Husband should pay Respect and Honour to his Wife on account of her extraordinary Virtue, Wisdom or Birth. *Tacitus* observes of his Father and Mother-in-Law, (*Agricola* and his Lady;) *vixerunt mirâ concordia per mutuum charitatem & invicem se anteponendo*: They liv'd in wonderful Agreement; thro' the Engagements of Mutual Affection, and by their kind Care of giving each the Preference to the other. Much less inconsistent would it be, for a Woman to pay to the same Man the Duty of a Daughter, and of a Wife, did she not find a restraint from the above-mentioned Principle.

The Reason alledg'd by *Socrates* in *Xenophon* (d), appears very Poor and Insipid, as if nothing deserv'd blame in these Matches but the great difference of Age, the effect of which must either be Barrenness, or suspicious and unressembling Issue: For are there not many Marriages in which the Years of the Couple stand at as wide a distance as those of Parents and their Children?

We cannot on this Head, but recommend the Chast and Pious Regard of the *Roman* Laws, which out of Reverenc to the bare Name of a *Father*, allow'd no Man to marry his *Adopted* Daughter, tho' all the Right of Adoption had

(a) This seems to be taken out of *Xenophon*. Apomnem. l. 1. Add *Ambros. Offic. l. 1. c. 18.* *Herodotus* (*Interp. p. 64.* towards the End.) reports of the *Egyptians*, that *They eat their Food in the publick Streets; but retire Home when they have Occasion to get rid of it; upon this Principle, that whatever was foul and indecent, yet necessary, was to be perform'd at Home in secret, and every thing which was not foul, abroad.* Yet we may remark (by the by) that the same People were jested upon, for tempering their Clay with their Hands, and their Bread with their Feet.

In *Sadus's Persick Rosary* (c. 8.) this Reason is given why the Ring shoul be worn on the Left-Hand, though less Honourable than the Right; *Because the Right-Hand is a sufficient Ornament to it self.* *Aloys Cadamust* (*Navig. c. 10.*) tells us of the *Azenagians* the Inhabitants of *Senega*, that *They are as much ashamed of their Mouth, as of any other Part of the Body; and therefore they ordinarily go with a Cover upon it, which they only take off on the account of Eating.* *They take it for a kind of Sink, always sending out Stench and Nastiness.* *Leo Africanus* (l. 1.) gives much the same Relation, and by him the People are called *Senegates*.

(1) See Mr. *Barbeyrac's* above-cited Note.

(b) *Media*, v. 471, 472. *Huart* (*Trial of Wits*, C. 1.) gives another Reason for this Modesty, which we have not leisure now to examine. (c) And therefore the Daughters of *Lot* (*Genes. XIX. 31.*) were too forward in their Conclusion: Though *Grotius* is of Opinion, that they thought their Practice absolutely blameless, having heard that it was usual with their Neighbours the *Arabians*, as it was likewise with the *Persians*.

(2) See Mr. *Le Clerc's* Note upon *Genes. XIX. 31.*

(3) *B. 2. c. 5. l. 12. n. 2.*

(4) See Mr. *Barbeyrac's* 2d Note upon this Section.

(d) *Apomnem. l. 1.*

been formally taken off and revers'd (a). And the Emperour *Claudius* acted much beyond his ordinary Capacity, when a Woman refusing to acknowledge her Son, and the Arguments appearing dubious on both sides of the Cause, he obliged her to a Confession of the Truth, by ordering the Young Man to demand her in Marriage (b).

Some have attempted to shew the high Indecency of such a practice from the strange Confusion it would cause in the quite contrary Names and Titles of Relation. Thus *Mirra* argues with her self in *Ovid*,

*Nec, quot confundas & jura & nomina sentis?  
Tunc eris & matris pellex & adultera patris?  
Tunc soror nati, genetrixq; vocabere fratris* (c)?

Canst thou be call'd (to save thy wretched Life)  
Thy Mother's Rival, and thy Father's Wife?  
Confound so many sacred Names in one;  
Thy Brother's Mother, Sister to thy Son.

Mr. Dryden.

And *Philo Judæus* (d) inveighing against the *Persians*, who allow'd the Marriages between Mother and Son, thus expresseth himself. *Nothing could have been invented more grossly Impious; to abuse the Bed of the Deceased Father, which claim'd a most Religious respect; to pay no Reverence to the Mother; to have the same Man become her Husband and her Son; on the other hand, to see the Mother assume the Name of a Wife; to hear their Common Children call'd the Brothers of their Father, and the Grandsons of their Mother.*

No less Unnatural and Detestable is the Custom of the Isle of *Ceylon*, where a Father, when he hath provided a Match for his Daughter, forestalls the Husband in the Office of the Bed; giving this ridiculous Reason, that 'tis

but just he should gather the first Fruits from a Tree of his own Planting (e).

XXXIII. The *Jews*, in this Point, had recourse, not so much to Natural Reason, as to the Original Prohibition of GOD. They taught, that from the Beginning of the World, six Kinds of Conjunctions were Divinely forbidden: with a Mother, or Mother-in-Law, with another Man's Wife, with a Sister by the same Venter, with a Male, and with a Beast. And all this (except the Case of a *Sister*) they deduce from those Words in *Gen. II. 24.* *Therefore shall a Man leave his Father, (that is, say they, the Bed of his Father, and consequently shall abstain from his Mother-in-Law,) and his Mother, (that is, he shall observe decency and distance towards his proper Mother;) and shall cleave to his Wife, (thus both Males are excluded, and Women married to other Men;) and they two shall be one Flesh;* (therefore unnatural Desires towards Beasts are here likewise forbidden; in as much as 'tis impossible for Man and Beast to make *one Flesh*.) This is Mr. *Selden's* account of their Doctrine (f). It was a very strange and singular Fancy of theirs, which the same Author reports (g), that a *Gentile*, becoming a *Profelyte of Justice*, immediately lost all Relation to his *Gentile* Friends, of what nearness and degree soever. Thus, if several Persons of the same Family, as suppose a Mother with her Daughter, were admitted together into the *Jewish* Communion, they imagined that their Right of Kindred straight expired, and that they ought to live as Persons entirely disengaged from each other. For by this Act of Embracing and Acknowledging their Religion, they conceiv'd Persons to be absolutely *Regenerated*, and put into the Condition of Infants (h). Thus their *New-man* having extinguish'd all the Ties that were upon him from his *first* Nativity, lay, in

(a) *Vid. L. 23. t. 2. l. 55. princip. D. de ritu nuptiarum. v. 346, &c.* So *Oedipus* in *Seneca* (*Phæniss*) v. 134, &c.

(b) *Sueton. Claud. c. 15.*

(c) *Metam. X.*

*Avi gener patrisque rivalis sui,  
Frater suorum liberorum & fratrum parens.*

*Thyestes* in the *Agamemnon* of the same Poet, v. 34, &c.

————— *Verfa est natura retro  
Avo parentem ——— patri virum,  
Natis nepotes misui.*

*Ibid.* *Per scelera natus, nomen ambiguum suis,  
Idem sororis natus & patris nepos.*

We meet with what follows amongst the Ancient *Epi-*  
[taphs;

*Herfilius hic jaceo, mecum Marulla quiescit,  
Quæ soror & genetrix, quæ mihi sponsa fuit.  
Vera negas, frontem trahis, hæc, enigmata Sphingis  
Credis? Sunt Pythio vera magis Tripode.  
Me pater e nata genuit, mihi jungitur illa;  
Sic soror & conjux, sic fuit illa parens.*

Son-in-Law to his Grandfather, Rival to his Father,  
Brother to his Children, and Father to his Brothers.

————— I've turn'd the Course of Nature back,  
Confounded all Relations, wildly mixt  
The Names of Father, Grandfather and Son,  
Husband and Grandson.

Conceiv'd in sinful Love, and born a Riddle;  
Puzzling his Friends to fix his doubtful Name,  
Son to his Sister, Grandson to his Father.

Here *Herfilius*, and next in deep repose  
*Marulla* lies, his Mother, Sister, Spouse.  
Start not, or frown to see the *Sphinx* renew;  
The *Pythian Tripod* never told so true.  
Shamed by her Sire, she weds their Common Son,  
And blends the three Relations into one.

(d) *Philo. Jud. de Leg. Special. p. 778. C. Ed. Par.*

(e) And the same vile Excuse is alledged for his *Incest*  
by *Chac-gehan* in *Bernier's* Description of the Empire of the *Mogul*. (f) *L. V. c. 1, 2.* (g) *C. 16.*

(h) *Tacitus* seems to have obscurely hinted at this Opinion, when, in his Character of the *Jews*, he says, *Those, who pass over to their Profession, use the same Customs; and one of the first Lessons which they are taught, is to despise the GODS, to lay aside all Duty and Regard to their Country, utterly to neglect and undervalue their Parents, Children and Brothers.* *Hist. l. V.*

that respect, under no Restraint or Limitation as to Marriage. And this Notion they pretended to found on the Divine Law. Yet, by the Traditions of their Wise-men, a *Profelyte* was forbidden to marry his Mother, his Daughter, or his Sister, tho' a *Profelyte* as well as himself. And if any Person, during his Continuance in *Paganism*, had wedded into such Degrees, at his Conversion he was oblig'd to release himself by Divorce. The Case was not the same with a *Slave*, when receiv'd into their Worship under that Condition. For as they imagin'd him likewise to have no remaining Alliance of Kindred or Blood; so farther, they judg'd it no Sin for him to pass beyond the above-mentioned Bounds of Marriage, which confin'd all *Free-men*, as well *Gentiles*, as *Jews*. The Reason of this Difference was, because they esteem'd a *Servant* as *No-Body*, in Civil Consideration: And thus the State was not concern'd in regulating such inferior Marriages, but they were confirm'd, or dissolv'd, at the *Master's* Pleasure. Yet the *Roman* Laws enjoin the same decent regard to Kindred (a) in the Marriages of Slaves, as of Free-Subjects.

'Tis remarkable what Travellers report of the *Chinese*, that they decline marrying Women of the same Name with themselves, tho' not allied to them by Blood. And that on the other hand, provided their Names be different, they never regard any Nearness of Birth between Husband and Wife; so that a Niece and an Uncle is a very allowable Match (b).

XXXIV. We are now to examine the other Degrees of *Consanguinity*, those in a *transverse* Line; and afterwards to pass on to the Case of *Affinity*. To begin with Brothers and Sisters; there is commonly so very remarkable a Modesty between them, that they are unwilling to be, at the same time present in a Place, where the Endearments of Love and Courtship are carrying on: Nay it may be observ'd, that Brothers themselves, are usually averse to talking with each other on these Points of Pleasure, tho' only in Sport and Jest (c). Yet the reason why we cannot positively affirm that Marriages, in the first Degree, are, of themselves, repugnant to the Law of Nature, is this; because as the Origine of Mankind is recorded in the Holy Scriptures, such Matches must necessarily have been made between the first Children of our first Parents. For it is by no means to be suppos'd that G O D would appoint such a Case in which the Law of Nature could not but be violated; and yet we see Him

commanding the Propagation of Kind, and at the same time providing no other way of performing that Duty, besides these Contracts between Brothers and Sisters. Nor can we say that the Creator lay under any Obligation of forming one only Human Pair. Some have express'd great Contempt of this Argument, as rash and impertinent, but their Censure will be of little force, 'till their Reasons are more considerable. They tell us, G O D was pleas'd Mankind should draw their Descent from one Head, that He might establish a firm Alliance amongst them on the Score of their Kindred. But would not the Alliance have been sufficient, should several Pairs have been at first produced, all having the same Nature, and the same immediate Author of it? And would not they have been able, by Inter-marriages, to keep up the near Relation amongst their Posterity? They urge farther, that if the Beginning of Human Race had been otherwise settled, Wars must have immediately followed, and the World have perish'd in its Infancy. But of what Consequence is this Objection, when even according to the Establish'd Method, we see one of the first Brothers falling by the Hands of the other? Therefore the Prohibition of these Marriages seems to have taken its Rise from some positive Ordinance (d): The Ground and Occasion of which might be, First, the great Modesty discoverable between Parties thus related; and, Secondly, this Consideration, that in as much as their Circumstances engage them to live together in a free and unobserv'd manner, were they farther allow'd to unite in a wedded State, too frequent Opportunities would be offer'd of Adultery, and other shameful Disorders (e).

It may contribute to the Illustration of this Point, to reflect again on the Opinion of the ancient *Jews*, as collected by Mr. *Selden* (f) (1). They, therefore, amongst the six Kinds of Conjunctions, originally forbidden by G O D, reckon the Marriage of a Brother with his Sister by the Mother's side. But they add, that this Command did not exercise its force 'till Mankind being sufficiently multiplied, Plenty of other Women might be had, and there was no need of breaking in upon this Degree. 'Tis an old Tradition with the Eastern People, that all *Adam's* Children, except *Seth*, were Twins; and that it being necessary amongst them for a Brother still to marry his Sister; yet they carefully abstain'd from Sisters of the same Birth. Farther, the *Jews* believ'd a Sister, by the Mother's side, to be more closely allied to her

(a) Vid. l. 2. §. 1. D. unde cognati. l. 8. l. 14. l. 2, 3. D. de ritu nuptiar. l. 22. de reg. juris. Selden. l. V. c. 16.

(b) Vid. Martin. Hist. Sinic. l. 1. (c) For which *Plato* assigns this Reason, (de LL. l. 8. p. 912. A. Ed. Wech.) That all the Talk of the World lies that way; Persons, in their very early Age, hearing these Doctrines ever insinuated, sometimes in jest, sometimes in more serious Application: and particularly in the Tragedies on the Stage, where Narrations are commonly made, that such vile Wretches, as *Thyestes*, *Oedipus* or *Macareus*, who have committed Incest with their Sisters, were seen in a Terrible manner to be their own Executioners. *Simplicius* on *Epicet.* c. 47. speaks to the same Purpose; Since Law and Custom have forbidden the Familiarity of Brothers and Sisters, the Inclinations are no less powerfully suppressed, than if the Command of Nature it self, had laid this Restraint upon them: except when Persons are transported with Frenzy, and tortured by the Furies of a Wicked Conscience. Comp. *Charron. de la Sageffe*, l. 2. c. 8. f. 6.

(d) Add. *Cumberland de L. N. c. 8. f. 9.* *Selden de J. N. & G. l. 5. c. 1. & 8.* (e) Vid. *Ovid. Metamorph. IX.* v. 458. 535. 558, &c. (f) L. V. c. 11. (1) See Mr. *Barbeyrac's* 1st, 2d and 3d Notes upon this Section.

Brother, than if by the Father's only. (And thus *Deuteronomy XIII. 6. Thy Brother the Son of thy Mother*, is Emphatically spoken, as a nearer Degree of Relation.) They thought the primitive Command affected only Sisters in the former Sense, not in the latter: for these they judg'd might be taken for Wives by the purest of the *Gentiles*, those who observ'd the Precepts of *Noah*, and govern'd themselves by the Law of Nature and of Nations. And hence, they say, it came to pass that *Abraham* married his Sister *Sarah*; no Restraint being yet laid, in that particular, from the positive Law. For least any should imagine, that the Term of *Sister* is there put for any Kinswoman, the Patriarch himself explains his own meaning, *Truly*, says he, *she is my Sister, for she is the Daughter of my Father, but not the Daughter of my Mother* (a). Yet that such Matches were not usual, in those Countries, is evident from this, that *Abraham* imagin'd He should avoid being taken for *Sarah's* Husband, if she pretended to be his *Sister*. Unless we are rather inclin'd to say, that He hoped they would take the Word in the fullest and most vulgar Sense, for the *Sister* by both sides.

A Difficulty ariseth on this Subject, from *2 Sam. XIII. 13.* where *Tamar* Answers her Half-Brother *Amnon*, soliciting her to his Bed, *Speak to the King, for he will not withhold me from thee.* Here on the one side, it is not probable that *Tamar* was Ignorant of the Divine Law, which expressly forbids the Marriage of a Brother and Sister by the same Father, as well as by the same Mother. And on the other side, it would have been in vain for Her to think of finally escaping the Violence of her Brother's Passion, by depending on this Reserve, that whatever she might seem to promise Him, He could not, at last, wed Her, without a manifest Violation of the Divine Command: which yet is *Josephus's* Opinion (b). The *Jewish* Doctors therefore give this Answer to the Case before us. They suppose *Maacab*, the Mother of *Tamar* and *Absalom*, to have been taken Captive by *David*, in the War against the King of *Gesur*, and to have born him *Tamar* whilst she continued a *Gentile*, and *Absalom*, after she was made a *Profelyte*. Since then they were perswaded that Persons, by embracing their Religion, were releas'd from all former Kindreds; and because the Child of an *Israelite*, by a *Gentile* Wife, follow'd the Mother, not the Father, and was likewise reckon'd a *Gentile*; they concluded that *Tamar*, when she became a *Profelyte*, lost all the Relation she had to *Amnon*, during her *Gentile* Condition: and that accordingly she believ'd she might be given in Marriage to Him, without transgressing the Divine Ordinance; Her Nearness

of Blood being extinguish'd in Her *Regeneration*.

To touch on the Customs of other Nations in this Affair; we find *Byblis*, in *Ovid*, complaining that the Laws of Marriage should be stricter amongst Men than amongst the Gods;

Dii nempe suas habuere sorores.  
Sic Saturnus Opim junctam sibi sanguine duxit  
Oceanus Tethyn, Junonem rector Olympi.  
*Metam. IX. v. 496, &c.*

In *Homer* (c) the Daughters of *Aeolus* are represented as married to his Sons. *Theocritus* (d) commends King *Ptolomy* and his Queen, for resembling the Matches of the Gods, in being Brother and Sister. *Lucian* (e) reports the same of *Mausolus* and *Artemisia*; in *Avrian* (f), *Hidreus*, the *Carian*, is said to have married *Ada* his Sister. Amongst the old *Peruvians* the *Incas* alone were permitted to marry their Sisters, and all other Men forbidden to take the same Liberty (g). On the other hand, the *Romans* abhor'd this Practice as most odious and unnatural. *Plutarch* (h), giving the reason why the Women, in that Nation, saluted their Relations with a Kiss, hath left this Remark, *When the Laws had Prohibited the Marriage of near Relations, they yet allow'd them to proceed to this innocent expression of Love; and this became a mutual Pledge and Mark of their Alliance. For in ancient times, the Romans abstain'd from wedding their Kinswomen, in any Degree of Blood; as they at present forbore their Aunts and their Sisters. It was late before the Marriage of Cousin-Germans was dispens'd with* (i).

The *Athenians*, by the Constitution of *Solon*, might marry their Sisters, by the Father's side, not by the Mother's. Thus *Plutarch* (k) relates a Match between *Themistocles's* Son and his Daughter by another Wife. *Demosthenes* (l) reports the same of his Grandfather. *Cornelius Nepos*, in his Life of *Cimon* (1), observes that General to have made the like Marriage, which, he says, *Was agreeable to the Athenian Customs* (m). Yet there is a Passage, in the Oration of *Andocides* against *Alcibiades*, which seems to overthrow all this: *Reflect*, says he, *upon the Examples of our Ancestors; with what Bravery and what Wisdom they proceeded, when they sent so great a Man as Cimon into Banishment, for violating the Laws, in taking his own Sister to his Bed* (n). *Plutarch*, in *Cimon's* Story, delivers himself with no Certainty on this Point; he tells us, *Some censur'd Him for using too much Liberty with his Sister, tho' only in Sport: Others affirm'd, that the Matrimonial Contract had really pass'd between them, and that the reason was, because the young Lady, on*

(a) *Genes. XX. 12. Vid. Grot. ad loc. dist.* (b) *Antiqu. Jud. VII. 7.* (c) *Odyss. 10.* (d) *Ibyl. 17.*  
towards the End. (e) *Dial. Diogen. & Mausol.* (f) *De Expedit. Alexand. l. 1.* (g) *Garcilasso de la*  
*Vega, l. 4. c. 9.* (h) *In Qu. Rom. p. 265. C.* (i) See the Reason, *ibid.* (k) *In Themistocl. in fin.*  
(l) *Contra Eubulid.* (1) *C. 1.* (m) See *Baeler's* Notes on this Place. (n) To this agrees *Athenaus*,  
*l. XIII. c. 21.*

account of the Poverty of the Family, could not find a Husband abroad.

The *Lacedemonians*, on the contrary, married their Sisters, by the Mother's side, not by the Father's; as *Philo Judæus* (a) informs us.

It appears from *Plato* (b), that he esteem'd Matrimony between Brothers and Sisters lawful; in as much as he forbids it only in the ascending or descending Line of Kindred.

Amongst the *Egyptians*, *Diodorus Siculus* (c) observes, this kind of Marriage was establish'd by an express Law, and was grounded on a superstitious Conceit, that the same Practice had succeeded fortunately with *Isis*. *Achilles Tatius* (d) reports the same Custom of the *Phœnicians*.

Others of the Ancients declar'd an absolute Dislike of this Freedom. It is one of *Phœnylides's* Precepts (1),

Μηδὲ κασιγνήτης ἐς ἀπόστονον ἐλθέμεν ἐυνήν.

Nor climb thy Sister's interdicted Bed.

And indeed that these Matches were very unusual through all *Greece*, may be gather'd from *Hermione's* Speech in *Euripides*, where she thus upbraids *Andromache*,

Τούτων πᾶν τὸ βέλγεσεν γυνῶ, &c. v. 103. &c.

Thus the *Barbarians* with incestuous Love, Fathers their Daughters, Sons their Mothers wed, Brothers their Sisters; and no Law restrains Their sinful Passion. —————

Or if they were once permitted in *Greece*, it is certain they grew entirely out of use with Posterity; as that Passage of *Sextus Empiricus* (e) sufficiently proves; *The Egyptians contracted Marriage with their Sisters, which amongst us is disallow'd by Law*. The same Author says in another Place (f); *In our Country we esteem it contrary to all Right and Decency, to make a Wife of a Mother or of a Sister* (g). Yet he chargeth both those Practices on the *Persians*; as do likewise *Strabo* (h), *Laertius* (i), *Curtius* (k), and *Lucian* (l). Tho' the Answer given by the Judges to *Cambyses*, in *Herodotus* (m), plainly shews, that the wiser Men, even in the *Persian* Nation, were of a very different Opinion.

It may not be improper to conclude our Search into the present Controversy, by returning to the *Jews*. They, then, in their Prohibition of Marriage between Brothers and Sisters, thought it made no difference whether the Sister, in such a Case, came by Adul-

tery, or by a Lawful Bed: Nay, if she was born of a Mother-in-Law, in a dishonest way, the Rule held against Her, in this respect (n): Tho', otherwise, as to the Crime of *Incest*, they held it could only be committed by *Matrimony*, not by Adultery, nor by Unmarried Pollution. Thus, amongst them, he did not pass for an *Incestuous* Person who had defil'd a Mother and her Daughter, but he only who had actually wedded both. Thus too a Man might marry her whom his Father, Brother or Uncle, had been too Familiar with, tho' he could not wed his Mother-in-Law, nor his Uncle's Widow, nor so much as his Brother's *Relict*, unless in the extraordinary Case of his dying without Issue (o). And so on the other hand, a Man might take her to Wife whose Mother, Sister, Grandmother, Aunt, Daughter or Niece he had corrupted. It is true, by the Traditions of their *Rabbins*, these Marriages were judg'd unlawful: yet the contracting Party was only corporally punish'd, and the Contract still allow'd to stand good. From all which we may infer, that the *Jews*, in stating the Notion of Affinity, held it to proceed not from a bare Nearness of Blood, unless caus'd in a Regular and Matrimonial way (p).

*Nicetas Acominatus* reports, that the Emperour *Andronicus Comnenus* having a Design of joining in Marriage *Alexius* and *Irene*, both incestuously Begotten on *Theodora*, and consulting his Judges on this Point, one of them gave his Opinion, that *The Parties being illegitimately born, were not to be esteem'd of Kin to each other, but had lost all Right and Alliance of Blood; and were in the Condition and Distance of Strangers*. But the Historian censures these Judges, as Men of greedy and fordid Tempers, who made a Gain of dispensing with GOD's Commands, and would sell their Voices for the Feasts and Favour of great Persons.

XXXV. As for the other Degrees, forbidden (2) in *Levit. XVIII.* it will be still more difficult to find a Reason why they should hinder Marriage, on the bare Consideration of the Law of Nature. Tho' it must be own'd, that such Matches have been condemn'd and detested by many Heathens. *St. Paul* (q) calls it *Such Fornication as is not so much as named amongst the Gentiles, that a Man should have his Father's Wife*. *Phœnylides* (3) sets it down as one of his Moral Lessons.

μητρῆς μὴ πατρὸς γὰρ δευτέρᾳ λέκτεσσι γυνῶ,  
μητέρας δ' ὡς πᾶσα τὴν μητέρας ἵχθια βᾶσαν.

Make not thy Father's injur'd Bed disgrace  
Thy Step-dame's Vows; but with Respect confess  
A Mother Her, that fills thy Mother's Place.

(a) De leg. Special. p. 779. E. Ed. Paris. (b) De LL. l. 5. (c) L. 1. c. 27. (d) L. 1. (1) V. 170.  
(e) Pyrrhon. Hypotyp. l. 1. c. 14. p. 31. (f) L. 3. c. 24. (g) Add. Selden. de F. N. & G. l. 5. c. 11.  
(h) L. 15. p. 505. Ed. Gen. Cafaub. (i) In Proœm. (k) L. 8. c. 2. f. 19. (l) De Sacrific. p. 364. Edit. Amst.  
(m) Thalia. Add. what is related of the *Thracians*, the Inhabitants of Mount *Libanus*, I know not with what Credit, by *Leon. Rachwolf*, Itin. Oriental. l. 2. c. 15. in fin. (n) Add. l. 54. D. de ritu Nupt. (o) Comp. l. 1. f. 3. D. de Concubin. l. 4. f. 8. D. de Gradib. & Affin. (p) Selden. ibid. (2) V. Grot. L. 2. c. 5. f. 13, 14.  
(q) 1 Corinth. V. 1. (3) V. 168, 169.

The Story of *Stratonice* is well known, whom *Seleucus* her Husband gave away to his Son *Antiochus*, when the young Prince was fallen in Love with her beyond Cure. It was a remarkable Saying of *Seleucus* on this Occasion, that *If his Wife express'd an Abhorrence of so unusual a Practice, he begg'd his Friends to inform her, that whatever Action was pleasing to the King and beneficial to the Publick, she ought to esteem right and just* (a). Yet *Appian* (b) doth not stick to call this Love of *Antiochus*, ἀδελφικὴ παθὼν, *A sinful Extravagant Passion*. It is said to be the ordinary Custom amongst the *Tartars*, for a Son to marry his Mother-in-law, when left a Widow by his Father (c).

The ancient *Jews*, as *Grotius* observes (1), founded the Prohibition of these Degrees chiefly on two Reasons. First, on that *Natural Modesty which hinders Parents from holding Familiarity with their Issue, either by themselves, or by such Persons as are, in Blood or Affinity, nearest to them*. Which Argument, as it is of good Force in the ascending and descending Line, so, in as much as the Shame there alledg'd is exceedingly weakened, and almost brought to nothing in the Collateral Kindred, especially beyond the second Degree, it can here by no means amount to a Precept of the Law of Nature. Yet are we to esteem those Civil Constitutions most just and well grounded, which extend the Prohibition to a wider Compass; on purpose, as it were, to fence in and secure those Degrees which, the Dictate of Nature, or the Positive Ordinance of GOD had before forbidden. Their second Reason was, *Leſt too great Occasion should be offer'd to Fornications and Adulteries between Persons thus related, and constantly converſing with Freedom together, if ſuch Pieces of Wantonneſs might be made good by the Remedy of Marriage*. This Argument, like the former, is sufficient to give Occasion to a *Positive Law*, not to evince any Precept of Nature. The *Jews* apply it well, to account for that seeming Difficulty in the 18 of *Levit.* where the marrying an Aunt is forbidden, and not the marrying a Brother's Daughter, though both seem equally distant in Degree. For they observe, that young Men frequenting the Houses of their Grandfather and Grandmother, and sometimes dwelling with them, are very much in the Company of their Aunts, whereas they come not so often to their Brother's Houses, nor have there the same Privileges and Freedoms. Yet the latter of these Degrees was esteem'd unlawful by the *Romans*, as appears from the Case of *Claudius*, when designing to marry *Agrippina* (d).

Many there are notwithstanding who assert, that in the place of *Scripture* but now mention'd, not such particular Persons are forbidden, but in general all such nearness of Degrees: whose Arguments, were there Occasion, might perhaps find an Answer.

Those who maintain that all the Degrees, mention'd in the 18th Chap. of *Leviticus*, are likewise repugnant to the Law of Nature, urge the words of the 24<sup>th</sup> Verse, *For all these Abominations have the Men of the Land done which were before you, and the Land is defiled*. 'For,' say they, in as much as every Transgression 'presupposeth a Law, those *Gentiles* in contracting such Marriages must needs have violated, either some Natural Law, or some Divine Positive Ordinance universally binding 'Mankind: The latter is hardly to be made 'out, and the former must therefore be admitted. To this *Mr. Selden* (e) answers, that the word *these* (2) is to be restrain'd to those Sins which the *Heathens* were capable of committing. And as an Argument that it doth not extend to every Particular there mention'd, he observes, that one Case there prohibited (3) is the marrying of two Sisters together, which could not be before vicious, having been practis'd by so righteous a Man as *Jacob*. (Though to this Remark of *Mr. Selden* it might well be added, that the Quarrels and Emulations between those Sisters, *Jacob's Wives*, was probably the Reason of this positive Prohibition.) In the same manner *Amram*, *Moses's* Father, married *Jochabad* his Aunt; another of the Degrees here forbidden (f).

By the *Turkish Alcoran* (g), a *Mussulman* is restrain'd from wedding his Mother, his Stepdame, his Daughter, his Sister, his Aunt, his Niece, his Nurse, his Foster-Sister, his Wife's Mother, his Wife's Daughter by a former Husband, his Son's Wife, two Sisters, a Daughter to a Woman whom he hath abused, and, Lastly, another Man's Wife, unless taken for a Slave in War (h).

It may not be from the Purpose to observe, that many have imagined the Force of Affinity to cease, on the Death of the Person in whom it was founded. It is a Saying of *Euripides* (4),

—New Affinities efface the old.

*Isocrates* (i), speaking of a Gentleman who had married his Aunt, says, *He took so much Delight and Satisfaction in my Father's Friendship, that losing my Aunt without Issue by her, he took my Father's Cousin-German for his second Wife, to keep up the Affinity between our Fa-*

(a) Plutarch in Demetr. p. 907. Ed. Wech. (b) In Syriacis, p. 127. Ed. H. Steph. Add. Senec. Controvers. l. 6. Decl. 7. Valer. Max. l. 5. c. 7. §. 1. Ext. Cicero, pro-Cluent. c. 6. expresseth a grievous Abhorrence of Marriage between a young Man and his Wife's Mother, O incredible Villany of a Woman, says he, and never heard of 'till this time in the World! Add. D. L. 23. t. 2. l. 12, 15, &c. De ritu nupt. (c) Haythou. de Tartar. c. 48. Paul. Venet. l. 1. c. 15: (1) In the Places above cited. (d) V. Tacit. Ann. XII. (e) L. 5. c. 11. (2) See Mr. Barbeyrac's Second Note upon this Section. (3) Levit. XVIII. 18. Upon which place consult Grotius. (f) We meet with some remarkable Things concerning the Degrees of Consanguinity amongst the *Indians*, in Abr. Roger. de Bramin. p. 1. c. 12. (g) Chapt. of Wives. (h) Add. Selden. de J. N. & G. &c. l. 6. c. 11. (4) Med. v. 76. & in Orest. 1083. (i) In Æginetic.

*milies* (a). *Florus* (b) tracing out the Cause of the Quarrel between *Cæsar* and *Pompey* observes, that upon the Death of *Julia*, Daughter to the former and Wife to the latter, the Band being broken asunder which had so long held them together, they soon discover'd their mutual Jealousy, and appear'd the most violent of Rivals. *Marriages*, says *Philo* the Jew (c), are the Ties and Engagements which unite the Families of Strangers; and when they are dissolv'd, the Affinity breaks off with them.

XXXVI. It will be convenient to add a word or two about those Inferiour, or *Secondary Wives* in use amongst some Nations: such as do truly plight their Faith to their Husband, and are united to him in the strictest manner of Society; yet so as that upon account of their unequal Condition or Birth, or for other Reasons they are not admitted to the full Honours, of their Character, nor acquire the same Rights for their Children, as other lawful Mothers (d). Of these Mr. *Selden* (i) hath treated at large; and from him it appears, that their Difference from just and proper Wives, is introduc'd purely by positive Law, or by the particular Covenant of the Parties, who to the principal Matrimonial Pa& may add any thing at their Pleasure, which doth not contradict and overthrow it. The chief Reasons on which this Practice seems to have been founded are these, the Preservation of noble Families, the Fear of injuring former Children (e), and lastly, the avoiding of those great Expences, which a *Wife*, in the higher and more perfect Degree, might challenge by the Custom of the State. In order to the keeping up of great Families, it is convenient that they marry into equal Fortunes and Honours: for the better procuring of which, it hath been enacted, in many Common-wealths, that in case a Man take a *Wife* beneath himself, the Marriage shall not have all those Effects and Priviledges, which it would otherwise, in Course, enjoy. And then again, nothing more weakens a Family than the dismembering of an Estate into too many Parts; wherefore to prevent this Misfortune, some have thought it proper to take up with these *Secondary Wives*, whose Children, if their Portions are not over large, have yet no Reason to complain. And as to the third Point, He is a notorious Fool who makes himself a Beggar to maintain the Pride and Grandeur of a *Wife*.

On the whole, it is clear how injuriously

we deal with these *inferior Wives*, if we allow them no better a Title than the vile Name of *Concubines*. For *Concubines* are properly such, as exercise Conjugal Freedom without Conjugal Faith, and differ only in Degree from common Strumpets: nor do they exempt themselves from the Scandal by entering into a private Engagement, and confining their dishonest Service to a single Person (f). But the Faith of the Marriage-Bed is infinitely more sacred and solemn than to be brought into Comparison with the strictest of these illegal Compacts, founded on the base Prospects of Lucre or of Lust (g).

*Busbequius* (h) remarks somewhat very particular of the *Turkish* Emperours, that after *Bajazet*, none of them enter'd into just and proper Matrimony. For he, after his Defeat by *Tamerlane*, falling together with his *Wife* into the hands of the *Victor*, took no part of the barbarous Treatment more to heart, than the Affronts and Dishonours put upon the *Sultaness* before his Eyes. In regard to this Accident, his Successors abstain from Conjugal Engagements, and as to the Affair of Issue make use of *Women* in the Condition of *Slaves*, who are not capable of suffering so much Injury and Disgrace. But indeed the *Turks*, in general, pay no less Affection and Kindness to their Sons by *Concubines* or *Harlots*, than to those who are born of their legal *Wives*; nor have the former any less Degree of Right to the Goods and Estate of their Father.

*Abbas*, King of *Persia*, took another way of preventing these Indignities: for, carrying with him into the Field all his Female Train, he commanded the *Eunuchs*, that had the Custody of them, to cut off the Heads of all his *Wives*, in case he lost the Battle (i).

The *Chinese*, when they despair of obtaining Issue in just Marriage, have recourse to the Remedy of *Concubines*; esteeming it the most miserable thing that can befall a Man to be at a loss for Children, who might mourn at his Decease, and perform the decent Honours of his Burial (k).

We have only this Observation to add, that as the publick Laws of Common-wealths are wont to invest other Contracts with certain Rites and Solemnities, upon want of which they pass for Invalid in Civil Cognizance; so in some States there are such Ceremonies, annex'd to Matrimony, as if omitted make it illegal, or at least deprive it of some Effects

(a) Cicero pro Quint. c. 6. The Affinity could by no means be broke off, whilst the Children were alive. Idem Philipp. XI. c. 4. concerning *Dolabella*, who had formerly married his Daughters; And this Gentleman, O ye heavenly Powers, was once my Friend! (b) L. 4. c. 2. n. 13. (c) De Legat. ad Caium. On the other side we are told of the *Tartars*, that amongst them 'tis an usual thing for different Parents to make Matches between their deceas'd Sons and Daughters; fancying that by this posthumous way of Marriage, a Relation is no less contracted between their surviving Friends, than if they had actually celebrated their Nuptials in their Life-time. (d) Vid. Selden. de J. N. & G. l. 5. c. 7. (e) V. Grot. l. 2. c. 5. f. 15. (f) So in *Julius Capitolinus* towards the end, the Emperor *Marcus*, upon the Death of his Lady *Faustina*, took the *Wife* of his Procurator for a *Concubine*. Ne tot liberis superinduceret novercam, That he might not bring so numerous a Family of Children under the Power of a Mother-in-law. (g) Vid. *Ælian*. V. H. l. 10. c. 18. (h) Yet sometimes we meet with the word *Concubina* in no disgraceful Sence. Vid. L. 32. t. 3. l. 49. f. 4. D. de Legat. and L. 5. t. 27. l. 3. C. de natural. liberis, Concubinage is call'd unequal Marriage. Add. *Godofred*. ad loc. diff. (i) *Epist*. 1. (k) *Petrus della Valle* Itin. P. 2. *Epist*. 5.

(k) *Martin*. Hist. Sin. l. 6. c. 1. p. 201.

which would otherwise have sprung from it, according to the local Customs and Constitutions (a). Now altho' the Law of Nature be a Stranger to these Formalities, yet inasmuch as it commands all Subjects to obey the Ordina-

(a) V. *Constitut. Sicul.* l. 3. t. 20.

nances of the Government, under which they live, it would be idle and ridiculous for such Persons, as have not the Power of making or of reversing Civil Laws, to plead the *Indifference* of Natural Law in the present Case.

## CHAP. II.

## Of Paternal Power.

Children are the proper Fruit of *Matrimony*; as they are likewise the proper Subjects of *Paternal Dominion*, that most ancient, and, at the same time, most sacred Kind of Government; by Vertue of which the Children are engaged to acknowledge the Superiority, and to reverence and obey the Commands of their Parents. The Origine of this Power, *Grotius* (a), and most Writers refer to the Act of *Generation*, by which the Parents do, in some measure, resemble the Divine Creator, whilst they make a Person really exist, who before had no Being. But in as much as both the Parents equally contribute to this signal Benefit, they say that both originally acquire a Right over their Issue; but that, in case they contend for the Sovereignty, and by reason of their contrary Commands cannot both be obey'd together (1), the Father's Authority is to carry the Precedence; not only on the account of the Advantage he hath in Sex, but likewise because the Mother her self is placed under his Direction and Sway.

II. Mr. *Hobbes* (b) takes another Road in tracing out this *Paternal Rule*: 'Tho', says he, 'this be a true Consequence, *A Man is the Father of another, and therefore hath the Dominion over him*, yet it is not so clear and manifest as to shew its own Necessity, as those do where one of the Terms is included in the Definition of the other; but must be made out by other Arguments and Proofs. Besides, since all Sovereign Power, if regularly established, is indivisible, so that no one can, at the same time, serve two Masters, unless in Subordination, and since two Persons concur to the Act of Begetting, that Act should seem an improper Foundation for Sovereignty: which may therefore be more conveniently

'deduc'd from a State of Nature, in the following Method. During such a State every Man hath a Liberty of practising against every Man, what he thinks may conduce to his own Preservation; and consequently the Conquerour is the Lord and Master of the conquer'd (2). Whence we may infer, that by the Law of Nature the Right of governing an Infant is first in the Power of the Mother; who, if she resolve to nourish and breed him up, as she is in Duty oblig'd to do, is suppos'd to do it upon this Condition, that he shall not prove her Enemy when grown up, *i. e.* that he shall pay Subjection and Obedience to her. (According to his Hypothesis, those are mutual *Enemies*, who are neither subject one to the other, nor own a common Master.) For it is by no means to be presum'd that I would give a Person Life, on purpose to put him in a Capacity of growing up to my Prejudice, and of gaining strength in time to repay my Kindness with Hostility. Thus therefore a Woman becomes, at the same Minute, a Mother and a Sovereign Mistress. Nor is the Excellency of Sex a sufficient Argument why we should attribute this Right of Governing to the Husband rather than to the Wife: For the Inequality is not so great between them, as that the Man can immediately establish his Rule over the Woman without Opposition; but, in a State of Nature, he must fairly win her by a Course of War. Farther, the Woman, by carrying the Child so long about her, and nourishing it with her Substance, doth certainly contribute, if not the most noble, yet the most laborious and troublesome Share to the Production of Issue (c). Lastly, in as much as in a State of meer Nature, where no Common-wealths and no Families are sup-

(a) L. 2. c. 5. f. 1. (1) See a Passage to this purpose in *Quintilian's* Sixth Declam. p. 86. Ed. *Lug. Bat.*

(b) *De Civ.* c. 9. (2) Our Author elsewhere has confuted this Principle of Mr. *Hobbes*, See B. 1. c. 6. f. 10. and B. 2. c. 2. f. 5, &c. (c) *Quintil.* Declam. 338. *It is otherwise in the Case of the Men, who are made Parents by a short and transient Pleasure, and are endear'd to their Children only by that outward Satisfaction. But the Mother's love with a much stronger Passion, remembering their ten Months Trouble, their long Course of Cares and Dangers.*

It is a Saying of *Medea*, in *Ennius*, (or rather in *Euripides*, v. 250, 251. from whence it was borrowed;) *I had rather be Three times under the Sword, than Once under the Hands of the Midwife.* Yet they tell us of the Women of *Paria* in *America*, that they bring forth without any Pain or Weakness, and immediately after their Delivery return to their ordinary Work and Employment. Much the same is reported of the Women of *Chili*; and 'tis added, that the *Spanish* Dames if they live there any considerable time, contract the same Hardiness.

*Orestes* in *Eurip.* v. 552, &c. when it mkes for his Cause, gives his Father much the Advantage of his Mother.

My Father plant'd me, and his Fair Dame  
Was but the Soil that bred and brought me forth.  
More tied I judg'd my self to succour Him  
That gave me Life, than Her that lent me Food

'posed,

posed, 'tis impossible to know who is the Father of the Child, but by the Mother's Affection; it follows that the Child belongs to whom she pleaseth, and therefore primarily to her self. On which account it was enacted by the *Roman* Constitution that Issue, brought forth without Matrimony (1), should follow the *Venter*, or the Mother (a).

III. From the Mother this Dominion, according to Mr. *Hobbes*, may pass to other Persons several ways. First, if the Mother renounce her Right by *exposing* the Child; the Person who finds, and breeds him up, shall enjoy the same Right which the Mother had over him before. For the Life which the Mother at the first gave him, she, as far as she is able, takes away again by this Act of exposing him: and consequently the Obligation he had to her, for her former Kindness, is entirely cancell'd by this Injury. On the other side, to the Person who sav'd and educated him, he owes all possible Returns, and ought to acknowledge him, both for his Parent and his Master (b). Here, though we should grant that such a Child ought still to preserve an Inclination of paying Duty to his Mother, and, upon her Sorrow and Repentance, to return in some measure, under his old Relation and Subjection; yet he cannot do this otherwise than with the Consent and upon the Resignation of his Educator, to whom all his Charges, &c. are to be refunded. And this seems to be the only Case in which it is possible to acquire Rule over a Man by Seizure or Occupancy.

Secondly, 'If the Mother were made a Captive in War, the Issue born to her belongs to the Person who took her; as her other Goods and Possessions. But here it must be observ'd, that the Right and Power of the Conqueror, over the Issue of his Female Captive, is quite of another kind than that which she, as a Mother, before enjoy'd.

Thirdly, 'If the Mother be her self a Subject in any Common-wealth, the supreme Governour there hath Dominion likewise over her Child. Where we are again to remark, that the Power of the Civil Governour is very different from that of the Parents: and that it doth not presently follow, that the Mother's Authority must be extinct, and as it were swallowed up in the chief Ruler's; but in some States 'tis only limited and restrain'd, in others 'tis left almost perfect and entire.

Fourthly, 'If a Woman enter into an Agree-

ment of living with a Man, under this express Condition, that the Man shall be Lord and Sovereign, then the Children born to them both shall belong to the Man, upon the Score of his Sovereignty over the Mother. But, if the Father be the Mother's Subject, the Children likewise fall under her Command; otherwise the bearing Issue would be a Prejudice to her Supremacy. And in general, if the Society between the Man and the Woman be such a regular Union, as gives one the Dominion over the other, the Children owe Subjection to the Ruling Parent. But, if in a State of Nature, a Man and Woman contract to cohabit in such a manner as to be independent on each other's Rule, the Children shall fall to the Mother, unless it was expressly ordered otherwise in the Bargain. For the Mother may, by Covenant, dispose of her Right as she pleaseth. Thus they tell us of the ancient *Amazons*, that they agreed with the Men of the neighbouring Countries, to whom they had Recourse for Issue, to send back the Males, and only to preserve the Female to themselves. But in Common-wealths, if a Man and a Woman engage by Contract to cohabit, the Children are the Subjects of the Man: because in Civil States, all the Domestic Sovereignty belongs to the Fathers of Families, by whom the States were founded and establish'd, and who, we may be sure, were willing to settle the Point in Favour of themselves. Such a Contract between a Man and Woman in a Common-wealth, if it be made in solemn Form, and according to the Laws of the Place, is call'd *Matrimony*. But in Case the Parties bargain only for Concubinage, or for a less solemn kind of Cohabitation, the Children shall then fall either to the Father or to the Mother, according as the Civil Constitutions have determin'd.

IV. We in this, as in other of the like Points, have recourse, in the first place, to Almighty GOD, the universal Cause and Author of Things. And yet we think it a very lawful Attempt, to search farther into the second Causes and immediate Instruments. For as to that which some pretend, that *All Sovereignty, which one Man obtains over another, is communicated to him by God, as it were in the manner of a Divine Commission, and that all Human Power is purely by Delegation*; We take it to detract from the Honour of God, although the Persons, who have such Sentences commonly

(1) See hereafter Section the Fifth. (a) By the Law of the *Lycians*, if a Free-woman married a Slave, the Children were adjudg'd Free: but if the greatest Man in the State wedded a Foreigner or a Strumpet, the Issue was accounted base and servile. The same People took their Names from the Mother, not from the Father, *Herodot. Clia*, p. 44. Ed. H. Steph. (b) Thus *Admetus* speaks in *Euripides (Alcest.)* v. 666. &c.

So far I died as Death was in Your Power:  
And if a kind Deliverer hath restor'd me  
To Light and Life, I own him for my Father;  
And boast to be the Comfort of his Age.

*Liban. Orat.* 13. A Man who takes another out of the Water, where he was ready to perish, may well be esteem'd a Father by the Person he hath preserv'd.

in their Mouths, speak with a great Appearance of Piety. For he who exerciseth a delegated Power, hath the same Power altogether with him from whom he receives it; only with this Difference, that the former possesseth it only as *borrow'd*, the latter as his *own*. But it would betray very low and unworthy Thoughts of the Infinite Majesty of Heaven, to conceive that the same Species of Sovereignty is enjoy'd by God and Man (a).

Having premised this Caution, we go on to the main Business before us. And, first of all, we think it may be settled as an undoubted Truth, that the Act of Generation doth yield an Occasion to the acquiring a Right over the Child, which shall hold good, not only against other Persons, who have not the same Claim of Parentage (b), but likewise against any Pretension that can be made in behalf of the Child it self. We say an *Occasion*; because we are not perswaded that *Generation* alone (1) is sufficient to give a full Dominion over Human Issue. For altho' our Children be indeed made of our Substance, yet in as much as they become Persons like our selves, and our Equals, as to all those Rights which naturally accrue to Men; before we can render them unequal to us, or subject them to our Dominion, it seems necessary for us to seek out some other Title. Especially since, in the Method of bringing a Child into the World, the Parents have no little regard to their own Pleasure and Satisfaction; and therefore cannot rate the Kindness at so vast a Price, and set it so highly on the Child's Score, as to demand back, in Consideration, a full Subjection and Obedience, whether the Child be willing or no. It is a Saying of *Lactantius* (c), *He that begets a Son hath no Power to make him be Conceived, to make him be Born, to make him Live: whence it appears, that he is not so properly the Author of his Sons Being, as the Instrument.*

The Right then of Parents over their Children, seems to be founded on these two Titles or Claims. First, it ariseth from that Duty which Nature (in enjoining Man to be a sociable Creature,) lays on them to take care of their Off-spring; she having, at the same time, to stir up their Diligence, wisely implanted in them a most tender Affection towards these little Pictures of themselves. For take away from the Parents all Care and Concern for their Children's Education, and you make a social Life an impossible and unintelligible Notion. But this Care cannot duly be exercis'd, unless the Parents have Power to direct and govern the Actions of the Child, in order to the procuring his Benefit and Safety, which he himself, through Defect of Years and Judgment, is incapable of apprehending and of providing for (d): and consequently Nature

doth hereby enjoyn Parents actually to make use of such a Power and Dominion, so far as it is necessary to the Accomplishment of so important a Work. For whoever obligeth a Person to the Prosecution of an End, is, at the same time, suppos'd to have given him Authority to apply all Means that shall appear requisite for its Attainment. And this Power of the Parents, resulting from the Duty lying on them to provide for their Issue, doth necessarily create, in the Children, an Obligation to submit themselves to their Parent's Direction, without which Act of Submission, the former Benefit cannot be obtain'd, and the Authority is to no purpose.

Secondly, The *Sovereignty of the Parents* seems, likewise, to be built on the *presumed Consent* of the Children, and consequently on a *Tacit Pact*. For, as the Parent, by the very Act of breeding up the Infant, doth declare himself ready to fulfil the Obligation of Nature, and to consult, so far as in him lies, the well educating of his Charge; so the Infant, on the other side, tho', on account of the imperfect Force of Reason, he cannot expressly promise those reciprocal Duties, which answer to the Parent's Obligation, yet by Vertue of this Care, employ'd by the Parents about him, he contracts as firm an Engagement towards them as if he gave his full and express Consent (e). And this Engagement begins to exert its Power, so soon as he arrives at the Knowledge and Apprehension of any thing, that his Parents have done for him. It being fairly presumed, that had he, at his coming into the World, been furnish'd with the Use of Reason, and made capable of understanding that his Life could not be preserv'd, without the kind Provision of his Parents, join'd with their Command over him, he would gladly have yielded Obedience on so commodious Terms. Which Consent of his, being *Rationally supposed*, hath the same Validity as if it had been openly declar'd (f). In the same manner, as a Person, who hath had any Business perform'd for him by another, in his Absence and without his Knowledge, is supposed by a kind of silent Covenant to contract an Obligation of refunding the Charges. It is clear therefore that the Power, which Parents have over a Child, is then actually constituted, when they apply themselves to nourishing and educating him, and rendring him, so far as they are able, a useful Member of Human Society.

Some indeed have maintain'd, that the Obligation between Parents and Children can by no means be deriv'd from tacit Consent and Covenant, upon this Argument: *Consent, whatever the Subject or Occasion of it be, doth not take place, except in Actions that were free before the Consent pass'd; but now it is not a*

(a) See *Matth. X. 28.* (b) That as he who is Master of a Thing, is likewise Master of the Fruits or Profits of it; so he who is Master of the Body whence the Child proceeds, should have the first Step or Title towards obtaining a Sovereignty over the Child it self. (1) See *Mr. Barbeyrac's First Note* upon this Section. See above in *B. 4. c. 11. f. 4.* (c) *Divin. Instit. 1. 5. c. 18.* (d) See *Sirac. VII. 25. XXX. 1. &c.* (e) *Add. L. 3. t. 5. l. 2. D. de negot. gestis.* (f) *Comp. Senec. Consol. ad Marciam. C. 18. in fin.*

matter of Freedom in the present Case, for the Parties to perform the mutual Duties, of Education on the one side, and of Obedience on the other. But this way of reasoning cannot weaken what we here assert. For it doth not imply the least Contradiction, for a Duty to arise, at the same time, from a Precept of the Law of Nature, and from Tacit Consent and Pact. It is not certainly free for a Man not to obey GOD; yet GOD hath been pleas'd to enter into Covenant with his faithful Servants. A Subject is no doubt oblig'd to perform all due Offices, in the State under which he lives; and yet, when he is to be Listed in the Military Order, not only his Consent is required, but his Oath. And thus why may we not as well affirm, that whilst the Parent actually undertakes the Education of the Child, the Child's Tacit Consent is to be understood; the Effect of which Consent amounts to this, that he shall not afterwards have reason to complain, that the Parent's Authority was obtruded upon him against his Will, and without sufficient Grounds and Title?

V. When the Question is carried farther, and it is demanded to which of the Parents this Right over their Issue, doth most properly belong, a Distinction or two will decide the Point: For the Persons concern'd, either live under some Common-wealth or not; and again the Parents either are, or are not engaged to each other by Covenant. Without the Bounds of a Common-wealth, or in a State of Natural Liberty, if the Parents were not united by any lasting Contract, the Child is under the Care and Command of the Mother. Because, in such a Condition of Life, it being as probable that one Man should be the Father as another, the Mother can only determine the Controversy: at least, the thing cannot be otherwise known, with so much Truth and Certainty, as Matters of Fact demand (a). On this Principle, the Roman Laws (1) award to the Mother, Issue begotten in Common (b). But if a Covenant hath pass'd between the Parents, by which they settled these Affairs, it will appear thence, which, of the two, is to bear Rule over the Children: for that two Persons should both hold the supreme Authority over a third, without Subordination or Division, is no regular Practice. This Covenant then between the Parties, either terminates in the bare Procurement of Issue, or it includes farther the Sovereignty of the Man over the Woman, and so falls in with *Just Matrimony*; where no doubt the Command over the Children is lodg'd in

the hands of the Father. But in Covenants of the former kind, though they usually take their Beginning from the Man, who seeks Children for himself not for her, and consequently bargains to have the Rule and Disposal of them; yet it may so happen, that quite contrary to this Order, the Woman calls in the Man for an Assistant to her design of Issue; not the Man the Woman. This was the Case with the ancient *Amazons*; and is still with any Sovereign Princess, that marries without quitting her Rights; the Man being here not so properly a *King*, as the *Husband of a Queen*. Nor ought we to think that Pacts, of this sort, are therefore repugnant to the Law of Nature, because in them, one of the Couple seems to renounce that Care of the Children, which Nature hath equally laid on both the Parents: For the Precept of Nature, in this Point, doth not precisely require that both Father and Mother shall apply themselves in the same strict Degree, to the Work of Education; but is satisfied if by Compact, the main Charge be committed to either. In the same manner, as the Mother is not so necessarily oblig'd to give her Infant Suck, but that she may make use of a Nurse (c): and as the Father acts upon good Prudence, when he delivers his Children into the hands of able Instructors, for the forming of his Mind and Manners.

But, in Civil States which for the most part have been erected by the stronger Sex, as the Men in common Course, are the Heads of the respective Families, so the private Dominion over the Children belongs to the Father; so that here, the Mother's *Commands* are in themselves, little better than *Counsels*, and borrow their full Force of obliging, from that share of Power imparted by the Husband to his Wife. For, as it is generally found convenient to admit the Woman to a part, in the Government and Direction of the Family; so the Father's Power, over the Children, doth by no means exclude the Mother's inferior Authority and Care. Not but that the Constitutions of particular Common-wealths may settle this Matter otherwise, as shall be judg'd expedient. *Peter della Valle*, in his *Travels* (d), informs us, that amongst the Inhabitants of *Babylon* or *Bagdet*, the supreme Power over the Sons is held by the Father, and over the Daughters by the Mother.

If, upon the Father's Decease, the Government of the Family remain with the Mother, it is but just that she exercise the same Authority over the Children which the Father formerly enjoy'd (e). And in Case she marry a

(a) *Comp. L. 3. t. 1. f. 31, 32. Institut. de verum divis. & L. 41. t. 1. l. 7. f. 13. D. de acqui. rer. dom.*

(1) *V. D. l. 1. t. 1. De statu hominum, l. 23, 24.* (b) The Egyptians follow'd a contrary Opinion. They accounted none of their Sons spurious, although born of a Slave; imagining that the Father alone was the Author of the Generation, and that the Mother contributed no more than Place and Nourishment. *Diodor. Sic. l. 1. c. 80. p. 72. Ed. Rhodom.* To the same Purpose speaks *Theages*, the *Pythagorean*, in his Treatise of *Vertues*, *The Father produceth the Form, and the Mother only supplies the Matter.* (c) The contrary Opinion is maintain'd by *Plutarch*, de *Educat. &c.* and by *Phavorinus* in *Gell. l. 12. c. 1.* Add *Ferdinand Pinto's Travels, chap. 54.* where he tells us how Strict and Religious a Point the *Japones* esteem it, for a Mother to give her Infant Suck. In the *Alcoran*, the Women are commanded to perform this Office to their Children for the two first Years. (d) *P. 1. Epist. 17.* (e) *Comp. Genes. XXI. 21. with XXIV. 4.*

second time, and the new Husband be intrusted with the Care of his Predecessor's Children, they are to pay him the like Reverence and Duty as was challeng'd by their proper Father. Yet we are told a very odd Custom of the *Chinese* in this particular; that if a Wife, after she hath buried one Husband, proceed to a second Match, her Children send her off, covered only with a single Garment, as an ignominious Mark of her light Disposition: and the reason of the Custom is, that according to the Inclination of that People, the Children cannot bear a *Father-in-Law*, much less respect and obey him (a).

VI. The next step we take must be to enquire how far this Power of Parents over their Children extends; or what are the proper Bounds and Measures of it. And here it is necessary to distinguish, first between those Fathers of Families, who live under no publick Government, and those, who are the Subjects of a Common-wealth; and again, between that Power, which the Father holds, as he is a Father; and that which he bears, as he is the Head of a separate Family. The Power which a Father enjoys, on the bare score of his being a Father, inasmuch as it accrues to him as a necessary Means of discharging the Obligation towards his Issue, which Nature lays upon him, must consequently be so great, as sufficiently to answer and effect that Design. Now the Obligation, or Duty of a Father, as such, chiefly turns on this general Performance, that he duly educate his Children; that is, nourish, protect, inform and govern them, in order to the rendring them useful to themselves and others, till they are able to consult their proper Benefit, and are grown Masters of their own Wills and Actions. (For, as to the Act of Begetting, that is not so properly a Part of the Paternal Duty, as the Occasion of it.) Parents ought to apply more Diligence and Caution in fulfilling this Obligation, the more Truth there is in that saying of *Plutarch* (1), *Good Institution is the Fountain and Root of all Honesty and Virtue*. Especially if they take this Observation of *Plato* (b) along with it, which commonly holds true; *Persons* (says he) *who are naturally endued with the most excellent Wits, if they happen to be spoilt in the Breeding up, commonly prove the very*

*worst of Mankind. Can you think that all those barbarous Villanies, all that horrid Wickedness, which we see in the World, proceed from mean and lazy Dispositions, and not rather from brave and generous Spirits perverted by ill Education? Or do you suppose, that a natural Weakness and Feebleness of Temper, does ever prove the Cause of any very great Good, or very great Mischief* (c).

It is plain then, that the Power of the Father doth by no means reach to so extravagant a Degree, as that he may destroy the Child whilst in the Mother's Belly (d), unless the Mother must otherwise infallibly perish (e); or after the Birth expose or make away with it, much less after the Increase of Growth and Years. For although it be very true, that the Infant hath his Rise and Original from the very Substance of the Parents, yet he is immediately plac'd by Nature, in a Condition of Equality with them (2); at least so far as to be Capable of receiving *Hurt and Injury* (f). Therefore the Opinion deliver'd by *Aristotle* in his Politicks (g) is to be exploded as unjust and inhuman. *As to the exposing and the preserving of Children*, says he, *let it be order'd by Law, that nothing Lame or Defective be suffer'd to grow up. If any Nation think it not allowable to expose their Infants, there, certain Bounds are to be set to the Number of Births: and if the Business of Generation happen to exceed the due Limits, it will be convenient to procure Abortion, before the Foetus is arriv'd at Life and Sense, for such a Period of its Growth is to determine, whether the Act of destroying it be harmless or sinful. Lycurgus did not express more Mercy in his Spartan Discipline. We learn from Plutarch that, when a Child was born, it was not left to the Parents Choice to preserve and nourish him. But he was carried immediately before an Assembly of the Seniors, who considered and surveyed him. If they found his Limbs strong and well set together, they order'd he should be bred up. But the weakly and misshapen Infants they adjudg'd to be carried away and thrown into a kind of Whirl-pool near the Mountain Taygetus: as if to live, when Nature had provided them so infirm or so unsightly a Body, could neither be for their own Good and Credit, nor for the Advantage of the Common-wealth* (h). Indeed this Unnatural Practice of exposing Infants was so fre-

(a) Neuhof. in Legat. p. 281. (1) De Liberor. Educat. p. 4. B. Ed. Wech. (b) De Republ. l. 6. p. 676. Ed. Wech.

(c) Idem de LL. l. 7. calls a Child, *A Creature more intractable than a Beast*. Liban. Declam. 20. Education is one of the highest Goods of Human Life. Horat. L. 4. Ode 4. v. 33.

*Doctrina sed vim promovet institam,*

*Rectique cultus peiora roborant:*

*Utcunque defecere mores,*

*Dedecorant bene nata culpa.*

(d) Vid. L. 47. t. 11. l. 4. D. de extraordin. crim. & L. 48. t. 8. l. 8. D. ad L. Cornel. de Sicariis, & tit. 19. l. 38.

f. 5. D. de penis. (e) Vid. Ant. Matth. de crimin. ad l. 47. D. t. 5. f. 5. Grot. in Flor. Spars. ad l. 39. D. de penis.

(2) See B. 1. c. 1. f. 7. (f) Plin. L. 9. Ep. 12. *So use your Fatherly Power as to remember that You are Your self a Man,*

*and the Father of a Man.* Vid. Philo Jud. de Special. Leg. p. 794, 795. Ed. Paris. Lactant. Div. Instit. l. 6. c. 20. Diod. Sic.

l. 1. c. 77. Add. Grot. ad Exod. XXI. 22. *Leg. Wisogoth. l. 6. t. 3. c. 7. Selden. de J. N. & G. l. 4. c. 1. It is a most*

*absurd and most barbarous Custom which they practise in Formosa, where it is reckon'd scandalous for the Women*

*to conceive before their thirty fifth or thirty sixth Year. And if they breed sooner than that time, by miserable*

*Pains and Beatings they procure Abortion.* (g) L. 7. c. 16. (21.) (h) I know not whether we may venture

to credit the Account given by *Diodor. Sic. l. 1. c. 80.* of the Method taken by the *Tartarians*, to make Experi-

ment of the Temper of their Children.

quent and almost so Universal a Custom with the Ancients, that *Strabo* (a) mentions it as something very particular in the *Egyptians*, that they breed up all their Children (b). So *Dionysius Halicarnasæus* (c) sets it down as a remarkable Opinion of the *Aborigines*; They refuse to make away with any of their Infants; thinking this one of the highest and most execrable Villanies. And *Tacitus*, in his Account of the *Jews* (d), makes their Abhorrence of this Cruelty one part of their Character (e).

Nor doth it appear reasonable to extend the Paternal Authority, as such, to the Power of Life and Death, even in the Case of Faults committed; but rather to fix its Bounds within the Exercise of moderate Correction. Because its whole Care and Business is taken up about so tender an Age, as can scarce be imagin'd capable of such grievous and incurable Offences, as demand Capital Punishment (f). It seems the more proper way of proceeding, when a Child of obstinate and incorrigible Perverseness rejects and despiseth his Father's kind Labours on his account, to cast him off, as unworthy of all Care and Notice. And thus to abdicate, or disinherit a Son, may pass for the severest Penalty that a Father, by virtue of his being a Father, can inflict (1).

VII. Of this Paternal Power strictly taken, we must understand that place of *Grotius* (g), where he divides the Age of Children into three Periods; First, 'Of imperfect Judgment and Choice; Secondly, When they have attain'd to Maturity of Judgment, but still remain as Members of their Father's Family, and have not undertaken the separate Management of their own Affairs; Thirdly, When they have left their Father's Family, either to join themselves to some other, or to erect one of their own. Which Distinction *Ziegler* seems to have condemn'd on no very good Reason. For though, as he observes, the Holy Scriptures (h) press the Duty of Obedience on Children, without making any such Difference, yet they do by no means forbid that grown Persons should be treated in another way of Management than Infants; nor do they require that a Son, when arriv'd at a State of Discretion and Maturity, should ever remove out of his Father's House. 'During the first Period of Age, then, (says *Grotius*) all the Actions of the Children ought to be regulated and directed by their Parents; for he who cannot govern himself, falls of course under the Government of Another; and the

Parent, according to Nature, is the most proper Person to exercise this Authority over the Child.

VIII. It is here made a Question, whether a Child, under this imperfect Period of Reason, be, by the Law of Nature, capable of Propriety, or of being the Master of any Goods or Possessions, in such manner as to exclude the Claim of his Parents? On which Point it may be proper to distinguish between Goods gotten by private Industry, and those which are left or made over by the Liberality of others, as in Legacies, Donations, &c. In that tender Age, what can a Child be suppos'd to get by his own Industry? Certainly not so much as his Parents has laid out on his Education. This therefore the Father may fairly challenge, in requital of his Pains and Charges. For tho' he were oblig'd indeed, by the Law of Nature, to support and maintain his Offspring, yet he was not, in the least, prohibited to make what Fruit and Advantage he could of his Labour. One might as well say, that Parents are forbidden to take any Delight or Comfort in their Children; a Satisfaction so very great, that most, who are so happy as to enjoy it, esteem it invaluable, and beyond all Compensation or Equivalent (i). For the same Reason, it would be a high degree of Impudence, for a Son, in this State of Minority, to require a Reward for the Service he does his Father. 'Tis a wise Saying of *Sophocles* (2),

*Good Children should forget the Toils they bear  
To help their Parents.*

In *Peru* the Children were oblig'd to assist their Parents with their Labour, till the Age of five and twenty (k).

In the other case, when any thing is to be transferr'd on the Child, in way of Gift or Legacy, at first view, such a Donation may seem invalid, because Acceptance is a necessary Condition required in the Receiver, which cannot be perform'd without deliberate Consent, and therefore not without the full Use of Reason. But because it would be an intolerable Hardship to make Children incapable of these Advantages, on account of their Immaturity, when, for that very reason, they have more need of the Assistance of Others; it is most agreeable to Equity, that another Person should accept this Bounty in their Name, and should likewise have the Goods in Charge till the Children are capable of being their own

(a) L. 15. (b) Add. *Diodor. Sic.* l. 1. c. 80. (c) L. 1. p. 13. (d) *Hist.* l. 5. (e) Yet *Curtius*, l. 9. c. 1. reports that the *Spartan* Custom was practis'd by some of the *Indians*. They bring up their Infants, says he, not at the Pleasure of the Parents, but according to the Order and Direction of Officers appointed to supervise this Affair; who command all such Children to be kill'd, as they find either extremely slow and heavy, or useless and defective in any Part of the Body. *Strabo*, l. 15. gives the like Account of the *Cathæans*. It is common, amongst the *Chinese*, for the Parents to kill their Children, especially the Females, without falling under Censure or Punishment. And, holding the Transmigration of Souls, as most other People of the East do, they think they do them a Kindness, by preparing their way to a happier Birth and a more advantageous Condition. (f) Thus the *Roman* Youths, whilst they wore the *Prætexta*, were not liable to Fines and Amercements, but receiv'd corporal Correction. *Plin.* N. H. l. 9. c. 23.

(1) See above in B. 4. c. 11. f. 7. & 11.

(g) L. 2. c. 5. f. 2. (h) *Ephes.* VI. 1. *Col.* III. 20.

(i) *Vid.* *Senec. Consol. ad Marciam*, c. 12.

(2) In *Oedip. Colan.* p. 289. Ed. H. Steph.

(k) *Garcilasso de la Vega*, l. 4. c. 19.

Managers. And for this Trust no Man is so fit as the Father. Whence it appears, that it is by no means natural for the Father to acquire a Property over Possession of this kind, tho' it be very Equitable, that he take not only the Care, but the Profits of them, as Helps towards maintaining the Child, till arriv'd at proper Years of Inheritance. And hence too, we may discover the just and solid Grounds of those Distinctions, in the Roman Law, between the *Peculium Profectitium*, *Adventitium* and *Castrense* of Children; the Stock or Wealth they get, by labouring under their Parents, by the Bounty of others, and by the Military Pay (1).

IX. Another Enquiry that may be rais'd on this Subject is, Whether the Paternal Power and Duty can be made over by the Father to a Substitute? On which Point we are to know, that altho' the Father's Authority and Obligation took their Occasion and Rise from a Personal Act, which is incapable of being transferr'd (a), yet this doth not hinder him from recommending his Office to a Deputy, the Advantage or Necessity of the Child so requiring. But then he would do well to keep *Plutarch's* Advice always in mind: *Those Parents* (says that wise Author,) *do justly deserve Censure, who having committed their Sons to the Care of Masters and Instructors, never trouble themselves to make Trial of their Proficiency. This is a very scandalous Mistake in Education. They ought, at proper Distances of Time, to enquire into the Boy's Parts and Improvement, and not to place all their Hopes in the Faith of a mercenary Teacher. Besides, the Master himself will, by this means, be engaged to use more Diligence and Application, when he finds that so frequent a Judgment will be pass'd on his Pains.*

Farther, it is not, in the least, repugnant to the Law of Nature, for a Father to resign his Child to be Adopted by some other honest Person, when 'tis likely to prove to the Child's Advantage (b). But that he should pawn, or sell his Child, Nature seems not to allow, in any Case; except when he cannot otherwise feed and support him. For then, he ought rather to sell him into some easy Servitude, whence there is Hope of being releas'd, than to let him perish with Hunger. *Ælian* (c) hath recorded a memorable Constitution of the *Thebans* to this Purpose: *No Man, under Pain of Death, shall expose an Infant or cast him out into an uninhabited Place. But if the Father be reduced to extreme Poverty, the Law directs*

*him to carry the Child, immediately after the Birth, to the Magistrate, who upon receiving an easy Price shall deliver it, whether Male or Female, to another Person, taking Security of the Buyer that he shall honestly breed up the Infant, and for his Pains shall take its Service when grown to Man or Womans Estate.* The Defence of which Law is grounded on this Rule, that Nature is suppos'd to give us a Right to every thing, which appears absolutely necessary to our fulfilling her Commands. In the same manner the Emperour *Constantine* (d) permits a Father, in the Case of extreme Want (2), to sell his Son or Daughter, so soon as they come into the World, lest they should otherwise starve: yet ordering, at the same time, that whoever would repay their Price to the first Buyer, should have the Power of redeeming them into Freedom (e). And when, in an Edict of *Theodorick*, and a Law of the *Wiso-Goths*, we find a Prohibition against *Selling Children for the sake of Food* (3); it is meant of Food for the Occasions of the Parents, not for the Necessary Sustainance of the Children. Yet *Romulus* granted Parents a very unreasonable Privilege, when, as *Dionysius Halicarnassens* (f) informs us, *He allow'd a Father to make Money, by selling his Son Three times; thus giving him more Authority over his Son, than over his Slave. For a Slave once sold, and then obtaining Liberty, is ever after at his own Command and Disposal. But a Son, tho' twice sold, and twice recovering his Freedom, return'd under his Father's Dominion, and was not exempted from it till he had pass'd the third Sale.* *Numa*, in some measure, softned the Rigour of this Law, by excepting from Sale those Sons who had contracted Marriage, provided they had done it by their Father's Orders, or with his Consent. The *Decemviri* durst not quite take it away, but left it to wear off by gradual Disuse, till it was at length expressly revers'd in the Code. Yet the old Custom was still kept up of selling a Son three times, tho' only in way of Fiction and Formality, at the Ceremony of giving him his Freedom. Tho' this too was afterwards taken off by *Justinian* (g). It appears from *Plutarch* (h), that amongst the *Athenians*, at least before *Solon's* time, a Father was allow'd to sell his Son for the Payment of his own Debts (i). And we are lately told of the *Muscovites*, that a Father makes this Advantage four Times, after which the Son is releas'd from his Authority (k). The *Chinese* make a frequent Practice of selling those Children, whom they think they

(1) See Mr. Barbeyrac's Second Note upon this Section. (a) *Liban. Declam. 20. p. 523. Edit. Morell. No Law can recall the Act of a Father, and cause him not to have begotten.* (b) *Add. Gell. lib. 5. cap. 19. Euripides, (Ion.) v. 1535, 1536.*

If that Friend want a Fortune, 'tis but fair  
He give his Son to this who wants an Heir.

(c) *V. H. l. 2. c. 7.* (d) *V. C. l. 4. t. 2. Si quis propter nimiam paupertatem, &c.* (2) *V. Grot. l. 2. c. 5. f. 5.*  
(e) *Cap. 94, 95. in Edict. Theodoric. & leg. Wisigoth. l. 5. t. 4. c. 12.* (3) *V. C. l. 4. t. 2.* (f) *L. 2.*  
(g) *L. 8. t. 48. l. ult. C. de Adoption.* (h) *In vit. Solon.* (i) *Comp. Matth. XVIII. 25. 2 Kings IV. 1.*  
*Philostratus, in vit. Apoll. Thyan. l. 8. c. 3. p. 401. Ed. Morell. reports of the Phrygians, That 'twas an ordinary thing with them to sell their own Sons; and not to regard them, if they happened to be led Captives into Slavery. Add. Plutar. Lucull.*  
(k) *Sigism Baro in Herberstein. Add. Olear. Itin. Persic. l. 3. c. 6.*

shall not be able to maintain; but with this good Condition; that any of them shall have the Privilege of buying themselves into Freedom, at the same Rate at which they were first fold.

X. (1) In order to our understanding what Power the Father hath over the Son, during the second Period, in our Division of Age, we must remind our selves of what was before slightly hinted, that Fathers are invested with another kind of Sovereignty, as they are the Heads of their respective Families. Now this Authority is different, according as the Persons live either within, or without the Limits of a Common-wealth. Separate Families, as they very much resemble States and Kingdoms, so they are govern'd by their Heads, in a way bearing some Proportion to Regal Power. For we are not willing to give them absolutely the name of *Civitates*, as Mr. *Hobbes* hath done (2); because Families and publick States are instituted on different Ends and Designs, and consequently many Parts of Civil Sovereignty are excluded from this private Dominion (3). And indeed Mr. *Hobbes* himself elsewhere confesseth (4), that *A Family is not properly a Commonwealth, unless it be of that Power, by its own Number or other Opportunities, as not to be subdued without the Hazard of War.* Yet Family-Rule in this separate Condition, so nearly approacheth to the Legislative Authority, as to have the Power of Life and Death in Criminal Cases, as likewise the Management of Arms, and the Care of Leagues and Alliances. This Dominion of the Father over the Children, now grown up, is establish'd by tacit Compact; the Father extending his Commands beyond the Affair of Education, and the Children freely putting themselves into a State of farther Obedience. For the Laws of Equity and Gratitude direct, that a Son should yield his Strength and Service chiefly to Him, to whom he owes all that he now is or enjoys; till such time as, with his Father's Consent, he be releas'd from the Subjection.

XI. But after the erecting of Common-wealths, of these Rights which before belong'd to Fathers of Families, some were contracted, others quite taken away. Yet so much Authority was almost in all places allow'd, as appear'd sufficient for Educating the Children: except that even this was much retrench'd under *Plato's* National Government; and in the *Persian* Constitution, if we admit *Xenophon*

for a true Historian (5). In many Nations the Privileges of Family-Rule were little impair'd. Thus at *Rome* the Fathers had the Power of Life and Death over their Children, which they exercis'd in a kind of Judiciary manner, calling a Council of their Relations and Friends, and causing Sentence to be executed according to their Determination (a). *Justinian* (b) calls this Right *Proprium Civium Romanorum, Particular to the Roman Citizens*, and not pretended to by other Men; for which Position *Bodinus* (c) hath fallen heavily upon him; alledging that the *Persians* and ancient *Gauls* (d) made use of the same: and that, the Abrogation of it in the *Roman* State was the Cause of many Troubles and Mischiefs. *Connanus* (e) is of the same Judgment; and *Dionysius Halicarnasseus* (f) is produced as an able Patron of the Custom. Some, on the other hand, engage chiefly in the Defence of the Emperour's words, confidently affirming, that no other Nations allowed the Fathers so extended a Power over their Children as the *Romans*; amongst whom it had indeed no Measure or Restraint. And in this Sense they interpret the Discourse of *Dionysius*, which was before alledged on the other side. Others say the Emperour's Meaning was this, that the Paternal Power in *Rome* was attended with certain Attributes and Properties, which it had not in other Parts of the World: as for Instance, if a *Roman* suffer'd either the *Minima capitis Diminutio*, or the *Deportatio*, The lowest Degree of forfeiting Liberty, or the being transported, he lost his Fatherly Rule; whereas it was never the Custom to deprive a Man, by those Punishments, of any Privilege he possess'd by the Law of Nature and of Nations. And they farther argue, that since all *Just Matrimony* is founded on Civil Constitutions; this Power of the Father being the Consequent of that Union, must derive its Force from the same Principle (g). But perhaps the easiess way of clearing that Passage in *Justinian*, is to keep to the Terms of *Civium Romanorum*, and to expound them strictly, in Opposition to all other Persons who were not *free Subjects*, and who had not the same Authority over their Children.

Those Founders of Common-wealths, who left the Fathers in Possession of their old Natural Rights in so wide an extent, seem to have proceeded on these Considerations: that the Respect, paid by the Children, might be thus

(1) The Three following Paragraphs are otherwise plac'd in the Original, This is the Eleventh, the Next the Twelfth, and the Third the Tenth. Our Author without any Reason, as appears from his Abridgment, *De Officio Hom. & Civ.* speaks of the Third Age of Children before he treats of the Second. (2) *De Civ. c. 5. f. 12.*

(3) See Mr. *Barbeyrac's* Second Note upon this Section. (4) *Leviath. c. 20.* (5) *De Educat. Cyri, l. 1.*

(a) *Vid. Val. Max. l. 5. c. 8. f. 2, 3, 5. Senec. de Clement. l. 1. c. 15.* 'Tis a Saying of *Turnus* in *Livy*, l. 1. c. 50. That there can be no shorter way of deciding a Point, than between the Father and the Son; because, if the latter oppose or disobey the former, he is to expect the Plagues of Divine Vengeance. (b) *Instit. L. 1. c. 9. f. 2. De Patria Potestate*

(c) *De Repub. l. 1. c. 4.* (d) So *Cæsar* *Comm. de B. G. l. 6. c. 19.* And some Footsteps of that ancient Custom remain'd till the Year of *Christ* 1301. amongst the People of *Bourdeaux*, by whose Laws, Fathers and Husbands had supreme Power of Life and Death over their Children and over their Wives: And if a Husband happened to kill his Wife in any Violence of Anger or Grief, upon declaring his Repentance by a solemn Oath, he was discharg'd without Punishment. (e) *Comment. Jur. Civil. l. 2. c. 13.* (f) *L. 2. p. 96, 97. Ed. Lips.* (g) This is the Judgment of *Mæstertius de Justitia Rom. LL. c. 27.*

rais'd to the highest Degree of Awe and Veneration; that the Fathers were the most likely Persons to know their Children's Faults, keeping them generally under their Eye; and, that at the same time, their Natural Affection would probably restrain them from abusing this Power to unjust Violence; the Exercise of it falling on an Age which requires Clemency rather than Cruelty. Thus *Phineus* observes in *Diodorus Siculus* (a), *No Father will ever shew an Example of very severe Punishment on his Son, unless his Natural Tenderness be overcome by the Greatness of the Crime.* And *Sopater* speaking of the same unlimited Authority, *The Law*, says he, *thus order'd, well knowing how upright a Judge a Father must needs prove over his Children* (b).

On the other side, those Legislators who took off this Rigour of Paternal Sovereignty, probably did not want their Due Motives. They might have observ'd some Fathers making a very ill Use of their Power, when transported by the Extravagance of Passion beyond all Nature and Justice (c). Again, they thought this Privilege altogether needless, since the Magistrates were sufficient for the Punishment of Capital Offenders. They might likewise esteem it a great Hardship, that a Father should be compell'd, in Contradiction to his own Wishes and Affection, to pronounce Sentence of Death on his Son, tho' justly convicted (d).

By the *Jewish Law* (1), it was one part of the Father's Power to cancel and make void the Vows of his Son, or of his Daughter. The reason of which Constitution, was not only for fear the Children, in their imprudent Age, should ruine their own Fortunes by rash Donations, moved by a false Appearance of inconsiderate Piety: but likewise lest they should imbezel their Father's Goods on the same Score, or hinder themselves from doing him the Service they ought. So that the restraining Authority, in this particular, did not arise purely from the positive Ordinance, but had a Foundation in Natural Reason; it being a known Principle, that no Person, under the Subjection of another, can, with any Force or Effect, dispose of those things with regard to which, he is under Government. As for that Law in *Deut. XXI. 18, &c.* (2) about stoning the rebellious Son, which in it self appears so rigid, Care was taken to soften it, as far as possible, in the Interpretation. Thus they held

that it did not extend at all to the other Sex; and that the Males, in two Periods of their Age, stood excused from its Force; when they were not arrived to the Maturity of Reason, and when they had left their Father's Family, and set up for Directors of their own Affairs. And then, the Words of the Accusation running, *This our Son is rebellious, he is a Glutton or a Drunkard*, there was a great difference of Opinion how much the Young Man must have wasted in these Excesses, before he could be proceeded against in this severe Method. They farther observ'd it to be requisite, that both the Parents, at the time of the Charge, should be alive; otherwise, the Son might have had some Fortune left him, sufficient to make Compensation for the Expence of his Vices (e).

Amongst the present *Japonesse*, the Father hath the most absolute Power of Life and Death over his Children.

From these and other Considerations it appears, how we are to understand that Rule laid down by *Grotius* (3): *In the second Period, says he, when the Children's Judgment is ripe and perfect, those Actions only of theirs are subject to the Command of the Parents, which immediately contribute to the well ordering of the Father's or Mother's Family: it being but equitable that every Part should conform in promoting the Benefit of the Whole. In other respects, the Children have a Moral Liberty of doing whatever their own Judgment recommends; yet so that they are still bound to take all possible Care to please their Parents; tho' should they take contrary Measures, the Force of this Duty will not reach so far as to render their Actions invalid.* These words, then, are to be restrain'd to the Power of *Fathers of Families*, as now establish'd in most *Christian States*: where the chief Business of it is taken up in Matters relating to Education. And 'tis indeed but just, that if the Children desire to be supported at present by their Father's Wealth, and to succeed to it hereafter, they should freely obey his Pleasure, while enjoining nothing absurd or indecent. If, without sufficient Cause, they refuse thus to comply, it cannot be expected but that the Parents should withdraw all farther Care and Expence on their account, and declare them *Disinherited*. Yet here too, it hath been the Care of Civil Laws to provide that Parents shall not inhumanly discard their Children, upon every Fit of Humour and Passion, without solid Rea-

(a) L. 4. c. 45. p. 247. Ed. Rhod. (b) *Add. Ælian. V. H. l. 1. c. 47.* (c) *Liban. Declam. 33. p. 762. Ed. Morell.* Do not imagine that the Bond of Nature hath, of it self, sufficient Force and Strength: indeed for the most part it holds firm and good; but any more violent Disorder of Mind is able to break it asunder; and a Father transported with Passion, lays aside that Name and Relation, and acts quite another Part. (d) *Add. Ælian. V. H. l. 1. c. 34. Val. Max. l. 5. c. 9. l. 4. Add. Charron de la Sagesse, l. 1. c. 43, 47. Libanius Declam. 35.* To do any thing against one's Children is the same as to undergo it one's self. The Sentence which the Men on this side bring from L. 48. t. 9. l. 5. D. ad. L. Pompeiani de Parricid. The Power of a Father consists in Affection not in Rigour, contributes nothing to their Purpose. For *Adrian* had then banish'd a Father for killing his Son as they were Hunting, on account of Adultery with his Mother-in-Law. And the Father is there justly censur'd for taking off the Offender in a villainous and treacherous Manner, when he might have call'd a Council of Friends, and sentenc'd him to Capital Punishment by Vertue of his Domestical Jurisdiction. Or it is enough to say, as to that Passage, that it is an Emblem of the good *Trebonianus's* merciful Temper, who was the Author of it. (1) See Numb. XXX. 4, &c. with *Grotius* and *Le Clerc's* Notes thereon. (2) See Mr. *Le Clerc* upon the place. (3) L. 2. c. 5. l. 3.

son. Thus *Plato* (a) allows not a Father to cast off his Son without the Consent of the other Relations (b). And, in general, as it belongs to the Wisdom of publick Governments to settle the Rights of private Persons, in Subordination to the common Benefit and Honour; so it hath been usual, with most Legislators, to prevent all Abuses of this Power, whether tending to the publick Damage, or to the unjust Oppression of the Children. For Instance, a Father is oblig'd, as far as his Abilities will reach, to render his Children useful Members of Civil Society (c): And since there is such a Variety of Callings, so many different ways of Living, it is very reasonable that the Children, in chusing their Profession, should be sway'd by their Father's Judgment and Authority, provided he propose nothing contrary to Honesty and Decorum; especially in case he supply them with Money for carrying on of such Designs. Yet it would be, at the same time, a Breach of Wisdom and of Justice, to compel Children to a Method of Life, to which their Genius is utterly averse; and a horrid Villany, to drive them on such a Profession as is either base and sinful, as the waiting on the Stews; or intolerable to the common Temper of Mankind; as Celibacy without the Gift of Continnence, and the Confinement of a Monastick Vow.

XII. In the third Period of Age, when the Children have left their Father's Family, and are releas'd from his Command, they are perfectly at their own Disposal, yet still retaining the Debt of Reverence and Duty, which is of perpetual Obligation, arising from those antecedent Merits of their Parents, which can never be cancell'd or repaid. *Plato* (d) is admirable on this Argument. *Justice requires*, says he, *that we endeavour to satisfy our greatest and oldest Debt, our Debt to our Parents. Every one ought to be fix'd in this Perswasion, that whatever he possesseth belongs to those from whom he receiv'd his Birth and Education, and ought, so far as is necessary, to be spent in their Service. To them therefore he is freely to afford his Goods of Fortune, of Body, and of Mind; as if he had only borrowed them from their Kindness, and was now to restore them in their Age, when they had the greatest Occasion for them; gratefully remembering the Cares and Pains they long since underwent on his account. Nor ought we to express our Reverence to our Parents*

*in Actions only, but in all our Words and Conversation. We are obliged to yield to their Passions, and to the common Effects of them; ever considering what just Reason a Parent hath to resent the least Injury or Disrespect from a Child* (e). He proceeds with the same Wisdom, in advising what Honours and Services should be paid to Parents after their Decease; that we ought to grace their Reliques with a Decent Monument, and to pursue all Methods and all Occasions of making their Memory Sacred. The *Chinese* are remarkable in this point of Duty; a Person engag'd in the greatest Affairs of the Court, upon the Loss of a Parent leaves his Office, if not Military, and retires Home to spend three Years in Privacy and Mourning. The reason of their fixing this Period of Grief, was, because the first three Years of our Life, we give our Parents the greatest Trouble (f). Amongst the same People the Son ever makes use of a lower Seat than his Father, and placeth himself at his side, not over against him. And indeed, that Children can never requite the Kindness of their Parents is a Truth in every Body's Mouth (g). Tho' *Seneca* (h) hath, for Opposition's sake, endeavour'd, in a long Dispute, to prove that a Son may sometimes even outdo a Father in Benefits: And *Alexander*, provoked once with some Complaints against his Mother, could not forbear saying, that *She made him pay very dear for his nine Months Lodgings* (i). But how vast soever the Merits of our Parents be acknowledg'd, this is certain, that it will not bear them out in imposing an unlawful Command; and therefore it was a brave Reply of the same Prince to the same Mother, urging him to put an innocent Person to Death, and reminding him of the Pains she had undergone for his Sake, *My good Mother, says he, demand some other Reward for your Trouble; the Life of a Man is too precious to admit of any Equivalent* (k). *Mr. Hobbes* (l) is of Opinion, that this Debt of Filial Reverence ariseth not only from the Law of Gratitude, but likewise from the Force of a *Tacit Compact*; it not being presumed, that he who releaseth another from his Rule and Dominion, intends so far to make him his Equal, as not to reckon it to him as a Favour: But a Person, thus dismiss'd from Subjection, is ever suppos'd to promise, that he will constantly pay his Benefactor all those external Marks, at least of Honour and Esteem, which

(a) *De LL. l. 11. p. 973.* (b) *Add. Quintil. Declam. 9. Senec. Contr. 1. 9.* (c) And therefore it was one of *Solon's* Laws, that a Child should not be bound to maintain a Father, who had bred him up to no Art or Profession, *Plutarch* in *Solon*. (d) *De LL. l. 4. p. 832, 833. Ed. Wech.* (e) *Vid. de LL. XI. p. 975. Arrian Epictet. l. 2. c. 10. Remember you are a Son; and that it belongs to Your Duty to think your Father's Good, in all respects, Your own: to yield Obedience to all his Commands; never to defame him to others; nor to do or say any thing that may turn to his Prejudice or Inconvenience; to yield and give place to him on all Occasions, and to assist him with Your utmost Power. Oppian. Halieut. l. 5. v. 89.*

Πατέρι δὲ ἰσχυροτέρῳ πάλιν ἰσχυρὸν υἱόν.

Sons are new Strength to a decaying Sire.

(f) *Neuhof. in Legat. More Signs of their Mourning may be found in Martinus's Hist. Sim. l. 1. in Imp. 8.* (g) *Aristot. Ethic. ad Nicom. VIII. 16. No Person can fully return the Benefits of his Parents; but he who serves and respects them to his utmost Ability, may be pronounced Honest and Just. Vid. Xenoph. Apomn. l. 2. p. 431, 432. Ed. Steph. Stobæ. Serm. 77. (h) De Beneficiis, l. 3. c. 29, 30, &c. (i) *Arrian. de reb. gest. Alex. l. 7. (k) Amm. Marcellin. l. 14. c. 10. Add. Gell. l. 2. c. 7. (l) De Civæ, c. 9. f. 8.**

Superiors are wont to receive from their Inferiors.

Yet it was, no doubt, a Strain of Superstition in the Jews, when they would not allow a Son to let his Father Blood, to open a Sore for him, or to draw a Thorn out of his Flesh (a).

Amongst those who live in a Commonwealth, it may happen, that upon account of some Office or Dignity born by the Son, the Father shall be oblig'd to do him Reverence, yet not so as to quit his Prerogative of private Respect (1). Thus *Fabius Maximus* commended the Action of his Son the Consul, who, as *Fabius* came riding towards him at a publick Meeting, ordered him to alight and make his Approaches to him on Foot (b).

Whether this perpetual Duty and Obligation of Children, remaining after their Father's Power is expired, arise from the Act of Generation or from the faithful Care and Labour of Breeding them up, is a Controversy that hath divided learned Men. Those who contend for the former, are wont to tell us, that the Kindness of giving Life is not only, in its self, the greatest good that can be bestow'd, but is likewise the Occasion of all others; and that, by this Action of conferring a Being, the Parents do, in some measure, resemble the Almighty Creator. Some, again, give their Judgment in favour of Education; as that which properly makes a Man deserve his name, and which is not perform'd without a long and difficult Course of Application and Expence. They illustrate their Opinion by this Observation in Nature, that amongst Brute Creatures the Male is not discover'd to have the least Regard for the Young which he begets, and the Dam's Tenderness ceaseth with her Care, when they are able to provide for themselves: whereas the Affection between human Parents and Children is perpetual: which must needs be a Token that the great Dearness on the one side, and the Obligation to Duty on the other, do not chiefly result from that Act of the Parents which they exercise in common with Beasts, but from their peculiar Diligence in forming and managing their Off-spring, in order to a Life of Decency and Society. *Aristotle* is cited in Defence of the former Notion, *A Father*, says he (c), *is the Cause of the Son's Existence, (which seems the greatest of Benefits,) and of his Nature and Institution.* And again (d), *Men stand engaged in the highest Degrees of Friendship and Piety towards the Gods, and towards their Parents. For, from these they re-*

*ceiv'd, the noblest of all imaginable Goods, their Being and Education.* On the latter of which Passages we may remark, that altho' the conferring of Life be first named, yet it is not expressly compared with the other Benefit. *Philo Judæus* (e) is produc'd on the same side; it is a Saying of his, *We can never return our Parents equal Favours; since we can't repay, in the same manner, their Kindness of first bringing us into the World.* And thus too, the Father in the Declamation (f); *We first produced You out of our own Life and Substance, and opened to Your Prospect this Vast Scene of Divine and Human things. We made You capable of seeing and of enjoying the Sea, the Earth, the unwearied Course of the Stars, the Heavens with all their sacred and shining Glories.*

Yet we cannot but deliver it as our Persuasion, that the Benefit of Educating is a much stronger Ground and Spring of Filial Obligation, than the other of Begetting. *Plato* (g) seems to countenance this Opinion, *Parents, says he, ought either not to have brought their Children into the World, or not to refuse any Pains in training and instructing them.* In another place (h), he introduceth *Demodocus* thus speaking of his Son; *The Act (of planting shall I call it, or) of begetting my Son, was the easiest imaginable; but the breeding him up was a Task of Difficulty and Trouble; ever filling me with Fears on his account.* And *Socrates*, in the same Dialogue, declares it as his Judgment, *I know not any Business in which a prudent Man ought to show more Caution and Diligence, than in forming his Son's Mind to Goodness and Virtue* (i). So the Father pleads in *Quintilian* (k), *I do not now, says he to his Son, set to Your Score those vulgar Favours of lending You Life, and Light, and Liberty; but whatever Bravery You have shew'd, whatever gallant Action You have perform'd, this I charge upon You as my Merit; 'tis my Strength with which you have conquer'd. That Soul of Yours, so unshaken, so undaunted under the greatest Dangers, had its Rise and Original from mine. It hath been my long Employment to render You a Man of Abilities and Courage; in your early Tears by my Precepts, and since, by my Example* (l). It is not indeed easy to imagine or allow, that a Parent hath conferr'd any considerable Benefit on his Child, should he cast him away when he first comes into the World (2); or afterwards, entirely neglecting his Culture and Education, should let him grow up like a Beast, to lead a Life useless to others, and shameful to himself (m).

(a) *Constant. L'Empereur in Babakama, c. 8. f. 3. Add. Selden. de J. N. & G. l. 7. c. 2. (1) Nam, quod ad jus publicum attinet, non sequitur [Pater] jus potestatis. V. D. L. 36. t. 1. Ad Senatus Consultum Trebell. l. 4. princip.*

(b) *Plutarch. Fab. & in Apothegm. Valer. Max. l. 2. c. 2. f. 4. Add. Bœcler in Grot. l. 2. c. 5. f. 6.*

(c) *Ethic. VIII. 13. (d) Ibid. c. 14. (e) Allegor. l. 1. p. 58. in fin. & l. 2. p. 62. D. Ed. Paris. (f) Quintil. V.*

(g) *In Crito. p. 34. B. (h) Theag. init. (i) Euripid. Hecub. Good Institution is the Spring of Virtue.*

(k) *Declam. 258. (1) Add. Declam. 278. & Phædr. Fab. l. 3. fab. 5. (2) Vid. Senec. de Benef. l. 3. c. 31.*

(m) *Si res nullæ minoris constat patri, quam filius; If his Son stands him in the least Charge of any thing he possesseth. By the Law of Solon in Plutarch, Children lawfully born were not obliged to maintain their Parents. The Reason of which Exception was grounded on this Consideration, that who forsakes the honest way of Marriage, plainly shews that he seeks a new Partner, not on the account of Issue, but of Pleasure; and therefore his Vice is his Reward; and he can by no means complain of any Ingratitude in such Children, because he hath Injured and disgraced them by making their very Nativity a Reproach. Add. Vitruv. l. 6. Prefas*

Juvenal's (1) Reasoning is very Just and True,

*Gratum est quod patriæ civem, populoque dedisti,  
Si facis, ut patriæ sit idoneus, utilis agris,  
Utilis & bellorum & pacis rebus agendis.  
Plurimum enim intererit, quibus artibus & qui-  
Moribus instituas.—— (bus hunc tu*

The State and People will your Zeal commend,  
In giving that a Man, and these a Friend;  
If fit to aid the publick Good: if Skill'd  
In Rural Labours, or the Martial Field,  
Or grave Debates of Peace. Th' important Stake,  
Now waits your Care, what early steps you take;  
What Scheme of Arts or Manners is design'd,  
To fix his Pains, or cultivate his Mind.

Aristotle himself, (who was cited to countenance the other side of the Question) hath left this Saying on Record (a), that Parents, who take Care to see their Children duly inform'd and instructed, deserve much higher Honours, than those who barely lend them a Being: the latter make them capable of Living, the former of living honestly and happily.

Nor doth that Consequence, on which the other Opinion is built, seem to hold; Life is the greatest Good; therefore the Act of the Parent in giving that, is the most fit and proper to raise an Obligation in the Child. For before I can charge any Action of mine on Another, as a considerable piece of Merit, it is necessary that I know to what Person I do the Kindness, and whether it will certainly reach him. Again, it will be convenient for me to reflect and consider, whether I really intended the thing as a Favour; how much it stood me in; whether I undertook it more for the sake of doing Good to the other Party than for my own Pleasure or Use; whether I was engaged in the Performance, upon Reason and Deliberation, or was drawn to it by the Force of Passion, or Allurements of Sense: Lastly, whether the Action be capable of benefiting the other Person, without the Addition of some farther Services. Whoever diligently weighs these several Points of Enquiry, will be easily inclin'd to acknowledge, that the Kindness of Educating, is much more proper to found an Obligation, than the vulgar Office of Begetting.

Yet we do by no means approve of all that Seneca hath urged on this Head, in his Discourse of Benefits (b). For he is not to be born with, when he calls the Life of a Man, whom GOD hath endued with an Immortal Soul, a Thing common to us with the wild Beasts, with the smallest, and with some of the foulest of

Creatures; and, the Happiness of Flies and of Worms. But some Parts of his Argument may be admitted without Censure. Look, says he, upon my Nativity, as it appears barely in it self, and You will find it to be a short and uncertain Favour, a Subject lying equally open to Good and Evil. No doubt it was my first Step to all the Benefits I enjoy, but it was not therefore the greatest, because the first; nor, because the greatest without it could never have been. And again, Barely to live is the least Degree towards living well. I would thus talk with my Father: Suppose, as You first gave me my Life, so I had saved Yours: in this I should certainly exceed Your Kindness, for I conferr'd my Favour when You was sensible from whom you receiv'd it, and I to whom I did it: and, then, I did not consult my own Pleasure, at least not my Pleasure alone, in the Performance. Would You conceive how small a Boon You bestow'd on me in my Birth? Fancy Your self to have immediately cast me out to perish naked and helpless; in this Case Your Act of Begetting me had been a manifest Injury. From all which I infer, that the Acquaintance of my Father and Mother, had proved but a slender Kindness to me, had it not been follow'd with other good Offices which ratified and confirm'd it (c).

XIII. Lastly, As the Father ought not, without weighty Reasons, to expel the Children his House; so they, on the other hand, shall not, according to the regular Course, pass into another Family without his good Leave. Yet in case they have just Grounds for their Departure, and yet cannot prevail on their Father's Perverseness to give Consent, I should be of Opinion, that their Duty doth not hinder them from removing, so as to concert their own Affairs, contrary to his Humour; especially when they freely resign all future Dependence on him, for their Fortune and Inheritance. For as Civil Constitutions do wisely countenance and strengthen the Authority of Parents, so they are not wont to encourage impertinent Obstinacy and Moroseness. Nor doth it seem to be in the Power of those who are Heads of Separate Families, to retain their Children, when they have reasonable Occasion to remove: inasmuch as, in regular Commonwealths, it is not usual to deny a Free-Subject the Liberty of transplanting himself, when tied to Residence by no particular Obligation.

XIV. To the same Head belongs that common Question, Whether Children may dispose of themselves in Marriage against the Consent of their Parents (2)? For the Solution of which we ought carefully and distinctly to consider what is incumbent on Children, by Vertue of

(1) Sat. 14. v. 70, &c. Vid. etiam Sat. 7. v. 184, &c. (a) In Diog. Laert. It is worth observing in Martinius, Hist. Sin. l. 4. c. 2. what mighty Respect and Veneration the Chinese pay to their Masters; who, as Juvenal says, ought to be Parentis loco, to be honour'd and obey'd like second Parents. The same Historian, l. 6. c. 1. reports, that the Son, in China, never riseth to a higher Degree of Honour than what hath been formerly born by the Father; And if, for his signal Services to the State, he be advanced farther, the Dignity, with which he is to be invested, is first to be prefer'd, by a kind of Posthumous Promotion, on his deceas'd Father: That People esteeming Duty and Reverence to Parents, the first and chiefest of Vertues. (b) L. 3. c. 30, &c. (c) A little after he styles Generation a Vulgar Benefit; the Office of a Father, Easy, slight, and of little value; regarding any thing else rather than the future Person to be produced. (2) V. Gros. l. 2. c. 5. l. 10.

their Natural *Duty*; and what on account of the Obedience which attends their State of Subjection: and again, what Rights belong to Father's strictly, as such; what as they are the Heads of Families. *Paternal Power, as such*, we have already observ'd to be just so great as is sufficient to the Government of the Children, till able to be their own Managers. This therefore doth not seem to extend it self so far as to the reverſing of a Matrimonial Contract: an Affair ſuppos'd to be carried on by Persons of mature Age and Reason. Indeed the Duty of Filial Piety and Reverence requires, not only that the Children apply themselves to their Parents for Advice in these Proceedings, but likewise that they make a Conscience of opposing so awful Directions (a). Yet if they happen to break their Duty, in this Point, it doth not follow that the Act must be null and void. For an Obligation to hear and to respect Another's Advice, doth not presently divest a Man of the Power to govern his own Concerns. *The Liberty of a Son*, as *Quintilian* (b) observes, *if it be at all allowable, is so in the Matrimonial Affair: For who can love by the Eyes, or by the Rules of another?*

But what shall we say of that other Power, which the Fathers hold as they are the Heads of Families? It's true, in many Commonwealths, the Laws have variously restrain'd the Liberty of Marriage. Thus, in some Places, no Person of the Royal Family can Contract, without the King's Approbation; such Matches often proving of very considerable Consequence to the Publick. In *Japan* the Prince chuseth Wives for his Nobles (c). In several Countries Marriage Contracted between a Subject and a Foreigner, between a Noble Person and a Commoner, are declared void. But as in all States and Governments, a Liberty of marrying and of removing is ever suppos'd, except where there is either an express Law to the contrary, or a Custom equivalent to a Law; so in *Separate Families*, where most of the Reasons fail, on which the Civil Constitutions,

(a) *Non equum est pugnare, pater cui tradidit ipse, Ipse pater cum matre, quibus parere necesse est: Virginitas non tota tua est: ex parte parentum est, Tertia pars matri data, pars data tertia patri; Tertia sola tua est: noli pugnare duobus, Qui genero sua jura simul cum dote dederunt.* Catullus.

Thus *Hermione* most dutifully speaks in *Euripides* (*Andromach.*) v. 987, 988.

— My Marriage is my Father's Care,  
His Judgment guides my Choice. —

And *Xenophon* *Cyrop.* L. 8. tells us, that *Cyrus* would by no means engage in Nuptial Affairs without the Consent of his Parents. (b) *Declam.* 257. (c) *Varen. Descript. Japon.* c. 12. *Add. Constit. Sicul.* l. 3. t. 21. (d) *Genes.* XXVI. 34, 35. (e) *Vid. L.* 23. t. 1. l. 12. f. 1. *D. De Sponſal.* (f) *Vid. Leg. Wisigoth.* l. 3. t. 2. c. 8. *Leg. Burgundion,* t. 12. c. 5. (g) *Varen. Descript. Japon.* c. 12. (h) *Garcilasso De la Vega,* l. 6. c. 36. (i) *Vid. L.* 23. s. 2. l. 2. *D. De Ritu Nuptiarum.* & L. 48. t. 5. l. 7. *D. ad L. Jul. De Adulter.* (k) *Add. Eccles. & Ziegler. ad Grot. l. 2. c. 5. f. 10.*

about this Affair, are built; the *Father of the Family* doth not seem to have a Right of prohibiting or of reverſing his Childrens Marriage, when not defective in any thing but his Consent: provided still, that they are willing immediately to leave his House; for it would be unreasonable to bring a Person to live under his Eye whom he professeth to dislike (d). Yet if a Father see his Authority slighted by his Children, without very sufficient Grounds for their Non-compliance (e), he may, as a Punishment of that Neglect, exclude them from all present Benefits and all future Expectations (f).

What Rights those *Fathers of Families*, who live not in a separate Condition, but under some Common-wealth, do in this respect enjoy, must be discover'd by the Customs and Constitutions of different Nations. Amongst the *Japoneſe*, Marriages are entirely directed by the Parents, or, if they are Dead, by the next Relations (g). And in *Peru*, under the ancient Government of the *Incas*, all Matrimony engaged in, without the Parents Approbation, was declared Null, and the Children Illegitimate (h). This, in general, is certain, that as the Laws of a particular Country may pronounce a Contract invalid, either because defective in Form, or because transacted between Persons to whom such particular Agreements are prohibited; they may, in like manner, suspend the Validity of Marriage without the Consent of the Parents; so that if destitute of this necessary Condition, it shall pass in Civil Estimation for Null and Insignificant (i). For the Agreement of the Parties to cohabit like Man and Wife, can no more render Matrimony good, when contrary to Law, than the Bargain of a Minor and the Delivery Consequent upon it, both undertaken without his Guardian's Influence, can effectually and irrevocably pass away his Estate. Tho' Parents are to be Admonish'd, that when the Government allows them so high a Prerogative, they should be very cautious, and very merciful in putting it in Execution (k).

'T would be Rebellion to resist those Arms  
On which Your Parents have bestow'd Your Charms.  
Your Virgin-Jewel is not all Your own,  
A third each Parent claims, a third alone  
Remains to You; forbear with Two to fight,  
Who, in their Portion, give the Son the Right.

### CHAP. III.

#### Of Despotical Power, or the Authority of the Master over his Servant.

AS the Husband and Wife (whence proceeds the common Off-spring) make the principal Parts of a *Family*, so *Servants* come

in for inferior, secondary Members, to bear the Burthen of common Labour and Business. Now these being usually treated in a way of severer

Discipline, give Occasion to the forming of a new Species of Government on their account; different from that which is exercis'd over *Children*, who demand a milder and more indulgent Sway. Yet we are perswaded, that neither this Society, between Master and Servant, can claim the Name of a Common-wealth or *Civil State*, as Mr. *Hobbes* (1) is inclin'd to call it: not only because it generally consists of fewer Persons than are necessary for mutual Preservation, in a Condition of *Natural Liberty*; but likewise because a Master furnisheth himself with Servants, not so much for the Sake of Reciprocal Defence, as that by means of their Labour, he may, in a more ample and more convenient manner discharge his Domestick Affairs.

II. As to the Original of this kind of *Society*, we must, in the first Place, discard that old Opinion, which makes Nature her self to have actually establish'd the Relation of Master and Servant amongst Men. It is true, we discover a strange Variety of Parts and Capacities. To give one Instance for all; we observe some Persons of so quick and piercing Sagacity, as to be able always to apprehend their own Interest and Benefit, and, at the same time, of such Vigilancy as to prosecute their Affairs, by their own free Motion, without the Admonition or Compulsion of others. Some, again, are of so heavy Dispositions, as not to see their own Advantage, any farther than they are guided; being much fitter for the Labours of the Body, than the Employments of the Brain; and farther, so given over to Supineness and Sloth, as unless they are forced and dragg'd to Application, they can manage no Concern with tolerable Care; nor so much as *Save or Spend*, by the Direction of their own Judgment. The latter Kind, are those whom *Aristotle* calls *Slaves by Nature*; not that Nature by her own immediate Act, sets them in such a Condition of Bondage, without any Human Deed or Covenant intervening; but because by forming them with so much Disadvantage in their Frame, she hath rendred it more convenient for them to live under absolute Subjection and Controul, than to undertake the Government of their own Proceedings (2). It was a Saying of *Agessilaus*, that *The Asiaticks were the worst of Free-men, and the best of Slaves*: which *Passienus* turn'd upon the Emperour *Domitian*, when he observ'd, that *There was never a better Servant, and never a worse Master* (a).

III. *Hornius*, in his first Book *De Civitate* (3), jars upon the old String, in contradicting the general Opinion of the Lawyers (4), who derive the Origine of *Servitude* from the *Law of Nations*. He says, 'The Manner only of this Institution is to be referr'd to the Practice of Mankind; a Custom having prevail'd amongst most People, to impose such a Condition upon their Captives in War. But we should always

' distinguish the Cause of the *Society*, from the Cause of the *Sovereignty*; the latter not being deducible from Custom, nor from the Law of Nations, but being establish'd by GOD himself. For since all Victory is from GOD, and by his Providence the Conquerour gets into his Hands the Person of the Enemy, it follows, that the Life of the Captive might immediately be taken away: But since Humanity would scarce have suffer'd, that the Victor should always exercise this Rigour on an unarm'd and suppliant Person, it was thought convenient to forbear Execution, and to retain his Power over the Prisoner, who might thus be of good Use in the Affairs of Life. But indeed, as the Occasion of Men's engaging in War, was ever partly their own Defence, and partly the Vindication of their Rights; so upon their obtaining the Victory, when they thought good to spare the Lives of the Conquer'd, it was at their Pleasure, either to put them in a State of Slavery, or only to keep them in Hold till such time, as by Ransom or Compact they shall be deliver'd. All which Privileges and Proceedings, together with the Authority over Persons thus brought into Subjection, were not immediately appointed by GOD himself, but were approv'd by Him upon Human Institution. Nor is that Assertion true, 'The Victor still retains that Power of Life and Death over the Captive, which he once procur'd; and consequently, his Right is the same, before he receives him into Fealty and Service, and after he governs him as a Part of his Family. For these are quite different things. The conquering Party, may by the Right of War, dispose how he pleaseth of his Prisoner, either kill him or save him; but this was never before term'd the *Power of Life and Death*; which denotes a lawful Authority of inflicting Capital Punishment, in case of an antecedent Crime. Lastly; what the same Author lays down. 'That all Sovereignty, of what kind soever, imports a Power over the Life of the Subject, and therefore we must not seek for Distinctions in the Power it self, but in the Exercise of the Power; and by Consequence, the Authority of the Husband over the Wife, of the Father over the Children, of the Prince over the People, is one and the same with that of the Master over the Servant; except that the ways of Treatment are more kind, and gentle in the former Instances, than in the last: is an Argument, that we can by no means prevail with our selves to allow.

IV. In our Judgment, the Origine of *Servitude* ought thus to be traced out. In the early Ages of the World, when Men began to quit their primitive Plainness and Simplicity, to cultivate the Method of Living, and to enlarge their Fortunes and Possessions, it is very likely the Wiser and Richer Sort, invited those

(1) De Cive, c. 5. f. 1, 2.

(2) V. supra L. 3. c. 2. f. 3.

(a) Tacit. Ann. VI. c. 20.

(3) L. 1. c. 3.

(4) V. Instit. L. 1. t. 3. De Jure Personarum. f. 2, 3, 4.

of less Parts, and less Wealth, to assist them in their Business, for Hire. Afterwards, when both Parties found their Benefit in this way of proceeding, the meaner Tribe were, by Degrees, persuaded to join themselves perpetual Members to the Families of the Greater; under these Conditions, that the latter should engage to supply Food and all conveniencies of Living, and the former should bind themselves to undertake all proper Labours and Employments, as their Patrons should direct. So that the first Rise of Servitude, is owing to the voluntary Consent of the poorer and more helpless Persons, and is founded upon that common Form of Contract, *Do, ut facias; I promise to give You constant Sustenance, upon Condition You assist me with Your constant Work.* What Power Nature allows a Master over Servants, of this kind, may be easily discover'd from the Ends of forming such a Society (1). He may enjoin them what Task he pleaseth, in Proportion to their Strength and Skill (2). He may likewise correct (3) their Sluggishness, by such Methods of Severity as are most likely to prevail on their particular Dispositions; tho' he cannot, on this Score, proceed to Capital Punishments: so that the highest Degree of Penalty he can inflict on their Idleness, is, to expel the lazy Drones from his Family, and leave them to their own Beggarly Condition. Nor doth it appear, that he can transmit them to another Master, without their Consent: they being really in the Capacity of *Perpetual Mercenaries, or Hirelings*, working for the Advantage of Him that employs them, whilst continuing in that State, but not at his Disposal when obliged to leave it. Lastly, If Persons, in this limited Order of Servitude, commit any grievous Offence against the Members of another Family, their Master cannot, even on this account, proceed to take away their Life. Yet least he should engage himself in Quarrels, by defending their Injuries and Crimes, he is allow'd, or rather he is oblig'd to expel them his House; which is a kind of delivering them up to Punishment. But if they prove guilty of any heinous Practice against the Master himself, and his Family, he may then justly kill them: yet not by Vertue of his Sovereignty, but as *Enemies*, by the Right of War (a).

And according to these Measures, the Condition of Servants, and the Power of Masters are, for the most part, described in the Old Testament (b).

V. The Convenience of discharging inferior

Offices and Labours, by the Hands of Others (c), being thus found out: in succeeding times, when Wars grew frequent in the World, it pass'd by Degrees, into a Custom, to indulge Captives with Life and Corporal Liberty, upon Condition that they should yield perpetual Service to the Conquerour (d). Thus *Diodorus Siculus* (e) reports of the ancient *Egyptian King Sesostris*, that he perform'd all his publick Works by the Help of Captives; fixing this Inscription on the Temples which he built, *None of the Natives have here employ'd their Labour.* Now these Slaves of War were, of Course, treated with severer Discipline, being supposed still to retain some Sparks of Hostile Hatred. Besides, an Act of Cruelty was judg'd somewhat excusable, when practis'd upon those who had formerly made an open Attempt on the Life and Fortune of their present Master; and the License in this Point improv'd so far, that it was esteem'd a harmless Matter to kill them, either in Violence of Passion, or upon committing any Offence (f). This Privilege being once introduced, was extended, tho' upon less Pretence, to the Children of the Vassals; and to their Slaves, if they happen'd themselves to be *Inferior Masters*. Yet, in some Common-wealths, it was quite taken off by publick Decrees, and in others very much abridg'd and restrain'd. The primitive Institution therefore, of Servitude, was not founded on War, but on voluntary Consent; tho' the Chance of War supplied Occasion, not only to the increasing the Number of Slaves, but to the rendring their Condition more hard and grievous (g).

VI. Let us see how Mr. *Hobbes* (h) derives the Sovereignty of Masters, and the Subjection of Servants, from his *State of War*. And, first, we must discard that fundamental Error of his, that from the Condition of Nature, which he calls a War of every Man upon every Man, there can result to any Person a Right of invading Another, and of reducing him into Servitude upon gaining the Victory. Yet thus much is Sense; that as, by the Right of War, an Enemy may fairly be kill'd; so the Conquerour may, if he pleaseth, give him his Life, upon his Promise of perpetual Service. In which Contract and Composition, the Good which the Vanquish'd receives, is the Security of his Life, which, by the Right of War, might have been taken away; and the Good which he engages to bring to the Victor, is his Service and Obedience, and those, as far as possible, *Ab-*

(1) Vid. Grot. L. 2. c. 5. f. 30. and Mr. *Barbeyrac's* First Note upon this Section. (2) Vid. Grot. L. 3. c. 14. f. 5. See Mr. *Barbeyrac's* 2d Note upon this Section. (3) Vid. Grot. d. l. f. 4. (a) Yet after another Manner than the Old Germans, who kill'd their Slaves, as *Tacitus* says, *Not out of Discipline and Severity, but pure Heat of Passion.*

(b) Exod. XXI. 21. &c. Levit. XXV. 39, &c. Deuteron. XV. 17, 43, 53, &c. Sirac. XXIII. 25, &c. (c) Hence *Aristotle* (Polit. 3.) calls a Servant, *ἑταῖρος ἢ ἐργάτης.* (d) As to the Original of this Custom, 'tis an Assertion of *Pliny's*, that *The Lacedemonians invented Servitude*; (l. 7. c. 56.) which cannot be admitted, except in one of these two Senses, either that they were the first in Greece who introduced this Practice, or that they made Slaves of their Country-men the Grecians, as well as of the Barbarians, when taken in War. The former Sense is favour'd by that Place of *Herodotus* (*Erato*, towards the End) where speaking of the Island *Lemnos*, its being seiz'd by the *Pelagians*, he adds, *Neither they nor any other of the Grecians had then Slaves.*

(e) L. 1. c. 56. p. 52. Ed. *Rhodom.* Add. *Busbeq. Epist.* 3. p. 120. Christoph. *Richer De Moribus Orient.* p. 101. (f) Add. Grot. l. 3. c. 7. f. 3. (g) Add. *Bœcler. ad Grot. l. 2. c. 5. f. 27.* (h) *Dé Cive, c. 8. f. 1.*

*solute*. For he that obligeth himself to perform the Commands of Another, before he knows the Particulars, is bound, without any Limitation or Exception, to do all that the other Party shall enjoin. Tho' the Law of *Humanity* affords some Relief and Temper to this rigorous Justice (a).

Farther, Mr. *Hobbes* (1) rightly observes, that not every Captive, in War, is thus supposed to covenant with the Conquerour. For some do not obtain an absolute Grant of Life, but a temporary Reprieve to cease at the Conquerour's Pleasure: which was the Case of those whom the *Romans* preserv'd to adorn their Triumphs, and to entertain their Amphitheatres. Nor is so much Trust and Credit given to every Captive, as that his Master should venture to leave him such a Degree of *Natural Liberty* as might enable him, were he so inclined, either to run away, or to refuse working, or to attempt any Mischief or Damage against the Family. Such a One therefore performs Service, not upon account of mutual Faith and Contract, or by Virtue of a *Moral Tye*, but upon meer Force, like Brute Creatures; being kept in Fetters or under close Confinement. The Obligation therefore of a Slave of War, towards his Master, doth not spring from the bare saving his Life, or deferring his Death; but is built on his Exemption from Chains and Imprisonment. By this Act, the Master expresseth so much Confidence in him, as to leave him possess'd of Corporal Liberty; by which means, if no *Moral Bonds* and Engagements had pass'd between them, the State of War would still continue; and the Slave might not only make his Escape, but might fairly slay his Preserver (2). From all which, it is clear, that there's a great Difference between those Slaves who are secured in Prisons, Work-houses, and the like, and those who are tied by Covenant to their Master: the former serving not out of Duty, but to avoid Punishment; and consequently, not acting against the Law of Nature, should they either run off, or assault their Master's Life. For to hold a Person in Chains, or Durance, is a Sign, that we do not think him sufficiently ensured to us by any *Obligation*, or *Moral Restraint*.

Yet that Assertion of Mr. *Hobbes* cannot pass for Truth, that *The Master hath altogether the same Right over the Slave, whom he thus keeps in Bonds, and him whom he holds only by Articles; in as much as his Right over both is supreme*. For that kind of Hostile Privilege which the Victor reserves to himself over his Prisoner, is a different thing from his proper Sovereignty: since, by means of the former, the Captive may, at any time, be deprived of his Life, under Pretence of the State of War, from which he seems to be not yet perfectly exempt-

ed. Whereas the highest Degree of Sovereign Rule or Dominion, doth not directly include a Right over the Life of the Subject, except on a criminal Account.

VII. But altho' *Dominion*, which is properly the Right of governing Another's Person, when establish'd with the free Consent of the Subject, cannot, regularly, be transferr'd without his good liking; Men having usually peculiar reasons why they chuse to submit to this Person rather than to any besides; yet in those kinds of *Dominion* which are grounded upon Force, it hath been ever judg'd allowable for the Sovereign to alienate them by his own sole Will and Act. Yet so long as the Subjects enjoy any Remains of Liberty, we cannot in strictness say, that the Men themselves are thus alienated or made over, but only the Right of governing them, as being join'd with some Use or Advantage. Every Sovereign may indeed, as Mr. *Hobbes* (3) remarks, say of his Subject *hic, meus est, this Man is my Property*; yet 'tis in a quite different Sense that we call a *Thing* our own. For, by the former Expression, I mean no more, than that I and none else have the Right of governing such a Person; yet so as to be my self under some kind of Obligation to him, and not impower'd to exercise that Right upon him, in an unlimited absolute manner. But, on the other side, the Property I claim over a *Thing*, implies a Right of using, spoiling, and consuming it, to procure my Advantage, or to satisfy my Pleasure; so that what way soever I dispose of it, to say it was *my own*, shall be a sufficient Excuse. It must be confess'd, that altho' the Law of *Humanity* doth by no means allow us to extinguish all Marks of primitive Equality in a Slave, who, whatever he may have formerly design'd, is now in a Condition of Peace and Kindness with us, so as to use him in the same manner as a Beast or Inanimate Creature, towards which we cannot stand under any Engagement; yet the barbarous Cruelty of many Nations hath proceeded so far, as to reckon their *Slaves* in the Number of their Goods and Possessions, and to treat them not in a way of Sovereignty, but of arbitrary Violence; calling them *their own* in the same Sense as their Cattle (b). Amongst these People, if a Master perform'd the least Good towards his Vassal, he did it purely for his own sake, lest he should suffer by losing him: and the poor Wretch was *Pitied* only upon account of his Price (c). But all this is not enough to prove what Mr. *Hobbes* affirms, that *Whatsoever the Slave possess'd before his entering on that Condition, doth then fall to his Master*: which can be admitted only in this qualified Sense, *that as much as the Slave was, before his Captivity, able to get by his Work, so much his Master may now claim, and oblige him*

(a) Vid. Grot. l. 3. c. 14.

(1) Ubi Supr. f. 2, 3, 4.

(2) See Lock's Treatise of Civil Government, c. 3. f. 2.

(3) Ubi supra, f. 4.

(b) Thus in *Quintilian* (Declam. 6.) the poor Man, that by the Chance of War had been made a Captive and Slave, had reason to say, *Meipsum perdidit, I have lost my self*. And, in the Roman Law, Runagate Slaves are said *furtum sui facere, to steal away themselves*. L. 47. t. 2. l. 60. D. De Furtis, & L. 6. t. 1. l. 1. C. De Serv. Fugitiv.

(c) *Add. Dio. Chrysof. Orat. 15. De Servitute, p. 241. Ed. Morell.*

to make good. When a Man voluntarily engageth in Servitude, he may, indeed, deliver up his little Possessions, as well as himself into his Master's Power. But there is no constant Necessity of thus proceeding. And as for those Persons, who in ancient times, sold themselves into Slavery, it is probable, that they retain'd not only the Price given, but likewise their former Goods, at least, in the manner of their *Peculium*; so as to have themselves the Propriety and Management of them, tho' their Masters had the chief Advantage; or else, that they surrendred them up to their Children, or Aged Parents, whom before they were obliged to maintain. Tho' indeed, the Jewish Doctors held it unlawful for a Man to sell himself, except under Danger of Starving (a). Amongst the Romans, it was a known Trick with Sharpers, to suffer themselves to be Sold, for the sake of going Sharers in the Price: and for their Punishment they were condemn'd to real Servitude. The Sham was this; Caius, suppose, pretended Seius to be his Slave, and accordingly offer'd him to Sale, tho' indeed a Freeman: Seius, being, upon Bargain, to receive a good part of the Gain, consented to the Proceeding. But the Man being once pass'd off to the Customer, and the Price deliver'd; a third Person was suborn'd to claim Seius in the Court as a Freeman, by preferring an *Action* against the Purchaser; who, (Caius being, in the mean time, slipt out of the way,) was thus doubly gull'd of his Money, and of his Man (b).

If a Man be compell'd to Servitude, by the Right and Course of War, the Goods which are taken with him shall be the Victor's. But those which are not taken with him shall be as if he were naturally Dead: at least till such time as he recovers his Liberty. Thus much is most certain, that what the Slave gets, during his Servitude, he gets for his Master. For to whom any Person fully belongs, to him shall belong whatever that Person can procure or produce. And in this Sense Mr. Hobbes says truly enough, that *The Slave hath nothing which he can retain as his own, in Prejudice to his Master's Title*. Yet what his Master peculiarly assigns or allows him for Management or Use, he may keep and defend, against his Fellow-Servants; as Victuals, Cloaths, Lodgings, Vails, and the like (r).

VIII. When the same Author (2) adds, that *A Slave cannot be injur'd*, the Words are not fit

to be receiv'd without much favourable allowance, large Abatements and Limitations. The Argument which he makes use of, *The Slave having subjected his Will to the Will of his Master, whatever the latter does, is done with the Will of the former, and therefore can be no Injury to him*; only proves thus much, that the Slave ought not to complain, whatever Work is enjoin'd him by his Master, provided it lie within the Compass of his Strength, tho' never so contrary to his Inclination: No more than a Subject can pretend he is unjustly dealt with, when an absolute Prince doth not manage things to his good liking. That this *Subjection of Will* amounts to nothing more, we will elsewhere fully evince. In other Matters, Who will deny but that it is an Injury to a Slave, to set him a Labour above his Ability, to beat him for not performing such an impossible Task, or to deny him necessary Food (c)? The Jews were so Inhuman, as to think themselves not obliged to furnish a *Gentile Slave* with Cloaths, or Vi&uals, tho', at the same time, they exacted from him the hardest Services, with all imaginable Cruelty (d). The reason of this barbarous Rigour might probably be, because they had themselves suffer'd the like Treatment in *Egypt* (e). And as for that Command in *Leviticus XXV. 43.* prohibiting Severity, they confined it to Persons of their own Nation. The Romans in their Customs and Laws, as to the Point of Food, express'd more Kindness (f). It was a noted Saying of *Cato's*, that *To quarrel with Servants about their Bellies, looks scandalously mean* (g). Yet, in other respects, the Roman Masters were remarkably Unmerciful. As in selling their Slaves, when grown Aged and unfit to Work; a Practice which *Plutarch* (h) justly censures, upon this Argument, that *It is Natural for Men to express some kind of Clemency and Beneficence, even to Brute Creatures*, which have undergone Labours for our Advantage (i). On the whole, *Aristotle's* reasoning will ever hold good: *We owe, says he, some Friendship even to a Slave; not as he stands in that Relation, but on the account of his being a Man. Since there is a common Right, which each Person may claim in regard to every other Person, with whom he is capable of partaking in Laws, or Covenants* (k).

As the other Rights of Fathers of Families, hath been moderated and restrain'd by Na-

(a) Vid. Selden. De J. N. & G. Sec. Hebr. l. 6. c. 7. (b) We have an Instance of this Trick in *Plautus*. Perf. Act. IV. Sc. 4. & 9. (1) V. Plin. L. 5. Epist. 16. (2) Ubi Supr. f. 7. (c) Theano (Epist. 3. in Opusc. Mythol. &c. p. 746.) makes it necessary to the just Use of Servants, that They be neither broken by Labour, nor by Want.

(d) Vid. Selden. de J. N. & G. Sec. Hebr. l. VI. c. 8. (e) Exod. V. 13, 14. (f) Vid. L. 1. t. 6. l. 1. f. 2. D. De his qui sui vel alien. Jur. sunt. & L. 7. t. 6. l. 1. f. 3. C. De Latin. Lib. Toll. (g) Plus. in Cat. M. (h) *ibid.* (i) *Plaut.* (Menæchm.) If you are desirous of keeping a Slave securely, You must tie him to You with large Commons. You may easily pin down a Fellow's Nose to a full Table. Juvenal (Sat. 14. v. 125) censures the Miser, that,

*Servorum ventres modio castigat iniquo,*

With scanty Measure shrinks his Servants Guts.

It was a commendable Decree of *Claudius*, which *Sueton* mentions (c. 25.) *When certain Persons had exposed their sickly and crazy Slaves, in the Island of Æsculapius, being weary of providing for their Cure; he ordered all those who had been thus exposed, to be declared free, and not to return to their old Masters, if they happened to recover: at the same time Enacting, that such Persons as chose rather to kill their Slaves, than thus to dispose of them, should be held guilty of Murther.* We meet with the same Account in *Dion. Cassius*, l. 60. (k) *Ethic. ad Nicom. VIII. 13. Add. Oeconom. l. 1. c. 5: Senec. De Ira, l. 3. c. 4. De Clement. l. 1. c. 18. & Epist. 47. Arrian. Epictet. l. 1. c. 13.*

tional Constitutions, so it hath happened to this Authority over their Slaves, which, in different Countries, we find more or less restrain'd. But where it remains absolute and unlimited, we must suppose it not to have been thus appointed by *Civil Ordinances*, but to have been pass'd by, and left as it formerly stood, before the Erection of Common-wealths. Yet it is observable, that the Laws of some States do encourage the Cruelty of Masters, and impose greater Hardships, on the Slaves, than the Law of Nature permits, under the most absolute Command. We have a famous Instance of this, in the *Roman Custom*, of dragging the whole Family to Punishment, when the Master happened to be killed: Which *Cassius* in *Tacitus* (a) endeavours to Defend, by Arguments drawn from Use and Convenience. The Emperour *Adrian*, in some Measure, lessen'd this Severity, by Decreeing, that upon such a Misfortune, not all the Slaves should be arraign'd for Murther, but those only who were so near in the House, as to be able to hear and apprehend the Mischiefe (b).

IX. About the *Offspring of Slaves*, there are two Points of Enquiry, Whether it necessarily follows the Mother? And whether it assumes the same Condition of Servitude? As to the former Question, it is a Rule in the *Roman Laws*, which holds of Slaves as well as of Beasts, that *Partus sequitur ventrem* (1), *The Birth goes along with the Bearer*. This *Grotius* (c) judgeth not to be altogether consonant to the Law of Nature, in case the Father can, by sufficient Tokens be discovered. 'For, says he, since we may observe, even in some Brute Creatures, that the Sire, as well as the Dam, expresseth a Care for the Young; we may hence infer, that both have an equal Interest in their common Issue: and therefore if the Municipal Laws are silent in this Point, the Father's Claim is as good as the Mother's (d). But we do not think this Argument of any Force; having before made out, that the original Right over the Child, is in the Mother; and only transferr'd to the Father, according to the Tenour of the Matrimonial Covenant.

As for the other Difficulty; since, in a Condition of perfect Slavery, not only the Works but the Persons belong to the Master, their Children will likewise fall under his Dominion, as every thing else which they produce. (e). Now why the *Maid's* Master should have a

better Title, in the Case, than the *Man's*, there are several Reasons to be given. As first, considering the Life and Familiarity of Slaves, to point out the true Father, might prove a Matter of Difficulty (f). Again, the Mother is, on account of her *Burthen*, render'd for some time, unfit to perform her usual Work; and consequently brings a Loss and Prejudice to her Master, which ought thus to be repair'd. To which we may add the common Maxim, that *Things planted belong to the Proprietor of the Soil* (2). If the Master himself have Issue by his Female Slave, the Condition of it shall be such, as either his Pleasure, or the Laws of the Country shall determine. And by them likewise Judgment is to be pass'd on a Child, which was Conceived by the Mother, whilst in a State of Servility, but Born after she had obtain'd her Freedom; or *vice versa*. Tho' Humanity ever inclines to the favourable side, and declares for the Child's Liberty (g).

It is easy to shew, that the Master doth no *Injury* to his Slaves Offspring, by dooming it to the same Subjection. For since the Mother hath nothing of her own, 'tis impossible she should maintain the Child, but with her Master's Goods. And in as much as the Master is obliged to furnish such an Infant with Food, and other Necessaries, long before he is capable of making any Requital for his Labour, and since, when he first begins to Work, his Pains are scarce equivalent to his daily Maintenance, he cannot escape *Servitude*, unless by the Master's particular Dispensation. And this Reason will hold, not only whilst he is supposed to continue, as it were, in the Master's Debt, but ever after; because the Condition, on which the Master first undertook to keep him, was, that he should perform perpetual Service: and to this Condition, he is presumed to have yielded a tacit Consent; especially if it be consider'd, that his very Birth is owing to his Master's Favour; who, by the Right of War, might have put his Parents to death. And as for that *Natural Freedom*, with which all Men are in Common invested, it then only takes place, when no Act or Agreement, of our selves or others, hath render'd us obnoxious to a State of Inferiority.

And thus we seem to have clearly stated the Case of Children, born to perfect Slaves, such as were Captives in War, and thence reduced to this Condition. As for those of the other Kind, who engage themselves in Servitude by

(a) *Ann.* XIV. (b) *In* Spartian. *Add.* L. 29. s. 5. *D. De* SCulto Silaniano *Conf.* s. *Sam.* XXVI. i6. The Scythians put out the Eyes of their Slaves, as we are told by *Herodotus* (*Melpom.* in the Beginning.) (1) *V. C. L.* 3. t. 32. l. 7. *De rei vindicat.* Concerning that of Beasts, see above in B. 4. c. 7. f. 4. (c) *L.* 2. c. 5. f. 29.

(d) *Vid.* *Edict. Reg.* Theodoric. c. 67. (e) *Add. Grot ad Exod.* XXI. 4. where he shews, that the Marriages of Slaves were disannull'd at the Pleasure of their Masters. *Xenophon* (*Oeconom.*) laying it down for one Rule, that Servants should not wed without their Master's Consent, gives this Reason for it; because *As those who are Good, do by this means grow more Loving and Faithful, so those who are Bad, improve in Knavery.* (f) *Vid.* *Plaut. Casin.*

(2) See above in B. 4. c. 7. f. 5. *Vid.* *Instit. L.* 1. t. 4. *De Ingeniis.* (g) *Plato* thus disposeth of Servile Issue, (*LL.* l. 11. p. 975. A.) *If a Female Slave bear a Child to another Slave, or to a proper Free-man, or to one that hath been set at Liberty, the Child shall belong to her Master. If a Man Slave have Issue by a Free-woman, it shall likewise fall to his Master. If a Master, or a Mistress, be convicted of having a Child by their proper Slave, the Father and the Child shall, in the former Case, be driven to another Country by the Woman; in the latter Case, the Mother and the Child shall be Banish'd by the Magistrates.*

their own free Motion; if there be no express Law or Covenant to the contrary, Equity and common Favour incline to this Resolution concerning them; that the Food of their future Issue is contain'd, or implied in their own Maintenance, which their Master owes them as a just Debt: and consequently their Children are not involv'd in a Necessity of Slavery (a).

X. Let us, in the next place, examine what Inconveniencies do really attend a State of *Servitude*, which, in the Opinion of most People, passeth for the greatest Misery incident to Mankind, and such, as one ought rather to dye than endure (b). The full Sum and Notion, then, of *Personal Servitude*, amounts to this; that a Man, for the sake of Food, and the other Necessaries of Life, shall lie under an Obligation to perpetual Labour: which if taken in its true Natural Extent, abstracted from the barbarous Cruelty of some Masters, and the unreasonable Rigour of some Laws, doth not imply any extravagant Degree of Hardship and Severity. For that perpetual Obligation is well requited by a perpetual Certainty of Maintenance, for which those, who work by the Hire, are often at a Loss, either through want of Business, or willful Idleness (c). Some have thought, and not altogether without reason, that the Prohibition of Slavery, amongst *Christians*, hath chiefly occasion'd that Flood of thieving Vagrants, and sturdy Beggars, which is usually complain'd of. Tho' there are *States* which have, in a great measure, put a Stop to this Nuisance, by Erecting publick Work-houses, and compelling lazy Rascals to a Life of Honesty and Industry (d).

Mr. *Hobbes*, in his Book *De Cive* (e), stating the Difference between Liberty and Servitude, expresseth himself to this Purpose. 'Liberty is nothing else but the Absence of all Impediments of Motion. Those Impediments may be either *Natural* and External, or *Moral* and Arbitrary. With regard to the former Kind, Things are said to be more or less *Free*, as they have more or less Space to move in; as a Man in a wide Prison, is more at Liberty, than Another under close Confinement. And thus a Person may be *Free* to proceed one way, and not *Free* to proceed another: as when a Traveller is hindred, by Hedges and Mounds, from diverting out of the Road, into the Corn-fields or Vineyards. This Species of Liberty may be term'd *Physical*, or *Corporal*; in which Sense, all Servants and Subjects are *Free*, who do not suffer Bonds or Imprisonment. Moral Impediments do not *absolutely* hinder Motion but by *Accident*; that is, by

'our intervening Choice, whilst we judge it better for us to abstain from such a Motion, than to perform it. Thus a Passenger in a Ship, is not restrain'd from throwing himself headlong into the Sea; yet, if he be in his Senses, he'll think a safe Cabin preferable to a Leap amongst the Waves. In like manner, whatever Penalties are denounc'd against any Action, a Man, that fears not the Danger, sticks not to break the Command. And this is that intrinsic Liberty of the *Will*, inseparable from it, which Slaves no less than all other kind of Subjects enjoy. We must search therefore, elsewhere to discover a Difference. And first, altho' scarce any Master is so severe, as to hinder his Servant from doing those things, which are necessary for the Preservation of his Life and Health, which are the chief Objects and Pursuits of Human Care; yet Free-men are, for the most part, allow'd to provide for themselves, in these respects, with more Plenty and more Ease, than Persons of that low precarious Condition, whose Constitution often suffers by their hard Fare, and unreasonable Labour (f). Again, Free-men do in this shew their eminent Advantage above Slaves, that they are admitted to the more Honourable Offices in Families and Common-wealths; and that they possess Superfluities in a far Larger Measure. Both which Privileges are wonderfully pleasing, to Men of lofty Spirits and Designs. For the Trouble of Business is soften'd and sweeten'd by the Honour and Credit of an Employment; and to swim in Affluence, is ever esteem'd a most valuable Happiness; as well, because we seem by this means, to be well provided for, against all future Accidents and Occasions; as because our Life will thus pass the more smoothly, and we shall have larger Ability of doing Kindnesses, and gaining a numerous Party by our Benefactions. But the main Distinction of all, is this, that Free Subjects are only engaged to obey the Supreme Power, and the general Laws of the State, and fearing no Punishment, but what is by them particularly denounced, in all other things they follow their own Fancy with full Delight and Satisfaction. But Slaves are obnoxious to the private Commands, and to the coercive Power of their Fellow-Subjects, and are compell'd to bear his Humour, tho' the most froward or imperious; which is the greatest Hardship, by reason of their near Abode, and frequent Intercourse with their Master. And to render their Bondage still more grievous, the publick Laws do seldom afford them Relief against their Master,

(a) *Comp. Boecler. ad Grot. l. 2. c. 5. f. 29.* (b) *Rosar. Persic. Sadi. Cap. 1. It is better to sit down feeding on one's own Bread, than to stand waiting at another's Table in a Golden Girdle* (c) *Vid. Arrian. Epictet. l. 3. c. 26. p. 257. Lucan Pharf. l. 3. v. 152.*

*Non tibi, sed domino gravis est, quae servit egestas.*

Want in a Slave turns to the Master's loss.

*Add. Grot. l. 2. c. 5. f. 27.* (d) *Add. Bodin. De Repub. l. 1. c. 4. Busbeq. Epist. 3. p. 118.* (e) *C. IX. f. 9.* (f) It is a Saying of Tully (*De Orator. l. 2. c. 6.*) *Mihi liber esse non videtur qui non aliquando nihil agit.* I don't look upon him as properly Free, who hath not sometimes the Privilege of doing nothing.

unless in Cases of most barbarous Severity and Cruelty. The more Soft and Gentle a Man's Nature is, the more must he be afflicted under these uneasy Circumstances (a). - We may add, that the Yoak of Servitude, is much the more galling on account of *Human Pride*; which encourages every Man to think himself worthy of Command; and thus when the Slave esteems himself altogether as fit, if not fitter, to bear Rule than his Master, he fancies that Fortune hath done him a mighty Injury, and desires on any Terms to change his Condition (b).

XI. A Slave may obtain Freedom several ways. As first, if his Master formally Release him; for what Right the Slave before transferr'd on his Master, the Master may restore to him again. Tho' it be customary, in many States, that the Slave, thus Releas'd, shall still yield some kind of Duty and Reverence to his Master (c). In case the Master own'd a *Superior*, he cannot otherwise bestow Liberty, than in a way consistent with the Rights of that *Superior*, and with the publick Laws. Secondly, if his Master Renounce and Discard him: which, in Common-wealths, is reckon'd a kind of Punishment; and differs not from *Manumission* or formal conferring of Liberty, in the effect, but only in the Manner and Design. In both Cases, the Master resigns his Right; but in the former by way of Reward, in the latter by way of Punishment: for that it is a real Grievance and Affliction to lose a Wealthy and Convenient Master, even Free Servants are often sensible. Thirdly, In case a Slave be made a Captive, whether alone or together with his Master, his new Servitude extinguisheth his old. But if the Master be only made a Captive, the Slave falls into the same State and Condition as he would do, were his Master naturally Dead, at least till such time as the Master be restored to Liberty. Fourthly, a Slave may be releas'd *Upon Uncertainty of a succeeding Possessor* (1); as suppose his Master dies without making over his Right to any Other; because then he is under no Engagement of performing Service.

For no Man is supposed to stand *Obliged*, unless he can know the Person to whom the Debt is to be paid. But whether a Man, thus releas'd, can claim the Privilege of a Free-Subject, in a Common-wealth, is a Question that the particular Laws and Customs must Determine. Some tell us, that amongst the *Turks*, the Act of setting a Slave at Liberty will hold good only against his old Master, but that any other Person may again compel him into Service. Another Case, when a Slave may be releas'd, *Upon the Uncertainty of a succeeding Possessor*; is if his Master dye, either in a Natural or Civil Sense, without an Heir. For tho' the Goods of such a Man are adjudg'd *Derelict*, and pass to the first Seizer, yet his Slave cannot be forced into a new Service by the same Claim. *Things* may be laid hold on by any Man, if no other hath already a Right over them: but *Persons* cannot be challeng'd by any other Title, than what ariseth from their own Consent, or from some antecedent Deed, in which they are concern'd. And therefore, that Right being now extinct, which the Victor by War obtain'd over his Slave, Natural Liberty returns: And this, altho' the Disposition of the Person should make it more proper for him to continue in Servitude; for the Fitness of a Man's Temper, or Inclination can by no means give Another a Right of dragging him into Bondage, nor is it, always, lawful for me to force a Person upon that which is really for his Interest and Advantage. Fifthly, when a Slave, not by way of Punishment (2) or on account of any preceding Offence, is thrown into Irons, or otherwise deprived of Corporal Liberty, he is by this Act releas'd from his former *Obligation by Compact*; for his Master is supposed to take off his *Moral Bonds*, by thus imposing *Natural*. It is inconsistent with a Covenant, not to believe the Party Covenanting, and that *Faith* cannot be *violated* which was not given. And hence a Slave under this Treatment may, if Opportunity favour him, without incurring the least Guilt, make his Escape.

(a) Yet there is a great Difference in Masters. In *Terence* (*Eunuch*. Act. 3. Scen. 2. v. 33.) a Guest is made from the Slave, that his Master is poor and miserable. But on the other side, as *Juvenal* observes (*Sat.* 5. v. 66.)

*Maxima quaque domus servis est plena superbis;*

Great Families are plagued with haughty Slaves.

(b) In *Xenophon* (*Cyropæd.* 1. 8.) *Chrysantas* seems to establish some such kind of Difference. In the same manner, says he, as we think it reasonable to be obeyed by those under our Command; let us yield a ready Obedience where it is our Duty. Yet there should be this Difference between Subjects (as we are) and Slaves, that whereas these are compelled to their Labour and Service, we ought to perform our *Devoirs* with Readiness and willing Compliance. Add *Dion. Chrysoft.* Orat. 14. De Servitude. (c) *Lex Wisigoth.* l. 5. c. 6. c. 17, & 21. (1) *V. Grot.* L. 2. c. 9. f. 1. (2) See *Dr. Cumberland's De Legib. Naturæ*, c. 9. f. 14. See above in B. 3. c. 6. f. 9. and C. 7. f. 5. Our Author has taken this whole Paragraph from *Hobbes*.

O F T H E

# LAW of NATURE

A N D

# NATIONS.

B O O K the S E V E N T H.

C H A P. I.

*Of the Causes and Motives inducing Men to establish Civil Societies.*

**A**FTER those which are term'd *Primary Societies* (1), we come now to treat of a *Common-wealth* †, which is the last and most perfect Form of Society, and that whereby the best Provision is made for the Safety of Mankind, since their Increase. What induced Men to quit their primitive way of living, in separate Families, will be evident, upon our Enquiry into the Nature of Civil Society, and the Disposition of those who compose it. For the better Illustration of which, it will be of great Use to examine the Accounts that are commonly given of this Matter.

II. And here the Generality have recourse to the peculiar Frame of human Nature, by which Man is supposed to be so strongly inclined to a Civil State, that he would neither be willing nor able to live without it. This they confirm by Arguments drawn chiefly from the Miseries of a separate Life; the wearisom Condition of Solitude; the Ends of Speech, which would be lost without Company; the Natural Desire of Conversation; the Advantage of uniting together; and the like: which we have before (a) alledg'd, to prove Man a

Sociable Creature. Mr. *Hobbes* (2), on the contrary, represents Man as a selfish Animal, whose Kindness chiefly terminates in his own Person and Interest (b), and whose Love for Society and other Men is only *Secondary*, being entertain'd with a View of serving his own Pleasure or Profit by their Assistance (3). For no one (as he argues) was ever determin'd in the Choice he made of another's Company, by the bare Consideration of his being a Man, but by some Prospect of Honour or Advantage from his Acquaintance; preferable to what he could expect from the Acquaintance of any besides. This he endeavours to illustrate, by Deduction from particular Societies. 'They who unite in a Body for the promoting of Traffick, are led to it purely by the Hopes of advancing their Goods more in Conjunction with others, than they could by their private Industry: and whatever disappoints, or puts an end to these Hopes, prevails with all, but Fools or Madmen, to put an end likewise to the Society. So where any are Joint-Commissioners in a publick Office, they contract a sort of Law-Friendship, implying in it more of mutual Fear than Love; and consisting

(1) See above in B. 6. c. 1. f. 1. † *Civitas*. (a) B. 2. c. 3. f. 15. (2) *De Cive*, c. 1. f. 2. (b) *Isæus*, Orat. 2. No Man values others more than himself. *Euripides (Medea.)* v. 85, 86.

All agree  
In this first Maxim of Philofophy,  
That Love begins at Home

*Isocrates, de Pace*, p. 285. Ed. Paris. In my Opinion, 'tis the common Desire of Mankind to advance their own Profit; and their common Labour to possess more than those about them. (3) Here we may observe, as well as in other Places, that our Author agrees with the Sentiments of Mr. *Hobbes*.

rather in Forms and Ceremonies, than in any sincere Union of Minds, and Combination of Affections. So that such Men may sometimes bandy together in a Party or Faction, for the sake of carrying on some private Ends; but to a generous and dis-interested Friendship they are commonly utter Strangers. Nor will any one of these, if he dare rely on his own single Strength for accomplishing his Aims, ever trouble himself about Associates. Again, when Persons meet upon the common Design of passing the Time away pleasantly, 'tis a mighty Satisfaction that each takes in making himself and the Company merry: in which he cannot succeed without exposing the Faults or Follies of other Men, in Cases suppos'd not to reach himself. (For Prudence would never allow him to censure that in Another, of which he was not himself acquitted in his own Conscience: according to *Juvenal's* Rule;

*Loripidem, rectus derideat, Æthiopem albus* (1).

Let him cry *filthy Black* whose Skin is white;  
And *Bandy-legs*, who treads, himself, upright.)  
Mr. Tate.

Therefore, for any one to deride Others is, in effect to declare his Contempt of them in respect of himself, and a certain malicious Design of setting off his own Lustre by their Blemishes. Even with them who keep within the Bounds of innocent Mirth and inoffensive Raillery, there is none but aims more at his own Satisfaction, than that of other Men: nay, such as make a Profession of diverting those about them, mean nothing more than, by shewing their Wit, to recommend themselves to the Company. Besides, most Men have naturally an itching Desire to be examining, censuring and exposing the Words and Actions of others; which, if they have frequent Occasion of gratifying, they look upon it, as a notable Ingredient in the Pleasure and Happiness of Life. And this Humour 'tis a difficult thing to suppress, or keep within Compass, by the Provision made against it by Laws and Penalties (a). Lastly, Suppose some, that pretend to more Knowledge and Wisdom than ordinary, met together to confer about Matters of Learning; each Man is for prescribing his own Opinion to the rest, and finding his Abilities or Authority disputed, resents it as the most Heinous Affront. Whence it plainly appears, that all Society or Intercourse, between such Men, is founded on the

Design either of supplying their Wants, or of gratifying their Vanity, or of finding Diversion and Entertainment. The same is asserted upon another Argument, taken from the Definition of the *Will*, and of what is *Good*, *Honourable* and *Profitable*. Societies are introduced among Men by their Voluntary Consent. Now where there is an Act of the Will, there is of Necessity an Object of that Act; which Object is always some supposed Good to the Agent. For be a thing never so good in it self, yet if it be not so likewise with respect to us, it loses all its Influence on our Powers of acting. Thus, for Instance, did Matters go never so well with the King of *Persia*, I should not look upon my self as having any Share in his good Fortune. All Good is attended with some Pleasure, either of the Mind alone, or of the Body in Conjunction with it. That of the Mind is either the Passion of Glory, or what may ultimately be resolv'd into such a Principle. That which affects the Body is Profit: which proves all Society to have first commenced upon the Score, either of Profit or Glory: that is, upon account of Love to our selves, exclusive of all Others. However 'tis certain, that Glory cannot be a lasting Foundation of Society for any number of Men; because, in Glory, as in Honour, where the Title to it is General, there is in effect no Title at all: the very Nature of Glory consisting in the Opinion of some Advantage (2), which, upon Comparison, we appear to have above the rest of the World. Neither does our joining in Society with Others give us any farther Occasion of Glory, than our Alliance with Men of great and extraordinary Virtues, may seem to argue a Parity of Worth in our selves. For, otherwise, a Man is valued in Proportion to that Ability he has of supplying his own Wants, without depending on the Aid of his Fellows (3). It must be confessed, that by mutual Assistance the Good of Human Life is highly promoted. Yet to have the Service of other Men, at our Command, would seem much more easy and agreeable: As amongst the other Conveniences and Helps of Living, that is still prized above the rest, which serves to more Purposes, and is purchas'd, or preserv'd with less Cost and Trouble. Whence we may conclude, for certain, that Man would be more inclin'd to Empire than to Society; that is, would much rather command absolutely, being himself exempted from all Obedience, than be oblig'd to any such Exchange of good Offices, as seems to be required in a sociable Life: were it not,

(1) Sat. 2. v. 23. (a) *Arrian. Epictet.* l. 3. c. 2. 'Suppose in a Dispute who was the chief Philosopher? One should tell You, he heard a judicious Friend say, that You were certainly the Man: Would not Your Heart swell with the ample Testimony, and enlarge its Dimensions at the Blast of Fame? But what if another Ill-natured Critick should give such Instructions as these; *Why do You lose Your Time in hearing this Pretender to Wisdom? What does he know? Perhaps he has learnt his first Principles, but I will venture him for getting a Step farther: Why, You'd be Thunder-struck with this mortifying Sound; You'd be put to't to keep Your Colour; and would have only Spirit enough to say, I'll shew him what a Man he has affronted, and what a Philosopher he has under-rated.* Add *Charron. de la Sageſſe*, l. 1. c. 36. f. 6. (2) See B. 8. c. 4. f. 11. (3) See the History of *Calvisius Sabinus* in *Seneca's* Epist. 27.

that he is restrain'd from acting after such an arbitrary manner, by the Danger which he apprehends from so violent Resolutions (a).

III. But altho' it cannot from hence be concluded, (as we have before observ'd (1),) that Man is not by Nature a sociable Creature; yet allowing him a Natural Desire of Society, since this may be gratified by the primary Societies, already described, this infers not his Desire of Civil Society, any more than his general Love of Employment bespeaks his Affection for that of a Scholar, in particular (b). This is what Mr. *Hobbes* proves in the following manner. Civil Society consists not in a bare Assembly of Men; but in an Assembly combined together by mutual Leagues and Covenants. The Force of these Covenants, ignorant People and Infants do not at all apprehend; nor is their Use discover'd by those, who never felt the Mischief of living without them. So that the former are utterly incapable of Instituting a Civil State, as being ignorant of its Nature: the latter are wholly regardless of it, as not being any way sensible of its Benefit; or at best they live under it in a manner, that testifies no Esteem of its Excellence and Worth. And therefore all Men, being born Infants, are, by Birth, unqualified for Civil Society, and so a great Number of them remain, to their dying Day: and the rest are formed and adapted to it, by the Force of Discipline, not of Nature. Neither is the Credit of this Doctrine shaken by that known Maxim of *Aristotle*, that *Man is Born, or is by Nature, a Political Creature*. For, sometimes, affirming a thing to be such or such by Nature, we denote it to be actually endow'd with some Quality, without any antecedent Act of his own, or of any One else, by which the Quality might be introduced. In which Sense; a Fish is endued with a Natural Faculty of Swimming, a Bird of Flying, and an Oak of Bearing Acorns. Sometimes, the same Expression signifies a Fitness in the Thing, to receive some Perfection by Culture and Discipline; the Reception of which *Nature* seems to intend, or at least to approve, as agreeable, or, however, no ways repugnant to its Temper and Frame. Thus a Horse has the Natural Faculty of prancing, which an Ass has not; a Parrot of prating; a Field of bearing Corn, and a Hill Vines; a Man of discouraging, and of learning divers Arts and Sciences:

In which Sense, also, we shall hereafter demonstrate Him to be a Political Creature, notwithstanding his being born an Infant: since we are wont to take our Measure of what does, or does not, agree to Man by Nature, from what he appears to be in his grown Estate, and under his full Use of Reason (c) (2). As to *Aristotle's* Expression, we must note, that he useth the Words, *ζῷον πολιτικόν*, in the larger sense, for a *Sociable Creature*, not strictly for such an one as is immediately bent upon *Civil Society*, and exactly disposed and fitted for it. Thus he says in the same Work (d), that a *Man is by Nature a Political Creature, and therefore would desire the Company of Others, though he did not stand in need of their Assistance*. But now his Affection, for *Civil Government*, can never be inferr'd from the bare *Desire of Company*; since this, as was observ'd, may be equally gratified by *Primary Societies*, such as may well be suppos'd without admitting a *Common-wealth*. So again, the Philosopher (e) proves Man to be a *Political Creature* from the Reasons of Speech, which else had been assign'd him to no Purpose: whereas, the Use of Speech is not confined to a *Common-wealth*; Men having lived and conversed together, long before the Institution of Government. In like manner, is to be understood that Passage in his first Book of *Ethics to Nicomachus* (f): *That Good may deserve the Name of Perfect, which appears to be Sufficient; and that we call Sufficient, which answers not only to the Wants of a single Man in a solitary Life, but those of our Parents, our Wife, our Children, our Friends and Fellow-subjects*: *Ἐπειδὴ οὐσιν πολιτικῶς ἐπιθεωρεῖται, Because Man is by Nature a Political Creature*. And yet, there is room for the several Relations of Parents, Children, Wife and Friends, without supposing a *Common-wealth*.

IV. For the clearing up of this whole Matter, we ought to consider, what that Condition is which Men enter into, upon their erecting a Civil State; what Qualities they are which may entitle them to the Name of *Political Creatures*; and, Lastly, what there is in their Frame and Constitution which seems (if we may so speak,) to indispose them for a *Civil Life*. First then, whoever enters into a *Community*, divests himself of his natural Freedom, and puts himself under Government, which,

(a) *Arrian. Epictet. l. 3 c. 21*. 'No Creature is engaged with so deep an Affection to another's Person, as to his own Profit: whatever stands in the way of this, whether Father, or Brother, or Son, or Lover or Beloved, he hates and rejects with Curfes and Scorn. For so has Nature appointed, that the strongest Charm should be our own Interest. This is our Father, our Brother, our Kinsman, our GOD. Wherefore if we refer to one and the same End our Profit, our Piety, our Honesty, our Country, our Parents and our Friends; all are secured. But if we measure our Profit by one Standard; and our Friends, our Country, our Relations, and our Justice it self by another; in this Case, Profit turns the Scale, and all other Considerations sink and are out-weighed. For *I and Mine*, are words which never fail to draw the Animal Nature after their Charm. Did you never observe (says he a little before) *Whelps playing and fawning upon each other as the very Patterns of Love and Affection? But would you know how long-lived this Endearment is? The Experiment will cost you no more than a Bone*. Tully, Off. 3. That every Man should procure the Necessities of Life, for himself rather than any besides, is an allow'd Privilege, and such as Nature inclineth does by no Means oppose. (1) *B. 2. c. 2. f. 7, &c.* and *C. 3. f. 16, &c.* (b) *Aristotle, ad Nicom. l. 8. c. 14*. Man may be rather term'd a *Conjugal Animal*, than a *Civil*: as a *Family*, in Necessity as well as in Time, is antecedent to a *Common-wealth*; and as the Propagation of Race, is the most common Labour of Animate Beings. Vid. Digby de Origine Mundi, c. 9. f. 8, &c. (c) Vid. *Cumberland de LL. Nat. c. 2. f. 2*. (2) See Mr. *Barbeyrac's* Third Note upon this Section. (d) *L. 3. c. 8. p. 345* (e) *Polit. l. 1. c. 2*. (f) *C. 5*.

amongst other things, comprehends the Power of Life and Death over him; together, with Authority to enjoyn him some things, to which he has an utter Aversion, and to prohibit others, for which he may have as strong an Inclination: so that 'tis possible he may often, in Obedience to this Authority, be oblig'd to sacrifice his private Good to that of the publick (1). Whereas, were Man to follow his Natural Inclinations, he would be subject to no Body, but live wholly at his Discretion, and make his own private Satisfaction and Interest the Scope of all his Actions. Some weighty Motives there must needs have been, and such as amounted almost to Necessity, that could persuade him to overcome these so very footing Desires. Man, therefore, first embraced Civil Society, not as led to it by the Biass of Nature, but as driven by the Fear of greater Evils. The name of *Political Creatures*, or good Members of a State, may be truly applied to those who promote the Common Welfare to the utmost of their Power, and freely prefer it to any private Consideration, nay and even measure their private Good by the Relation it bears to that of the Publick; and, lastly, at all times demean themselves, with Kindness and Courtesy to their Fellow-subjects (a). But no one, now, is so little acquainted with Human Nature, as not to know how ill-qualified the Generality are for discharging such a Part: it being evident, that very few do acquit themselves in all Points of their Duty; that Nothing, besides the Fear of Punishment, could keep the greater Number in any tolerable Order; and that very many continue all their Life long, *Impolitick Animals*, or, which is the same thing, Evil Subjects. Nay, it may be affirm'd, that no Creature is more fierce and unruly than Man, or expos'd to more Failings, which tend to the Disturbance of Society. Beasts sometimes contend about their Food; and then 'tis only in the Case of Scarcity: sometimes, again, they enter the Lists, at the Instigation of their Lust, which yet has only its Seasons of returning. But be they of never so savage a Disposition, they seldom express it against their own Kind. Whereas Men quarrel with Men; not only as excited by the Stings of Hunger, and by a Lust so vigorous as never to be out of Season; but by other Vices and Passions, unknown to Beasts, and often repugnant in Nature one to the other. Of these, the chief are an

endless Thirst after Things superfluous (b), and Ambition, the most pernicious of all Evils; of which, as no Creature seems to have any Sense, excepting Man; so He has the most lively and tender Sense imaginable: while, in the mean time, 'tis the Privilege of Brutes to be moved at nothing, but bodily Sufferings. Add to this, that quick Resentment of Injuries, and eager Desire of Revenge; an Evil less common and less active in Brutes. And, what is worst of all; Men pursue the Ruine of each other, with so much Industry, that of all the Mischiefs to which Human Condition lies open, the most Part are owing to their own Malice. Nor may it unreasonably be ascribed to the peculiar Care of Divine Providence, that Men advance to Maturity so much slower than Beasts; to the End that they may, by length of time, be in some measure broken of their fierceness and haughtiness of Temper, and brought to an Accommodation with different Dispositions. Otherwise, supposing Man to be put immediately in Possession of his Full Strength, the Forest could shew nothing so untractable (c). What Mr. *Hobbes* (d) observes, concerning the Genius of Mankind, is not impertinent to our present Argument: that All have a restless Desire after Power; not because they really wish to be advancing still to higher Degrees of Command, or that they may not, in their own Temper, be satisfied with a moderate Portion of it; but because they have no way of being secured in the Possession of what they already enjoy, but by farther Acquisitions: the old Stock being ever spending, and therefore ever requiring new Supplies. And this End being accomplish'd, there again succeeds a fresh Desire, either of Fame by new Conquests, or of Ease and sensual Pleasure. Moreover, Competition for Riches, Honour, Command, or any Prerogative and Power above Others, inclines to Contention, Enmity and War: the way by which any one Competitor may arrive at his Hopes, lying through the Death or Defeat of his Rival. It may farther be urged, that whereas in Brutes of all Kinds, there appears visibly a great Affinity of Desires and Propensions; with us, there is not more Diversity of Men, than there is of Opinions and ways of living; each of which is cry'd up, with a wonderful Perverseness, by the several Patrons of them, in Preference to all besides: a Thing sufficient, of it self, to make Disturbances in any Multitude, who are to unite in a

(1) *Potest autem, quod inutile Reipublicæ sit, id cuiquam Civis utile esse?* Can a good Citizen think that advantageous to Himself, which is prejudicial to the State? (a) *Arrian. Epictet. 1. 2. c. 10.* What then is the Duty of a good Citizen? That he measure nothing with respect to his own private Advantage; that he consult about nothing, as if released and disfranchis'd from the rest of his Kind. But, that he so behave himself, as the Hand or Foot, if they were endued with Reason, and understood the Order of Nature, would never entertain any other Motion or Desire, than what was directed to the Good of the whole Body. *Herodotus* observes of the *Persians* (*Clio.*) That those who Sacrificed, amongst them, did not put up Petitions for themselves, and their own private Happiness; but in behalf of the whole Nation, and of the King, in chief. (b) *Salust (Catalin.)* 'The Love of Money, and, afterwards, that of Empire were the Source of all our Mischiefs. Covetousness subverted Fidelity, Probity, and other worthy Endowments of Soul; introducing, in their stead, Pride, Cruelty, Profaneness, together with a common Sale and Market of all things. Ambition engaged its numerous Votaries to put up false Colours; to have one thing in their Mouth, and another in their Mind; to measure Friendships and Enmities, not by Reality, but by Advantage; and to endeavour more the keeping a good Face, than an honest Heart. (c) See *Proverbs XIII. 24. XXIII. 13, 14. Eccclus. XXX. 1, &c. 12.* (d) *Leviath. C. XI*

Society (a). So far it is therefore from true, that Man is by Nature a *Political Creature*, or by Birth is fitted for the Discharge of *Civil Duties*; that 'tis as much as can be done, to train up some few, by long Discipline, to a tolerable Behaviour in this Respect (b). Not to mention the Vices of the vulgar Sort, (who are the greater Part of Mankind,) so often enlarged upon by other Authors (c). So that a thorough Knowledge of Human Malice and Fraud, in order to the avoiding and disappointing them, makes up a very considerable Part of Civil Prudence (d). From what has been said, may be sufficiently gather'd the Sense and Import of this Expression, that Man is by Nature a *Political Creature*: by which is meant, not that all and each of us are fitted, by Nature, for sustaining the Part of good Citizens; but that some, at least, by the Force of Instruction and Discipline, may be so formed as to acquit themselves well, under that Character; and that since Men have increas'd and multiplied, Civil Societies are absolutely necessary to their Safety; for which as they are, by a Natural Principle, engaged to provide, so they have the same Natural Obligation to enter into Regular States and Governments, the chief Benefit of which Institutions is, the Habitual Exercise of an Orderly, Decent and Friendly Life.

V. *Hornius* (e) calls a Common-wealth *the Work of Nature*, and accounts for its Rise in a Natural way: As, that the first Pair, from whom descended the whole Race of Mankind, were united by the Bonds of Conjugal Love, and their Children by those of Natural Affection, to them and to each other: that these Engagements founded a Family, which by constant Increase from new Births, with that Love of Society, implanted in Men by Nature, and improved by Neighbourhood and Alliance, at length furnish'd out a Civil State: it being absurd and senseless to imagine, that Men were once dispers'd in Woods and Deserts, and there led a Vagabond Life like the Brutes about them. But admitting the Origine of Common-wealths, according to this Natural Account;

yet to exclude all Compacts, and all other Motives from a Share in their Institution, is no less irrational than to say, that because a Seed grows up to a Tree, and because a Tree is cut out into Planks and Beams, and these, rightly framed and compacted together, compose a Ship, therefore a Ship is the Work and Product of Nature; without allowing the Labour of the Artificer, or any other particular Cause, to conspire in erecting that sort of Fabrick. We, therefore readily acknowledge it for false and fabulous, whatever is fancied of a great Number of Men first assembled together, then dispers'd abroad into Woods and Deserts, and after that reunited into one Common-wealth. But then their Opinion is no better grounded, who suppose Mankind, from the primitive Couple, or from four Families after the Deluge, to have fallen immediately into the Order of Civil State. For, however a Father might keep his Children under his Care, and the same common Roof, till such time as they came to Years of Maturity; yet since, in those first Ages of the World, they lived altogether on Tillage and Pasturage, when Children were married, the Father had no Reason to detain them longer. On the contrary, we are inform'd by Scripture, that it was usual for them, when arrived at an Age proper for taking the Care of a Family upon them, to separate and chuse out new Habitations: especially while the World was yet unstock'd, and while the Pleasantry of the Scene invited them to distant Quarters (f). Nor was it peculiar to *Sicily* of Old, to have such Inhabitants as *Homer* (g) describes;

Τῶσιν δ' ἔτ' ἀρχαί, &c.——

*No Councils they, nor Courts of Justice hold;  
But on some Mountain's Top in Caves grow old.  
Each o'er his Wife and Children Empire bears;  
And none beyond his Cave extends his Cares.*

There is, it is granted, a Natural Affection between Brethren; yet not such as excludes their Desire of living rather upon the Level, than

(a) *Euripid. (Phœnis. v. 502, &c.)*

If what is Good, or Beauteous always bore  
The same conspicuous Marks, to Mortal Eyes,  
Men would be Friends, the World a peaceful Scene.  
But Name and Species only join us now;  
Differing in things, and clashing in Desires.

(b) *Plato de LL. l. 6. p. 864. Ed. Weck. We affirm Man to be a mild and tractable Creature. And indeed, if, besides the Happiness of Nature and Birth, He obtains the Benefit of Good Institution, He becomes most Gentle, Lowly and Divine. But upon ill insufficient Education, he grows the fiercest Animal of all that the Earth breeds. Arist. Pol. l. 1. c. 2. in fin. As Man, if rightly perfected, is the best and noblest of living Creatures, so, if estranged from Law and Justice and Virtue, he is the worst and most contemptible. Idem, ad Nicom. l. 2. c. 1. in fin. 'Tis not an indifferent Matter whether a Person has been thus or thus accusom'd from his Youth: but rather 'tis a Point of the greatest Consequence, and upon which all depends. Ibid. l. 7. c. 7. in fin. A Man, left to himself, would do a thousand times more Mischief than a Beast. Add. Senec. Epist. 103. Polyb. l. 17. c. 13. As Men exceed other Creatures in Craft and Cunning, so they may, many ways render themselves the vilest of all that breath. Other Animals being govern'd wholly by bodily Pleasure, are by that alone led into Failings and Disorders: but Mankind, who are distracted with Variety of Opinions, offend as often through Perverseness of Judgment, or Rashness of Thought, as through Frailty and Imperfection of Nature. Lactantius de Ira Dei, c. 12. What could be more fierce and cruel than Man, if living under no Restraint of a Superior, he might evade or despise the Authority of Laws? Plutarch in Cicer. p. 884. D. Ed. Weck. Were Power added to Passion and Inclination, Man would be the wildest thing living.*

(c) *Add. Mornay de Vir. Relig. Christiana, c. 16. (d) See Bacon's Adv. of Learning, B. 8. c. 2. (e) De Civitate, l. 1. c. 4. f. 6. (f) See Genes. XIII. 5, 6, 9. (g) Odyss. L. 9. v. 113, &c.*

with

with any Distinctions of Superiority amongst them: Neither such as does convince us, that their Friendship could not be Long-lived enough, supposing their Effects to be distinct and separate. So that, according to this Account, the Propagation of Mankind must rather tend to the increasing their Division, than to the uniting them in Society. But when the wiser Part began to consider, that, by their assembling into one Body, the Inconveniencies attending separate Families might be removed, they hereupon thought it not sufficient to agree together upon entering upon the same Covenant, and submitting to the same common Power, unless, for their better Convenience and Security, they likewise agreed to contract their Dwellings, and, for the future, confine them to the same Place. And, in this Sense, are we to interpret those Authors, who suppose Men, from being dispers'd about in the Woods, to have been afterwards assembled and united together by the first Founders of Civil Government.

VI. Some make the Wants and Necessities of Men to be the principal Cause of their framing Political Societies; upon a Prospect of living in better Fashion and greater Plenty, when united together, than they could possibly do in a Condition of Solitude. In which Account, thus much is certain, that were Men left alone, each to shift for himself, destitute of all Help from others, no Creatures could be more exquisitely miserable. On the other side, 'tis undeniable, that upon the Institution of Common-wealths, Human Life grew refined to a Degree of Luxury and Delicacy (a). But notwithstanding this, it seems evident to us, that Necessity was not the sole, or the principal Cause of Common-wealths, howsoever *Plato* (b) may favour that Opinion: Since the Arts of making Wine, of providing Cloaths, and of turning the Ground to Pasture and Tillage, being even then known, while Men lived as yet in separate independent Families; there seems already to have been a sufficient Provision made for all the Necessaries of Life (c). For let us suppose a Father of a Family possess'd of a large Portion of Land, and well stock'd with Servants and Cattel, what could such an one want for his Support? What, at

least, that might not be supplied by the means of Commerce (d)? In like manner, as it is now usual, for different Nations, to import from each other any sort of Commodities, for Use and Pleasure; without thinking it necessary, for that Purpose, to unite together under the same Government and Constitution. And Instances may be given of People, living for many Ages, under Civil Establishments, in a Condition no way superior, for Plenty and Abundance to that of the Fathers of Families in ancient Time (e). So that all that mighty Plenty and Luxury, which now reigns in some Parts of the World, seems to derive its Origine from great Cities, rather than from Common-wealths. Because, in the Cities, the meaner People, having no Income from Cattel or Land, are forced, (for a Livelihood,) upon improving divers Arts and Inventions. Which, likewise, are not a little promoted by a Sort of Vanity, common to great Towns, of vying one with the other in Dress and Finery, and thereby of running out into Extravagance; for the Support of which more Trades are intended, than for the Relief of Man's real Necessities: which yet *Civil Life* could very contentedly be without (1).

VII. Therefore the true and leading Cause, why the Fathers of Families would consent to resign up their Natural Liberty, and to form a Common-wealth, was thereby to guard themselves against those Injuries, which one Man was in Danger of sustaining from another (2). For, as nothing, next to Almighty God, can be more beneficial to Man than Man himself: so nothing is able to work him greater Mischief; as *Cicero* shews at large in his second Book of *Offices*, C. 5. &c. Now Man being infested with various Evils, has found out for each, a proper Remedy. Sickness and Disease, he prevents or removes by the Succours of Physick; Hunger, by tilling and manuring the Ground; against the Severities of Weather he is defended by Houses, Cloaths and Fire; and by Weapons or Stratagems, against the Fury of Wild-Beasts. But for redress of those Evils, which Men, at the Suggestion of depraved Nature, delight to bring upon each other, they had recourse to themselves, as the surest Defence, by joining together in one

(a) *Lactantius*, de *Opif. Dei*, c. 4. n. 20, 21. If each Man alone had sufficient Strength to ward off all Dangers, and stood in need of no Assistant; what Society would there be in the World? What mutual Reverence or Respect? What Order? What Reason? What Humanity? What would be more vile than Man? What more extravagant? What more fierce and cruel? But now while each single Person is poor and indigent, and cannot subsist without the Help of his Fellows, All desire Society for Ornament and Defence of common Life. (b) *De Repub.* l. 2. p. 598, &c. Ed. *Wech.* (c) See *Genes.* XIII. 2. XXIV. 35. (d) *Vid.* *Cornel. Nep. Attic.* c. 13. (e) Who therefore might make the same Boast with him in *Valerius Flaccus*, l. 5.

Nec mania nobis  
Vestra placent, feror Arctois nam liber in arvis,  
Cuncta tenens mecum: omnis amor jaciturag; plaustri  
Sola; nec hac longum victor potiere rapina:  
At epule quodcumque pecus, quodcumque ferarum.

I your Imprisonment of Walls disdain,  
Who live a Free-man on our Northern Plain.  
Of little Wealth I boast, but what I wear;  
And if the Plough goes well, shall never die with Care.  
No other Prize can tempt a Victor's Toil;  
Nor shall this long remain an envied Spoil.  
Nature purveys for me; the fiercest Beast  
True Venison yields, and every Flock a Feast.

(1) See our Author's Dissertation, *De Statu Hominum Naturali*, §. 6. upon this Section.

(2) See Mr. *Barbryns's* First Note  
Body,

Body, and erecting a Civil Society (a). And when they were once reduced to such Order, as to be secure from mutual Injury, they must, of course, enjoy a greater Share of those Benefits, which it was in their Power to confer upon each other (1). And this Account is seconded, by those who deduce the Original of Commonwealths from *Fear*. By which we are not to understand the violent Disorder of one in a Fright and Consternation; but only a wary Provision against future Evils. Of which *Aristophanes* (b) rightly observes; ἡ ἐπιφοβία πάντα, *Caution preserves all things*. And by this Exposition of the word *Fear*, we avoid all the Force of what is objected, that, had Men been really afraid of each other, they would have been so far from uniting together in a Civil State, that they would not have endured each other's Sight, but, One flying this way and Another that, would hereby have remain'd in a perpetual Separation. As if *Fear*, implied in it nothing but *Flight*, and not also, *Diffidence*, *Suspicion*, and *Caution*. Nay, this is one Property of being afraid, the providing against the probable Grounds of Fear. Thus, going to sleep we shut the Doors, for fear of Thieves; when they are shut, our Apprehension is over. We go armed in a Journey for fear of Robbers; and, being well armed, fear no more. To which Purpose *Thucydides* (c) observes, that the Custom of wearing Swords, which was generally receiv'd in the barbarous Nations, continued likewise among some People of *Greece*, by the Necessity of ancient Times, when, as yet, they had no Walls to defend them from Enemies abroad, and could not meet together without some Fears and Jealousies at Home. Remarkable likewise is that Speech of *Pyrrhus* to the *Athenians*, recorded by *Plutarch* in his Life; when being permitted to enter the City, and offer Sacrifice to *Minerva*, upon his returning thence, He said, 'That for his part, He retain'd a grateful Sense of their Kindness and the Confidence they reposed in Him; but advised them, *Not to open their Gates, if they were wise, to any King for the future*. Civil Communities, even in the times of profoundest Peace, do yet fortify their Towns, guard their Frontiers with Troops, and fill their Grainaries with Warlike Stores; all which would be an unnecessary Expence, did not they apprehend some Danger from their Neighbours: of whom, after these Precautions, they are no longer afraid. So that 'tis the Natural Effect of Fear, to find out Remedies against it self. And, in like manner, because Men were afraid of each other, they supplied each other

with Relief, by joining in a Civil State. Of the Force and Efficacy of which, those Authors seem to have a deep Sense, who affirm, that, *In Case there were no Courts of Justice in the World, Men would destroy and devour each other* (d). And indeed, that Men have abundant reason to apprehend and fence against mutual Danger, we have, in another place (e)(2), fully made out: Which is no less true for what *Hornius* objects, *That the Fathers of Families, for many Ages, lived together on Terms of Equality; without the fear of any such pretended Invasion on their Rights: and that Ambition was but of a late Growth amongst Men; coming in after the Institution of Commonwealths, and then giving occasion to the Distinctions of Honour and Dignity*. As if it were not Ambition which occasioned the first Murther in the World; when *Cain* was enraged, that his Brother's Offering should find more Acceptance with God than his own (3)! Besides, Ambition is but one Root of those Evils, which spring, in like manner, from Perverseness of Temper, and Competition of Desires. Of which, even in those plain and primitive Ages, the former produced that savage and brutish Fierceness in the Race of the Giants; the latter occasioned Strife and Dissention betwixt the nearest Relations (f). In the Breasts of Kings, Ambition ('tis true) reigns with greater Violence, and transports them to Actions more bloody and cruel: yet we may trace some Footsteps of the same Passion in Shepherds and Rusticks, *Hornius* (g) proceeds to observe, That, in those early times, *to provoke others with Words or Blows, would have proclaim'd a Man's Folly as well as his Malice: because, this would have given a Right to the Party, thus provoked, to take the first Opportunity of killing him. Again, there could be no Hopes of Booty amongst People, as yet unacquainted with Wealth, and possessing no other Stores but those of Fruits, plenty of which was to be had in other places, with little Pains and no Danger*. As if the Prospect but of moderate Gains were not, with bad Men, Temptation enough to do wickedly! Or as if Thefts and Robberies were not as common of Old, as they are at this Day, amongst People living wholly on Grasing and Tillage! Not to say, that the Occasion of founding Commonwealths, was not only to protect Men from Robberies, but also from any Injuries, which they might be capable of offering or receiving. What he afterwards affirms is very true; That, *Let the Suspicions of Another's mischievous Design be never so well grounded; this will not justify an Attempt upon him, by*

(a) The *Persians* took the true way of demonstrating this; who had a Custom, upon the Death of their King, to live the five ensuing Days without any Law; to the end, *That finding, by Experience, the miserable Effects of Anarchy, the Slaughter, the Rapine, and if there be any thing worse, that accompanied such a Condition, they might be engaged in a firmer Allegiance to their Sovereign for the future*, Sext. Empir. adv. Mathem. l. 2. p. 70. Ed. Genev. To the same Purpose may be applied some of the Reasons which, according to the Account of *Herodotus*, B. 1. induced the *Medes*, living before in independent Villages, to invest *Deiox* with the Regal Authority over them. (1) The Remainder of this Sect. is taken from our Author's Abridg. de Off. Hom. & Civ. l. 2. c. 5. f. 7. (b) In *Avibus*, p. 532. Ed. Lug. Bar.

(c) L. 1. (d) Comp. *Hobbes de Cive*, l. 1. f. 2. (e) B. 2. c. 2. f. 6, 12. (2) V. *Grot. l. 1. c. 4. f. 4. n. 2.*

(3) *Genes. IV. 4, &c.* (f) See *Genes. XIII. 7. XXVI. 15, 20, 21.* (g) *Vid. Virg. Eclog. 3. v. 25, &c. Eclog. 7. Theocrit. Idyll. 5. & 8.*

*way of Prevention.* And that Right and Power of All over All, with which Mr. *Hobbes* invests Mankind in *his* State of Nature, ought to be extended no farther than right Reason allows of; amounting only to this Sense, that Man, in a State of Natural Liberty, has a Right to employ against all Persons, all such means for his Preservation, as Reason judges necessary for him to use, and dangerous to let alone. Wherefore to carry our Caution farther than right Reason shall prescribe, is, doubtless, a Breach of the Law of Nature. So that he, who on any uncertain Fears, kills the Person he is afraid of, when he might, as conveniently, have escaped from him, must be adjudged guilty by the said Law. Whence they appear to be certainly in the wrong, who imagine that this Principle justifies Rapines and Robberies, upon such as are not open and profess'd Enemies. For Robbery and Rapine plainly denote such Means, as sound Reason can never judge necessary to a Man's Preservation; but such as are rather made use of to serve the Ends of Avarice and Cruelty: it being never alledg'd, in Plea for Robbers, that they spoil Men of their Goods, in their own Defence. That other Expression seems very ridiculous; *Supposing Hatred and Diffidence to have reign'd never so much amongst Men; yet this could never be said to have happen'd purely for the sake of Common-wealths:* for Men did not therefore hate or distrust one another, purposely that they might constitute a Civil State; but they therefore constituted a Civil State, because they distrusted or hated one another. And tho' we should allow as fully as can be desired, that while the Hatred of one Person extended only to some few, who were disagreeable to him, he might, at the same time, love and favour all Others, or, at least, not be enraged against them; yet if each Man had but his single Foe, this alone were enough to fill the World with Hatred and Dissention. 'Tis therefore a vain Attempt, to ascribe the Original of Communities, to *The Accidents of Neighbourhood, and the Natural Increase of Mankind by Generation.* This last, indeed, affords a constant Supply, whence Civil Bodies are stock'd and maintain'd: in like manner, the former might perhaps give Occasion for Neighbours to join themselves to the same Community, rather than to divide. But the Cause which first moved Men to establish Societies, is, by no means, deducible from these Grounds.

VIII. Nor has any One reason to imagine, that a bare Reverence of the Law of Nature, which prohibits indifferently all sorts of Injuries, could ever have been able to secure the whole Body of Mankind, (as consider'd in a State of Natural Independency,) from mutual Prejudice. Some there are (it must be confess'd,) with whom Honour, Justice, Faith

and Innocence are so much in esteem, that they would not violate these Rules, tho' sure of Impunity. Many also may be well represented by that Character which we find in *Aristotle* (a); *Who refrain from Injury upon a Principle of Fear; (it being difficult to wrong others, without being likewise wrong'd by others:)* and who are therefore unwilling either to do Wrong or to receive it (1). Now, were all Men of this Temper, the Establishment of Civil Communities might not appear so very necessary a Work. But, on the contrary, what Numbers are there, who make light of breaking through the most sacred Ties of Duty, whenever invited to injure Others by the Prospect of some Gain to themselves, and the Hopes of escaping, by Force or Fraud, from the Hands of the injured Parties? Not to distrust such Men as these, would be Voluntarily to expose our selves to their Wickedness and Insolence. *Parum tuta per se ipsa probitas est,* says *Sallust* (b): *Unguarded Honesty is but an undefensible Hold.* But as it is the part of Prudence, to keep a watchful Eye on bad Men, and to make an early Provision against their Attempts; so is that Assertion of Mr. *Hobbes* (c) unreasonably harsh, wherein he affirms, *That the Hope of any Man's Security and Preservation consists in his being able, by his own Strength and Cunning, either openly or secretly, to be before-hand with his Neighbour in Mischief.* Indeed the Generality of Men are so far corrupted, that wheresoever there is Appearance of greater Advantage from the Transgression of Laws, than from the Observation of them, they make no Scruple to transgress them: According to that of *Plato* (d); *Whoever conceives it in his Power to do unjustly, readily does so: each Person concluding Injustice to make much more for his private Interest, than Justice could do.* Yet to reproach all Mankind with this perverse Disposition, is carrying the Point and the Censure too far. Nay, by the Confession of Mr. *Hobbes* himself (2), some modest Natures there are in the World, that do not assume to themselves more than they leave to others; always having their Eye on that Rule, *To do as they would be done by.* How any one, upon Pretence of providing for his own Security, could rush upon the Oppression and Ruine of such innocent and excellent Persons, I must, for my part, own my self at a loss to understand. Nor can it ever be, that right Reason should warrant my going to kill or oppress another, of whose Designs to do me hurt I have not had very particular Indications: there being, till then, many better ways left open of composing Matters amicably. For, as to that Pravity of Nature and Disposition, which is common to the whole Race of Men, and which therefore admits of various Degrees, we cannot, on the account of it alone, conclude a Man an open and profess'd Enemy.

(a) *Ad Nicomach. l. 4. c. 3. p. 46. C. Ed. Paris.*

(b) *Adherbal. in Bell. Jugurth.*

(c) *De Civ. c. 5. f. 27.*

(1) This Passage is not to the purpose, respecting only Covetousness; Our Author has express'd himself more to the point, in his Abridgment *De Officio Hom. c. 1. 2. c. 5. f. 8.*

(2) *De Civ. c. 5. f. 1.*

(d) *De Repub. l. 2. p. 593. Ed. Wash.*

'Tis own'd, therefore, that as to the Discharge of Natural Duties from Others to me, I cannot have it, in a State of Nature, so well secured, as under Civil Government: yet neither is it left in so miserable an Uncertainty, as that hereby I must be oblig'd, or may be permitted, to treat All Men in a hostile Manner. For, while I find my own Strength to be equal or superior to another Man's, and while that Man, by Word or Deed, testifies a Desire of living peaceably with me, and by real Proofs confirms the Truth and Sincerity of that Desire; What reason have I to account him my Enemy? Or, How can the bare Suspicion, that all this Friendship is but Counterfeit, or, that, in time, he may come to alter his Mind, give me Authority to assault him by way of Prevention? And the Truth of this will appear more evidently, if we look upon the Practice of entire and independent States and Governments, which are, with regard to each other, in a State of Nature. Here all Men agree in judging it a Crime for one Nation, by secret Stratagem or open Force, to Attack another, (as yet not known by any Exchange of good or bad Offices, nor engaged in Friendship and Alliance by Covenant or overt Act,) only because there is no common Power presiding over both, by which the other State, if attempting any injurious Designs, might be restrain'd and punish'd. Which clearly proves against Mr. Hobbes (1), that the *Law of Nature is not altogether dumb even in a State of Nature*: tho' indeed there is much greater Security of having this Law obey'd, under Civil Government; where the Power of the Magistrate is at hand, to compel those who are wanting in returns of Kindness and Peace. But, notwithstanding all this, thus much Prudence suggests to us, that we should not only provide, by a timely Defence, against the open and profess'd Malice of Wicked Men; but that we should likewise esteem the Goodness of Others, not infallible and immutable. And, to answer all these Ends, no such universal Safe-guard, as *Civil Society*, could be invented or conceiv'd.

IX. Moreover, altho' the Law of Nature direct us, in case any Difference arise, to adjust it amicably amongst our selves, or refer it to the Arbitration of Others; yet neither thus would the common Peace be sufficiently secured. For with the same Ease, that we dispensed with our selves, in breaking the other Natural Rules, we might also slight this of appealing to Arbitrators, and so have immediate recourse to Arms. Besides, supposing two Men, had by Consent, referr'd their Differences to a third Person; yet were either of the Parties dissatisfied with the Decision, it were no hard Matter for him to renounce and reject it; in case

he found his own Strength sufficient to shelter him from Human Punishment: especially since the Arbitrator is not endued with any Authority and Command, by Virtue of which, he might oblige the Parties to stand to his Sentence. Therefore, in a State of Natural Liberty, Prudence will advise us, that we rely not too much on the bare Faith of others; but that we believe the Observation of all Compacts to be then best ascertain'd, when either they are grounded on the mutual Advantage of the Parties, or when 'tis in our Power to force those with whom we treat, to be just and honest. But where Perfidiousness is encouraged by Hopes of Profit, and not restrain'd by Fear of Punishment, there it were Madness to think, that bare Covenants should be able to warrant our Safety. This appears from the Practice of all Nations; who when they break off their Alliance with one State, strengthen themselves with the Friendship of another: by which Act they do not presently Condemn themselves of Treachery, in thus seeking for Protection to the Faith of Others; but, in as much as Communities are chiefly guided by Interest, in fixing their Alliances, they do but substitute an advantageous League in the room of one which was, either unprofitable, or dangerous. And 'tis under these Restrictions and Mitigations only, that we can any ways admit of Mr. Hobbes's (a) Position, that *Covenants founded upon mutual Faith, in a State of Nature, are invalid*. For tho' it be plausibly enough said by Livy (b), that *All Men are ambitious of being credited; and that, to repose Faith in them, is, with most Men, a Tye upon their Fidelity*; yet 'tis the safer Course, in a State of Nature, to think upon that vulgar Saying;

[v. 830.  
Πίστις χρημάτων ἄπιστοι, ἀπιστίη δ' ἐπίπιστοι. Theogn.

*Undone by Trust; and by Distrust preserv'd.*

X. Again, there is another reason why the Law of Nature cannot be able, of it self, to ensure the Peace of Mankind. For this, is the Case of Natural Liberty, that each Man, as he places his Defence and Safety in his own proper Strength, so as to the means of obtaining that End, and the whole Management of his Actions, he purely consults and follows his own private Judgment. And what a wide Difference there is between Men in this respect, no one can be so ignorant, as not to have made part of his Observation (2). Few there are of so happy and noble a Temper, as to have, at the same time, that piercing Sagacity, which may discern what is for the lasting Advantage of all Men in general, and of each in particular; and

(1) *De Civitate*, c. 5. f. 2. (a) *De Civitate*, c. 2. f. 11. (b) *L. XXII. 22.* (2) Mr. Bruyere in His Character of Man, has this, 'If a Man ask why the whole World does not make one single Nation, nor speak the same Language, nor live under the same Laws, nor agree in the same Usages and Worship, I answer, that, considering the variety of Mens Humours, the difference of their Tastes, and the contrariety of their Judgments, 'tis strange that even seven or eight Persons can live Amicably under the same Roof, within the same Compass, and compose one single Family.'

that Strength and Firmness of Soul, which may constantly pursue what has been prudently foreseen. The greater Number are, on account of their Natural Dulness, imposed upon by gross Error, in the likeness of Reason. Others are hurried by the Violence of their Passions, wheresoever the Gratifications of Lust, or the false Appearance of Advantage shall draw them. Now in so endless a Diversity of Opinions and Desires, What Hopes can there be of Peace and Agreement: whilst every Fool is as strongly conceited of his own way, as the Wisest Man is convinced of *his*; and the former will no more submit to the latter, than the latter will condescend to be instructed by the former? Since therefore Reason alone, according to the Tenour which we find it to hold in particular Persons, is insufficient to compose these Differences in Judgment; other Means are to be used, by which an agreeable Union and Harmony of Mind may, in some Degree, be obtain'd (1).

XI. In fine; altho' it be evident to all Men, that by breaking the Law of Nature, they exceedingly obstruct their own Happiness (the Promotion of which, depends on the Assistance of Others,) and bring many grievous Evils and Dangers on themselves; tho' Nature has likewise imprinted it on the Minds and Consciences of Men, that such as act contrary to her Decrees, by lightly invading and harming their Neighbours, shall not, in the last Event, go unpunish'd (a): lastly, tho' the Benefits that would redound to them, from their observing Natural Precepts, and the Evils which they incur by transgressing them, are a manifest Argument, that it is better for Men to live kindly and sociably than otherwise: yet would not all this be enough to procure the settled Peace of Mankind. And that, because the Multitude act not by rational Motives, but by wild Impulse, mistaking Passion for Reason; chiefly thro' the Fault of Custom or Education, which stifle and suppress the Force of inward Reflection. As also, because the greatest Part of Mankind are wholly intent upon the present, without any Care or Thought of the future; and are commonly moved by these Objects, which thrust themselves upon their Senses,

while those of a higher and nobler Nature are too Refined for their Affections, and too Remote for their Desires. Whence it comes to pass, that the dread of Human Punishment, is, with too many, more prevalent than that of Divine Vengeance; which yet ought to hold the Sovereign Place in our Fears. Because, the Justice of Providence is, for the most part, slow, and the Methods of it Secret and Retired (b): Which, with bad Men, is an Argument, that the Calamities, which sometimes attend Impiety, arise from other Causes (c); especially, when they find, that the worst amongst them often abound in those things, which the Vulgar take for the Measure and Standard of Happiness, while the Good are oppress'd with many Afflictions, sufficient to persuade the Wicked and Foolish, that Virtue has little Power, unless in making Men miserable. Thus *Plutarch* (d) observes: *When Judgment is immediately executed on a Crime, it stops those Men in the Course of their Wickedness, whom Success would have encouraged to proceed. For nothing does so much enfeeble the Hopes and deject the Mind of the Oppressed, as the Respite and Delay of Divine Vengeance; and nothing more increases the Cruelty and Insolence of their Oppressors. And with this very Prospect it is, that the Wicked encourage and hearten themselves in Villany; that the Fruit of their Crimes they shall receive in Hand, but the Punishment in Reversion, and at a great Distance from Enjoyment.* It may farther be added, that the Stings of Conscience, preceding a villainous Act, are not so fierce and raging as those which follow after, when what is once done, we find past our Skill to undo (e): and that the Voice of Reason, which could not be heard in the Hurry and Tumult of our Passions, when these once begin to cool and settle, will sound most forcibly in our Breast (f). *In like manner* (says the Wise Author but now cited (g),) *as Malefactors, when led to Execution carry each their Cross, so does Sin, out of every Offence, frame its own Torments: that most ingenious Artist of a miserable Life! such as is not only confounded with Shame, but distracted with Horrors, Convulsions, Remorse; and all the Tumults of a troubled Mind.* But because these inward Tor-

(1) The latter part of this Period is taken out of our Author's Abridgment, *De Officio Hom. & Civ.* B. 2. c. 5. f. 8. (a) Claudian. *De IV. Consulatu*. Honor. v. 204.

*Exstruite immanes scopulos, attollite turre,*  
*Cingite vos fluvios, vastas opponite sylvas;*  
*Non dabitis murum sceleris.* —

Heap Rocks and Towers the vast Ascent to win;  
Let Floods surround, or Forests hem You in;  
All Nature is too weak a Fence for Sin.

(b) 'Tis an Observation of *Cæsar*, that Divine Providence, to strike Men with a deeper Sense of Affliction, by a sudden Change from prosperous Affairs, sometimes grants to those, whom it intends exemplarily to punish for their Wickedness, the more fortunate Success, and the longer Enjoyment of Impunity. *De B. G. l. 1. c. 14. n. 5.* (c) *Add. Ecclesiast. VIII. 11.*

(d) *De Sera Numinis Vindicta*, p. 548. D. E. (e) *Curtius VIII. 2.* Nature seems unkind in leaving Men under this great Weakness and Disadvantage, that generally they consider things less before they do them, than after they have done them.

(f) *Plutarch De Ser. Num. Vindicta*. p. 555. E. When a Man, out of Avarice, Envy, Ambition or sensual Delight, has committed some heinous Wickedness, and after the violent Thirst of his Desire is cool'd and appeas'd, takes time to reflect, that what he propos'd of Profit, Convenience, or Satisfaction in any kind, has left him utterly disappointed, while the base Impressions and horrid Tyranny of Sin remain in full Force; must necessarily be brought to this Persuasion, that when for the sake of empty Glory, or unworthy Pleasure, he broke through the most sacred, most beautiful and excellent Rules of Mankind, he, at the same time, fill'd his miserable Life with Shame and Disquiet.

(g) *Ibid.*

ments make no Impression on Sense, they have so much the less Efficacy towards restraining the Growth of Wickedness in Others. Mr. Hobbes (a) is in the right, when he tells us, that Scarce any Human Action can be assign'd, which is not the Beginning of so long a Chain of Consequences, as our foresight seldom reaches to the End of. The pleasant and painful Accidents of Life, are so firmly link'd together, that he who receives the Pleasure, is, at the same time, oblig'd, (whether he apprehends it or not,) to accept of the attending Pain. Thus the Abuse of Power is punish'd by the Power and Violence of Others; Intemperance by Diseases, &c. and these are what I call Natural Punishments. Yet the Generality of Men, either through Defect of Judgment, or Vehemence of Passion, are commonly hindred from giving these Considerations their due weight. Wherefore there remain'd no way of laying so powerful a Restraint on Human Corruption, as what is now afforded, since the Institution of Civil States. *Plutarch* (b) seems to have forgotten himself, when he censures *Colotes* for the following Assertion: They who first regulated Life, composed Laws, set up Governments and Magistrates over Cities, and enforced Obedience to their Di-

rections, were certainly the Persons who deliver'd us from Trouble and Tumult, and establish'd Peace and Safety in the World. Take away these Engagements; and we should live like wild Beasts, and hardly forbear to devour the next we meet. For, that grave Writer, who reprehends this way of speaking, could have no very deep Insight into Human Nature and Disposition, if he imagin'd, that, upon reversing the Laws of all Civil Communities, the Honour and Safety of Mankind could be preserv'd by the Wise Rules of *Parmenides*, *Socrates*, *Plato*, or *Heraclitus*. And, tho' we should never so freely subscribe to *Aristippus's* Boast (c), who, when ask'd, What Advantage Philosophers had above other Men? Replied, *Were there a general Repeal of all Laws, we should continue to live as regularly and peaceably as we do at present*: yet, What would become of the far greater Number; who, if left to themselves, would fancy Lust and Passion the best Reason and Philosophy? Rather, therefore, let this be the final Decision of the Case; *Qui ratione traduci ad meliora non possunt, metu contineantur* (\*): 'Tis fit, that they whom Reason cannot persuade to do Better, Fear should restrain from doing Worse.

(a) *Leviath.* c. 31. towards the End.  
 (\*) *Quintil. Instit. Orat.* l. XII. c. 7.

(b) Against *Colotes*, p. 1124. D.

(c) In *Hesych. De Vir. Illustr.*

## CHAP. II.

### Of the inward Structure and Constitution of Civil States.

IT follows now, that we enquire more exactly into the inward Structure and Constitution of *Civil States*. That Men, therefore, might render themselves secure against the Wickedness of Others, so far as the Condition of their Nature will admit, no other Expedient could have been invented but this, that each Person should provide a sufficient Guard about him; by means of which, the Designs of others might appear so dangerous in the Execution, that they would think it their safest Course, rather to refrain than to engage, rather to keep the Peace, than to be the Challengers and Aggressors in a War. For the malicious Inclinations of Men, and their ready Disposition to their Neighbour's Hurt, cannot any way be more effectually kept under, than by setting before their Eyes some present Danger, which must certainly fall on him that shall dare to Assault another; and by taking away all Hope and Prospect of Impunity. Now such a Defence, or Assistance as this, can by no means be afforded by any fortified Place, whether it derives its Strength from Nature or from Art: For to lie thus continually in Hold, is to be a perpetual Prisoner: nor would it be easy, for a

single Man to Defend his Post. But if he let in others to help him, there will be a Danger from them likewise, and he will stand in need of a new Protection. Some kind of Aid might indeed be expected from Arms; but not to such a Degree, as that one Person alone, should be able to promise himself any long Security from hence, against numerous Oppressors. So too, the Defence, which might be made by Brute Creatures, is very slender and uncertain, and by no means capable of shielding us from Dangers of this Nature. For tho' we meet with a Story of two Dogs, that performed Military Service against the *Americans* (a) (1); and tho' the Emperour of *Ceylon* in his Royal City of *Candy*, is reported to have a Life-Guard (as it were) of an hundred Elephants, which go their rounds upon the nightly Watch, and are the publick Executioners of Criminals: Yet many Men must join in teaching and training them, e'er they can be made fit for these Employments. It remains therefore, that against the Dangers, which might be apprehended from Men, Men alone could afford an agreeable Remedy, by joining their Forces together, by interweaving their Interests and Safety, and by

(a) *Gomara, Hist. Gener. Ind. Occid.* c. 44. & 65.

(1) See *Montaigne's Essays*, B. 2. c. 12. p. 336.

forming a general Confederacy for their mutual Succour (a).

II. But it is manifest, that the joining together of two or three, or of a few Persons, must necessarily prove insufficient for this Defence; because, then, the least Addition, on the side of the Invaders, would turn the Scales, and carry them on to certain Victory; and therefore would encourage and embolden them to begin the Assault, by promising not only Impunity, but Success. So that to obtain the Security, of which we are now in search, it is requisite, that the Number of the Confederates be so great, as that the Advantage of a small odds, on the Enemy's side, shall not visibly determine the Issue of the War; and consequently, that this League and Union be made by a considerable Multitude. Hence *Plato* (b) demands such a Number of Subjects in his Commonwealth, as shall be able to repel their Neighbours, when they prove Injurious, and to succour them when they are Oppress'd. From what has been offer'd, this farther Remark may be drawn, that the just Measure of any State, ought to be taken from the Proportion it bears to the Strength of those about it. And therefore those Communities, which were heretofore look'd on as sufficiently large, when Mankind was divided into a prodigious Variety of distinct Governments, are too little since the forming of Mighty Empires. For, as *Pliny* (c) observes, *Bodies, however high and towering, sensibly diminish, when set in Comparison with those that overtop them.*

III. To proceed; 'tis no less necessary, that the Multitude united on this account, do agree about applying the means, for the Attainment of the desired End. For otherwise, how numerous soever they may be, yet, if they consent not in using the best Methods for effecting the common Security, but resolve to manage each his own Strength according to his own Fancy, the Design will come to nothing. Because, being divided in Opinions, and moving contrary ways, they will not help, but hinder, one another. Or, to suppose the best, if they should once happen to agree well enough about the Undertaking of a single Action, either upon sudden Impulse, or upon Counsel and Deliberation, led on by the Hope of Victory, of Booty, or of Revenge; (as may sometimes be observed, in the mad Disorders of popular Tumults (d): yet afterwards, either by the Differences of their Tempers and Judgments, or by that Envy and Emulation, which is natural to most Men; or through Lightness and Inconstancy, they will be so torn asunder, as that, for the future, they will have no manner of Inclination, either to afford their mutual Succour, or so much as to keep the Peace amongst themselves (e). And consequently these united Bodies, which are form'd of a great Num-

ber of Persons, are, of all, the most unlikely to hold for any long time; unless they are kept together by some general Fear, restraining them from quitting a Resolution, at their Pleasure, which they have once, by Agreement, taken up. Whence it follows, that the bare Consent of a Multitude, tho' confirm'd by Covenant, cannot give us that Security, which we now seek after; or, that 'tis not enough, for many Persons to enter into a Confederacy of mutual Assistance, and to promise on both sides, that they will direct their Strength, and all their Actions towards this End, and towards the common Good. But 'tis still necessary, that some farther Tye be laid upon them, that they who have once consented, for their general Benefit, to be peaceful and helpful to each other, may be hindred by some Fear, from drawing back and disagreeing, when they find their private Advantage clashing with the publick.

IV. For the Illustration of this Point, *Hobbes* (1) examines strictly the Nature of some inferior Animals, which (after a sort) do appear likewise to maintain Society among themselves; of which kind, the most Remarkable are the Ants and the Bees (2). For these Creatures, tho' void of Reason, by which they might engage in Compact, and submit to Government; yet by joining Consent, that is, by desiring and declining all the very same things, do to direct their Actions towards the common Good, as that their petit Confederacies are liable to no Differences or Dissentions. Why it should happen otherwise with Mankind, and why a considerable Multitude should not be able to live amicably together for any time, without the Restraint of Civil Authority, is a Question not unworthy our Debate. The Reason, then, for which the wise Appointment of Nature hath join'd these little Creatures, rather than others, in publick Bodies, seems to be this; that they continue all the Winter, and are still nourish'd after their ordinary manner, whereas most other Insects, during that Season, either perish, or are preserv'd without any external supply of Food. Now these Winter-Stores may be much more conveniently brought together and laid up, if many join their Service, than if each Labours apart from all the rest. Whence 'tis evident, that the Communities, form'd by these Creatures, have a quite different End from that of Human and Political Societies: tho' we may discover in them, some Resemblance of a Communion of Goods, whilst they labour all for the same general Stock, and afterwards do all receive their Maintenance from it. *Hobbes* offers this farther reason of the Difference, that all the Government of these Animals, is nothing but an universal Consent, or, many Wills directed to the same Object, not one arbitrary Will, as in Civil States:

(a) *Comp. Hobbes De Civitate, c. 6.*

(b) *De Legibus, l. V. p. 845. E. Ed. Wech.*

(c) *Panegyric, c. 61. n. 2.*

(d) *Vid. Tacit. Annal, l. c. 32.*

(e) Compare the Discourse of *Polybius*, on the Vices of the Athenian Commonwealth, l. 6. c. 45.

(1) *De Civitate, c. 5. f. 5.*

(2) *V. Virgil. Georg. 4.*

he means, that each of them, in particular, conspires with the rest, to work together, and to treasure up their Provision in the same Heap; and that all their Wills are not reduced into one Sovereign Will, as in Politick Bodies; so that what a single Ruler, or a governing Council determine, should pass for the Will of All in general. The main Causes why, in these Creatures, which live by the Guidance of no Superior Faculty than Appetite and Sense, the bare Agreement of Inclinations should be so lasting, and so effectual, as to stand in need of no other Assistance, seems to be these that follow. 1. Men are continually in Competition for Honour and Dignity, whereas these Creatures are not: And consequently, that Envy, Hatred and Emulation, which flows from this Spring amongst the former, is not to be discover'd amongst the latter. 2. The Natural Appetite of the Bees, and that Faculty, which we may call the Judgment of their Senses, are exactly uniform, and are carried on toward the publick Good, which in them, differs not from the private. *Whatever is not good for the Hive, (as Antoninus (a) observes) is not good for the Bee:* To see their Hives full and flourishing, is their whole Wish and Desire. But amongst Men, *So many Heads so many Wits:* and scarce any thing is look'd on as truly Good, which doth not afford the Possessor somewhat singular and extraordinary above his Neighbours. 3. Creatures, which have not the Use of Reason, neither see nor fancy that they see any Defect in the Administration of their common Societies (1); in as much as they Erected them not with the Guidance of Judgment, but by the bare Instinct of Nature, and have not the Art of comparing them with others. Again, not one of the Bees ever entertains a Design of forming her Comb in any other, than the Common hexangular Figure: whereas, in Human Politicks, there are very many, who, thinking themselves Wiser than their Fellows, are Disgusted with the present Condition, and are for introducing a Change in the Government. And according to the Difference of Judgments, several of those Projectors are for setting up several Models, or for reforming things each in his own way, the Consequence of which, must be the Distracted of the State, and, in the Issue, a Civil War. 4. These Creatures, tho' they have some Use of Voice, in making known to one another their Desires, at least, when their Affections are more warmly rais'd; yet they want that Art of disguising things, in the false Colours of Speech, which is necessarily required to the disturbing the Minds and Passions of a Society: This being the Instrument by which, what is Good, is Represented, either under a greater or a less Degree of Goodness than it really hath, and, what is Evil, is, in

the same manner, either Aggravated or Extenuated: or, perhaps, both are painted with a quite different Face from what they truly bear. But now, the Tongue of Man is often us'd for a kind of Trumpet of War and Sedition; which is able, not only to propose false Rules of living and of acting, but also, with fair Glosses and much insinuating Language, to recommend them to Others, and thereby to render their Minds utterly averse to the Genius of a peaceful and social Life. On which account, it was not without Justice said by the Comedian (2), of the eloquent *Pericles*, that *He-thunder'd, and lighten'd, and confounded all Greece.* 5. Irrational Creatures cannot distinguish between Contumely, or Contempt, and real Damage; or rather, they have no Sense at all of Contempt. Therefore, whilst they find the Necessities of their own Bodies supplied, they commence no Quarrel with their Fellows. But of Men, those are the greatest Disturbers of the Commonwealth, who enjoy the greatest Opportunities of being easy. Nor do they engage in Contentions, about their Honour or their Reputation, till after they gain'd an absolute Victory, over the Force of Hunger, or the Injuries of Weather. Lastly, the Agreement of these Creatures is *Natural*; but that of Men only *Federal*; that is, Artificial, or rather Moral; held together by no other than Moral Ties, which do not, in the least, extinguish the Natural Difference of Men's Inclinations, the Roughness of their Tempers, and the Power which they have of taking quite contrary Measures. To all which, we may add this farther Consideration, that, in the Kingdom of the Bees, there is no Sovereign Authority properly so call'd (3), (tho' this be the very Life and Soul of a Community;) for which reason their Monarch is not Arm'd with a Sting. And therefore 'tis the greater Miracle of Nature, that

— *Rege insolubili, mens omnibus una;*  
*Amisso rupere fidem.* —

Their Prince secure, one common Mind they bear;  
 But, Him once lost, with wild Distracted jar (b).

Yet here it ought to be well observ'd, that the Comparison, thus pursued, between the two Multitudes, one of Men, the other of Bees, hath been alledg'd to no other End, but to shew why, in a great Body of Men, destitute of the Advantages of Civil Government, no long Agreement or good Understanding can reasonably be expected. But we would by no means be thought to insinuate, as if these Inclinations, in which the Seeds of Discord are contain'd, were found to be of equal Force and Efficacy in each particular Man; or, as if sound Reason did not, from the bare Consideration of Human Nature, suggest such Arguments, as

(a) L. 6. f. 54. (1) The Government among such Creatures is but pretended and Chimerical. See *Algernon Sidney's Discourse of Government*, c. 2. f. 8. (2) *Aristoph. Acharn.* V. *Plin. L.* 1. Ep. 20. n. 17, &c. Ed. *Cellar.*

(3) Tho' by a kind of Miracle in Nature, the whole Hive disperse themselves, as soon as their King leaves them. *V. Senec. De Clementia*, L. 1. c. 4. & 19. (b) *V. Virgil. Georg. L.* 4. v. 212, &c. Add. *Xenophon. Cyropad.* 1. V.

must engage and command Men, rather than any other Animals, to follow Concord and mutual Kindness. And therefore our Design, in this Matter, is not, in the least, thwarted by a Learned Author (a), who hath undertaken to retort these six Reasons of Mr. *Hobbes* by shewing, That as Man naturally loves Honour, so Honour is the Natural Result of good Actions: That he more perfectly understands the Force of the publick Good, in securing his own private Interest: That he enjoys the Gift of Reason, which equally disposeth him, as his Lot shall fall, to Govern or to Obey: That he hath the Art of enlivening and adorning his Rational Faculty, by setting an Edge and a Grace upon it, with the most proper Expressions: That he apprehends himself to be under the Guidance of a Law, by the Power of which he distinguisheth a down-right Injury, from a Damage offer'd without Injury: Lastly, That Agreements, made amongst Men, are not only strengthen'd and confirm'd by Nature for a long Continuance, but do likewise receive from Art, as the Assistance of Nature, many Defences against less uncertain Dangers, and, by means of Writing, a Duration beyond the Age of Man. The Argument doth not at all affect us, unless it could make out, that a numerous Body of Men, united under no common Government, might not be disturb'd by a very few: As likewise, that all Men are Judicious and Wise, and do, after the clearest manner, apprehend the Dictates of sober Reason, and have utterly disabled all their evil Affections and Desires. He, certainly, erects a Civil State upon no better than a ruinous Bottom, who makes too large Allowances to the Modesty and Ingenuity of Mankind; and measures the Integrity of Others, especially of the lowest Rabble, by his own.

V. But what that is which we may depend upon, as sufficient for the long keeping together the Consents and Inclinations of an united Multitude, will easily appear, to one that thoroughly examines the common Bent and Genius of Mankind. Now in this there are two Vices to be discover'd, which especially hinder any Number of Persons, from long continuing in the same general Design. One is, the great Variety of Inclinations and Judgments, about discerning what is most expedient for the common End: to which there is join'd, in many Men, a Dullness of apprehending which of several Means propos'd, is more advantageous than the rest; as likewise, the obstinate Stubbornness in defending what they have once, right or wrong, happened to embrace. The other general Vice, is a sluggish Coldness in Business, and an Aversion to doing willingly, what we know to be for our Interest: when we are under no necessary Force, which might drive us on, if we hung back, and oblige us,

whether we will or no, to the Performance of our Duty. The former of these Evils may be remedied, by uniting in a perpetual Bond the Wills of all the Parties, or by so ordering things, that in all Affairs, relating to the common Good of the Society, there should be but one Will to govern their Proceedings. The latter, by constituting some Power which shall be able to inflict a present and sensible Punishment, on those who oppose or hinder the publick Benefit. *Tully* (b) hath a remarkable Saying to this Purpose: *They observe* (speaking of the *Aristotelians*,) *that even the Passion of Grief was not constituted by Nature, without our great Use and Advantage: that Men, taken in Offences, might be heartily troubled at the Correction, the Reproof, the Ignominy which they undergo. For they, who can bear Infamy and Reproach, without Concern, seem to have obtain'd the Privilege of sinning with Impunity.*

Now the Union of Wills, could not possibly be compass'd in any of the following ways: Either that, by a Natural Conjunction, the Wills of all the Parties should be amass'd into one; or that one Person only, should exert his Will, and all the rest suppress theirs; or that the Natural Disagreement of Inclinations and Contrariety of Desires, should, by any means whatsoever, be absolutely taken away, and combined in perpetual Harmony and Concord. The only Method then, by which many Wills may be conceiv'd as join'd together, is, at least, this; that each Member, of the Society, submit his Will to the Will of one Person, or of one Council; so that whatever this Person or this Council shall resolve, in Matters which necessarily concern the common Safety, shall be deem'd the Will of All in general, and of Each in particular. For when I have made over my Power to Another, his Act and Choice is interpreted as mine (c).

So again, as to the other Remedy propos'd, 'tis impossible to constitute such a Power as shall be formidable to the whole Multitude, by Natural Means; that is, by transfusing the real Strength of All and Each of them into one Person, so as to leave all the rest utterly weak and impotent. But one Man can thus only be supposed to possess the Strength of All, when the whole Body, and every particular Member, have oblig'd themselves to use and apply their Strength, as He shall judge expedient. When this Union of Wills and of Forces, is once compleated, thence, at last, ariseth what we call a Common wealth, or Civil State, the strongest of all *Moral Persons*, or *Societies*.

What hath been offer'd may, perhaps, be more distinctly understood, if we consider, that by the Submission of their Wills, made on the part of the Subjects, their *Natural Liberty of Choice* is not extinguish'd; by virtue

(a) Bp. Cumberland De L. N. c. 2. f. 22. (b) Tusc. Quæst. l. IV. c. 20. (c) A good Man submits his own Judgment and Choice to the Governour of the Universe, as good Subjects do to the Laws of the State. Arrian Epictet. l. I. c. 12. p. 118.

of which they are still able, *de facto*, to resume what they once gave, and to deny and withdraw their Obedience which they promis'd: as likewise, that the Strength and Power of the Subjects are not, by any Natural Conveyance, transferr'd really on the Sovereign, as if, for Instance, the Strength, which lay in the Shoulders of all the Subjects, should be removed to the Prince's Shoulders; and, consequently, that both the Wills and the Strength, of those who are govern'd, are, as we may say, turn'd in the Scales, and render'd conformable to the Governour's Pleasure, only by these two *Moral Weights*, which we come now to examine. The first is taken from their own Act and Covenant, by which they engage their Allegiance: and this receives all possible Force from the Command of G. O. D, and from the sacred Authority of an Oath; both which are so much the more effectual, in over-ruling Men's Minds, the more carefully the Parties have, from their Childhood, been Educated with good Discipline and Instruction, and the more Knowledge they have obtain'd of the Necessity and Usefulness of Civil Government. But they who, through the extreme Pravity of their Mind, resist the Force of this Weight, whilst they, either foolishly imagine Government to be a Stratagem found out for the vexing and oppressing of all others, to satisfy the Tyrannical Pleasure of a few; or else are overcome with a heavy Listlessness, rendering them averse to the voluntary Performance of what their Duty requires; these, we say, are drawn to obey their Superiors, by that other Weight which we have still in reserve; that is, by the Fear of Punishment, and by external Compulsion. Farther, since he who compels Another, ought to surpass him in Strength, and since that Strength, by which Governours exceed the Force of private Persons, ariseth from hence, that the Subjects are ever ready to apply their united Power, as they shall be commanded; hence 'tis evident, that the Ability, which Rulers have to compel and restrain Evil and Disobedient Subjects, is owing to the Obedience of the Good. Now, that the greater Part of a Nation's Strength, shall always be in the Hands of the Sovereign, 'tis easy for him to effect (1); provided that he first obtain'd his Crown by Lawful Means, and that he expresseth any tolerable Care and Endeavour towards the Discharge of his Trust. For as he may ever reasonably hope, that the Majority of the Subjects will be mindful of the Divine Command, and of their Oath of Allegiance and Fealty; so 'tis, indeed, ever the Interest of the larger and better Part of the People, that the State should remain Secure and Undisturb'd, and that the Lawful Government should be maintain'd in its due Privileges and Authority. But besides all this, Governours have ready at Hand certain useful Engines,

which afford a vast Addition to their Power: such as are, good Fortresses, and a standing Force, engaged to the Prince by more than ordinary Ties; by means of which Assistances, a Multitude, how numerous soever, may be reduced to Obedience, especially if they want Arms, and are scatter'd at a wide Distance, through the several Parts of the Country; and in case the Sovereign useth due Caution, to hinder his People from bandying into Factions.

VI. That the Union, which we have been thus explaining; may be more thoroughly apprehended, we are to know, that many Natural Persons, before they close into one Moral Person, whatever they Act, and whatever Obligations they take upon themselves, they Act and Undertake in their single Capacities, so that the Number of the Actions and Obligations is equal to the Number of the Natural Persons. And tho' often, when we would denote many independent Men, we use the Word *Multitude*, which seems to imply some kind of Unity; yet if we consider more exactly, this Term is not one of those which we call *Collective* Words, or such as signify an united Body, compos'd of many Individuals, as those other Names of an *Army*, a *Navy*, an *Assembly*, a *Senate*, and the like; but really imports no more than a bare Number of things in general, without specifying whether they be of the same or different kinds, whether they be united or dispers'd. And therefore, properly speaking, a *Multitude* of Men is not one compound Body, but many separate Persons, each of which hath his own Judgment, and his own Will to Determine him in all Matters that shall be Propos'd. For which reason, if we thus consider a *Multitude*, and then abstract it from the particular Men of whom it consists, we cannot ascribe to it, in this general Notion, any one Action distinct from those of the private Persons, or any peculiar Privilege or Right. Hence suppose a Man to be in a *Multitude*, or to have many other Men about him, not join'd in a common Society, should most, or should all the rest of these perform any Act, or engage in any Compact, whilst he alone enters his Dissent to the Business, or, negatively, doth not any way approve or partake of it, the said Act or Compact shall on no account affect his Person. So that, on the whole, to join a Multitude, or many Men, into one *Compound Person*, to which one general Act may be ascribed, and to which certain Rights belong, as 'tis oppos'd to particular Members, and such Rights as no particular Member can claim separately from the rest; 'tis necessary, that they shall have first united their Wills and Powers by the Intervention of Covenants: without which, how a Number of Men, who are all naturally equal, should be link'd together, is impossible to be understood.

VII. The Nature and the Number of those

(1) Mr. Le Clerc (in His Additions to Morery's Dictionary, at the bottom of the Article of *Calvin*.) says, That Princes who have but a moderate share of Integrity, may be almost Ador'd by their Subjects.

Covenants, by the Mediation of which, a Civil State is compacted, may be discover'd by the following Method of Enquiry. Let us conceive in our Mind a Multitude of Men, all naturally Free, and naturally Equal, going about voluntarily to Erect themselves into a new Common-wealth: here it will be necessary, first of all, that they covenant each with each in particular, to join into one lasting Society, and to concert the Measures of their Welfare and Safety, by the publick Vote. (Tho', in a Compact of this Nature, 'tis the most usual way, for particular Persons, to reserve to themselves the Liberty of departing, if they shall see fit (1).) This Covenant may be made either Absolutely or Conditionally. The first is done, when a Man engageth himself to stick to this Society, whatever Form of Government shall afterwards be approved of by the major Part. The latter, when the Person engaging adds this Clause, provided such a Form shall be introduced, as is agreeable to his private Judgment. Farther, when this Covenant is to be transacted, 'tis requisite that all and each of them give their Consent. He that shall disagree, tho' he may happen, for some time, to continue in the same Place with the rest, yet stands without the Bounds of the rising State, nor is obliged by the Vote of his Fellows, tho' the greater Number, so as to be under any Necessity of joining himself to the new Establishment: but he remains under his Natural Liberty, in which it shall be lawful for him to provide for his private Security, according to his own Measures. But after such a Society, representing the first Rudiments and Beginnings of a State, hath been united in the manner described, it is then farther necessary, that a Decree be made, specifying what Form of Government shall be settled amongst them. For before this Point is adjusted, 'tis impossible they should take any regular Step towards maintaining the Safety of the Publick. Now when Matters are come to this Issue, they who join'd themselves in the Society, upon absolute Terms, shall, if they design to continue longer in the Place where the Society is fix'd, be bound, by the Agreement of the Majority, to acquiesce in the Form establish'd, tho' their own Opinion more incline to some other Model. For, by adding no Exceptions to the Covenant, they are presum'd to have, in this respect at least, submitted to the Will of the greater Number; from whom it can, with no manner of reason be expected, that they should quit their own Judgment, to comply with a few that obstinately stand out. But on the other-hand, they who entred themselves in the Society upon Conditions, unless they expressly consent to the Government resolv'd upon, shall not become Members of the new State, nor be concluded by the Vote of the Majority.

VIII. After the Decree hath pass'd, to settle the particular Form of Government, there

will again be Occasion for a new Covenant, when the Person or Persons, on whom the Sovereignty is conferr'd, shall be actually constituted; by which the Rulers, on the one hand, engage themselves to take care of the common Peace and Security, and the Subjects, on the other hand, to yield them faithful Obedience; in which likewise, is included that Submission and Union of Wills, by which we conceive a State to be but *one Person*. And, from this Covenant, the State receives its final Completion and Perfection. But now, if the Form establish'd, should happen to be a Democracy, this latter Covenant doth not so manifestly appear; because the same Persons are, in different respects, Sovereigns and Subjects: whereas every Covenant requires two distinct Parties. Nor doth the different respect seem a sufficient Distinction; as, for Instance, when the same *Titius* is said to be a Father, a Son, a Husband, a Son-in-Law, a Father-in-Law, a Merchant, &c. for here if this *Titius*, as a Merchant, shall promise any thing to the same *Titius*, as a Father, there is no Covenant in the Case. We are therefore to understand, that, in a popular Government, the particular Members and the Sovereign Assembly, are not only distinguish'd by different respects, but are really different Persons, (tho' not of the same kind,) who have distinct Wills, distinct Acts, and distinct Rights from each other. For the Will of particular Men is not, immediately, the Will of the People: nor can, what particular Men shall happen to do, be construed as the People's Act, or *vice versa*. Again, particular Men neither enjoy the Sovereignty, nor any Part of it, but 'tis lodg'd in the Body of the People. For to have a Part of the Sovereignty, and to have a Vote in that Assembly in which the Sovereignty resides, are two different things. So that, hitherto, there seems to be no reason why we may suppose a Covenant to pass between the general Assembly, and the private Members of the State. One thing indeed there is which may be urged, with some Colour to the contrary: 'tis that such a Covenant would be of no manner of Use; because, each Man, by giving his Consent to the setting up of a Democracy, is, at the same time, presumed to have submitted his Will to the Will of the major Part; and besides, the Love that he hath for his own Person and Fortunes, seems to lay a sufficient Necessity on any Man to labour with his utmost Ability for the publick Good, with which his own private Welfare is inseparately United. However, altho' it may not, perhaps, be altogether so necessary in Democracies, as in other Governments, that this Covenant, or mutual Engagement for performing the respective Duties of Sovereign and Subject, should be openly and expressly made; yet 'tis absolutely requisite, that we suppose it to have pass'd by tacit Agreement. For whether we look on that first

(1) See hereafter in B. 8. c. 11. f. 2.

Decree, for the Establishment of the Democracy, as the bare Act of many Wills conspiring in one Desire, or as the Covenant of each Man with each, to this Purpose, *I will submit my Will to a general Assembly of us all, upon Condition You will do the like*: yet from all this, thus strictly consider'd, there can no other Obligation arise but what follows, that every Person shall be bound to acquiesce, in this particular Form of Government, so long as 'tis not alter'd by universal Consent. But now the Subjects, in a popular State, are certainly under a farther Obligation. For first, each Member is bound to stand to such Decrees, and Commands as shall proceed from the general Assembly; and then again, they are engaged, every one in particular, to contribute each his utmost Service to the State, and to prefer the publick Good to his own private advantage (a). Otherwise, on what Pretence should any Man be punish'd, for not giving Attendance at the publick Councils? Since then such an Obligation is evidently discover'd, there must, of Necessity, be some Principle whence its Origine is derived; and this can be nothing else but the Covenant, of which we have been now discoursing.

But, if the Society agree to erect an Aristocracy, or a Monarchy, then this latter Covenant is far more visible. For upon creating the Senate, or the Prince, both Parties interchange their mutual Faith, and mutual Performances thence arise, as their necessary Duty. In as much as, after the Sovereignty hath been once conferr'd and receiv'd, the Prince or the Senate, no less than the Subjects, stand bound to discharge certain Offices, with which they were not before concern'd: The People, before the passing of this Covenant, being no more engaged to obey one Man, or one Council of Men; than that Man, or that Council of Men were engaged to undertake the Care of the Publick. But now, from what Principle could this mutual Faith and Obligation to Duties, which were not required before, take their Rise, but from Covenant?

What we have hitherto deliver'd, concerning the two Covenants, and the one Ordinance or Decree, may be illustrated by that Account, which *Dionysius Halicarnassens* (1) gives us of the first Settlement of the Monarchy in *Rome*. For here, first of all, a Number of Men flock together, with Design to fix themselves in a new Seat; in order to which Resolution, a tacit Covenant, at least, must be supposed to have pass'd amongst them. After this, they deliberate about the Form of Government, and that by Kings being prefer'd, they agree to invest

*Romulus* with the Sovereign Authority. And this holds too, in the Case of an *Inter-regnum*, during which the Society being held together only by the prime Compact, it is frequent to enter the Debate about the Frame and Model of the Common-wealth (b).

We ought carefully to observe, that this Method of Producing and Constituting a Civil State, by the means of two Covenants and one Decree, is the most Natural, and what agrees in general to every kind of Government (2). Yet a Monarchy, may sometimes happen to be Constituted by one Covenant alone; as suppose many Persons, without any antecedent Agreement, amongst themselves, should, at the same or a different time, each Man for his own Person only, subject themselves to a single Master, almost, in the same manner as an Army, which is form'd out of Strangers and Mercenaries, who come from all Parts to offer their Service. So again, they who join themselves to a Community already Establish'd, have need of one Agreement only, by which they, on their own part, petition to be admitted into the State; and, on the other part, they who represent the State, upon Security given for their Obedience, admit and receive them.

It would be an unjust Suspicion, in any Person, to imagine that what we have offer'd about these Covenants, in making them the Cause and Foundation of a Civil State, is purely our own arbitrary Fiction, because the first Rise of most Governments is unknown, or, at least, we do not certainly apprehend them to have been compos'd and cemented after the manner here described. For 'tis certain every State once had its Beginning (3). But now, before the fixing of any State, the Persons, of whom it was to consist, could not be united to each other by the same Ties, as they are after the State is actually set up; nor could they yet be subject to those to whom afterwards they owe Subjection. And since we cannot understand, how either this Union, or this Subjection could be made, without the Covenants or Agreements before mentioned, it is necessary, that the said Agreements must, tacitly at least, have pass'd in the Institution of Common-wealths. Nor is there any thing to hinder, but that the Original of some things, not committed to the Monuments of Time and History, may be traced out by the Disquisitions of Reason.

IX. It may be worth our while, on this Occasion, to examine with particular Strictness the Opinion of Mr. *Hobbes*, who, in the Generation of States, acknowledgeth no more than one Covenant of each Man to each Man;

(a) In *Thucydides*, a Member of a Democratical State, unacquainted with publick Affairs, is styl'd an *useless Citizen*. l. 2. c. 40. Ed. Oxon. *Socrates's* Dispute with *Charmides* in *Xenophon*, Memorab. l. 3. p. 486.

(1) B. II. in the Beginning. (b) See the Debate of the *Persian Nobles* in *Herodot. Thalia*, p. 121, &c. and of *Brutus* and his Associates, in *Dionys. Halicarn.* l. 4. (2) Mr. *Budde* (in his *Practical Philosophy*, p. 2. c. 4. f. 13, 14.) says, that Philosophy reaches us the same concerning the Origine of States: but, if we consult History, we shall scarce find one Example of any State that has been form'd by such Express Compacts. See Mr. *Barbeyrac's* Second Note upon this Section. (3) See Mr. *Lock* upon Civil Government, C. 8. f. 7, &c. and *Algernon Sidney* upon the same Subject. C. 3. f. 25 and 33. See Mr. *Barbeyrac's* Third Note upon this Section.

frequently representing and declaring, that there passeth no Covenant between the Prince, or the Senate, and the Subjects. Indeed, we may easily gather from the Design of his Books of Policy, which is clearly discover'd in the *Leviathan*, the reason that put him upon this Assertion. His principal Aim was to oppose those seditious and turbulent Spirits, who, in his time, labour'd to bring down the Regal Power to their own Model, and either utterly to extinguish, or to render it inferior to the Subjects. To cut off from these Men their ordinary Plea for Rebellion, which was, that there is a reciprocal Faith between the Prince and the People, and that when the former departs from what he engaged by Promise, the latter are releas'd from their Obedience, as also to hinder restless and factious Persons from interpreting every Action of their Prince, which suited not with their own Humour, as a Breach of his Faith; he resolves to deny that there is any such thing, as a Covenant, between Subjects and their Sovereign. And having undertaken to maintain, that every Monarch, properly and truly such, hath an absolute and unlimited Power; it follow'd, of Course, that he should exclude all Covenants or Compacts from this Affair, because these seem to be the chief Instruments, of reducing Authority to Bounds and Rules. But now, although it highly concerns the Interest of Mankind, that the Regal Power should be kept sacred and inviolable, and be secured from the impertinent Cavils of those busy Designers, who are always plucking at it; yet this Consideration doth by no means make it necessary, for us to deny what is as clear as the Light, and to acknowledge no Covenant, in a Case where there is certainly a mutual Promise for the Performance of Duties not before required. Whilst I voluntarily subject my self to a Prince, I promise Obedience, and engage his Protection: on the other hand, the Prince, when he receives me as his Subject, promiseth his Protection, and engageth my Obedience. Before this reciprocal Promise, neither was he bound to protect me, nor I to obey him, at least by any *perfect* Obligation. And who will pretend to say, that an Act of this kind doth not fall under the Head of Covenants? Nor is this Covenant therefore useless because they, who by their own free Choice, appoint a King over themselves, seem before-hand to have entred into an Agreement for the advancing such a particular Person to the Throne. For as the bare Election, without the Acceptance of the Party Elected, confers on him no Power over the rest; so 'tis plain enough, from the Nature of the Business, that they who freely put themselves under the Power of Another, desire he should, in the Exercise of that Power, pursue the End for which it was given him: and that he receiv'd the Power on this Condition,

that those who conferr'd it on him should not, by his means, miss of their Aim. They who create a Sovereign, therefore, as they, at the same time, promise whatever the Nature of Subjection requires; so, on the other part, engage him to endeavour the procuring of all those Benefits, for the sake of which Civil Governments are introduced. And what can we call this but the entering into Covenant?

X. Nor, upon admitting this Covenant between Prince and People, do those Inconveniencies, to which Mr. *Hobbes* seems to have had an Eye, necessarily follow. This indeed is common to all Covenants, that they lay upon Men an Obligation to some certain Performance. But then, there is the greatest Difference imaginable, between those Covenants in which one of the Parties doth, at the same time, put himself under Subjection to the other, and those in which neither Party requires, with respect to the other, any Superiority or Command. Thus the Right of a Master over his Servant, at least over such an one as freely enters into that Condition, depends upon Covenant; and in the same manner the Authority of a Father over him that offers himself to be Adopted, and the Command of a General over his mercenary Troops. And yet this doth not hinder, in the least, but that in all these Cases there is a Right of Governing on the one side, and an Obligation to Obedience on the other: nor may the Party, in Subjection, throw off the Yoak, when his Superior's Command proves disagreeable to his own Humour (a). For, in all these Covenants which do not include a Submission of Will and of Strength, some certain Duties are specified, to be mutually perform'd on the inward Principle of Conscience; and when either Party refuseth voluntarily to fulfil his Engagement, there remains no Redress but either from War and Violence, or from the Compulsion of their common Lord. But in Covenants, where one of the Parties is made subject to the other, the latter may, as he thinks fit, prescribe what shall be done by the former; and hath likewise a Power of forcing his Compliance, in case of Refusal; whereas the former Party cannot, on any account, be said to hold the like reciprocal Power over him. Wherefore a Governour cannot be tax'd with Breach of Covenant, unless he either utterly abandon all Care of the Publick, or take up the Mind and Carriage of an Enemy towards his own People, or manifestly, and with evil Design, recede from those Rules of Government, the Observation of which was, by the Subjects, made the necessary Condition of their Obedience. And 'tis very easy for one in Authority to avoid and escape all those Imputations, provided he will but consider, that the highest of Mortal Men are not exempt from the common Laws which attend their Fortune and

(a) Xiphilin. *Epit. Dion. in Neron.* All Sovereign Force and Authority, when conferr'd by a private Person, passeth immediately from the Giver, and holds good against him in the Hands of the Receiver.

Condition, and that, as *Pliny* (a) observes, *No Prince was ever himself deceiv'd, who had not before deceiv'd others.* Lastly, that Prince must either be extremely vicious, or extremely weak and impolitick, who cannot so order Matters as that it shall be always the Interest of the greater, or the stronger Part of the People to see Him preserv'd in his Person and Government. And it may be a strong Motive to him, to apply his best Endeavours towards the compassing this good End, if he barely reflect on that Saying in *Livy* (b); *Is it to be imagin'd that any People, or so much as any single Man, will continue longer than they needs must, in a Condition which is grievous and uneasy to their Mind?* If then the Majority of the People find it their Interest to stand by their Prince, and to defend the publick Administration as lodg'd in his Hands; as they cannot but do, if he guide his Councils with Justice and with Wisdom, then his Fortune rests upon a safe Bottom. He that cannot compass thus much, is fitter for any other Employment, than for Sovereignty and Command.

XI. Let us proceed to weigh more particularly the Reasons urg'd by Mr. *Hobbes* in favour of his Opinion. And here, first of all, we think it very inconvenient, that he should go about to derive the Obligation of Subjects, towards their Sovereign, from *Such a Covenant by which each Man obligeth himself to each of his Fellows, that he will not resist the Will of that Person, to whom he hath yielded himself to be govern'd* (c). Indeed, they who have agreed amongst themselves, to confer the Sovereignty on a certain Man, are presumed to have agreed likewise, that they should all submit their own Wills to his Will; or, that, in the Management of the Common-wealth, his Will should represent the Will of them All. Nor is it unusual to ratify such a Consent, about conferring the Sovereignty, as also the Terms under which it is confer'd, by the mutual Covenants and Oaths of the People. Yet to agree about investing such a Person with the Government, and to confirm their Investiture, by interchanging their Faith one with another, are two different things. But to go farther, there's no Absurdity in supposing, that Subjects should mutually engage their Faith to yield Obedience to their common Prince: as we know, there are such Covenants in which All engage for each, and each for All. Yet there is no Necessity, but that this may entirely be omitted, and in Fact 'tis seldom practis'd. When a Stranger is incorporated into a State, he swears Allegiance to the Sovereign: but he is now here required, so far as we can discover, to contract with the other Subjects about paying this Allegiance. Lastly, it would be a thing of very dangerous Consequence, to build our Obligation to our Prince on a Covenant with each of our Fellow-

subjects, which should import as, follows, *I transfer my Right upon the King for your sake, that You, for my sake, may transfer your Right upon him also.* For at this rate, every Subject will seem to make the Obedience of every other Fellow-subject the necessary Condition of his own: and consequently, if any one happens to violate his Engagement, all the rest stand releas'd from theirs. And this Reason alone shews what Necessity there is, that each Subject should be bound to his Sovereign, in his own Person, without any Dependence on the Obedience of others; to the end, that how uneasy soever one, or two may perhaps appear under their Confinement, the Sovereign may make use of the united Strength of all the rest, in reducing the Rebellious to their Duty.

No less incongruous is that Assertion of Mr. *Hobbes* to this Purpose; *That the Obligation to obey the Supreme Civil Power, doth not arise immediately from that Covenant by which particular Persons give up all their Right to the State; but only mediately, from hence, that, without Obedience, the Right of Sovereignty would have been vain and insignificant, and, by Consequence, no Common-wealth would have been form'd* (d). What need of this winding and turning, when he might have gone on in the streight Road? The Reason, which moved him to this Position is certainly idle and frivolous. He proceeds upon a tacit Supposal, that things, agreed to by Covenant, cannot lawfully be refused; whereas a Prince may lawfully command his Subject, what the Subject may as lawfully disobey; as if the King should order me to kill my self, or himself, or my Father, though judicially condemn'd: wherefore, in his Opinion, the Obedience of Subjects is to be drawn from some other Principle, than from any Compact with the Sovereign. But now, we maintain, that the lawful Power of the Prince, and the Duty of the Subjects do exactly and compleatly answer one to the other: and therefore we deny that, in any Case, the Subject can lawfully refuse what the Prince lawfully enjoins. For he can lawfully enjoin no more, than what really is, or, at least, is judg'd to be agreeable to the End for which Civil Communities were first established. If either, through evil Design, or through unwise Councils, he attempts any thing contrary to this End, the Act shall on no account be esteem'd lawful. But whether the Subjects may resist all such unreasonable Injunctions, is properly another Question, and shall be discuss'd in another place. Mr. *Hobbes's* Instances are of no weight in this Point. For, if the Prince might lawfully command any of those Actions which he mentions; that is, if the Performance of such a thing, by a Subject, should seem Conducive to the Good of the Common-wealth, the Subject could not law-

(a) *P. mag. c. 66. in fin.*(b) *L. 8. c. 21.*(c) *De Civ. c. 5. f. 7.*(d) *Ibid. c. 6. f. 13.*

fully refuse to comply (a). And, on the other side, if the Commands were void of all Justice and Reason, and the Subject slain for not performing them; no Man in his Wits, will say that such an one was lawfully put to Death. \*

As to what he affirms in the same Chapter (b). That the Right of a Sovereign is confer'd on him by the People, in the way of *Donation*; this is not so much as consistent with his own Notions. *Donation* he himself allows (c) to be the transferring of Right from one Party to another, without the like Return. But now when a Prince is invest'd with the Sovereignty, there is a mutual transferring of Right; or a reciprocal Promise. The Subjects engage to be obedient, the Prince to take care of the Common-wealth, to which Duties neither of them stood bound, before this Act pass'd between them. For, as before the Government was confer'd on such a Person, the rest of the Society might have oppos'd or resist'd his Command, though they afterwards appoint him for their Sovereign; so he on his part, if they had demanded his Care or Protection, might likewise have resist'd them; that is, might have denied those Performances, as things which they had no Right to require of him (d).

XII. The other Set of Reasons, which He makes use of (e), to overthrow all Compacts between Prince and People, will appear to be no less weak than the former. In the first place, he undertakes to prove that Democratical States are constituted not by Covenants between each Man and the whole People, but between each Man and each Man. His Argument is; 'Because, in every Covenant, the Parties covenanting must exist antecedently to the Covenant it self. Whereas before the Settlement of the State, the People cannot be said to exist, as being not one Compound Moral Person, but only a Multitude of Individuals. And then again, after the State is settled, to enter into such a Covenant would be to no Purpose; because the Will of the People includes in it the Will of any private Subject, to whom the People must be supposed, in this Case, to engage their Faith; so that they may release themselves when they please, and, by Consequence, are actually free. But now 'tis Manifest, that there's a Medium between these Suppositions. Before the Settlement of the State, many Men are not indeed a *People*, that is, a Democratical

Community: therefore no Covenant can be made with them as such. And so too, after the State is settled, a Covenant of this Nature would in one Sense be in vain; that is, 'twould be in vain, for one or two particular Subjects, to make a private Compact with the People about the publick Administration: for he that hath once given his Consent to the introducing a Democracy, is presumed to have thereby oblig'd himself to obey such Degrees, as shall proceed from the Majority of the People; which Obligation must needs suffer Prejudice from any particular Covenant. But, still in the very Act of constituting a popular State, a mutual Covenant may, and really doth, pass between the People and the private Members: the Nature of which we have already explain'd. A Man might argue, with just as much Reason and Consequence, that a Husband cannot possibly have entred into any Covenant with his Wife: because, before Marriage, she was not his *Wife*; and, after Marriage, 'twould be in vain to come to a Covenant; the Woman's Will being then put under Subjection to the Man's. Whereas in the very Act of taking or choosing such a Woman for a Wife, a Covenant might pass between the Parties. *Epicurus's* Fallacy about Death was a piece of Sophistry much of the same Strain, as 'tis recited and confuted by *Lactantius* (f). *When we are in Being, Death is not; and when Death is in Being, we are not: therefore Death signifies nothing to us; or, Death and We have nothing to do with each other. What a nice Cheat was this upon our Understanding? As if we fear'd Death when 'twas once over, and had taken away our Senses with it; and not rather fear'd to Die, by which Act our Senses are thus taken from us! For there is a certain Point of time, when We seem to be gone, and yet Death is not quite arriv'd. And here's the miserable Moment, when Death begins its Being, and We conclude ours.*

But farther, should a Man contend with never so much Earnestness, that he cannot, in Democratical Governments, conceive such a Compact in his Mind, or that he judgeth it utterly useles; yet he cannot fairly take Occasion thence to exclude it from other Forms, where, those who command, and those who obey, are really and naturally different Persons. For here certainly a mutual Covenant is required, by which the former engage to undertake the Care of the Publick, and to make the Safety and Welfare of the People

(a) See *Judges IX. 54. 1 Sam. XXXI. 4. Zonaras, Part III.* reports, that when *Theophilus* the Emperour upon the Loss of a Battle, stood almost benumm'd with Fear, and would not stir out of the Field; *Manuel*, with his Sword drawn, accosted him to this Purpose, *Unless you follow me, I am resolv'd to kill you on the spot; for 'tis better you should lose your Life, than that you should fix a Mark of the highest Disgrace on the Roman State, by falling into the Hands of the Enemy.* At which Threats the Emperour with some Unwillingness, awaken'd from this Lethargy, and following his Guide, got off safe. The Poet observes, *Quint. Colab. l. 13.*

A Prince should rather *fall* amongst the Brave,  
Than wear the Badges of a *Royal Slave*.

(b) *Self. ult. in fin.*

(c) *Ibid.*

(d) *Comp. Luke XII. 13, 14.*

(e) *C. 7. l. 7. &c.*

(f) *Institut. Divin. l. 3. c. 17.*

the chief Law of their Actions; and the latter, again, engage to yield Obedience. Hence 'tis evident, what Judgment we ought to make of that other Assertion laid down by Mr. *Hobbes* (a), that, *Because the particular Members of the Society, not by any Compact with the People, but by private Covenants between themselves, are bound to acquiesce in every Act of the People; they are, by the same Covenants, bound to acquiesce in that Act of the People, which transfers the Sovereign Right of the State upon a Senate, or upon a Monarch.* For 'tis no good Consequence to say; if the General Assembly of the People agree to transfer the Supreme Command on a Senate, or on a King, particular Persons are bound to stand to their Resolution; therefore there passeth no Covenant between the People, who transfer the Right, and the Nobles, or the King, on whom it is transfer'd.

He has still an Argument behind, of as much Strength and Weight as the rest. He tells us, that a King, though elected by the People, cannot by the same People be obliged to any Performance; because immediately, upon his Election, the People are dissolv'd, and lose the Existence they had as *one Person*; for which Reason the Obligation directed towards them, as *one Person*, doth likewise perish and is dissolv'd. Now, what he fixeth here for the Basis of his Opinion, that the Obligation towards any *Person* ceaseth, the Person himself being taken away; is to be understood of those Cases only in which, either the Person is extinct by a Natural Death, or that Quality expires in which alone the Obligation was founded. But when a Free People transfer the Government on a King, neither do they themselves die in a Natural Sense, nor is the King's Obligation founded in that *Quality* of the People, which denominated them a Free State; but in that by which they resolve to be, for the future, a Society of Men under a single Governour. As a Suitor, who is engaged by Covenant to a Young Woman, cannot, after the Marriage hath been consummated, except against the Contract, on pretence that his Obligation is expired, because she is not a Virgin now, as she was when the Covenant was made. For the Obligation of the Suitor was not founded in the *Quality* of Virginity; but he contracted with a Virgin in order to her changing her Condition to that of a Wife. Upon the constituting a Monarch, the People are *dissolv'd* in this respect only, that the Supreme

Authority doth no longer reside in a General Assembly; but they are by no means dissolv'd into a loose Multitude, not united by any mutual Bands: for they still continue one Society, held together by one Government, and by their original Covenant amongst themselves. The whole of the Matter therefore is this; Mr. *Hobbes* imposeth upon less intelligent Readers, by the ambiguous Signification of the word *People*. In Democracies, the *People* denotes the whole Body of Men who, in different respects, govern and are govern'd (b). But who will venture to affirm, that an Obligation towards a People in this latter Sense, or as they are subject to a Monarch, or to a Senate, may not continue and subsist, tho' contracted whilst they were yet Free, but in order to their future Subjection, and in certain prospect of it? To conclude, Mr. *Hobbes* himself elsewhere (c) expressly asserts, that God was made the King of the *Jewish* People by virtue of a Covenant between Him and them (1). And how then can he pretend, that there is no Covenant between a mortal King and his Subjects? A little before he delivers the direct contrary: *When a Man, says he, submits himself to his Conquerour, he is bound by as Necessary an Obligation as the truest Subject: for a Contract, lawfully entered into, cannot fairly be broken or transgress'd* (2).

XIII. By the Means of these Covenants then, a Multitude of Men are so united and incorporated as to form a Civil State; which is conceiv'd to exist like *one Person* (d), endued with Understanding and Will, and performing other particular Acts, distinct from those of the private Members. Again, as 'tis distinguish'd and known from the same Members by one general Name (e), so it hath peculiar Rights and separate Properties, which neither particular Men, nor many in Conjunction, nor All together, without him in whom the Supreme Authority resides, can make any Claim or Pretences to: and, lastly, it hath peculiar Actions proceeding from it, which private Persons can, on no account, assume or challenge to themselves. So that the most proper Definition of a Civil State seems to be this, 'It is a Compound Moral Person, whose Will, united and tied together by those Covenants which before pass'd amongst the Multitude, is deem'd the Will of All; to the End, that it may use and apply the Strength and Riches of private Persons towards maintaining the common Peace and

(a) *De Cive*, c. 7. f. 9.(b) *Vid. Hobbes de Cive*, c. 13. f. 3.(c) *Leviath. de Interregnis*, f. 7. *Conclus.*(1) *Vid. Hobbes Ibid.* c. 35, 40.(2) *Vid. Hobbes Ibid.* c. 20.(d) *Statius Achil.* l. 1. v. 437, 438.

Sparsa ac diffusa motes  
In Corpus vultumque coit, & rege sub uno  
Disposita est.

A wild and shapeless Mass  
Assumes a Figure and a comely Grace,  
Under a Monarch's Reign.

(e) *Vid. L. 1. t. 8. l. 6. f. 1. D. De Divis. Rerum*, & L. 2. t. 4. l. 10. f. 4. *D. De in Jus vocando*, & L. 3. t. 4. l. 7. f. 1. *D. Quod cujuscunque Univers. Non.* & L. 47. t. 18. l. 1. f. 7. *D. De Question. Add. Senec. de Beneficiis*, l. 6. c. 19, 20.

Security (a). Mr. *Hobbes* hath given us a very ingenious Draught of a Civil State, conceiv'd as an *Artificial Man*: 'In which the Sovereign is the Soul, as giving Life and Motion to the whole Body; the *Magistrates* and the other *Officers*, *Artificial Joints*; *Rewards* and *Punishments*, fastened to the Seat of Sovereignty, and by which every Member is moved to the Performance of its particular Duty, the *Nerves*, which do the same in the Body Natural; the *Wealth* and *Riches* of particular Members are the *Strength*; *Salus Populi* (the *People's Safety*), its *Business*; *Counsellors*, by whom all things needful for it to know are suggested to it, are the *Memory*; *Equity* and *Laws* an *Artificial Reason*; *Concord* is *Health*, *Sedition* *Sickness*, and, *Civil War*, *Death*. Lastly, the *Pacts* or *Covenants*, by which the Parts of this Body Politick are cemented together, resemble the Divine *Fiat*, or the *Let us make Man*, pronounced by GOD in the Creation (b). Whence we may gather, by the way, that *Isocrates* (c) was in the wrong when he affirm'd the *Form of Government* to be the *Soul of the State*, having the same *Force* and *Power* as the *Mind* hath in the Body. Whereas the *Form of Government* is rather the same in the State, as in a human Body the *Structure* and *Disposition* of the several *Parts* and *Members*.

XIV. The State in exerting and exercising its Will, make use either of a single Person, or of a Council, according as the Supreme Command hath been confer'd, either on the former or on the latter. Where the Sovereignty is lodg'd in one Man, there the State is supposed to chuse and desire whatever that one Man (who is presumed to be Master of perfect Reason,) shall judge convenient (1); in every Business or Affair, which regards the End of Civil Government, but not in others. For Instance, if a Prince declare War, if he make Peace, or enter into an Alliance, this is interpreted as the Will and Act of the State (d): but not, if he eat, or drink, or sleep, if he marry a Wife, or if he be guilty of any Vice or Disorder. So that we may form a Distinction between the publick Will of the Monarch, representing the Will of the State, and the private Will of the same Monarch, which he useth, like any other Man, in the Prosecution of his personal Affairs. Hence there naturally ariseth this Question, Whether if He in whom the publick Will resides, wills otherwise than He

ought to do, and consequently sins in the Exercise of this publick Will, the Action which proceeds from a Will, thus depraved, is to be look'd on as the Action of the State? For every Person, who submitted his own private Will to that of the Prince, is supposed to have done it with this Intention, that the Prince should will nothing, but what should be just in it self and advantageous to the Publick. Here it seems reasonable to pronounce, that an Action, proceeding from the Abuse and Corruption of the publick Will, is in it self a publick Action, or the Action of the State; because perform'd by the Sovereign, as consider'd in that Capacity. Thus if a King or a Senate ordain evil Laws, execute wrong Judgment, appoint unfit Magistrates, or undertake unjust Wars, the Act, in all these Instances, is certainly publick. As when a Coach-man overturns, the Action is his as a Coach-man, tho' as one unskilful or negligent in his Art. But then, in the Court of Conscience, no Man is accountable for such an Act, unless he contributed positively and effectually towards its Production. Therefore Subjects are not charged with the Faults of the Government, nor they, in a Senate or Ruling Council, who dissent from any such Proposal, and are out-voted by the rest. But the Inconveniences, which innocent Subjects suffer on account of these publick Crimes, are to be rank'd amongst those general Evils to which Human Nature, in this Condition of Mortality, lies necessarily expos'd; and which we must therefore endure with the same Patience as we do extreme Drought, or immoderate Rain, and those other Misfortunes which we style *naturally Evil*. Though there are several Things, which Experience shews to have a very great Virtue and Efficacy towards the preventing of these Inconveniences; as Fundamental Laws, Good Education and Discipline, and, above all, the Precepts of Religion.

It follows, on the other hand, that whatever any particular Person, or many together, or All, without the King, shall will or do, beside or contrary to his Authority or Command, not only in Business of the latter, but also of the former kind, shall not, in the least, be look'd on as the Will or the Action of the State, but as a private Will, or a private Action: nay, there shall be so many distinct Wills, and so many distinct Actions as there are particular Men concern'd in the willing, or the doing

(a) For that Definition of *Dion. Pruseus* (in *Borysthenic*.) *A State is a Multitude of Men living together, in the same Place, under the same Laws*, we may perhaps hereafter find Occasion to examine; it being founded on the Maxims of Grecian Policy. Nor hath *Apuleius* much better Success when he defines the *Platonic Common-wealth*, as the most perfect Model of Government, in the following manner; from the Authority of *Plato* himself; *A State is a Union or Conjunction of many Men, amongst whom some govern and some are govern'd, but All agree and mutually assist each other, guide themselves in their Duty by the same Laws, (such as are good and just,) and have accustom'd themselves to live within the same Walls, and to have the same Inclinations and Aversions in all things.* (b) *Leviath. Proem.*

(c) *Areopagit. p. 245. & Panathenaic. p. 450.* (1) Provided, First, that he act with Knowledge, and not thro' Error, nor thro' any rash Motion, which for a time deprives him of the Use of his Reason; and, Secondly, that he don't violate the Fundamental Laws of the State. *Titius Observ. 559.*

(d) *Euripid. Supplic. v. 1188, &c.*

'Tis fit *Adrastus* swear;  
The King and Lord of Greece shall swear for All.

thus

thus or thus. And the same Judgment is to be pass'd on that which single Men, or a Number of Men shall attempt, by their own private Motion, without Authority or Order from that Governing Council, in which the Sovereign Power resides. Therefore amongst the Opinions which encourage Sedition, and which tend to the dissolving the inward Frame and Structure of any State, especially of a Monarchy, Mr. *Hobbes* (a) reckons this for one, that the Vulgar are not able rightly to distinguish between a State, or *People*, and a *Multitude*. A *People* or a State makes but one Person, having one Will, and performing only one and the same Action. Neither of which can be said of the *Multitude* of Subjects, opposed to the Prince or Sovereign Council. But what he affirms afterwards, that *The People Rule in every State*, comes to nothing through his idle Affectation of over-much Nicety. For the Word *People* must import one of these two things, either the whole State, or the Body of the Subjects. In the former Sense, 'tis ridiculous Tautology, *the People, that is the State, rules in every State*: in the latter Sense 'tis absolutely false, *the People as distinct from the Prince, rules in every State*. As for that which follows, *In Monarchies the People govern; because the People, by the Will of one Man, exert their own*; he ought rather to have said more plainly thus, in a Monarchical Government, the Will of the Prince is supposed to be the Will of the State. Nor can that Paradox, *Rex est Populus, The King is the People*, be explain'd in any other Sense than this. His other Remarks are true enough; as, that the Vulgar always speak of a great Number of Men, as of the People, or the State, and are wont, upon Occasion, to say, the State hath Rebell'd against the King, which is impossible; and that the People or the State, desire and refuse what is desired or refused, by some troublesome discontented Mutineers; under the Name and Colour of *the People*, animating the Members of the State against the State, the Subjects against the Sovereign.

XV. But where the Supreme Authority is conferr'd on a *Council*, made up of many Persons, each of whom retains his own Will: the Question first to be determin'd is, What Number of these Persons, agreeing in the same Resolution, shall represent the Will of the *Council*, and by Consequence, of the State? For otherwise, as no Man is bound to follow Another's Judgment rather than his own, unless he hath subjected his Will to the Will of the other Party; so thio' a Man enter into Society

with others, in order to the directing their Business by the common Vote, yet, if by express Condition, he reserve to himself this Privilege, that he will not be obliged to any thing to which he doth not give his Consent, the Decrees of the Majority shall not, in the least, affect him, or force his Compliance. Thus there are *Bodies Incorporate*, in which each Member hath a Negative, and by it can render the Consent of all the rest void and ineffectual. Yet, if a Person absolutely refuseth to hearken to Reason, and out of mere Stubbornness opposeth those who are in the right Opinion, he may be expell'd the Society, as a Nuisance, or, in some Cases, may be brought to farther Punishment. For tho' here, he is not bound to follow the Act of the greater Part, by his own precedent Covenant; yet he is under the Obligation of a general Law, which commands him to shew himself Friendly and Easy to others, and, as a Part, to conform himself to the Good of the whole (b). It must be confess'd, that in Meetings of this kind, especially when consisting of a great Number of Persons, Business is never Dispatch'd without much Difficulty, and, many times, falls and comes to nothing, by reason of the Difference of Mens Judgments, and the impregnable Obstinacy of some Tempers. And, according to the ordinary Course, if any Person hath once absolutely, and, without Terms of Exceptions, united himself to any Society or Assembly, in as much as he cannot require, that all the rest should be govern'd by his Vote, or that they shall omit what seems necessary or profitable for them, in Deference to one dissenting Member; he is, at the same time, presumed to have obliged himself to the acknowledging and ratifying all Resolutions, which the major Part shall have settled. For if he looks on this as any Hardship, he should have put in his Exception to it, when he first treated about his Admission into the Society. But it would now betray a Spirit, unreasonably proud and troublesome, to think himself Wiser than all his Fellows. If a Man so far persist in his Opinion, as to be uneasy, because he cannot force it upon the whole Company, he is at his liberty to quit the Union in which he was before engaged. But 'twould be high Injustice for a Person, when he hath been out-voted, to follow the Example of those we find described in the Historian (c). *Every one of them, (says he) taking it heinously that his own Opinion was not followed, applied himself more negligently and heavily to the common Business; nay, rejoiced upon any ill Success or Miscarriage, that he might have Occasion*

(a) *De Cive*, c. XII. f. 8. (b) On which Subject, we may add the Argument in Father *Paul's* History of the Council of *Trent*, (l. 4. p. 788.) that the *French* were not bound by the Decrees of the Council, having protested against it. Where the Judgment of the Parliament of *Paris* is also produced, and runs to this effect: 'That the Authority of the whole Body is then, indeed, transferr'd on the major Part, when the Cause affects All in common, but toucheth none in particular: but when the whole Cause so belongs to All, as that each are to be allow'd their respective Shares; in this Case, the Consent of every one in particular is necessary, and the Negative is the more favourable side: nor are the Absent in the least obliged: unless they confirm the Resolutions by their own Vote. That, Ecclesiastical Assemblies are of this kind; in which, how frequently soever Councils may be held, the absent Churches are not at all bound by their Decrees, except they please to receive them.

(c) *Agathias*, l. 4. c. 5.

thence to boast amongst those of his own Party, and Demonstrate, that there could be no other Cause of the Disappointment, but the slighting his particular Advice. Hence, according to the regular Course, the Votes of the Majority in Assemblies, have the Force and Virtue of a general Decree: not because there is any Necessity of this, by the Appointment of Nature, but because there is hardly any other possible means of transacting Business amongst Numbers (a) (1): Tho' it sometimes happens, that a Proposal, more for the Benefit, or the Honour of the State, may be rejected, when the Authors cannot form a Party strong enough to carry it: For, in these general Establishments, for the ordering of Human Affairs, which often admit of so great Variety, since 'twas not possible for Men to invent such a Method, as should be free from all manner of Inconvenience, that must be follow'd which holds good for the most part (b). And therefore, 'tis idle to pretend, that since it seems agreeable to Nature, that what proceeds from more Wisdom should take place, against what proceeds from less; it is therefore repugnant to Nature, that the weaker Opinion of many, should out-weigh the wiser Opinion of a few, and consequently, that the former should compel the latter to an imprudent Undertaking. Indeed, in determining speculative Truths, Opinions are not pass'd by Number, but by Weight: And the Multitude of Patrons is it self look'd on as a Mark of Error (c). But this Rule can by no means be applied to the Management of Business in an Assembly, the Members of which have all an equal Right to influence the Proceedings. For who shall be the Judge here which Opinion is the Wiser? Certainly not the Parties themselves, which are thus divided. For neither side will allow the other thus to over-rule a Point, in which their Credit, as well as their Interest, is so nearly concern'd. And where's

the Man, who doth not think his own Parts and Wisdom more considerable than his Neighbours? Nay, How many are there who take a Delight in disparaging an Opinion or a Project, tho' the best that could have been advanced, only because they were not themselves the Authors and Contrivers of it? Nor would it be easy, for the two dissenting Parties to refer such Controversy as this, to the Decision of a common Arbitrator; for again, the Arbitrator's Wisdom or Integrity might be call'd into Dispute, and might require a new Judge to determine the new Question. Not to say, that most of the Points, debated in these Assemblies, relate to such Matters as cannot conveniently be committed to the Judgment of those who do not belong to the Society. It hath been therefore thought most proper, to enter upon such a Method as should be the least expos'd, either to Difficulty or Uncertainty; and none can be invented which should answer this Character better, than the counting of Voices (d). Besides, whoever is allow'd the Privilege to Vote in a Council, is presumed of sufficient Ability to penetrate and comprehend all Affairs, that shall fall under their Deliberation. Which must be allow'd to be true of those Councils, at least, into which Persons are not admitted, without some kind of Choice and Approbation of Others. Neither would it be always expedient, to give any one Man in the Council, as suppose the President or chief Director, the Power of controlling the whole Matter by his Vote, and declaring which of the Opinions is the better. For, if the Prerogative should be granted to him, he might prefer the Judgment of the smaller Party to that of the greater; nay, he might reject both Proposals, on Pretence that neither was Good; and thus he would, to all Intents and Purposes, be the sole and arbitrary Governour of the State. As absolute Princes may follow that Advice which

(a) Vid. L. 50. t. 1. l. 19. D. Ad Municipalem. Flin. Lib. 2. Epist. 13. n. 5. *The Votes pass by Number, not by Weight; nor is it possible, that in a publick Assembly it should be otherwise, where nothing is so unequal as the very Equality it self; whilst All have not the same Wisdom, and yet All have the same Right.* Idem. Lib. 6. Epist. 13. n. 4. *Whilst the Point is unresolv'd, every Man hath the Privilege of dissenting; but when 'tis once determin'd, All are bound to maintain what the Majority have Decreed.* And of this regular Course of proceeding, we are to understand that of Aristotle, Polit. IV. c. 8. *That which most agree in, is receiv'd under all manner of Governments. For in Oligarchy, in Aristocracy, and in Popular States, the Resolution of the greater part of those concern'd in the Supreme Management, is confirm'd and ratified as a publick Decree.* (1) See Mr. Barbeyrac's second Note upon this Section.

(b) Bodin. De Republ. l. III. c. 4, p. 456. (c) Senec. De Beat. Vit. c. 2. *Whilst I am treating of a Happy Life, You are not to answer me, as upon a Division in the Senate House, The greater Number is on this side; for the greater part is, for that very reason the worst. Mankind are not so Happy, as that the best things shall have the most Patrons and Defenders. And therefore a Multitude, is generally an Argument of the Wrong.* Phocion, when a certain Proposal of his was receiv'd with general Applause, turn'd to his Friends, and ask'd them, Whether he had unadvisedly let drop somewhat that was amiss. Plutarch in Apothegm. 188. A. Idem. De Educat. p. 6. A. Ed. Wech. *To please the Vulgar is to displease the Wise; Euripides will bear Testimony to this Observation, whom we find speaking to the same Purpose.*

I've not the Art of tickling vulgar Ears,  
But yet my Vote weighs somewhat with my Peers.  
When Asses judge, 'tis Musick to be loud;  
And that which Shocks the Thinking, charms the Crowd.

Hence, as Quintilian observes, ( Institut. Orat. l. X. c. 7. ) *They who are ambitious of appearing Wise to the Fools, appear Fools to the Wise.* Plato Conviv. p. 1188. C. Ed. Wech. *A few Men of Understanding are more to be feared, than a whole Multitude composed of Ignorance and Weakness.* Add. Valer. Max. l. 3. c. 7. s. 1. Ext. Dio. Chrysost. De Illo non capto, p. 190. D. Ed. Paris. Morel. *For a thing to have been believed a long time by Fools, is no Authority or Argument for its Truth.* (d) Plin. Panegy. c. 62. in fin. *'Tis better to trust the whole Company, than any private Member: particular Persons may deceive and may be deceived; no Man ever cheated All, no Man was ever cheated by All.*

is offer'd by the fewest of their Counsellors; or may take such Measures as are contrary to the Opinion of them All.

XVI. But as to this Point of the Plurality of Votes, it is needful to observe, that in some Councils 'tis not enough for an Opinion proposed to have the Advantage of one Vote, or of some few more than the contrary, but, e'er it can be carried, it must have a Majority to such a certain Number (1). Thus the Law about the Election of the Pope (a), requires two Thirds (2) of the Cardinals (3) to agree in their Nomination. And the same Rule appears to have been follow'd in the Election, and in the Orders of the *Decuriones* under the *Roman* Emperours (b). In the *Venetian* Historian (c), we find this Clause, added to the Decree of the Senate for Banishing the *Jesuites*, that nothing should be determin'd in Prejudice of the said Decree, unless eighteen Senators were present, and unless five Parts out of six consented to the Resolution. Yet, where there is no such particular Appointment, that side which exceeds the other, tho' by a single Vote, shall be accounted a true Majority, and equivalent to the Consent of the whole Body (d). 'Tis to no Purpose, that some urge against this Judgment, the Maxim of the Civil Law (e), *Quod omnes tangit, id ab omnibus approbari, æquum est, Equity requires, that what Affects or Concerns All, should have the Approbation of All*: for we cannot hence conclude, therefore 'tis Injustice, that, for the more convenient Dispatch of Affairs, a few dissenting Members should yield to the stronger side. But farther, the Maxim produced, doth not relate to those Assemblies or Councils, which are constituted for the Regulation of publick Affairs, but to private Partnerships and Confederacies, form'd by bare Compact, or by the Agreement of several Men, to be joint-possessors of some one thing. Now such an Agreement, or Confederacy as this, doth not give the Persons concern'd, a Right to determine any thing about the common Affair, if so much as one of the Partners disagrees to the Proposal, thinking it prejudicial to his own Interest (f). As for that Clause, which is added to the Law before mention'd, about the

Papal Election, that 'What is there particularly order'd, about the two Thirds, shall not abridge the Liberty of their Churches, in which the Opinion of the greater and founder Part ought always to prevail; the reason of it seems to be this; because according to their Hypothesis, the Supreme Judge, the Pope, may declare which Opinion is the *founder*, in case a Dispute should arise on that Point. Wherefore the *founder* side, unless it be the stronger likewise, shall not be consider'd, except in Cases where there lies an Appeal to some Superior (g).

XVII. If the Parties divided are equal, no Resolution shall pass; but Matters shall continue as they stood before: because there is not ground enough for any Alteration either way; but, the Weight on both sides being the same, the Balance hangs even, and the Business naturally stops. Hence, even in Criminal Cases, upon an Equality of Votes the Party is acquitted: Tho' the Penalties, Enacted against false Accusation or litigious Suits, seem not to take place on these Occasions (h). Amongst the *Jews*, the Criminal was not condemn'd (4), tho' there happen'd to be one more Vote against him than for him. Which Custom was no doubt, founded on this Principle, that since there is no less Religion and Conscience to be observ'd in what is pronounced by a Judge, than in what is deposed by a Witness; as a single Witness is not sufficient to Convict (5), so a single Judge is not sufficient to Condemn. For the rest of the Judges, by declaring directly contrary to each other, seem'd mutually to evacuate the Force of their own Authority. We ought to add one more Remark on this Subject; and it is, that where Suffrages are given by Companies or Tribes, the particular dissenting Members in one Tribe, who were out-voted by the Majority of their Fellows, shall not be allow'd to encrease the Number of dissenting Suffragans in any other Tribe.

XVIII. Lastly, when more than two Opinions are started, the Question is, Whether they are all to be reckon'd separately from each other, so as to give the Preference to that which, taken apart, hath more Favourers than any one besides; or whether two or more Sen-

(1) V. Grot. L. 2. c. 5. f. 17. ibiq. *Bæcler*. (a) Jus. Canon. C. 6. De Elect. & Electi Potestate.  
 (2) V. Gratian. Can. 36. Distinct. 63. See Mr. *Barbeyrac's* First Note upon this Section. (3) See Mr. *Barbeyrac's* Second Note upon this Section. (b) L. 3. t. 4. l. 3, 4. D. Quod cujuscunque univers. Nom. &c. C. L. 10. t. 31. l. 45. De Decurion. Prudent. l. 1. Contra Symmach. v. 604. &c.

*Sic consulta patrum subsistere conscriptorum.  
 Non aliter licitum prisco sub tempore, quam si  
 Tercentum sensisse senes legerentur in unum.  
 Servemus leges patrias; infirma minoris  
 Vox cedat numeri, parvaque in parte fiescat.*

Whilst ancient Honesty possess'd the Throne,  
 To acts of Senate just Respect was shown,  
 Because three hundred Heads had join'd in one.  
 Still let the Laws prevail; the Weaker Few  
 Yield up their False Belief, a Captive to the True.

(c) Maurocen. l. 17. (d) Vid. L. 4. t. 8. l. 17. f. 6. D. De Receptis. Vid. Grot. d. l. (e) Cap. Quod omnes de Reg. Jur. in Decretal Lib. VI. (f) By which we are to explain l. 11. of B. 8. t. 3. D. De Serv. Præd. Rust. & L. 10. t. 3. l. 28. De Communi dividundo. (g) Add. Gratian. c. 36. Distinct. 63.  
 (h) *Quintilian*. Declam. 254. Equal Votes favour the Person in Danger. *Antiphon*. Orat. XIV. When things are equal, they make for the Prisoner, not for the Accuser: as an Equality of Votes, assists the former, not the latter. Add. *Aristot*. Probl. f. 29. c. 13. Vid. L. 42. t. 1. l. 39. D. De Re Judicat. M. *Senec*. l. 1. Controv. V. One Judge Condemns, the other Acquits; of two different Sentences, the Milder ought to take place. The Greeks called this favourable Case, *Minerva's Vote*: On which Subject the Reader may consult a whole Dissertation of *Bæcler's*. (4) See Grot. B. 2. c. 5. f. 18. Note the last. (5) See above in B. 5. c. 13. f. 9.

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tences, tho' different between themselves, may be first join'd together to cast out a Third, and then play'd against each other, so that the Motion, which upon the last Result hath most Voices, shall prevail? Here, if we consider things barely according to their Natural Equity, without any special Compacts or Constitutions to the contrary, it seems proper to distinguish between those Opinions which really and totally differ one from the other, and those of which one is included in the other as a Part, or which differ only in Quantity; so that the latter may be allow'd to unite in that common Point where they agree, but the former may not be join'd, being absolutely Inconsistent. Thus they who adjudge a Delinquent to pay twenty Pounds, and they who adjudge him to pay ten Pounds, may unite in the ten Pounds, against those who would entirely acquit him; and he shall stand guilty, to the Value of the said Sum, as that in which the Majority, of those that are to try him, agree: The Fine of ten Pounds being contain'd under that of twenty (a). Hence arose that Custom in the Roman Senate, of ordering a Member *Sententiam dividere* (b), to divide his Opinion, when he had not deliver'd himself distinctly, but had advanced two Motions at once, one of which was approved by the Company, the other not. But if some Vote a Criminal to Death, Others to Banishment, and a third Part are for clearing him; neither can they who propos'd Banishment join with those who declared for his Death, against the acquitting Party, nor the Acquitters and the Banishers against those who condemned him to Capital Punishment. For these Sentences are altogether incompatible; Death being neither a Part of Banishment, nor Banishment of Death. And tho' the acquitting and the banishing Parties, thus far agree, that both are for saving the Man's Life; yet their Opinions do not directly produce this Agreement, but only by way of Consequence: the Opinions being in themselves really different. For they who would absolve the Criminal, do thereby release him from all manner of Suffering; whereas they who sentence him to Banishment insist positively upon having him punish'd, tho' in such a particular Manner and Degree (c). *Polybius* (d) reports a remarkable Cause of this Nature. Certain *Grecians* were held Captives at *Rome*, and a Motion made in the Senate after what manner they should be

disposed of. Upon the Debate, three Opinions were propos'd, one that they should be releas'd, another that they should be condemn'd, and a third that they should be detain'd Prisoners for some time longer; the first, in the Number of Votes, exceeding both the other, if separately taken. Here *Posthumius* the Prætor, who then presid'd in the Senate, having a Grudge against the Captives, made use of the following Stratagem to the great Prejudice of their Cause. When the Members were to divide, he omitted one of the Opinions and propos'd two only, ordering those who were for releasing the Men, to go to one part of the House, and those who were for disposing of them any other way, to go to the other part. By which means, they who would have confin'd them for a time, united themselves with those who would have condemn'd them; and so both together outvoted those who would have granted them their Liberty. In *Gellius* (e) we find the following Controversy propos'd: *Seven Judges were to sit upon a Criminal, and that Opinion was to stand, in which the greatest Part of that Number should agree: Upon hearing the Case, two of the Judges declar'd for the Prisoner's Banishment, two more would have him Fined, and the other three voted him to suffer Death: Being demanded, in order to his Execution, he demurs to the Sentence.* This Case was then offer'd for such an one as they term'd ἀποεῖς, or unexplicable. *Cnemon* in *Heliodorus's* History (f), is Condemn'd by seventeen Hundred Voices to Death, and by a Thousand to Banishment: Yet, in as much as the former Party was divided, some requiring that he should be Stoned, others that he should be thrown Alive into a vast Cavern of the Earth: the Thousand who decreed to Banish him made the greater Number (g).

It is farther observ'd by *Grotius* (h), that when several Persons, join'd together, do not form a Society, or general Body, properly so call'd, but are only tied to each other with regard to some certain thing which they all partake of, yet, by unequal Shares; then not only the Order and Precedency shall be fix'd according to their different manners of partaking, but the Votes, in stead of being Numbered, shall be Measured by that Proportion which each Suffragan holds in the common Possession (i). On which Rule we may add this Remark; that since a Society or Combination of this Nature, is founded only upon somewhat,

(a) To this Purpose see l. 38. f. 1. d. l. D. De Re Judicat. & l. 27. D. De Receptis, d. l. & cap. 1. Jur. Can. De Arbitris in VI. 'Tis but lost Labour in *Grotius* (*Flor. Spars.*) when, as to the Case propos'd in one of these Laws (l. 27.) he opposeth the Determination there made, and says, the Criminal ought to be condemn'd in ten, because the greater Part agreed to this Sum, and that what they disagreed in, ought to be rejected. For in five they All agreed, but the Majority only then prevails, when the whole Body do not unite in any single Resolution.

(b) Vid. *Cicer. Epist. Fam. l. 1. Ep. 2.* *Senec. Epist. XXI.* What is customary in the Senate, ought likewise, I think, to be the Practice in Philosophy: when any Man delivers an Opinion, which I like in part, I bid him divide, and I follow accordingly. (c) Vid. *Plin. l. VIII. Epist. 14.* (d) *Excerpt. Legat. 129.*

(e) L. IX. c. 15. The same Case is the Subject of *Quintilian's* 356th Declamation, where, among other things, there is this good Remark. *Non idem sentientes non potes jungere, idem sentientes compara.* You can't join those that disagree; therefore compare those that agree. See likewise the Argument of the 30th Declamation in *Liban.*

(f) L. 1. (g) *Add. Cujac. Observ. XII. Cap. 16.* & *Ziegler ad Grot. l. 2. c. 5. f. 17.* (h) *Ibid. f. 22.*

(i) On this Subject, *Vid. L. 2. t. 14. l. 8. D. De Pactis, & L. 16. t. 3. l. 14. D. depositi, & L. 42. t. 5. l. 16. D. De Reb. autor. judic. possid.*

which All have a common Title to enjoy, and not upon such a Covenant as is requisite to the Establishment of a just and regular Community, and by which each Member submits his private Will to the Will of the Majority; therefore when 'tis affirm'd, that the Vote of him, who holds a larger Share in the Possession shall have the Advantage of Another's Vote who holds a smaller Share; we are to understand it with this Limitation; that the former shall not be allow'd, by Virtue of his Superior Vote, to divest the latter of his Right, or any way to procure his Prejudice. And thus we may apprehend what is to be look'd on as the *Will of the State*, where the Sovereignty is lodg'd in many Hands.

XIX. As to the Number of Men who may compose a Council or Assembly, in which publick Affairs are to be debated and determin'd, 'tis manifest that *three*, at least, are absolutely required (a). For should there be but *two*, if they happen to be divided in Judgment, there is none else to turn the Scale on either side, and so no Business can be concluded (b). Nor is it any Objection against this Rule, that sometimes two Persons only are term'd *Colleagues*, as for Instance, the *Roman* Consuls. For that Word often imports no more than the Equality of Office and Dignity (c). In Latin we meet with *Collegium Tribunorum*, the *College of the Tribunes*; and yet any one of those Magistrates, by entering his particular Dissent, could evacuate any Resolution agreed on by the rest. So that they who are united to each other by such a Relation, and bear such a common Title of Honour, do not always form a regular Assembly, in which the Wills of all the Members are, by Virtue of some Covenant, compacted into one Will. But Men may happen to compose a Body or Society, and yet retain each his particular Will, distinct from the Will of his Fellows. Therefore to urge, that a *Contract of Fellowship* may be made between two Persons only (d), is of no Consequence in the Point before us. As for what may be alledg'd to the contrary out of the *Digests*; the meaning of the Law in that place is, not that a *College* or *Company* may be originally constituted by a single Person; but that upon Failure of the other Members, by any extraordinary Accident, one Man shall be sufficient to preserve and represent the Body already establish'd, till such time as new Members may be substituted in the room of the former.

According to regular Course, the absent Members are not consider'd in these Assemblies, provided they have receiv'd lawful Notice (e), but their Right devolves (as it were) upon those that are present. *When two* (says *Seneca* (f)) *act by a common Commission, he that is present hath the Power of both*. Yet, in our Judgment,

this Maxim ought to be restrain'd to Business of daily Occurrence, and such as will admit of no Delay. It is likewise an Exception to the same Rule, if the Laws require such a precise Number of the Members to concur in every Business (g). In some places, the absent Members are allow'd to exercise their Power by delegating some others who appear in Person, and thus to give their Suffrage amongst the rest, either in Writing, or by the Mouth of their Proxy (h).

XX. The Civil State being thus framed and settled, the Person or Persons, on whom the Supreme Authority is conferr'd, whether one Man, or a Council, either Particular or General, obtain the Name of a *Monarch*, a *Senate*, or a *People*; and private Men, as oppos'd to these, are styl'd Subjects. Here we must observe, that a Man may become Member of a State two ways, by *express*, or by *tacit*, *Covenant*. For they who were the Original Founders of Common-wealths, are not supposed to have Acted with this Design, that the State should Fall and be Dissolv'd upon the Decease of all those particular Men, who, at first, compos'd it; but they rather proceeded upon the Hope and Prospect of lasting and perpetual Advantages, to be derived from the present Establishment, upon their Children and their whole Posterity. We must therefore presume them to have had this in their Aim, that their Children and all their future Race should, as soon as they came into the World, enjoy the Benefits and Blessings of the Publick Constitution. Which since it is impossible to obtain without Government, the very Life and Soul of a State, therefore All who are born within such Dominions, are hereby supposed to have submitted themselves to the standing Government. Hence there is no Necessity, that they who have been once invest'd with the Supreme Command, should require the express Homage and Allegiance of their new Race of Subjects, tho' all the Persons, who first conferr'd their Authority upon them, may possibly be extinct. Farther, since every Civil Community is fix'd in such a particular Scene, where the Members have placed themselves and their Fortunes in Security, which could not but be endanger'd, were all Men allow'd promiscuously the Privilege of coming thither without acknowledging the Government; therefore 'tis to be look'd on as a general Law in all States, that he who comes within the proper Limits of a State, and much more if he desire to reap the Benefit of it, shall be presumed to have abandon'd his Natural Liberty, and to have subjected himself to the Government there establish'd; at least for so long as he thinks fit to reside in those parts. If he deny to make this acknowledgment, he is to be reputed as an Enemy; so far however, as

(a) *Vid. L. 50. t. 16. l. 85. D. De Verb. signif.* (b) *Vid. Cap. 1. Jur. Can. De Arbitris.* (c) *Vid. l. 173. D. d. l. De Verb. signif. & L. 26. t. 7. l. 14. D. De Admin. tut. & L. 46. t. 3. l. 101. D. De Solutione, &c.* (d) *L. 3. t. 4. l. 7. f. 2. D. Quod cujuscunque Universit. Nomine, &c.* (e) *Vid. C. 36. Jur. Can. De Electione & Electi Potest. & l. 45. D. d. l. De Decurion.* (f) *Controv. VII. 4.* (g) *Vid. L. 3. D. d. l. Quod cujuscunque Universit. Nomine, &c. & l. 45. D. d. l. De Decurion.* (h) *Vid. Cap. 46. De Electione & Electi Potestate, in Ultimo.*

that he may lawfully be expell'd the Borders. So it is manifest, that they are no less subjected to the Civil Authority, who join themselves to a State already settled, than they, who, by assembling and uniting themselves together, form'd it at the Beginning.

It may not be improper to Remark on this Occasion, that there is some Disagreement amongst Learned Men, about the true Notion of *Civis, a Member of a Civil State*. Mr. *Hobbes* (a) seems to make *Civis* an equivalent Term with *Subditus, a Subject*. According to which way of speaking, Women, Children and Servants, will be made proper Denisons. Our Judgment on the Point is, that since every State is constituted by Mens submitting their Wills to a single Person, or to an Assembly, they principally have a Title to the Name of *Members*, by whose Covenants the Society was first incorporated, and they who regularly succeed into the place of these primitive Founders. And since these Acts belong to the Masters of Families, they should seem to merit this Name by an especial Right: but Women, Children and Servants, whose Wills were before included in the Wills of their Domestical Governour and Director, can challenge it only by way of Consequence, and by Virtue of their Dependence upon him; in as much as they likewise enjoy the common Protection of the State, and hold several Rights and Privileges on the Score of that Relation. But Inmates, Strangers, and other Temporary Inhabitants, are not Members of the Common-wealth, because they propose only to tarry for a certain Space, but not to settle their Persons and Fortunes on the publick Bottom. *Aristotle's* Definition fram'd to express a Member of a State, and taken from his *holding a Share in the Magistracy, and in the judicial Proceedings*, agrees only to a Democratical Government, as he himself observes (b).

XXI. To proceed; in most Common-wealths, the Members are found especially disposed to two subordinate Bonds or Engagements, by one of which they unite in certain Numbers, to form a particular Body, yet still under the Direction of the Publick; and by the other, the Ruling Power calls them to some Inferior Share in the Administration. These Bodies of Men, form'd in Subordination to the State, or General Body, whether they are term'd Companies, Corporations, Colleges, or pass under any other Title, may first be divided into those which were fram'd before the Settlement of Civil States, and those which have been erected since. The Bodies or Systems, preceding Civil States in point of Antiquity, are *Families*; in which the Authority and the Right, held by the Father and the Master, have been already explain'd. Of which Right, so much remains in their Possession, as hath not been cut off, ei-

ther by the Nature and Frame of the publick Society, or by civil Ordinances, or lastly, by general Custom. Such *Bodies* as have been form'd since the Establishment of the Civil Society to which they belong, may be distinguish'd by the Names of *Publick* and *Private*. The *Publick* are those, which have been set up by Authority from the Sovereign Power in the Common-wealth. The *Private* are, either those which have been compos'd by the sole Act of the Subjects amongst themselves, or such as depend upon some Foreign Power, which, within the Dominions of Another, is to be look'd upon only as a private Right and a private Act. *Private* Bodies may again be divided into *Lawful* and *Unlawful*; of which the former are, or ought to be, approved of and allow'd by the State, the latter not. We say *ought to be allow'd*: For suppose under a State where the Divine Worship is corrupted, some endued with Sense and Knowledge of the true Religion, should hold private Assemblies, without either open Tumults, or secret Conspiracies against the Government Establish'd, how much soever the Persons in Authority may dislike what differs from their own Perswasion; yet no one will presume to term these Assemblies *Unlawful*, since the Supreme Governours themselves lie under an Obligation to Acknowledge, Approve and Maintain the same Truths that are there Profess'd. So likewise, if in a Barbarous State, where all Improvements of Learning are publickly discouraged, some Persons should meet together, to join in the Pursuit and Enquiry of Wisdom; such a Body of Men cannot be pronounced an Unlawful Society. Both are again divided into *Regular* and *Irregular*. The former are those, in which, by Virtue of certain Covenants, there is an Union of Wills amongst all the Members: The latter those, in which we do not so much apprehend any Union of Wills, as a Consent and Conspiracy, without any mutual Bond or Engagement, such as may proceed from some common Affection, as, suppose, from Hope, from Desire of Gain, or of Revenge; from Ambition, Anger, and the like.

XXII. With Regard to all *Lawful* Bodies, 'tis to be observ'd, that whatever Right they possess, and whatever Power they hold over their Members, is all under the Determination of the Supreme Authority, which it ought on no account to oppose or to over-balance. For, otherwise, if there could be a Body of Men not subject to the Regulations of the Civil Government, there would be a State within a State. Therefore, if any Common-wealth was at first fram'd by the Union of several absolute and independent Bodies, 'twas altogether requisite, that the respective Bodies should give up so much of their former Power and Right, as was necessary for the forming a Civil Com-

(a) De Cive, c. V. f. 11. (b) Polit. l. 3. c. 1. Thus he goes on, *According to different States, the Members are different. Wherefore the Description we have given, belongs especially to the Members of a Democracy; to those of other Governments it may accidentally, but doth not necessarily, agree. Idem Polit. l. 3. c. 2. There being many Forms of Civil Bodies, there must, by Consequence, be many kinds of Members, who compose them.*

munity: Because else they could not but fall short of the End which they propos'd. But, if we look on these Bodies or Systems in a State already settled, we are then to consider, what was the Intention of the Supreme Governour, in founding or in confirming such a Company. For if he hath given and ascertain'd to them, in express Words, an absolute and independent Right, with regard to some particular Affairs which concern the publick Administration; then he hath plainly abdicated part of his Authority, and by admitting two Heads in the Constitution, hath rendered it irregular and monstrous: which no one in his Wits will do, unless upon extreme Necessity. But if the Sovereign is desirous to preserve the Power whole and unimpair'd, it is necessary that the subordinate Body should so restrain and moderate its Rights, as not to prejudice the Supreme Authority, nor to put any such Extent upon their Privileges, or to draw any such Consequence from them, as shall tend to the releasing the said Body from their inferior and subordinate Condition. Now after what manner the Power of these Bodies is limited, we are to learn from the particular Charters of their Foundation, or Confirmation; as likewise from the Common Laws of the State, which are supposed to bind all and each of the Members, unless where they have been expressly abridg'd or repeal'd. From all which it follows, that, if the Administration of such a Body be committed to a single Man, whatever he acts according to the Rules of their Foundation, or according to the general Constitutions of the State, shall be look'd on as the Act of the whole Body. But what he doth contrary to, or beyond either of these, shall be his own proper personal Act, which shall not affect the rest, and for which he alone shall be accountable. If the Government of such a Body be lodg'd in a Council of several Persons; when any thing is done by them contrary to Law, or to their Foundation, those only shall be liable to Punishment, on this account, who agreed to the Proceeding; but they who either dissented, or were absent from the Assembly, shall be judg'd innocent: whom therefore it concerns, for the sake of their own Security, to protest against the Decree of the rest, and to register their Protestation in the publick Acts and Memorials, lest they should happen to be involv'd in the Punishment of their Fellows Crime. Whereas on the other side, in an Independent Assembly, no particular Member hath the Liberty of protesting against a Decree; because this would be to deny the Supreme Power of the said Assembly.

As to the Debts of these Bodies or Companies, the first thing to be consider'd is, in whose Name they were contracted. For what any Member owes on his own private account, is not a Debt of the Company. Only in this respect, that when the Sentence of the Court

obligeth him to Payment, Execution may be taken, not only upon the rest of his Goods, but upon those likewise which belong to him as a Partner in that Society. But such Debts as are contracted by the Governours of the Company, (whether this Power be lodg'd in the Hands of one, or of more Persons;) according to their Charter of Foundation, and those Rules which are to guide their Proceedings, oblige the whole Body, as such; and unless they have a common Stock, each Member is to answer for his *Quota*. Yet here again there is this Difference, that such Creditors as do not belong to the same Common-wealth, upon Denial of Payment, may treat the Members no otherwise than if each had engaged for the whole. As in all other Cases, any Person under a foreign Jurisdiction, stands liable to suffer Repritals for the Debts of his Country-men. Debts contracted otherwise than the Rules of the Company allow, bind those only who gave their express Consent to the contracting them; and not those who dissented, except to the Value of what they have been Gainers by them. And such a Debt, when the common Stock, so far as 'tis affected by it, will not hold out, is to be discharg'd by Contribution of the dissenting Members, according to their respective Proportions. But if a particular Member lend Money to the Company, as such, he can only charge the Goods of the Company; and if they fall short, he must thank himself for the Loss (a). If a Controversy arise between any Member and the Company, the Company shall not be Judge, but the State to which the Company is in Subordination. For 'twould be very inconvenient, that they should be allow'd to give Sentence in their own Cause, when the Matter may be thus refer'd to a Common Power.

XXIII. *Unlawful Bodies* are, not only those which unite on the account of some manifest Villany, or some Design contrary to express Law; as the Companies of Thieves, Beggars, Strowlers, Pirates, High-way-men, &c. but likewise any Confederacies between Subjects built on a private Compact, without the Consent of the Government, and repugnant to the End of Civil Communities: which are usually term'd *Conspiracies* or *Factions*. The Design of these is various. Sometimes, the Persons thus Associating, aim at the chief Command, and would seize the Government into their own Hands: sometimes they propose, by this means, to bring the Management of publick Business to their own Humour or Advantage. Some are for increasing their private Fortunes by plundering the Publick; others bandy into Factions, only to secure themselves from Punishment. Nay those Confederacies which carry a plausible Pretence, as suppose, Protection from Danger, Redress of Grievancies, Removal of Evil Counsellors, and those likewise, the Cause of which is kept secret, are suspicious and dangerous. For in the first place, this is

(a) Comp. *Hobbes. Leviath. c. 21.*

to invade the Office of the Sovereign, by entering upon those Affairs which belong solely to his Care and Direction; and then farther, when the Mutineers are grown confident of their own Strength, they may easily be encouraged to turn it upon the State (a). Hence many Actions not otherwise culpable, in their own Nature, become unlawful when perform'd in a tumultuous or factious manner. Thus to petition the Government, or to Accuse any Person of a supposed Crime, are Proceedings which the Law allows; but to do either of these, with a numerous Body of Men gather'd for that purpose, bears the Appearance of Riot and Sedition. And so in Martial Laws, it is usually made a Capital Offence, for Soldiers to petition for Pay, in a large Company, drawn together on that Design (b).

XXIV. Besides that common Bond, which engageth all Subjects to their respective Sovereigns, there lies a particular Obligation on those who are entrusted by the Higher Powers with the Exercise of some part of the Government, in their Name and by their Authority; and who pass under the general Style of *Magistrates* and *Publick Ministers*. Distinct from these are the private Ministers or Servants of the Prince, who perform Common Offices for him, as they would for any other Master. Amongst the former kind, or those who serve the

Prince in his Politick Capacity, there is this Difference observable, that some of them Exercise a part of the Government and Princely Office, and do therefore, in such a particular Measure, represent the Person of the Sovereign; who are, properly and strictly term'd *Publick Ministers*: Others barely assist in the Dispatch and Execution of Publick Business. To the first Class belong the Regents, or Protectors of the Kingdom, during either the Minority, or Captivity, or *Delirium* of the Prince; then the Governours of Provinces, Cities, and Districts; the chief Commanders of the *Militia*, by Land, or Sea; the Directors of the Treasury; the Judges and others concern'd in pronouncing or executing Justice; the publick Censors of Doctrines, Ambassadors to foreign States, and the like. In the other Class, we are to reckon the Counsellors, who do not themselves Exercise any part of the Sovereignty, but only declare to the Sovereign their Opinion about Affairs; those likewise who are any other way serviceable to the publick Management; as the Secretaries, the Gatherers, Keepers or Dispensers of the Revenue, the Souldiery, those who lend an inferior Assistance in the Proceedings of Justice, and if there be any Others of the like Characters; the Order and Distinction of which, in every particular State, easily may be understood (c).

(a) Thus *Otho* speaks in *Tacitus*. (Hist. L. 1. c. 84. in the Beginning.) *At present indeed, and in the Post You now hold, You are for me; but whilst You run up and down in the dark, and All are in Confusion round You, Chance or Opportunity may engage You against me.*

(b) Add Acts XIX. 39, 40. Vid. *Hobbes*, *De Cive*, c. 13. f. 12, 13. & *Leviath.* c. 22. where he compares lawful Bodies to the *Muscles*, and unlawful to *Wens, Boils, and Imposthumes*, Engendred by the unnatural Conflux of Evil Humours.

(c) Comp. *Hobbes* *Leviath.* c. 23. & *Bodin*. *De Republ.* l. 3. c. 7.

### C H A P. III.

#### Of the Generation of Civil Sovereignty or Majesty.

LET us proceed to examine, whence that Sovereignty or Supreme Command, which appears in every State, and which, as a kind of Soul, informs, enlivens and wields the Publick Body, is immediately produced. In order to which Enquiry, we suppose first of all, that Civil Authority, for the obtaining of its just Effect, requires as well Natural *Strength*, by means of which the Subject, if he presumes to decline Obedience, may be terrified into his Duty, through the Fear of Punishment; as also a *Title*, by Virtue of which, as by just Right, the Performance, or the Omission of any Action, may be imposed on Others: to which *Title* there answers in the Subject an Obligation to comply with what is thus enjoin'd. Now both these Requisites do immediately flow from those Acts by which the State is united and subsists. For tho' no Person can transfer his Strength to another by any real and natural

Conveyance, yet *He* is supposed to be Master of other Men's Strength, according to whose Pleasure, they are bound to exert and apply it, not having any Power to resist or to refuse his Commands: In as much as there can be no other way of transferring Strength, amongst Men. And since all the Members of the State, in submitting their Wills to the Will of a single Director, did, at the same time, thereby oblige themselves to Non-resistance, or to obey him in all his Desires, and Endeavours of applying their Strength and Wealth to the Good of the Publick; it appears, that *He* who holds the Sovereign Rule, is possess'd of sufficient Force to compel any Persons to a Discharge of the several Injunctions, which he lays upon them (a). So likewise, the same Covenant affords a full and easy *Title*, by which the aforesaid Sovereignty appears to be Establish'd, not upon Violence, but in a Lawful manner, upon

(a) *Liv.* l. 2. c. 59. *The Force of the Supreme Command is built on the Consent of those who Obey.*

the voluntary Consent and Subjection of the respective Members. This then is the nearest and immediate Cause, from which Sovereign Authority, as a Moral Quality, doth result. For if we suppose Submission in one Party, and in another the Acceptance of that Submission, there accrues presently to the latter a Right of imposing Commands on the former; which is what we term Sovereignty or Rule. And as by private Contract, the Right of any thing which we possess, so by Submission the Right to dispose of our Strength and our Liberty of acting, may be convey'd to another. Whence, if any Person should, for Instance, voluntarily and upon Covenant, deliver himself to me in Servitude, he thereby really confers on me the Power of a Master. Against which way of arguing, to object the vulgar Maxim of *Quod quis non habet, non potest in alterum transferre, No one can transmit to Another what he doth not possess himself*; is but a Piece of trifling Ignorance. Yet still to procure to the Supreme Command an especial Efficacy and a Sacred Respect, there is need of another additional Principle besides the Submission of the Subjects. And therefore, he who affirms Sovereignty to result, *immediately*, from Compact, doth not in the least detract from the Sacred Character of Civil Government, or maintain that Princes bear Rule by Human Right only, not by Divine.

II. Yet this is beyond Dispute, that sound Reason sufficiently intimated to Mankind, how that upon their Multiplication in the World, their Honour, Peace and Safety could not subsist without the Establishment of Civil States, which cannot be understood without a supreme Authority. And thus both the States themselves, and the chief Government erected in them, are suppos'd to proceed from God, as the Author of the Law of Nature. For not those things alone are from God, which He institutes and ordains by his own immediate Act, without the Concurrence or Interposition of Men; but those likewise which Men themselves, by the Guidance of good Reason, according as the different Circumstances of Times and Places required, have taken up in order to the fulfilling of some Obligation, laid upon them by God's Command (a). And, in as much as the Law of Nature cannot, amongst a great Multitude, be conveniently exercis'd, without the Assistance of Civil Government; 'tis manifest, that God, who imposed the said Law on Human Race, did command likewise the establishing of Civil Societies, so far as they serve for Instruments and Means of improving and enforcing the Law of Nature. And hence likewise it is, that God, in the Holy Scriptures, expressly approves of such Government, acknowledging and confirming it, as his own Appointment, and guarding by the

severest Penalties the sacred Awe and Veneration of it. But whether or no God expressly commanded the instituting of States, as to particular Times and Places, is a Point in which we have no certain Information. For the Precept of the Sons of *Noah*, concerning *Judicatures* (1), which may perhaps be urged to this Purpose, doth not specify the particular Time and Place of erecting them. So that we may understand it in this Sense, that the Methods of judicial Processes, when once settled, ought diligently to be exercis'd and administer'd. *Bæcler* (b) explains the Origine of Civil Government with very little difference from what hath been here deliver'd on the same Head. *The Supreme Authority*, says he, *is not to be derived from the bare Act of Men, but from the Command of God, and from the Law of Nature: or from such an Act of Men by which the Law of Nature is follow'd and obey'd. For He that enjoins Society, enjoins likewise the Order and Method to be observ'd in it: but now the very Soul of Society, is Government; and of all the Societies the most perfect is a Civil State.* Which is right enough; provided we add, that the Divine Command concerning the Erection of Civil States, exerted and discover'd it self through the Suggestion of Reason, by which Men came to understand, that the Honour, Gracefulness and Peace, which the Law of Nature proposeth as its Aim, could not possibly subsist without Civil Society; especially after Mankind was considerably multiplied. And, in this very Point consists the Difference between Civil Communities and other Human Institutions: the latter also being introduced through the Perswasion of sound Reason, yet not after such a manner, as if the Honour, Safety and Welfare of Human Race could not be preserv'd without it. As to the Fifth Commandment in the Decalogue (2), which enjoins Obedience to the Civil Magistrates (urg'd by *Bæcler*;) we are to observe, that this doth not exclude the next and immediate Cause of Government; as the Commandment against Theft doth not, in the least, exclude or supersede the Origine of Property. And then for the Title of *God's Vicegerents upon Earth*, ascribed to Governours, we think it may very fairly and conveniently be explain'd in this Sense; that whereas the Peace and good Order of Mankind, was not sufficiently procured by a bare Reverence towards the Law of Nature, and towards the Author of it, that End is now happily produced, by the Virtue and Efficacy of Civil Dominion. In which Sense, the following Positions of the same Writer are plain and intelligible: therefore, *That a State might properly be a State, and might obtain its End, God, by the Law of Nature, instituted a certain Order and Method of Commanding and Obeying, in which Order, by the Will of God, and by the*

(a) Comp. 1 Tim. II. 2. (1) *Vid. Selden. de Jur. N. & G. Sec. Heb. 1. 7. c. 4. &c. & Le Clerc in Deut. I. 17.*

(b) *Ad Grot. l. 1. c. 3. f. 6.* (2) See hereafter in B. 8. c. 1. f. 4. towards the end. See Mr. *Le Clerc* upon this Commandment, and upon *Gen. XXVII. 33.*

*Dictate of Natural Reason, there must be somewhat Supreme and Independent, controllable by no human Pleasure, which as it is subject to God alone, so it is the Second or the Deputy of His Power; and this is nothing else, but the Supreme Civil Authority. But it is purely the Act and Disposal of Men, whether they will intrust the Supreme Authority with one or with many Persons, and what particular Methods they will follow in establishing distinct Forms of Commonwealths. Grotius's Opinion concerning the Original of Government is not so profane, but that it may be born with, if assisted by a dexterous Interpretation. He says (a) that Men, not influenced by the express Command of God, (and no such express Command doth indeed appear;) but of their own accord, (yet not without the Dictate of Right Reason, and the Will and Pleasure of God,) having experienc'd the weak Defence of separate Families against the Assaults of Violence, (after Mankind had considerably spread and increased,) united themselves in Civil Society; the Effect of which was Civil Power, styled on this Account by St. Peter (b), the Ordinance of Man, as establish'd, immediately, by Human Appointment. But as for the other Assertion of Grotius, That the Civil Authority is therefore term'd Divine or said to be of God, because God approved of what Men wholsomly instituted; we can on no account admit it in this Sense, as if God approved of the Establishment of Civil Government, (as 'twere) *ex post facto*, or after it had been actually settled; as He hath been pleas'd in many Places of Scripture (c), to confirm and ratify the Condition of Servants, which no doubt is an Human Invention. But 'twas absolutely requisite to add, that Men were able antecedently to apprehend the Divine Will, by duely weighing the Condition of Mankind upon its Multiplication; which as it could not be preserv'd without Civil Societies, or in a solitary Life; so Men, whilst in this Matter they followed the Guidance of Reason, Agreeably to the Scope and Design of the Law of Nature, must be supposed to have fulfill'd the Divine Pleasure.*

III. Tho' we think what hath been here deliver'd, sufficient as well to sanctify the Original of Civil Government, as to engage the Veneration of Subjects towards their Rulers; yet it may be worth our while to consider, what Solidity there is in the Arguments of a late Author (d), who maintains that we ought to go much higher in this Point. He supposeth then, that what is the Cause of Civil States is not likewise the Cause of the Publick Government and Supreme Authority in them. And therefore he allows the States themselves to be establish'd by Covenants; but asserts on the other side, that the Sovereignty is confer'd on Princes immediately by GOD himself, and that nothing which proceeds from Men, doth

at all contribute to its Production. And, consequently, that a Free People, when they Voluntarily choose to themselves a King, do not confer the Majesty upon him, but only mark out the particular Person on whom that Character is, by the Divine Gift, bestow'd: As in many Boroughs or Towns Incorporate, the Election of Magistrates belongs to such an Order of Men; and yet the Magistrates receive their Power of acting, not from that Order of Men, but from the Supreme Ruler in the State. Which Position, tho' it may possibly take with some Persons, through a specious Appearance of more than ordinary Piety; yet 'tis manifest, that it tends to the breaking in sunder of all those Compacts and Fundamental Laws which pass between Princes and Subjects, with regard to the publick Administration. And in the first place, we cannot admit, that he should ascribe Majesty to Kings alone, and utterly deny it to Free States and Democracies. It's true, the Custom of Speech, during these last Ages, seems to have appropriated the Term of Majesty to Kings, by placing it amongst their Royal Titles. Yet this doth not hinder but that the same Word may be used to denote the Supreme Authority, under any Form of Government. And thus too, that Definition of Majesty, poor and dry as it is, in which he calls it, *The chief Power, every where, over the State*, agrees as well to a Senate, or to a Popular Assembly. Tho' in this respect Kings have the Pre-eminence, that each particular Member of the Senate, or of the general Assembly, is subject to the Supreme Power of the People; whereas the Person of a King acknowledgeth no Superior upon Earth. Yet as to the Force and Efficacy of Command over Subjects, 'tis the very same under all sorts of Constitutions. To proceed, the sole Cause of this Majesty he makes God himself, *Who, upon the People's Election, immediately transfuseth it on the Prince*. Here I am mistaken, if he did not conceive Majesty under the Notion of a real and physical Quality; as they manifestly do, who affirm Civil Government to be the *Creature*, or the Act and the Work, of God, *so that no other Creature, either in an equal or in a superior kind of Causation, or by any innate Principles, doth at all contribute to its Institution*. By which Discourse their gross Ignorance of Moral Things is sufficiently betray'd. The Argument which sets forth, how that Persons, exalted to the Throne from an inferior Station, have suddenly been surrounded with an unusual Glory or Splendor, which could not shine from any other place than Heaven; may serve for a Declamation before such an Audience, as are unable to distinguish empty Flourishes, from solid Truth. That Kings are the peculiar Care of GOD Almighty, serves not in the least towards the Proof of his Opinion. And besides, the Divine Providence hath been

(a) L. 1. c. 4. f. 7. n. 3. (b) Epist. 1. c. 2. v. 13. (c) Ephes. VI. 5, 6, 7, 8. Coloss. III. 22. 1 Tim. VI. 1. Tit. II. 9. (d) Joh. Fred. Hornius *de Civitate*, l. 2. c. 1.

pleas'd to shew no less Evidences, as it were of a particular Favour, to other Persons preserv'd to be hereafter in an eminent manner useful to the World. At the same time, we read of no inconsiderable Number of Kings, who have drunk Poyson out of their precious Cups, or have fallen by the Treachery of their own People. As to that Temper and Constitution of Body in some Princes (1), which is observ'd to produce Effects not unlike to Miracles, the Physicians are to be consulted on the Point. Nor doth he prove what he aims at, by alledging the Punishment, either of Tyrannical Kings, or of Stubborn and Rebellious Subjects; or by heaping up Testimonies in so plentiful a Store; (which too acknowledge God no less for the Author of Aristocratical than of Monarchical Government;) or by reciting those Divine Predictions concerning some Kings, the like to which have not been wanting in popular States. And as to what pass'd in the Nation of the *Jews*, this can carry no Evidence as to the Original of Kingly Government in general (2); there having been many other Kingdoms establish'd long before: but it belongs rather to the manner of conferring the supreme Command on a particular Person; according to particular People.

IV. Let us consider the Arguments by which he labours to make out, that all Human Causes are of a far more inferior Power, than to be capable of producing Majesty or Sovereignty, the most August thing upon Earth. Amongst which, that which carries the Prize from all the rest is this; *That since neither particular Men, nor a loose and ungovern'd Multitude, are themselves-endued with Majesty, therefore neither can they confer it on the Prince.* But now it may and often does happen, that a Moral Quality, (in which Class, Government ought to be reckon'd,) shall be produc'd in another Person, by the Concurrence of those who had it not, truly and properly, in themselves before: so as that they may be rightly deem'd the productive Cause of the said Quality (a). As many Voices, joining in Consort, produce a Harmony, which no single Person could pretend to, by himself. And on this account, it must be censured as very false Reasoning in *Socrates*, when he encouraged *Alcibiades* not to fear the venturing himself in an Assembly of the People, by telling him, *If You despise them Man by Man, You ought likewise to despise them when gather'd into a Multitude* (b). Farther, since Sovereignty results from the Non-resistance of the Subjects, and from their Concession that the Sovereign shall dispose of their Wealth and Strength; 'tis easily seen that some scatter'd Seeds (as it were) of Government lie hid in particular Persons, which, by Means of

concurrent Compacts, being excited into Motion, do grow and shoot forth. So that 'tis grossly absurd to infer, that Sovereignty is not, *immediately*, of Human Original, because it is not discoverable in the Natural Powers, or Faculties of Men: as if we were all this while speaking of a physical Quality; or as if there were no moral Qualities, distinct from the physical! I know not what Relish Wise and Christian Princes can have for such flattering Titles as these; that *God transcribes in the Person of the King that Right of governing Mankind, which He held alone by virtue of Creation*: Yet so as that GOD still retains His ancient Right, and therefore reacheth out this Power to Kings by *Accumulation*, and not by an *absolute Abdication*: together with the like Insinuations, by which base and wicked Parasites delight in raising the Glory of their Prince to the Dishonour of their God. You would think 'twas a moot Point with them, whether, after the constituting of Monarchs, God reserv'd to Himself any Power or Command over Mortal Race; and whether these who govern below, ought to own his Superior Authority? Certainly nothing can be more manifest, than that Civil Government is quite different in kind from that Command of God, which He holds by Right of Creation: and therefore 'tis not only absurd, but blasphemous to affirm, that *the Sovereignty which God alone is invested with, as the Maker of All Things, He, out of his singular Benevolence, doth communicate to Men.*

Endeavouring to give us another Proof that God is the immediate Cause of Sovereignty, he distinguisheth between *the immediate efficient Cause*, and *the immediate constituting, or appointing Cause*. The *Sovereignty* only is, he says, immediately produced by God; the *Crown* and *Scepter* being commonly receiv'd from other Hands. 'Hence he observes, that we 'ought to separate these two ways of speaking, 'God is the immediate Cause of Sovereignty; 'and God immediately constitutes the Prince, 'or God immediately confers the Sovereignty. 'It being somewhat tolerable to affirm, that 'God confers the Sovereignty, by the Mediation or Interposition, either of the popular 'Vote, or of Succession, or of Occupancy (c). 'But that, in every Act of producing Sovereignty, God cannot bear, or permit any, 'proximate or secondary Cause. Now whoever looks more nicely into things, will perceive, that these Men apprehend Sovereignty under the Idea of some physical Being, which after the Production of it by God, wanders up and down in the World, without any certain Seat or Subject, till the Prince being at length design'd by the People, it falls upon him and

(1) See Mr. *Montaign's* Essays, B. 2. c. 12. p. 343. Edit. Paris. in fol.

(2) See *Algern. Sidney's* Discourse upon Government, C. 2. s. 9.

(a) *Vid. L. 41. t. 1. l. 46. D. de Acquir. Rer. Dom.*

(b) *In Ælian, V. H. 1. 2. c. 1.*

(c) In this Sense are we to understand that Passage of *Themistius*, Orat. 6. Ed. *Harduin*, p. 73. C. Do not imagine the Senators to have been the main Causes and Authors of this Election. The Concurrence of their Votes was the Act of Heaven: the Vacancy of the Throne was the Appointment of the Gods, and Human Assistance was only the Instrument of completing and executing the Divine Counsels.

cloaths him with August Majesty and Splendor. Where they must certainly be at a Loss, if a Man should be so importunate as to demand, Whether this Sovereignty, before it finds a place of Rest in the Person of some Prince, be a Substance or an Accident; and if the latter, how it can exist without a Subject? Farther, at what time it was created; at the Beginning of the World, or afterwards? As likewise, Whether there be but one Sovereignty only, diffused through the whole World; or, Whether particular Princes have each a peculiar and entire Sovereignty of their own? Whether upon the Death of the Prince the Sovereignty dies with him; or, Whether it survives, like the Soul in Separation from the Body, or finds Reception, by a kind of *Metempsychosis* in the new King (a)? But in truth, to enquire after the Cause of Majesty or Sovereignty, taken in a separate Sense, is no better than Impertinence; in as much as it never exists, but in the Subject. 'Tis just the same as if I should make a particular Search into the Cause of Human Nature, separately considered; when as to the Cause of *Men*, as they exist, I have sufficient Information. And since this Author, before any hath obtain'd a Right to the Sovereignty, leaves it in the Power of the People, to elect what Person, and at what time they please, or to introduce any Form of Government (b); I would desire to know what would become of his Sovereignty, should all the People agree in preferring an Aristocratical or Democratical State to it. We acknowledge indeed, that Election properly and strictly speaking, is no more than the *Manner* of acquiring Empire. But there seems to be no reason which should hinder, why by one and the same Act the *Person* may not be mark'd out, and likewise the *Sovereignty* confer'd as then first commencing its Existence. For 'tis very Childish to imagine, that in Moral Things, when any Right, or any Moral Quality is confer'd on Another, it must of Necessity have somewhere existed separately before. On the contrary, it is evident, that Rights and all other Moral Qualities do rather arise from the Concurrence of Men's Minds in mutual Compacts (c). Nor will there be any Difficulty in removing that other Scruple; *If the People be the secondary Cause of Sovereignty, then the Power by which they produce it, must have been receiv'd from God; which doth not appear to be true in Fact.* For, since God hath implanted in Men a Care of their own Safety, hath commanded them to maintain a peaceable and well-order'd Conversation, and hath likewise endued them with Reason, whence they are enabled to find out Means conducing to this End, amongst which the Establishment of

Civil Government justly challengeth the first place; who will make any farther question, whether or no the Power of setting this Constitution on foot, was a Privilege vouchsafed to them by God Himself? Those Maxims of Philosophy, which our Author so frequently lets fly against us, are partly but of slender Credit, and partly through Ignorance and Mistake, are unskilfully transfer'd from Natural to Moral Things; which we are not now at leisure to discuss in particular. And then, as for the Account which *Ovid* gives of the Origin of Sovereignty in the Fifth Book of his *Fasts*, 'tis meer Poetical Fiction.

V. No less Pains hath *He* taken in confuting the Opinions of those, who derive the supreme Authority from any other Head. Upon which Argument, as he hath deliver'd a great deal of Truth, so are there some things which are justly liable to Censure. He is so far in the right, when he denies that Wars, occasion'd by the Ambition or the Lust of Tyrants, could give Rise to the Sovereign Power. For *Wars, occasion'd by Tyrants*, do certainly presuppose Civil Communities. Yet still, the notorious Violence of Many Persons, and their Desire of oppressing others, might possibly give Occasion to the Fathers of Families, living independent and scatter'd up and down, to unite in Political Bodies (1). It is moreover evident, that most Empires, which have made a Noise and Figure in the World, if not all in general, have owed their Growth and Progress, to War. And yet this is no reason why we should pitch upon War for the Original and Fountain of Government. For at least, that Band of Men, which first conspired to invade their Neighbours, voluntarily engaged in Subjection to a common Leader. And as for those who were invaded, no lawful Sovereignty could be establish'd over them, till by giving their Covenant and Faith, they had promis'd Obedience to the Conquerour.

VI. Yet it is not so utter an Impossibility, that Civil Empire might arise from Paternal Government (2); such we mean as extended it self to some Breadth, taking many petty Villages under its Direction. 'Tis true, the Command of Fathers, belongs properly to the Care of educating Children, as that of Masters, doth to the Management and Improvement of Estates; nor can either be alter'd by the bare Number of Children, or of Servants. Yet there is not so wide a Distance between Paternal and Civil Government, but that Men might pass from one to the other, without the Production of any new Sovereignty by the immediate Power of God. For suppose a Father of a Family, bless'd with a plentiful Issue and with a numerous servile Train, to allow both

(a) Add the Dispute in Father *Paul's* History of the Council of *Trent*, l. 2. p. 213. concerning the Nature of the *Sacramental Symbols*, where the Managers are put to great Shifts, by Reason of their Unskilfulness in *Moral Things*.

(b) See *Deuterom.* XVII. 14. (c) *Comp.* *Hobbes de Civie*, l. 2. c. 4. See also above in B. 3. c. 5. f. 2, 3, 4.

(1) See Mr. *Barbeyrac's* First Note upon the Seventh Section of the First Chapter of this Book.

(2) See Mr. *Barbeyrac's* Second Note upon the Tenth Section of the Second Chapter of the Sixth Book, and Mr. *Lock's* Second Treatise of Civil Government, C. 8. s. 11, &c.

the Children and the Servants, by way of Emancipation or Infranchisement, the Privilege of managing their own Concerns, and of constituting particular Families, upon this Condition, that in order to the common Security, they shall still be subject to his Government; I know not what such a Person wants to make him a compleat Prince, provided he be Master of so much Strength, as is sufficient to compass the End of a Civil State. Upon his Decease, if he left any Appointment with regard to a Successor, especially if his Sons consented to the Disposal, that Settlement shall be followed. If he did not, then the People, as if they were to frame the whole Constitution anew, shall resolve what Government or what Governour they will hereafter receive. In which Case there will be no Breach of the Law of Nature, tho' the Younger Son should by the free Votes of the Assembly, be elected in his Father's room (a).

VII. He farther endeavours to evince, that neither can such a Person be term'd the Cause of Sovereignty, who first possessing it himself, confers the Regal Dignity on some one who is at present his Subject, releasing him from all future Dependence: as if a King remits to his Vassal his former Engagement, and allows him to hold as a Sovereign Prince, what he before enjoy'd only as a Feudatary Tenant: or if he makes a Grant to any of his Subjects of some Province in his Dominions, exempting it, for the future, from his own Jurisdiction. For a Cession of this kind is (he says,) no more than the *Manner* of obtaining Sovereignty, and may be reduced to the Head of Elections. Now whoever thoroughly considers the Matter, will easily find out, how the Supreme Authority is produced in this Case. And 'tis plainly thus; the King by quitting his Right, both over the Vassal and over the Feud, at the same time makes one Person capable of Sovereign Power, and others capable of submitting to the Exercise of it. For that Feudal Territory cannot hereafter belong to the *Vassal*, as an Absolute and Independent Prince, unless it be first utterly disengaged from the Authority of the *Lord*. And by this Means, the Government, thus establish'd, really and truly proceeds from the Consent of the People. For if the *Lord* hath Power, by his own sole Act, to bestow such a Province on whom he pleaseth, he certainly, at the Beginning, receiv'd this Power from the Consent of the People, either Voluntarily given, or obtain'd by the Issue of a just War. But if the *Lord* cannot do this by his own bare Authority, then 'tis evident, that the express Consent of the People must concur in the Disposal.

VIII. To conclude this Dispute; the same Author in the last place maintains, that even then the People are not the Cause of Sovereignty in the Prince, when having before liv'd under a Democratical Form, they choose a single

Governour. For, says he, the Sovereignty cannot here be confer'd on the Monarch till such time as the People have first renounced their Right; but the People, in that very Moment, in which they renounce their Right, have no longer any thing to do with the Sovereignty: therefore all that they do, is to elect a Person, who having receiv'd his Power from GOD, shall, for the future, rule over them. But now upon the same Argument, it may be denied, that Property can pass from one Man to another. For, just in this manner, another cannot become Proprietor of my Possession, till I have first resign'd my Property. But after my Resignation, I have lost my Property, and consequently cannot transfer that on Another which I have not my self: and therefore all that I do, is to choose a certain Person, into whom the Property, (sprouting up a-new, I know not where,) is afterwards to be infused.

As to the voluntary Abdication of Monarchs, his Opinion runs in the following Sense; *That the Government being first abdicated, and the People loos'd from their Allegiance; the Sovereignty doth afterwards return to its Original Author, in order to its being again brought back, and communicated to the appointed Heir.* This is manifestly a *Metempsychosis* or *Transmigration* of the Sovereign Power; which a wise Man will not require us to be at the Trouble of confuting. In Reality, he who abdicates a Crown, gives his Successor an Occasion, and a Capacity of receiving it from the Hands of the People, upon their Submission; or, of actually entering upon the Government, to which the Decree of the People, settling the Order of the Succession, had before given him a Right.

IX. It may not be improper, before we leave our present Subject, to enquire in short, to whose Power it belongs, to confer the Regal Titles and the Ensigns of Majesty, or any Denomination by which the Supreme and Independent Authority in a State, inhering in a single Person, is wont to be express'd. And here it's manifest, that to bestow the Name and Title, belongs to the same Persons, who have a Right to bestow the thing it self, that is, the Supreme Command. And by Consequence, a People, that either now first unite themselves in a Civil Body, or else, laying aside their former Frame of Government, resolve on a Monarchical Constitution for the future, whilst they confer on one Man the Authority over themselves, they, by this very Act, gave him a Right to bear the Title and Style of King, and to signify his High Station by decent Badges of Honour. Such a King, as he owes his Dignity and Empire to no Foreign Power; so he need not wait for the Consent and Approbation of other Princes or States, in order to the assuming the Actions or the Character proper to his Office. But as a

(a) See *Genes.* XXVII. 29, 37.

Foreigner could not dispute his Right to the Government, without a manifest Injury, so would it be injurious likewise to deny him the Appellation of King. Nor can any Pretence to the contrary be drawn from the small Extent of his Dominions. For a *Kingdom* doth not denote any certain Measure of Territory or of Power, but a particular Form of Civil State, which may happen to be greater or less. But to make him a King, who before own'd the Command of some Superior, 'tis necessary, that he obtain the Consent of his Superior, to release Himself and his Dominions from the Bond, by which they stood engaged to their former Lord. Thus he who is under a *Feudal* Obligation, cannot, without his Lord's Consent, take up the Character of a Sovereign Prince. And unless he be releas'd from this Obligation, tho' his Lord should grant him the *Title*, yet he will hold the *Dignity* it self after an imperfect and subordinate manner. So we find that the Successors of *Alexander the Great*, durst not assume the Regal Style, till *Alexander's* own Family was extinct, to which the Sovereignty did of Right belong. And even after this, 'twas necessary for them to have the Consent of the People under their Command, which the numerous Forces kept in Pay about them,

secured beyond the Possibility of a Denial (a). In the same manner, he who subdues a Territory by Arms, as he may, by the Right of War, acquire the Power and Authority, so may he likewise obtain the Title and Character of a King (b). If a Prince would erect any particular Province of his Empire into a distinct Kingdom, the way of compassing this Design, is to separate it from the rest of the Body, and to govern it by a peculiar Jurisdiction, independent from his other Dominions. That the *Roman Senate* frequently bestow'd the Title of *Friend and King*, as Marks of Esteem and Honour, is a piece of History, vulgarly known. And this they might justly do with regard, either to those Princes on whom they themselves had confer'd the respective Dominions, or to those, over whose Kingdoms they still held some Superior and Transcendent Right. But to have offer'd the same Title, as purely a Matter of Favour, to other Monarchs, over whom they could not pretend to the least Authority, had been a most insolent piece of Usurpation. And yet such a presuming Prerogative, the Popes have not been ashamed to challenge over the most Free and Independent States of *Europe* (c).

(a) *Vid.* Cornel. Nep. *Eumen.* Plutarch Demet. Justin. l. 15. c. 2. Appian Alexand. in *Syriac.* Diodor. Sic. l. 29. c. 54, 55. (b) *Vid.* Justin. l. 41. c. 4, 5. (c) See Father Paul's History of the Council of Trent, l. 5. p. 354. where he reports, how Paul IV. advanced Ireland to the Honour of a Kingdom: and Thuanus's Hist. l. 46. about the Title of *Great Duke* confer'd on Cosmo of Florence.

#### CHAP. IV.

### Of the Parts of Sovereignty, and their Natural Connexion.

THE Supreme Civil Authority, tho' in its own Nature it be one indivisible thing (1), yet because it exerts its self in different Acts, according as it is employ'd about different Means, necessary to the Preservation of the State, is generally conceiv'd as consisting of many Parts; with Resemblance to those Parts which are term'd *Potential* (2), in Natural Philosophy. For the Sovereign Command is, by no means, such an entire Compound Being as is made up of Heterogeneous Parts, which as they are join'd and knit together, by some common Band, compose one Body, yet so as that each Part is capable of subsisting separately by its self. But as the Soul is one single Substance, dispensing Life and Vigour through the whole Body, and yet as it exerciseth different Operations, in Proportion to the Difference of the Objects presented to it, or of the Organs through which it works, is conceiv'd as having *Potential* Parts; so, in like manner, the Supreme

Authority, as it is busied in prescribing general Rules of Action, is term'd the *Legislative Power*; as it determines the Controversies of the Subjects by the Standard of these Rules, 'tis the *Judiciary Power*; as it either arms the Subjects against Foreigners, or commands them to lay down their Hostility, 'tis the *Power of War and Peace*; as it takes in the Assistance of Ministers in the Discharge of publick Business, it is called the *Right or Power of appointing Magistrates*; and so with regard to its other Offices and Functions.

II. What therefore these Parts of Sovereignty are, may plainly be discover'd from the Nature and End of Civil States. A State, then, is a Moral Body conceiv'd to act by one Will. But in as much as it is made up of many Natural Persons, each of whom hath his particular Will and Inclination; and since these several Wills cannot, by any Natural Union, be join'd together, or temper'd and dispos'd into a lasting Harmony, therefore that one Will, which

(1) This is *Grotius's* Term, in B. I. c. 3. f. 17. n. 1. 'Tis founded upon a false Hypothesis, which our Author has confuted in the preceding Chapter. See Mr. *Barbeyrac's* First Note upon this Section. (2) This Term is explain'd in Mr. *Barbeyrac's* Second Note upon this Section.

we attribute to the State, must be produced by the Agreement of all Persons, to submit their own private Wills to the Will of one Man, or one Assembly of Men, on whom the Government hath been confer'd. Farther, since the respective Members ought, in Duty, to conform themselves to the Will of the State, 'tis necessary, that this Will be made known to them by clear and evident Signs. Hence we apprehend it to be one of the chief Offices of Sovereignty, to prescribe and declare to others what they ought to perform, or to omit. And because 'twould be impossible, in so great a Multitude, to give Injunctions to every particular Man, on Occasion of every particular Action; therefore general Rules are establish'd, for the perpetual Information and Direction of all Persons in all Points, either of Positive or of Negative Duty. Besides, since we easily discover amongst Men, an immense Variety of Judgments and of Appetites, whence an infinite Field of Controversy might arise; it is on this Score highly conducive to the common Peace, that publick Determinations should settle what each Man ought to look on as his own, what as another's; what is to be esteem'd Lawful or Unlawful (1) in the State, what Honest or Dishonest: As likewise, what Degree every Man retains of his Natural Liberty, or after what Manner each Person is to moderate the Use and Exercise of his own private Rights, in order to the publick Tranquillity (2).

III. To proceed; The chief End of Civil Communities is, that Men, by conspiring mutually to aid and assist each other, may be secured against those Damages and Injuries, which they might otherwise suffer from their own Kind; and, by this means, may either enjoy Peace, or have sufficient Defence against any Assaults or Molestations. Now in order to the procuring of Peace, 'tis, in an especial manner, necessary, that each Person be so far guarded against the Violence of his Fellows, as that he may be able to live securely; that is, without having any just Cause to fear Injury from Others, whilst he himself is not injurious to Others. Indeed, that Men should be absolutely protected from mutual Hurt, or that all Injuries should be impossible, the Condition of human Things will not allow. Yet such Care may be taken, such Provision made, as that there shall be no probable Grounds for the Apprehension of Danger. And this Security, is the Aim which Men propose, when they submit themselves to the Direction of Others. Of which, if no greater Degree could be obtain'd by joining Strength, than each private Man could give himself by standing singly upon his own Guard, 'twould be Folly to renounce our Natural Liberty, in which every Person is his own Protector. But to compass this Secu-

rity, 'tis not enough, that each of those who are about to form a Civil Body, do covenant with the rest, by Word or Writing, that he will not kill, or steal, or offer any other Harm or Prejudice: For 'tis manifest how far Human Nature is, in most Persons, corrupted; and Experience sadly informs us, how little Force the Reverence of verbal Engagements, or the Authority of Oaths hath, with the Generality of Mankind, towards the keeping them in their Duty, should the Fear of Punishment be once remov'd. For which reason likewise, 'tis not enough to have one who shall prescribe Rules of Acting, if he be invested with no farther Power. Therefore, to engage Men to an Observance, both of the common Precepts of Nature, and of those particular Laws, which are ena'd for the Good of the State, there must be added the Fear of Punishment, and the Power of inflicting what is fear'd. And, that Punishment may produce the proper End of its Institution, it ought to rise to such a Measure and Proportion, as that there shall be manifestly a greater Evil in transgressing the Laws, than in obeying them; so that the Severity, of what is to be suffer'd, may over-balance any Pleasure or Profit, which may now, or hereafter, be obtain'd by the Offence: It being impossible for Men, out of Two Evils, not to choose that which, to their Judgment, appears the least. And thus the Regard which Men have to their own Lives and Safeties, secures mine. And altho' it may sometimes happen, that Persons shall be so transported, either through Rashness and Precipitancy, or some other extravagant Commotion of Mind, as to prefer the Satisfaction of the Crime, to the Bitterness of the Penalty; yet this is to be reckon'd amongst those uncommon and extraordinary Accidents, which the Condition of our Nature, and the Circumstances of our Affairs will not suffer us to prevent. This Power of inflicting Punishment, on those who transgress the Commands of the Sovereign, is presumed to be then confer'd, when particular Men yield up the Use of their own Strength to the Service of the Community. By which Act, they oblige themselves to execute Justice on Delinquents, when the Sovereign demands their Assistance in this Particular; or, at least, not to aid and defend those who are to suffer. But, for a Man to oblige himself to undergo Punishment, without Reluctancy or Resistance, is a vain Engagement, and such as cannot hold good, on account of that Natural Aversion, which we bear to all things, destructive of our Safety and our Life. It is, truly enough, affirm'd by Mr. *Hobbes* (a), that this is the highest Degree of Power, which Man can hold over Man, to be able to prescribe to others, in whatever he thinks beneficial to

(1) Tho' here our Author uses the Terms of *Hobbes*, (*De Cive*, c. 6. f. 9.) yet he means always, that the Laws of a Sovereign include nothing contrary to the Divine Laws, whether Natural or Reveal'd, as he will prove in the first Chapter of the next Book. (2) The latter Part of this Section is taken from our Author's Abridgment, *De Offic. Hom. & Civ.* B. 2. c. 7. f. 2.

(a) *De Cive*, c. 6. f. 6.

the State; and, by denouncing just Penalties, to terrify the Stubborn and Disobedient into a Compliance with what he thus enjoins. But then, as for what the same Author farther asserts, *That he who hath a Right of inflicting Punishment, as he shall see fit, hath a Right of compelling all Persons to all Things, at his Pleasure*; it ought to have a Limitation affix'd to it, taken from the End of Civil Government: in as much as we are to presume, that he in whom the Supreme Authority resides, hath no other Will or Pleasure, but such as, upon good Principles of Reason, appears to have some Tendency towards the said End.

IV. Moreover, since under the exactest Systems of Laws, there arise frequent Disputes, about the right Application of them to particular Cases, and many Circumstances are to be consider'd, before a Fact can be pronounced Illegal, or the Author of it convicted: On this account, the *Judiciary* Power is supposed to come in to the Assistance, and Support of the Two Powers already mentioned. The Office of the *Judiciary* Power, is to hear and decide the Causes of the Subjects, to examine the Actions of particular Men, which are represented as Breaches of the Law; and to pronounce Sentence according to the Legal Penalties. Mr. *Hobbes* (a) seems to have had an improper Notion of this Power: since the Right of Judging, as to the Use and Exercise of any Part of the Sovereignty, is understood to be implied or included in the respective Part.

V. But tho' the Means, hitherto prescribed, may afford the Subjects full Security against those of their own Body; yet this is not enough to answer the End of Civil Establishments. For 'tis to little Purpose, for Men to be at peace amongst themselves, if they are not able to defend themselves against Strangers; and this they cannot effect, unless they are united in their Strength. Because it's purely owing to Conjunction, that Many are stronger than One: in as much as, otherwise, a thousand separate Men are not superior, in Force, to a single Person. In order therefore to the General Safety and Welfare, 'tis Necessary, that there be such a Power in the State, as may assemble, unite and arm so many Subjects, (or hire Mercenaries in their room,) as shall be thought sufficient for the Common Defence, with Proportion to the uncertain Number and Strength of the Enemy; and may likewise, when it shall be afterwards expedient, embrace Conditions of Peace. And since both the Seasons of Peace and of War receive a considerable Advantage from Leagues, for the better communicating the Benefits of different States, and for repelling and reducing to Reason some stronger Enemy, by a confederate Force: there must be inherent, in the Sovereignty, a Power to enter into such Alliances as shall be serviceable in either Condition, and to engage all the

Subjects to a just observance of them; and, at the same time, to derive upon the Publick such Fruits and Advantages as shall accrue by their Means.

VI. Again, since the Affairs of the Community, occurring as well in Peace as in War, cannot be administr'd and executed without Officers and subordinate Magistrates, there is need of such a Power as may appoint Men, to enquire into the Controversies arising between Subjects (b), to dive into the Policies of neighbouring States, to gather in and give out the publick Revenues, and lastly, in every respect, to consult and promote the Common Benefit. And then, it must be another part of the same Power to compel these Officers, when once constituted, to the Performance of their Duty, and to call them to account, upon proper Occasions (c).

VII. Farther, in as much as publick Business in the time of War, or of Peace (1), cannot proceed without Expence, such a Power is likewise requisite, as may set aside, for these Uses, some part of the Goods, or Products, of the Country; or may compel private Men to contribute so much out of what they separately possess, as is judg'd necessary to support the common Charges; as likewise to command and require the Hands of the Subjects, upon Occasion of any needful Work. To the same Power belongs the Invention of other lawful Ways and Means of increasing the Riches of the State. The Principal of which, is the Right of imposing Duties on Goods imported or exported; and also of paring off some moderate Proportion from the Price of Commodities, consumed by the Subject.

VIII. Lastly, Tho' to take away the intrinsic Liberty of the Will, and, at the same time, to unite and compose Men's Judgments of things in a perpetual Harmony, by an inward Principle, be above Human Ability to effect; yet to provide that these Sentiments and Persuasions, however different, may not disturb the publick Peace, is a Business absolutely necessary. For since all voluntary Actions take their Rise from the Will, and have a Natural Dependence upon it; and since the Inclination of the Will, to the doing or the not doing of any thing, is built on the Opinion of that Good or Evil, of that Reward or Punishment, which the Party conceives will follow from the Performance or the Omission; and consequently, since Men's Actions are ever guided by their Opinions; some outward Means must needs be found out, by which these Opinions and Judgments shall be brought, as near as possible, to conspire and agree; at least shall be hindred from giving the State any Disturbance by their Opposition. To this End it is expedient, that the State do publickly own and profess such Doctrines, as are agreeable to the End and Design of Civil Government,

(a) *Ibid.* f. 8.(b) See *Exod.* XVIII. 15. *Philo Jud. de Creatione, init.* *Joseph. Archaeolog.* III. 3.(c) *Add. Bœcler ad Grot. l. 1. c. 3. s. 6. p. 218.*(1) See *St. Paul's XIII. Chapter to the Romans, Vers. 6.*

and the Minds of the Subjects be, from their Childhood, grounded in them. In as much as the Generality of Mankind judge of things, according as they have been accusom'd, and according to the common Notions, which they see obtain in the World: very few being able, by the Strength of their own Parts, to discern what is good and solid in the Conduct of Human Life. There is, indeed, scarce any one Opinion, either relating to the Worship of God, or concerning those Things, the Knowledge of which is strictly term'd *Human*, but may be made the Occasion of Dissention, Discord, Reviling; and, in the final Issue, of Blood and War. And this doth not happen, on account of the Falsity of the Opinion, or because to admit the contrary, would bring heavy Inconveniences on Mankind, or on Civil Communities; but by reason of Men's unhappy Dispositions, who always imagining themselves to be wise, would gladly appear so to all others, and are violently enraged against those who presume to be of the contrary Perswasion. This any one will readily confess, who hath but chanced to cast his Eye on those Quarrels of the Learned, about meer Trifles, carried on with no less Heat and Fury, than if their Lives and Religions lay at Stake. Now such Differences and Disputes, tho' they cannot be absolutely prevented, yet they may be hindred from interrupting the publick Peace and Tranquillity, by due Penalties enacted against those who shall maintain and foment them (a). Yet what we would observe on this Subject, is not properly level'd against those Opinions concerning indifferent Points, but against such, as being obtruded upon Mankind, either under the Colour of Religion, or with some other fair Pretence, shock and confound the Laws of Nature, and the Principles of sound Policy, and tend to the breeding of Mortal Diseases in a State. Nor will any true and just Opinions be in Danger of suffering by this Censure. For, no true Doctrine is opposite to the common Peace; and that which doth contradict Peace cannot be true; unless we may, at the same time, affirm that Peace and Concord are repugnant to the

Laws of Nature. Wherefore the Power of examining the aforesaid pernicious Doctrines, and of banishing them from Civil Societies, is justly attributed to the Supreme ruling Authority (b).

IX. Our next Business is to shew, that these Parts of the Sovereign Power are naturally so united, and, as it were, interwoven with one another, that should we suppose some of them to inhere in one Person, some in others, the regular Frame of the State must absolutely be destroy'd. Which Truth that we may thoroughly apprehend, it ought to be observ'd, that there are, above all others, two Bands especially, by which the Wills of many Men, or of whole Assemblies, are closed and made to conspire into one; *Covenant* and *Command*: of which, nevertheless, the latter adds a much stronger Tie than the former. They who are held together by bare Covenant, stand obliged, by the Law of Nature, voluntarily to perform the Terms of Agreement; their Natural Equality, in other respects, remaining as before. Now so long as the Articles are on both sides observ'd, a fair Union and Concord may continue amongst them. And when any one Party, with a wicked Design, flies from the Engagement, he is guilty of a Breach of the Law of Nature: but then the rest, whose Interest it was that the Covenant should remain inviolable, have no means left of reducing the false Brother to Reason, but meer Force of Arms, in which he who offer'd the Injury, is frequently not inferior to him that receiv'd it. After the same manner, they, who upon equal Terms, stand bound to each other by virtue of some League or Confederacy, are at Peace and Agreement, so long as each Party makes good what he promis'd; but when either proves perfidious, the Band of Union is dissolv'd, and an Occasion of Hostility ensues. Whence it appears, that bare Covenants are not Bonds sufficient, at least, for the long holding together many Persons in a Moral Body: especially since it doth not always so happen, that the smaller and weaker Party recede from their Obligation, to the Prejudice of the more numerous and the

(a) Plato de LL. l. 11. p. 977. D. Ed. Wech. Let no Man revile another: but in Cases of Doubt and Controversy, let the Parties behave themselves towards each other, and towards the Company, after the manner of Learners, as well as of Teachers; so as utterly to refrain from Reproach. For, to abuse each other in a Dispute with foul and scandalous Language, is to scold like Women: and, very frequently, Words, which in themselves are trifling Matters, give Occasion to the deepest Hatred and Enmity amongst Men. (b) Diogenes Laert. (in Theophrast. l. 38.) reports a Law of Sophocles Son of Amphiclidus, to this Purpose, That no Philosopher should keep a School, unless by the Decree of the Senate and Commons; and that to do the contrary should be a Capital Crime.

Plato de LL. l. 7. p. 888. C. Ed. Wech. Let no Poet presume to feign any thing, but what is consistent with the Laws of the State, and is just, honest and good. Nor shall he be allow'd to shew his Compositions to any private Persons, before the Guardians of the Laws, and the Judges appointed for this Service, have revised and approved of the Performance. To this Purpose see Casaubon Exercit. in Baron. and his Epistle to Fronto Duceus, n. 624. Ed. Grev. Nor is it a despicable Remark of Mr. Hobbes, which he gives us in his Book de Homine, c. 13. l. 8. Many Books, says he, we have, compil'd by Romans, either under the Common-wealth, or soon after its Extinction, and by Grecians, during the flourishing Condition of the Athenian State, replenish'd as well with Precepts as Examples, by which the Minds of the Vulgar are render'd averse to Regal Power; and this for no other reason, but because they find these Authors making Panegyrics on the Villanies of base and perfidious Men, that is, on the Murthers of Kings, when they have before branded them with the Name of Tyrants. But still the Genius and Disposition of the Multitude is much more corrupted by the reading of those Books, and the hearing of those Preachers, who would have a Kingdom within a Kingdom, an Ecclesiastical within a Civil Supremacy. Hence instead of the Old Bruti and Cassii, we have our Modern Clements and Ravalliacs, who whilst in assassinating their Princes, they were only the wicked Instruments of other Men's Ambition, thought they did God Service.

Add the Preface of the same Author to his Book de Cive; as also Leviath. cap. 21. where he reckons up the Mischiefs, that have arisen from the Aristotelian Doctrine of Liberty. Corp. de Cive, c. 6. Leviath. c. 29, 46, 47.

more powerful, but very often the direct contrary. And tho' we should suppose, in the Principal Compact, a Clause to this Purpose, that whoever presumed to break the Articles, should be prosecuted with the united Strength of all the rest, yet (not to say, that this Clause would be of no effect, in case many Persons should join in such a Breach,) unless a Democratical Government were establish'd amongst the Members, or, unless they, who before compos'd a *Society*, do unite more closely in a Formal *State*, there will be need of another Covenant, to determine what Method shall be observ'd in proceeding against him who shall refuse to stand to this additional Engagement; and so on, *in infinitum*. But now Sovereignty or Command, is a much stronger Tie, for the keeping an united Body of Men in firm Agreement. For they who are bound to each other under the same Government, do not continue equal to the Government it self; but whilst the Power of prescribing Rules to, and of inflicting certain Evils, by way of Punishment, upon such as transgress the Rules prescrib'd, is confer'd either on a single Person, or upon an Assembly; all Persons lie under a far greater Necessity to remain obedient, than if they were united by Compact only; which could not take away the Equality of the Members, or their Right of administering their private Affairs, according to their own Judgment.

X. It ought farther to be consider'd, that if any will maintain the *Potential* Parts of the Sovereignty (as they are term'd,) to be, within the same State, seated in distinct Persons or Councils, they must, at the same time, necessarily allow, that he, to whom any Part belongs, must be furnish'd with sufficient Power, as well to compel the Subjects to the Observance of what he ordains, by virtue of that Part, as to defend this his Right, when attack'd or disturb'd; tho' that particular Limb of the Prerogative, which contains the Power of War and Peace, may possibly reside in another Person: and lastly, that he have a Right of determining, by his own Judgment, at what time and in what manner, the Part of the Government which he holds shall be exercis'd and employ'd. For to possess a Right of declaring to Others what You would have them do, and yet to be destitute of Power, for the obliging those to a just Compliance who refuse Your Injunctions, deserves any other Name rather than that of Authority or Command. And we hold *that* by a very precarious Title, which we cannot defend against Others. Nor is he any better than Another's Officer or Minister, who exerciseth any kind of Right at the Pleasure and Disposal of that other Party.

XI. From what we have laid down, it will be evident, that there is so near and so necessary a Connexion between all the parts of the Sovereignty, as that not one of them can be separated from any other, but the regular Frame of the Common-wealth must be destroy'd, and

instead of it, an irregular Body must start up, held together only by an infirm and ineffectual Covenant. For if we appropriate the Legislative Power to one, and to another, the Judiciary, each primarily and independently, it will of Necessity follow, that either the former is null and void, or that the latter only ministers to the former. Because, to make Laws which You can't put in Execution is vain and insignificant: and on the other side, to have Strength whereby You may compel and controul, and yet such as You must not use or apply but at the Pleasure of another, is to be an Officer barely executive. Again, should we grant the latter the Privilege of applying his Strength according to his own Discretion, without being accountable to Others, then we utterly overthrow the Legislative Power, as before. It is necessary therefore, that both these Powers should depend upon one and the same Will. Nor can the Power of Peace and War, or that of exacting Tribute be separated from this vindicative or judiciary Right. In as much as no one can fairly compel the Subjects to bring in Contributions, towards the Expences of the State, on either account, but he who hath a Right to punish the disobedient. Farther, it would be absurd to give the Right of making Leagues, for the Service either of Peace or War, to any other Person, besides him who hath also the Right of decreeing Peace or War, as he judgeth convenient. For otherwise, either the former will be only a bare Minister, or the latter will depend upon Another's Pleasure, in acquiring Means for the Exercise of his own Right. So likewise, if You constitute any Person for the chief Management of Business, and do not, at the same time, empower him to appoint inferior Assistants, and to require their Service in their respective Posts, (without which Assistants the Business cannot be perform'd,) You really make him as meer a Servant as the rest. For which reason, neither can the Power of appointing Magistrates, be divided from the other parts of the Supreme Authority. Lastly, to the same Authority it must belong, to take Cognizance of Doctrines and Opinions, of such especially, as bear any Relation to the End of Civil Government, and which are of Force and Efficacy either in promoting or in hindring Obedience to the Sovereign Ruler. For if one should command the Subjects to do a thing, under Pain of Temporal Death, and another perswade them that to do it would be to incur Eternal Death, and each by his own Right, separately and independently enjoy'd (1); the Consequence must be, not only that the Subjects, tho' innocent, may be justly punish'd, but also that the State must sink into an irregular System, a Monster with two Heads. For neither can any Man *serve two Masters*, nor, in the Case before us, is he whom we think we ought to follow, upon Pain of Eternal Damnation, less our Master, than he whom we obey upon the Fear of tempo-

(1) See a Discourse of our Author's, intituled, *De Concordia vera Politicæ, cum Religione Christianæ*, s. 11.

ral Destruction. And were the Right of controlling and regulating Doctrines once taken away, the more superstitious Subjects would be drawn into Rebellion by their own Fancies (a). What farther Power the Sovereign hath, as to Sacred Matters under Christian Governments, is a Point which we leave to be more distinctly stated by Others (b) (1). Nor are we here at leisure, to discuss the Opinion of *Philo the Jew* (c), who having shewn, that *Moses* was a King, a Law-giver, a Priest, and a Prophet, adds, *Since all these Offices are reducible to one and the same Head, they ought by mutual Ties, to be united and enclosed one within the other; and they are all requisite in the same Person, so that he who wants any one of the four, is to be look'd on as a lame Ruler of an imperfect Common-wealth.*

XII. This will be more clearly discern'd, if we examine those several Divisions of the Sovereignty, which might be propos'd. Let, therefore, the Power of Peace and War be in the Prince; the Power of making Laws and executing Justice in the Senate; the Right of levying Tribute, in an Assembly of the People. Here, if the King commands the Subjects to Arms, and they refuse to obey his Orders, either the King may compel them by Punishments, which he himself has a Right of inflicting, or he ought to deliver them up to take their Tryal before the Senate. Now should we admit the former of these, it doth not appear, how he, whom we suppose not to have the Power of putting the Laws in Execution, can punish the Subjects before they are actually list'd, and brought under Martial Discipline. If You say, that, in this particular Case, the King hath a Right to punish the Disobedient, tho' not in other Cases; You, at the same time, give Him the Privilege of oppressing and grieving his People as he thinks fit, and so You cancel the Rights of All beside. For when he orders them to take up Arms, he'll punish them if they dare to refuse; and when he hath once led them out on an Expedition, then the Nature of Military Discipline gives him the Power of Life and Death over them: and nothing is easier than for a General to cut off any Soldier, who hath the Misfortune to fall under his Hatred or Displeasure (d). On the other hand, if the King must be oblig'd to have recourse to the Senate for Justice, when any Persons refuse to list themselves under his Command; in this Case, either the Senators must pronounce the Sentence of their Condemnation, and give Orders for the Execution of it, barely by the King's Commission and Authority; which is contrary to the Supposition: or they must judge whether the Act alledg'd be Criminal or not;

and this Proceeding will certainly be vain and fruitless, unless the same Judges may likewise take upon them to examine, whether or no the War now engaged in by the Prince, be for the Advantage of the Common-wealth: And thus the King's Right will, again, be destroyed. We shall discover the same Inconveniences, if we compare the Right of the *Prince* with that of the *People*, under such a Constitution, as we did before with that of the *Senate*. For as the Measures of War are now settled in most Countries, *Tacitus's* Observation (e) holds true; that, *Armies cannot be had without Pay, and Pay cannot be had without Taxes*. If therefore the Prince have not a Power of compelling the Subjects, by virtue of his Sovereign Command, to bring in their Shares of the Publick Contributions, his Right over the Affair of War, will be no more than a bare Power of perswading and advising the People, that, in such or such a particular Juncture, to engage in a War, would be for the Advantage of the Common-wealth. On the other hand, if the People are not empower'd to judge whether the War, towards which these Subsidies are levied, be for their Interest or not; then what have they to boast of, but the laborious and servile Office of Assessors and Collectors? Nor will things be in a better Posture, should we separate the Branches of Sovereignty, according to any other Division that could be invented (f). So just was that Remark of *Asinius Gallus*, in *Tacitus* (g), that *As a Government hath but one Body, so it must be directed but by one Mind*: (whether of a single Person, or of a Council or Assembly.) This may be well illustrated by the Example of the Human Soul, to which the Sovereign Authority in a State, seems to bear some Resemblance. Now should we suppose the Potential Parts of the Rational Soul, the Understanding and the Will, to exist separately, in two different Subjects or *Suppositums*, one of which should have only the Faculty of the Understanding, the other only the Faculty of the Will; neither of these *Suppositums* could be call'd a Man, nor could Human Actions be expected from either; whilst one lay unactive and immoveable, the other blind and insensible. To which purpose the Epigram in the *Anthologia* (h) seems proper to be applied:

Παρεδ ὁ μὲν γυφοῖς, &c.

The Blind Man bears the Lame: what Fate denies  
The Wretched Pair, their mutual Help supplies;  
One lends his Feet, the other lends his Eyes.

Here the two unfortunate Persons were able,

(a) *Comp. Hobbes ibid. & Horn. l. 3. c. 11. f. 3.* (b) See especially *Grotius De Imperio Summarum Potestatum circa sacra, c. 1.* (1) See Mr. *Barbeyrac's* Second Note upon this Section. (c) *De Præm. & Pam. p. 919. A. Edit. Paris.* (d) *Vid. Liv. l. II. c. 23, 32, 58. l. III. c. 10, 20, 24. l. IV. c. 1, 5, 58. l. V. c. 2, 10. and in many other places.* (e) *Diodor. Sic. l. XIV. c. 73. Quintus Curtius, l. VII. c. 2. Pelys l. 1. c. 9.* (f) *Hist. l. IV. c. 74.* (g) *Annal. l. I. c. 12.* (h) *L. 1.* (f) *Add. Bodin. De Republ. l. 2. c. 1. p. 287. with the Observation made on that Author, by Arniseus, De Republ. l. 2. c. 6. f. 1. par. 56.*

in some sort, to make up the Defects of Nature, so long as they agreed to afford their mutual Assistance. But should this Agreement have been once broken, and a Quarrel have happen'd between them, each Party would have been alike at a loss about their Way. In the same manner, should any persist in dividing the Parts of the Sovereignty, he will by no means compose a regular State, but a disorderly Body, the Members of which, holding these separate Limbs of the Government, shall be kept together, not by any common Authority, but by bare Compact or Agreement. Now in such a Society, some kind of Peace and Concord might be maintain'd, so long as particular Persons kindly conspir'd in their Opinions, with regard to the Publick Good, and were each of them ready, voluntarily to perform what was requisite towards this End. But should any Dissention arise, no means of Redress would be left, but either to seek abroad for an Arbitrator, or to decide the Controversy by the Sword.

XIII. Tho' the Case be manifestly thus, as we have represented it, yet there is no inconsiderable Number of Men, who stand up resolutely for the Division of the Sovereign Power, that hereby they may frame I know not what Mixtures of Common-wealths, which being rightly temper'd and qualified must needs, forthwith produce the most happy System of Government. They would gladly engage *Aristotle* to be of their Party, but without effect; he, in the place of his Works which they alledge (a), speaking of a Mixture far different from any that can be applied to the parts of the Sovereignty. Which makes it seem the more strange, that some Interpreters (and *Mich. Piccart* amongst the rest) when they come to treat of this Mixture, put such things together as, probably, never entred into the Philosopher's Head. The Temperature, which *He* so much adviseth and recommends, runs in the following manner; *That the King shall have the Power of making War, of Coining Money, of engaging in Leagues, of conferring Publick Rewards: that the Senate shall possess such Rights as demand Experience and Deliberation; the framing and the executing of Laws, and the administering of Publick Justice: lastly, that the Populacy shall manage such Affairs, as their Knowledge chiefly directs them to; the Examination of the Revenue, the Division of Lands, the Creation of Magistrates, the Inspection of Buildings, High-ways, Aqueducts, Corn, and other Helps and Assurances of the State.* In like manner, it would not argue any Division in the Sovereignty, should we, for instance, suppose, that the Senate had the Power of condemning, but the Prince, or the People of pardoning and acquitting. For here the Prince might, by his Prerogative, absolve any Person against whom the Judges had pronounced Sentence; and consequently the latter would be only an inferior Court, whose Deci-

sions must borrow their Force and Ratification from the Authority of the former. Whence it sufficiently appears, that if in any State, the Judgment of Capital Causes belongs to the Senate, the King still retaining the Right of *Grace*, or Pardon; the Senate doth really hold, by Deputation from the King, this Power of presiding in Criminal Processes, and of pronouncing Sentence as the Law directs; and this, as well for the Banishing all Partiality from the Methods of Justice, as to divert the *Odium* from the King: yet so as that the Power of Life and Death are radically or originally inherent in the King's Person. Some would frame a Division in the Judiciary Power it self; so that the Prince should have the Power of Life and Death over Strangers only, but the People over the Natives. But now, if the People exercise this Power over the Natives, only as an inferior Court, then they do not in the least intrench upon the Prerogative of the Prince. On the contrary, if they hold it originally and independently, then the King will have nothing left him but an empty Title, and will only perform the Office of a *Prætor peregrinus*, a Judge of Foreign Causes. As for what they add, about dividing the Right of Coinage, it is too impertinent to deserve a Repetition.

*Arnisæus* (b) is very large on this Point, and amongst many accurate Remarks, justly rejects some spurious kind of Mixtures in Government. And, at last, the fairest Model he could invent, was, that the King should have the Power of War and Peace, of levying Tribute, of Coining Money, of distributing Publick Rewards; that the Senate should be employ'd in judging Causes, and in receiving Appeals; as likewise in the Reformation of Manners by good Laws, and in exercising the Power of Life and Death: And lastly, that the People should be allow'd the Care of the Revenue, and the Creation of Magistrates. Of which Model, a Judgment may be form'd, by what we have before observ'd.

XIV. *Grotius* himself (c) hath attempted somewhat towards dividing the Parts of the Sovereignty. Where he is so far in the right, when he denies that any such Partition of Power, between the Prince and the People can be made, as that the prime Compact shall be thus loosely express'd, *If the King Govern Well, then the People shall Obey; if he Govern Ill, then the People shall Compel him to his Duty:* Observing, that certain Bounds and Limits ought rather to be assign'd to the Power of either Party; such as may easily be apprehended from the Difference of Places, Persons, and Affairs; but that the bare Good or Evil of an Action, consisting in the Application of fit Means to the publick Safety, which often admits of very great and obscure Debates, cannot be a proper Bottom to ground a Partition upon; in regard to that extreme Confusion which must follow, whilst the King, on the one hand, would in-

(a) Polit. l. IV. c. 8, 9.

(b) Rel. Polit, l. 1. c. 6. f. 1.

(c) L. 1. c. 3. f. 9, 17.

list upon the Management of an Affair, alledging that he order'd it Well, and the People, on the other hand, would challenge the Direction of it, pretending that it had been Ill Managed before. His other Remark is no less true, that for a Prince to promise the People, by Oath, that he will perform, in such a particular manner, things which belong to the Administration of the Government, doth not argue a Partition of Power. But through all the rest of his Discourse, he falls into the Common Error. One way then, by which he thinks the Sovereignty may be divided, is when a Partition shall be made by express Agreement. A Precedent of this kind he alledgeth from the *Roman State*, in the time of *Probus*, when the Senate confirm'd the Prince's Laws, heard Appeals, created Proconsuls, and supplied the Consuls with Lieutenants. As if any Person could be ignorant, how that, amongst the Emperours, those who affected to seem more Modest than others, exercis'd the Sovereignty under the Mask and Disguise of the ancient Common-wealth; leaving to the Senate some inferior and petit Affairs, such as had little Influence on the main Government; but reserving strictly to themselves the chief Force and Command, which consisted, for the most part, in the Souldiery. Another Project of dividing the Sovereignty, he expresseth in this manner; *If the People, being as yet Free, shall require thus much of him whom they choose to be their King; and shall lay it upon him after the manner of a standing Rule or Command.* Now here, 'tis not easy to apprehend what kind of thing a *standing Command* is, when supposed to continue after that the Party hath lost the Power of Commanding. For every Command presupposeth a compulsive Force, to be exerted so often as the Command shall be transgress'd. Wherefore, the People who appoint themselves a King on such Terms, shall either keep this compulsive Power over him, or they shall not keep it. If the former, the King is only so in Name; the Force and Efficacy of the Government residing in the People: If the latter, the Command will be insignificant. He ought therefore to have said, that a People, as yet continuing in a State of Liberty, may oblige the future King to follow certain Rules in the Discharge of the Government. But that such a Compact doth not imply or infer a Division of the Sovereign Power, we shall hereafter make appear. His last Instance of dividing Sovereignty is, *When in conferring the Government, some Clause was added, importing that the King*

*might be compell'd or punish'd, upon Default.* But indeed, the Sovereignty can by no means be said here to be divided, but the People really possess it entire, only allowing the King, under a great and specious Title, the Office of an extraordinary Magistrate; in case the People have a Right, on any account, to compel or to punish their Prince. For Punishment ever proceeds from a Superior, consider'd in that Capacity. And as for Compulsion, this may be used two ways, either Morally or Physically; that is, either by way of Authority and Command, or by way of Force and Violence. Authority over an *Equal*, as such, is impossible. Therefore when *Grotius* argues, that the People, at least, are equal to the Prince, because in some particular Cases they may compel him; he must at the same time allow, that neither Prince nor People have Authority or Sovereignty over the other: which is repugnant to the Nature of a Civil State. The other kind of Compulsion, by Arms and Hostile Violence, takes place only between Equals, or such as are not properly subject one to the other. And of this Compulsion must we understand the Case urged by *Grotius*; *That a Creditor hath naturally a Right of compelling his Debtor.* For certainly he hath no such Natural Right, by way of Command or Sovereignty inherent in his Person: for then it must necessarily follow, that every one who commenceth a Debtor, must fall under *Subjection* to his Creditor. But still the Creditor hath the full Privilege of compelling his Debtor to Payment, either by the Assistance of the Judge, (such as cannot be had between Prince and People;) or else, if he live in a Condition of Natural Liberty, by Hostile Force. If then, we would assign this way of compelling to the People, we must withal allow, that both Prince and People live in a State of Natural Freedom; that is, that the Civil Government is utterly dissolv'd. To conclude, we readily acknowledge the Truth of *Grotius's* Observation, that, *In Civil Institutions, there is nothing absolutely free from all Inconvenience; and that therefore we ought not, on account of the Inconveniences attending a divided Power, to conclude it impossible: in as much as every Right is to be measur'd not by the Opinion of one or two particular Persons, but by the Will of him from whom the Right proceeds.* But then, it must be granted us in requital, that if any please themselves with framing such a Partition, they will hereby constitute, not a regular State, but an ill-jointed and distemper'd Body.

## C H A P. V.

## Of the Different Forms of Government.

THE Sovereign Authority, besides that it inheres in each State, as in a Common or General *Subject*; so, farther, according as it resides either in one Person, or in a Council (consisting of some, or of all the Members,) as in a proper or particular *Subject*, it produceth different Forms of Common-wealths. And here, e're we proceed to enquire into this Variety, we take it for granted, that we may have free leave to retain the Word *Form*, when we would express that Constitution or Model of State, which ariseth from the Difference of the *Subject*, in which the Supreme Power is primarily and originally seated. That the actual Administration of the Government recedes, in many Cases, from the particular Form, is a thing vulgarly known: as in *Democracy*, for instance, some Affairs are managed in the way of *Monarchy*, others in the way of *Polyarchy*; according as Business is committed to the Care of one Person, or to such a Number of Commissioners. And because it is a Matter of great Consequence, whether the Power any Person exerciseth be his own, or whether it be Another's, of which he may at any time be deprived, holding it only by a precarious Title; therefore 'tis great want of Accuracy in a certain Author to affirm, that 'When a King suffers himself to be led by the Nose, by some few Counsellors, who abuse the easiness of his Temper, or a People by some powerful Demagogue, or when, in a ruling Senate, one Member leads the rest, by his Wisdom or Eloquence, or over-awes them by his Interest and Strength; a *Polyarchy* is really introduced in the first of these Cases, and a *Monarchy* in the two latter: and that in the first Case, there is nothing but an empty Name, and outward Semblance of Monarchy, in the second, of Democracy, in the third, of Polyarchy or Aristocracy. Thus also, no intelligent Person will imagine the *Form* of a Common-wealth to be alter'd, upon a Change either in the Persons or in the Number of Ministers; no more than he will think, that when a new Successor banisheth from his Councils and Presence, one who was chief Minister under the former Prince, and had the Management of all Affairs, an *Inter-regnum* must hereupon ensue. The Capacity and Inclinations of him or them, who, either by their own Right, or by Delegation from Others, exercise the Sovereign Power, do indeed affect and vary their Administration, but do by no means touch the *Form* of Government. In the same manner, supposing the chief Authority to be exercis'd well in one Place, and ill in another; yet a new Model of State doth by no means result from the different Exercise of the same Power. Wherefore,

as a Person in sound Health, doth not differ in *Specie* from one that is Sick, and as the unnatural Distortion of the Body, doth not produce Men of a new Kind; so neither do the Vices of those who Command, or of those who Obey, nor the Corruption of Laws, make the least Step towards Constituting another Species of a Common-wealth.

II. It may be useful farther to observe, that most Authors, who have treated of Civil Knowledge, have employ'd themselves in explaining the regular Forms of Government; as for the irregular Forms, many have not so much as thought of them, some few have very slightly touch'd upon them. Hence it came to pass, that if they happen'd to meet with a *Civil Body*, which did not exactly come up to one of those usually term'd *Simple* Forms, they had scarce any Word left to express it by, besides the Name of a *Mixt* Government. But now, not to urge how very ill this *Mixture* is applied to some Common-wealths; it is weak to imagine, that besides these three *Regular* Forms, there are none other, which may be term'd *Irregular*. For all Men don't build their Houses just according to that Model which the Rules of Architecture prescribe. The *Regularity* of a State we conceive to consist in this, that all, and each of the Members seem to be govern'd, as it were, by one Soul: Or that the Supreme Authority is exercis'd through all the parts of the State, by one Will, without Division or Convulsion. And hence the Nature of an *Irregular* State, may without much Difficulty be Collected. Farther, there are some Political Systems, compos'd of several perfect States in Conjunction; which, with unskilful Judges, pass for single States, and these two may have their use in our Enquiries, concerning the several Forms of Common-wealths.

III. The Forms of a regular State are three only, arising from the *proper* or particular *Subject*, in which the Supreme Power resides; which is either a single Person; or a Council, Select or General. For the Sovereignty is committed, either to one Man, or to a Council of several Men. And this Council is made up, either of all the Members, or of the smaller indeed, but the better and more select, Part. One Species or Form therefore is, when the Sovereignty is lodg'd in a Council, consisting of all the Members, and where every Member hath the Privilege of a Vote; and this is call'd a *Democracy*. Another is, when the Sovereignty resides in a Council, compos'd of select Members, term'd an *Aristocracy*. A third, when the Sovereignty is in the Hands of one Man; call'd a *Monarchy* or a Kingdom. In the first, the Sovereign is styl'd a *People*; in the second, *Optimates* or Senators,

nators; and a *Monarch* in the third. *Pindar* (a) hath express'd all the three together:

————— *When Choice or Fate*  
*Puts to the Reins a single Master's Hand;*  
*Or when th' impetuous Multitude Command;*  
*Or when wise Patriots guard the thriving State.*

IV. In the first place, we will examine the Nature of a *Democratical Government*; not that we think it to excel the other Forms, either in Dignity, or Splendor, or in real Usefulness and Advantage (b); but because in the greatest part of the World it appears to have been the most Ancient; and because Reason shews it to be more probable, that many Men, being in a Condition of Natural Freedom and Equality, when they resolv'd to join in one Body, should at first be inclined to administer their Common Affairs by their Common Judgment, and so to constitute a Democracy. Nor is it to be supposed that a Father of a Family, as yet Free and Independent, who upon weighing the Inconveniences of a separate Life, voluntarily join'd himself to those of his own Condition, in order to the forming a Civil Community, should, in a Moment, have so far forgot his former State, under which he dispos'd of all things, relating to his own Safety, merely as he pleas'd, as to be willing to submit himself immediately to a single Director, with regard to the Common Interest, with which his own private Security had a necessary Connexion. But at the Beginning, it seems rather to have been thought more equitable, that what belong'd to All, ought to be managed by All; 'till in Progress of time, most receded from this Model, either Voluntarily, or by Necessity; whether this Necessity was brought upon them by some of their own Members, or by Strangers. What *Plato* (c) discourseth concerning the *Athenian* Common-wealth, seems to be of weight on this Subject; *The Original* (says he) *of our Government* (under which the chief Authority was in the People, and the Magistracies were conferr'd on Persons of the greatest Ability and Merit,) *was taken from the Equality of our Race. Other States there are, compos'd of different Blood, and of unequal Lines; the Consequences of which are, disproportionable Sovereignty, Tyrannical, or Oligarchical Sway. Under which Men live in such a manner, as to esteem themselves partly Lords, and partly Slaves to each other. But we, and our Countrymen, being all born Brethren of the same Mother, do not look upon our selves to stand under so hard a Relation, as that of Lords and*

*Slaves. But the Parity of our Descent inclines us to keep up the like Parity by our Laws; and to yield the Precedency to nothing, but to superior Virtue and Wisdom.* Now it is manifest, that most Civil Communities arose, at first, from the Union of such Families as were allied in Race and Blood (d). Nor is this Judgment oppos'd by the Authority of ancient Story, which, tho' it makes frequent mention of Kings, yet at the same time informs us, that most of them were such, as had rather an Influence in perswading, than any Power of commanding. So *Justin* (1), in the entrance of his Work, describes that kind of Government as the most primitive, which *Aristotle* (2) styles an *Heroical Kingdom*; such as is by no means inconsistent with a Democratical State. To the same purpose *Thucydides* (e) observes, that *The most ancient Kingdoms, pass'd by Inheritance, and were confin'd within settled Honours, and tied to certain Terms and Conditions.* Thus in most Nations, Liberty and popular Sway were at first establish'd; 'till, by Degrees, that vast Multitude of petit Common-wealths was reduced, chiefly by War and Violence, into some few great Empires. What *Aristotle* (f) urgeth for the Antiquity of Regal Government is as follows; *Wherefore Cities were at first under Kings, as the barbarous Nations are at this day: for the Persons who join'd in forming these States, were themselves before under the same Government: the Sovereign Rule in Families being that which is kept up in Kingdoms.* Which last Words receive a fair Illustration from the smart Saying of *Lycurgus*, who when a Person advis'd him to introduce a Democracy in the State, answered, *Do You first establish a Democracy in Your own House* (g). But really, *Aristotle's* Argument doth not conclude. The contrary might rather be inferr'd; that these ancient Fathers of Families, having been accusom'd before, to bear Rule, should be more inclined to a Democratical Form, under which they might still enjoy the Privilege of giving their own Judgment upon Affairs, and might bear a part in the publick Administration. Nor do they settle the Point, who tell us, that 'Paternal Government' was the most ancient amongst Men; being at 'first, mild and gentle, till upon the Increase 'of Families, and of Vices together, it was 'strengthen'd with the Power of Life and 'Death. That this Government was continued 'down through succeeding Families, in the 'Persons of the First-born, who, by a kind of 'Natural Right, held both the Sacred Office, 'and the Civil Authority; that, by this means, 'the Heads of Families grew into so many

(a) *Pyth. Od. 2. v. 157, &c. Ed. Oxon.* (b) *Philo Jud. De Mundi Opificio*, gives this Censure of the Favourers of Polytheism; *They who are not ashamed to transfer, from Earth to Heaven, the worst Frame of Government, the Dominion of the Multitude.* (c) *In Menexeno*, p. 519. B. (d) *Isocrates* is of the same Judgment; *It seem'd unjust to us, (Athenians) says he, that many should be ruled by the Authority of a few: that those who were inferior in their Fortune alone, and in no other Respect, should be debar'd from a Share in the Magistracies and Honours: And that, whilst we have All the same Common Country, the same Privileges of Birth, some should be Masters and Proprietors of the State, others no better than Strangers and Dependents; and that, under the Pretence of Law, Persons, by Nature, Members of the Common-wealth, should be denied the Offices and Employments in it.* *Add. Liban. Progym. loc. comm. contra Tyrannum.* (1) *Principio rerum, Gentium Nationumque Imperium penes erat Reges*, L. 1. c. 1. (2) *In His Politicks*, B. 1. c. 14. (e) *L. 1. c. 13. p. 8. Ed. Oxon.* (f) *Polit. l. 1. c. 2.* (g) *Plutarch in Lycurg. p. 52. A.*

petit Kings; the great Multitude of whom discover'd in the Land of Canaan (a), seems a plain Argument in the present Case. But indeed, as the Right of Primogeniture was not of so great Force and Efficacy, as to Establish Regal Dominion amongst Brethren without their Consent, and to oblige them to unite their Families to that of their Elder Brother's; so besides, these primitive Governours, whom we find dignified with the Title of Kings, were commonly no more than Superior Magistrates in Popular Societies; tho' this Honour was most frequently bestow'd on the chief of the Race, when the respective Society was compos'd of Families, which had the same Original; yet so as that this Right of Birth and Seniority was not always observ'd.

V. It seems needful, on the present Argument, to bring the Opinions advanced by Hornius (b) under a particular Examination. He then, in relation to Aristocracies and Democracies, which he comprizeth under the General Name of *Free States*, passeth his Judgment to this purpose; *There may be such an Establishment found out, as shall avoid the Confusion of the promiscuous Multitude, and shall attain to a decent and agreeable Order, making Provision for the Common Safety, by Pacts and Covenants, without Subjection, and without the Loss of that Liberty which is extinguish'd under a Monarch's Reign.* Here we have almost as many Mistakes as Words. That the Order, which may be observ'd in Free States, is the only thing which shields off the Confusion of the promiscuous Multitude: That Free States are held together barely by Compact and Covenant, without any Sovereign Command: That particular Persons are not so strictly subject to a popular Assembly, or to a Council of Senators, as to a Prince under a Monarchy: That all the parts of Sovereignty are not so fully Exercis'd under the former Governments as under the latter: That the Power of Life and Death is less employ'd, with regard to private Men, by a People than by a Prince. What he asserts farther, that *Certain Fathers of Families, living as yet in a separate Condition, learnt from the neighbouring Kingdoms, what Form of Government to introduce*; is so far from appearing true, that in the first Union of Families and Nations, most Communities seem rather to have been of the Popular Form; till upon Discovery of the Inconveniences attending such a Government, they fell, sooner or later, under the Command of a single Sovereign; some, by their own voluntary Act, some, by Force and Compulsion. No less vain is that Remark; *As Art endeavours to imitate Nature, but can never reach to Equal or to Excel her; so in these Artificial Forms of Government, the Nature of Kingdoms is, in some sort, represented, as to the Influence which they have on the Common Use and Benefit; but the inward Force and Virtue of Dominion, with which Monarchies are*

*endued, being the Work of Almighty GOD, was beyond the Power of Men to produce.* Of the Origine of Majesty or Sovereignty we have already treated; and why may not this as well agree to a Moral Compound Person, as to a single Man? For surely 'tis no Contradiction to affirm, that the Senators, under an Aristocracy, are all equal, as to their private and separate Capacities, and yet are each of them subject to the Authority of the whole Council. And it requires no Depth of Parts to apprehend the Difference between All in general, and Each in particular; between the Assembly of the People, in Democracies, and private Men, dispers'd according to their respective Habitations. Therefore 'tis but a trifling Argument which we find urged by this Author; *Where the Sovereignty is ascribed to All, there either All do really possess it, or some few only. If All, then they will have none to be their Subjects; because to command and to obey cannot belong to the same Person: If it be said that the particular Men are Subjects, then All cannot be Governours; because when each separate Person is in a Condition of obeying, the Multitude, which they compose, must likewise stand under the same Engagement; for Obedience is the only thing which, in this Case, the private Members confer on the Common Body.* Certainly in Moral Compound Bodies, somewhat may be attributed to All in Conjunction, which we cannot assign, either to each Member taken a-part from the rest, or to any one of those Particulars: and consequently the whole Society, is in reality a Moral Person, distinct from the separate Members, to which such a peculiar Will, such Actions, and such Rights may be appropriated, as private Men are not capable of possessing. Those Scruples likewise must soon vanish which are rais'd from this Consideration, that in popular Assemblies the Majority always prevails. For this is one of the Moral Affections which attends the very Essence of a Compound Body, that the Consent of the greater part of those who make up the Council shall be deem'd the Consent of All; in as much as no other means can be assign'd, by which the Wills of many Natural Persons, when they happen exactly to conspire, should be brought to a Moral Union. Wherefore, it cannot be pretended, that, in Aristocratical or Democratical States, the *Subject*, in which the chief Authority resides, is obscure or uncertain, tho' it should happen, that those Individual Persons, whose Voices upon one Occasion compos'd a Majority, upon another should prove to be of the weaker side. For none of these Circumstances take away that Unity of Will, which is to be attributed to the whole Body. In a Senate, if so many Members happen not to agree, as are required towards making a Majority, the Senate is presumed to design or to declare nothing, and therefore no Step is to be made in the new Affair. Which, tho' it often turn to the Disad-

(a) Vid. Joshuah XII. &amp; Judg. I. 7.

(b) De Civitate, l. 3. c. 11:

vantage of the State, yet doth not prove that the Senate is not invested with Sovereign Command. Besides, that other Allegation is false; *True and proper Sovereignty cannot be ascribed to a Multitude, by reason that the Obedience which is necessary, upon such a Supposition, must be here wanting: since the Multitude cannot be bound always to keep the Resolution which they once embraced; and since the Obligation, rising from their Authority, doth not affect them as taken All together in a General Body.* For as it doth not destroy the Sovereignty of a King, that he may when his Pleasure alters, revoke a former Decree, upon which A&t the Obligation of the Subject to the said Decree expires; so whatever Power the Common Assembly may have, as to the altering of their own Decrees; yet, in the mean time, particular Persons are no less engaged by them, than they would be by Regal Injunctions. If not, let those who maintain the contrary Opinion shew us, that Offenders against the Laws are not so liable to Punishment under Free States, as they are under Monarchies (a). 'Tis no better than Trifling to argue; that *If the Sovereignty be lodg'd indivisibly in the Hands of many together, then each of those many must necessarily hold some Part of it, out of the Collection of which Parts the whole Sovereignty must at length be constituted. But at the same time 'twill be likewise necessary, that each of these Parts be Supreme: and thus in one State, there will be more than one Supreme; which is absurd.* For, in Moral Consideration, there is no manner of Absurdity in supposing, that those particular Wills, which Unite and Conspire to make up the Will of the Community, should want some Power or Quality which the General Will is possess'd of. So that 'tis no good Consequence to say, the Sovereignty is the Supreme Right; therefore each Man holds a Part of it, which Part is likewise Supreme. We might with as much reason infer, that because the Votes of particular Persons, separately and solitarily Consider'd, are ineffectual towards the enacting of a Law, therefore many of them in Conjunction, are still unable to perform this Work. Lastly, he adds, that *Since, in a Governing Senate, there is no one Member who may not, if he offend against the State, be brought to due Punishment by his Brethren; it follows, that in case all the Senators should prove guilty, the punishing of them would belong to the People. But each Member being thus punish'd and removed, the Sovereignty of the whole Council could no where subsist.* This Difficulty will admit of an easy Solution, if we first rightly explain what it is to offend against the State. He, then, is properly said to be thus guilty, who commits any thing tending to the Prejudice of the Publick, contrary to the Laws and Injunctions of the Sovereign. Wherefore the whole Body of Senators cannot offend against the State, unless they either violate those Laws, the Obser-

vation of which, was made the Condition of their holding the Sovereignty; or turn profess'd Enemies to the People under their Charge: Upon which Suppositions, their Fate will be the same as that of Kings in the like Cases. What he farther vents in prejudice of Free States, is notoriously false. As that, *The Sovereignty, exercis'd by a Monarch, is quite a different thing from that which appears in Free Governments, tho' their Effects may be alike. Because a Monarch, besides that personal Dignity and Splendor, of which no Man is capable in a Common-wealth, is endued with Majesty, which Free States may not assume.* But now we look on it as a certain Truth, that GOD may, with equal Justice, be styl'd the Author of Monarchies and of Free Common-wealths; and that the former are no less produced by Covenants than the latter; from which Covenants, the Sovereignty results in both Cases; the immediate Cause of Obedience being in the People: that a Subject, consider'd under that Capacity, is obliged to the same Duties in a Common-wealth and in a Kingdom; that his Obedience is no less strictly required, and his Subjection is in no less Degree, under the one Form than under the other; and that both Governments have the same Right of punishing Criminals. For who will believe, upon the bare Word of this Author, *That, in a Kingdom the Punishment of Offenders is grounded on a Right over the Lives of the Subjects, which is wanting in Free States: and that therefore under the latter, the Transgressors of the Laws are punish'd as Enemies; or only by the Right of War?*

VI. We may now enquire how a Democracy is erected, and what this Form of Government hath in it, peculiar from others. When, therefore a Number of Free Persons assemble together, in order to enter upon a Covenant about uniting themselves in a Civil Body, this preparative Assembly hath already some Appearance of a Democracy; properly in this respect; that every Man hath the Privilege freely to deliver his Opinion concerning the Common Affairs. Yet he who dissents from the Vote of the Majority, shall not in the least be obliged, by what they Determine, till such time as by means of a second Covenant, a popular Form shall be actually Confirm'd and Establish'd. Mr. Hobbes (b), for want of distinguishing these two Covenants, hath handled this Subject with great Confusion. For we have formerly proved (1), that no Man can be obliged by the plurality of Votes, before he hath given his Consent to such a Form of publick Administration. Therefore what he asserts is false, that *By their voluntary assembling of themselves together, we are to suppose, that they stand obliged to whatever the major Part shall resolve.* What he farther delivers, may, in the following manner, be more clearly explain'd. When many Men upon a general Meeting, oblige

(a) *Add. Liv. l. 2. c. 3.*(b) *De Cive, c. 7. f. 5.*(1) *C. 2. f. 7.*

themselves by Compact, to unite their Strength and Wealth; either in this very Meeting a Decree is pass'd, for the introducing some particular Form of Government, or not. In case, no such Decree about the Government be made, nor the Time and Place assign'd for the holding another Assembly, then, the present Meeting is presumed to be void, and each Person continues in his Natural Condition of Liberty, as before. For a Number of Men cannot become one Body, unless they have agreed upon a Constant Method of transacting publick Business. If they break up without settling this Point, yet prefix a Time and Place, for Considering and Debating the Matter farther, in order to a final Resolution; we have then no more than the Rudiments and first Principles of a State, which cannot yet be properly styl'd a Democracy. For we must not presently make use of this Name, when every Man hath a Right to give his Opinion, or when the Time and Place are pitch'd upon for another Congress; in as much as this way of proceeding is common to all kinds of Societies and Conventions, at their first rise, and before they are fully establish'd: But we are then to call it a Democratical Government, when the Right of settling Matters, relating to the publick Safety, is conferr'd for ever on a General Assembly.

VII. Towards compleating the Nature of a Democratical State, these Conditions seem especially necessary. First, that a certain Time and Place be assign'd, for holding those Assemblies, in which the common Affairs are to be Debated and Determin'd. For, as on the one side, the private Business of particular Men will not suffer them always to attend the Publick, so on the other side, if nothing be agreed upon as to the Time and Place; those who belong to the Society may either meet at different Times and Places, by which means, Factions are necessarily introduced; or else, not assemble at all; in which Case, they will not be a *People*, but a scatter'd Multitude, to whom no Action, and no Right can be attributed as to one Compound Person (a). Secondly, That the Vote of the Majority, shall pass for the Vote of the whole Body: since, as the World goes, it so very rarely happens, that a great Multitude of Men agree in their Judgments as to the same Matter. In the last place; since some Affairs of the Common-wealth occur every Day, and are of inferior Moment; others are less frequent, and affect the main Interest; and since it cannot be convenient, for the whole People to meet about settling the former Concerns, either in daily Councils, or at Intervals of so little Distance, as to let nothing of this Nature escape their Examination; it is therefore necessary to appoint certain Magistrates, as Sub-

stitutes or Delegates, who, by the Authority of the whole People, may dispatch Business of every Day's Occurrence; may, with mature Diligence, search into more important Affairs, and in case any thing happens of greater Consequence, may report it to the popular Assembly; and may likewise see the Decrees of the People put in Execution: for a large Body of Men is almost utterly useless in respect of this last Service, as of many others.

VIII. An *Aristocracy* is then constituted, when the Assembly, who by means of their first Covenant, united themselves, as it were into the Rudiments of a State, do by Common Decree, entrust the Supreme Administration in the Hands of a Council, consisting of some select Members. These Members, when they have been declared and design'd by the said Assembly, either by their Names, or by some other Mark of Distinction, and have also accepted of their Designation, are then supposed to enter upon the Sovereign Command. And here we may observe, that Mr. *Hobbes* (1) is mistaken when he draws the Origine of Aristocracy from Democracy, if his meaning be, that all Governments of the former kind were Changes from the latter, which are supposed to have been before compleatly Establish'd. For Experience proves, and Reason does not deny, that Men might pass on from the first preparatory Covenant, either to Aristocracy or to Monarchy, without taking Democracy in their way. Besides, we have before made it appear (2), that Mr. *Hobbes* doth but play with an Argument, when he tells us, 'That no Covenant can be transacted between the Senators and People, because the Government, being once conferr'd on the former, the latter do no longer exist after the manner of one Person. For to make Men capable of sustaining Obligations towards others, 'tis sufficient that they still continue Natural Persons, tho' the Moral Personality, which they once bore, may be expired. We may add, tho' the People, upon transferring the Sovereignty from themselves, do not henceforth exist as one compleat Person, opposed to their newly received Head; yet this doth not dissolve them into a loose Multitude; in as much as being join'd to their Head, the Senate, they still constitute one Person. Farther, what He infers in another place (b) is false; that *As the People, under a Democracy, so the Court of Senators, under an Aristocracy, are free from all manner of Obligation*. For should we be never so willing to grant the Antecedent (3), upon Supposition, that the respect which All in general bear to each in particular, may perhaps seem insufficient to found a mutual Obligation between them; yet it cannot hence be concluded, that neither is there any

(a) *Thucydides* (l. 2. c. 21. Ed. Oxon. in the Beginning) reports, 'That *Pericles*, once finding the *Athenians* to be of a wrong Opinion about the Method to be used in a War, would neither call an Assembly of the People, nor hold a select Council; least some very false Step should be taken, whilst their Debates would be guided rather by Passion than by Reason. (1) *Ubi Supra*, f. 8. (2) C. 2. f. 12. (b) S. 9. (3) See the Fifth Section of this Chapter.

mutual Obligation betwixt Senators and People. As 'twould be no Consequence to say, I do not any way stand oblig'd to my self, whilst I manage my own Affairs in Person; therefore if I transfer the Care of them on another, he likewise shall be exempt from all Obligation. One thing this Author rightly observes (a), that under an Aristocratical, as well as under a Democratical Form, unless certain Times and Places are appointed for the Senators to meet, there will be no longer any such thing as a Court or a Compound Person, but a disorderly independent Multitude, without Authority or Rule. In as much as the Wills of the particular Members, from the Combination of which we apprehend the Will of the Court to spring, cannot be known otherwise than by their assembling together for this purpose. For to take the Senator's Votes, by a distant Scrutiny sent about in Writing, is a Method full of Inconvenience. Farther, it is no less necessary in an Aristocracy than in a Democracy, that the Times of meeting in a Council be not fixt too far asunder, unless the Exercise of the Sovereign Power, at least with regard to Business and daily Occurrence, be in the mean Time entrusted with some one Magistrate, or with Commissioners, not many in Number.

IX. Lastly, A *Monarchy* is settled, when the Sovereign Authority is confer'd upon one Man. And that this is done by means of a Covenant intervening, we have already sufficiently demonstrated, against the Opinion of Mr. *Hobbes* (1). Before we proceed farther, we cannot but take under Examination the pestilent Notion of a certain Anonymous *Dutch* Author in his *Political Balance*, which runs in the following manner. 'Since the Act of conferring the Sovereign Power is always design'd for the more convenient Prevention and Removal of Evils, whether proceeding from inward or from outward Causes; it cannot be presumed that a Democratical Society should ever have devolv'd this Authority on one Man and his Heirs, by a perpetual Succession. For, in as much as their Hopes of a more commodious Protection, under a single Governour, were grounded purely on the Virtues which appear'd at first in the Person Elected; and since no one can be ignorant, that all Men are changeable and mortal, and that, in a short time, either Age will render them unfit for Government, or, if they die sooner, they will leave either no Issue, or such as must be young and unexperienced; or that, should they happen to leave Children grown to mature Years, yet these may either not be more able to rule than others, by any Natural Capacity; or may want Will and Inclination to defend their Charge; we must therefore by no means suppose that

a popular Society ever intended to debar themselves of the Privilege of choosing a better Governour, in the room of one, who is either weak or wicked. But that when Persons had thus got the Sovereignty into their Hands, it was easy for them, by drawing to their Assistance the greatest part of the People, especially the Souldiery, so to confirm their Power to themselves and their Posterity, as to be able ever to hold the Command even against the Will of the Subject. To which we reply, if it ever entred into the Thoughts of a Society, to confer the chief Rule on a Person under this Condition, that whensoever the People should vote his Government not so Effectual towards procuring the common Safety, as their Democratical State was before he should be depriv'd of his Office; they did not, by such an Act as this, constitute a Monarch, but only an extraordinary Magistrate, who was to depend upon the Breath of the Multitude, and therefore was not invested with the Supreme Authority. Besides, since 'tis evident, how little a State is a Gainer by frequent Changes in the Throne, other *Mens* rather than other *Manners* still succeeding; and how great a Blow it must be to the Publick to force a Prince from his Command, who hath had Opportunity, in his publick Administration, to strengthen his private Interest; it is but a fair and easy Presumption, that a People should be willing to trust their Fortune once for all, by fixing the Government irrevocably in a King: the Evils which naturally flow'd from their former uncertain, unsettled Condition, being much more to be dreaded, than any which a degenerate Monarch might create. Especially, if we consider how far the exorbitant Inclinations of such a Prince may be limited and retrench'd by fundamental Laws. And, lastly, 'tis by no means allowable to revoke all such Acts, the Issue of which doth not exactly answer our Expectation: since Human Affairs must be always liable to Accidents, and since we can establish nothing, but what will be attended at least with some Inconveniences (b).

A *Monarchy* differs from the Two former Species of Government in this respect (2), that under them, before any Matter can be debated or determin'd, that is, before the Authority can be actually exercis'd, 'tis necessary that certain Times and Places be assign'd for this purpose: whereas in a *Monarchy*, (at least if it be such as we term *Absolute*;) Deliberations may be held and Resolutions taken, at all Places and Times (c). For a People, or a Senate, in as much as they do not compose one Natural Body, must wait an Opportunity of meeting together. But a *Monarch*, who is but one Person in Natural, as well as in Moral Account, is always furnish'd with an immediate

(a) S. 10. (1) C. 2 f. 9, &c. (b) *Add. Grot. L. 1. c. 3. s. 8. n. 1.* (2) *Vid. Hobbes, De Cive, C. 7. l. 13.* (c) *Herodian. l. 1. c. 14. p. 13. Ed. Oxon. 'Εκεί τε ἡ Ρώμη ὅτε πύτ' ἀν' ὁ βασιλεὺς ἦ. Where the Emperour is, there Rome is.*

Power of exercising his Sovereign Command, thro' all Instances of Government. It is likewise true what Mr. *Hobbes* (1) observes on this Head, that in a People, or in a Court of Senators, in case any Decree pass which is contrary to the Law of Nature, the State it self, or the Moral Person, is not affected with the Guilt, but those Members only whose Votes concurr'd in the Resolution. For *Sin* regards only the Natural or Express Will, not the Moral or Political Will, which is purely Artificial. Otherwise they also, who disliked the Proceeding, would be included in the Crime (a). But in a Monarchy, if the Prince decree any thing which the Law of Nature forbids, the Prince himself is the Sinner; because, in his Person, the Civil or Political Will is the very same with the Natural.

X. To these Regular Forms of Government, it hath been the Custom, with most Authors, to add certain others, which they term *Vicious*, *Distemper'd*, or *Corrupt*. Now here it is certain, that in many Common-wealths, no less than in particular Men, we may observe a very plentiful Field of Corruptions and Diseases; so that it may be look'd on as some kind of Perfection to have the fewest Failings. Of those Diseases, which infect Civil Societies, some, we see, take their Rise from the Wickedness of particular Persons, others from some Defect in the publick Constitution. The former we may style the *Vices of Men*, the latter *the Vices of the State*. It may be proper to touch on some Instances of each Kind, for Illustration and Distinction. In a Monarchy, then, *the Vices of Men*, or personal Faults are as follow; if he, whom either the Chance of Blood, or the unhappy Suffrage of the People hath advanced to the Throne, be destitute of the Arts of Government, and very little or not at all affected with any Care or Concern for the Common Interest, which he prostitutes to the Ambition, or to the Avarice of bad Ministers; if he render himself Terrible, by Passion or Cruelty, forgetting that he is a *Man* himself, or that he governs *Men*; if he take a delight in exposing the Common-wealth to unnecessary Hazard or Danger; if he squander away what hath been gather'd to defray the Expences of the Publick, either in Luxury, or in unadvised

Grants and Bounties (b); if he heap up Money beyond the Bounds of Reason, first squeeze'd out of the Subject; if he be notoriously abusive or unjust (c); or guilty of any other Practice, which enters into the Character of a bad Prince (d). The *Vices of Men* in an Aristocracy are: if, by Corruption and base Acts; Persons, of no Honesty or of no Ability, find an Easy Admission into the Senate, whilst True Merit is excluded; if the Senators break into Parties and Factions amongst themselves; if they make it their Endeavour to enslave the Commonalty to the Service of their private Interest, and to increase their own Estates at the Expence of the Publick. In a Democracy, personal Faults are such as these; if Men, who really want Judgment, turbulently and importunately maintain their own Opinions; if extraordinary Virtue, yet such as is not likely to prove too hard a Match for the Common-wealth, be oppress'd and born down by Envy; if through a Lightness and Inconstancy of Humour, Laws are rashly made and as rashly repeal'd; and what was embraced but now with Applause, is soon after disliked and rejected without Reason; and if sordid and worthless Persons are entrusted with the Management of Affairs (e). Lastly, such *Vices of Men* as may affect any Species of Government are: if the Persons on whom the chief Administration lies, perform their Office negligently or dishonestly; and on the other hand, if the Subjects, who ought to rest contented with the Glory of obeying, grow refractory and aspire to Command (f).

The *Vices* or Faults of a *State*, in general, are; when the Laws and Institutions are not accommodated to the Nature of the People, or of the Place; or when they are so framed as to breed inward Distractions, or to provoke the just Hatred of Foreigners; or when they render the Subjects incapable of performing such Service as is necessary for the Preservation of the Common-wealth: as suppose the Constitution be such, that Men, whilst they comply with it, cannot avoid sinking into effeminate Weakness, or, on the other hand, cannot bear the easy unactive Condition of Peace (2); or lastly, when they contradict some of the principal Maxims of Civil Doctrine;

(1) *Ibid.* f. 14. (a) See Luke XXIII. 51. (b) *Drepan.* Paneg. upon *Theodosius*, c. 27. n. 1. Ed. Cellar. 'Tis the last Defence of wicked Princes, to plunder some that they may be bountiful to others. (c) 'Tis remarkable what *Philostratus* reports, (*De Vit. Apollon.* l. 3. c. 9. in the Beginning,) of the old Indians, that they allow no manner of Honour or Privilege to the Heirs of the Crown; That neglectful Treatment may be a Lesson to them against unreasonable Pride. (d) Such as *Claudian* sets down, *De Bello Gildon.* v. 157, &c.

Quæcunque profunda  
Traxit avaritia, luxu pejore refundit:  
Instat terribilis visus, mortentibus hæres,  
Virginibus raptor, Thalamis obscænus adulter.  
Nulla quies: oritur præda cessante libido;  
Divitibusque dies & nox metuenda maritis.

Those Heaps which boundless Avarice supply,  
Vainly he spends in viler Luxury;  
Tyrant to all that live, and Heir to all that dye.  
Alike the Nymphs and injur'd Matrons move,  
Or Brutal Rape, or foul adult'rous Love.  
Sin never sleeps; new Spoils, new Lusts invite:  
The Wealthy fear the Day, the Married dread the Night.

*Themist.* Orat. 10. *De Pace ad Valent. Imper.* He is but a lame Prince or Legislator, who is fit for the Service of War, but unskilful in preserving Peace. (e) In *Plutarch*, *Dion.* p. 978. E. Popular Ambition is term'd a wild Distemper, not inferior to Tyranny it self. (f) *Add.* *Hobbes Leviath.* c. 29. about the End, where he discourseth ingeniously on some Diseases of the State. (2) These Instances are taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* L. 2. c. 8. f. 10.

and the Mischief will still be the greater, if these Irregularities happen to wear the Disguise of Religion (a).

XI. Though a sound and a distemper'd Common-wealth are vastly different from each other, yet we are not, on this account, to multiply the *Forms* of Government, and to oppose one or two *Vicious* Forms to each of those which we term Good and Regular. For these *Vices* or Defects do neither change the Nature of the Authority it self, nor the proper Subject in which it resides. And thus far Mr. *Hobbes* (b) is in the right, when he denies, that *Anarchy*, oppos'd to *Democracy*, *Oligarchy* to *Aristocracy*, *Tyranny* to *Monarchy*, are three other kinds of Common-wealths (1). *I think*, (says he,) *no Man believes, that want of Government is any new kind of Government*. But what he farther observes (2), is not universally true; 'That *Anarchy*, *Oligarchy* and *Tyranny* are three Names impos'd by those who, either 'mislik'd the Government, or the Governours. 'It being usual with Men to signify by Names, 'not the things only, but at the same time 'their own Affections, as their Love, Hatred, 'or Anger, their Contempt, or Esteem. For, as it happens in other Matters, that one Man loves what another violently abhors, so the same Form of Government, meets with the Approbation of some, and with the Aversion of others. And this, not only because some Persons reap a particular Advantage from such, or such a Species of Common-wealth; but likewise on account of peculiar Tempers and Inclinations (c). Men of haughty Spirits, and who dislike the Equality of a popular State, when they see all Men, without Distinction, giving their Votes in publick Business, of whom the inferior Commonalty always make up the greater Number, call this an *Ochlocracy*, or, a State where the base Rabble sit at the Helm, and where no Prerogative is allowed to such extraordinary Merits, as they look on themselves to be possess'd of. And yet this Name, as full of Contempt as it is, might, with Justice, be applied to such a Government as we read of amongst the *Ephesians* of Old: who when they expel'd *Hermodorus* out of the City, gave this reason for their Proceeding; *Let no Man amongst us excel his Neighbours; if he doth, let him find out another Seat, amongst another People*: and whom *Heraclitus*, for this Judgment, declared to be all worthy of Death (d). Again, if any Person is discontented that he hath not a place in the Senate, and at the same time thinks himself not in the least inferior to

many of that Order; Envy and Contempt together prompt him to give them the Name of *οἱ ὀλίγοι*, *the Few*; that is, some inconsiderable Mortals, who having in no respect the Advantage of those about them, do yet exercise Authority over their Equals or their Betters. And a Man, under this Chagrine, hath commonly in his Mouth the Complaint which *Ajax* makes in the Poet (e).

— ἢ γὰρ ἔτ' ἑσθλός ἐστι γέγεε, &c.

*Merit no longer finds a just Reward:  
Folly's a Favourite, and Vice prefer'd.*

People of a more lofty Genius, and those, on the contrary, who are more mild and tractable both join in giving the Title of *Lords* and *Masters* to Foreign Princes, who govern with a stricter hand: whereas 'tis well known, that when a Father treats a stubborn Child with Severity, and one that is more submissive with Gentleness and Kindness, in both Instances he exerciseth the very same Paternal Power. The like may be affirm'd of the Name of *Tyrant*, which is now attended with an indelible Mark of Hatred and Detestation, from the Custom of the *Grecians*, who thought the chief Happiness of States to consist in a popular Liberty. *Lucian* (f) himself passeth this Censure upon them: *In general*, says he, *People, not considering whether the Person who bears Rule be just or unjust, have an Abhorrence to the bare Name of Tyranny*. Many of their Authors apply the same Word to any kind of Government in the Hands of a single Person. Thus *Aeschines* (g) particularly says, *There are three Political Forms in use in the World, Tyranny, Oligarchy and Democracy* (h). Hence 'tis worthy our Remark what *Mnemon* (i), in *Photius*, reports of *Dionysius*, the Fourth Tyrant of *Heraclea*; *Having*, says he, *arrived to a high pitch of Glory, he disdain'd the Name of Tyrant, and assumed that of King*: the latter being less Odious and more Honourable. Yet there is no one who doth not apprehend, that these invidious Titles are sometimes affix'd with sufficient Justice, to distinguish the Government of bad Princes or Senators from that of Good, the Fury of a turbulent and inconstant Multitude, from the wise Administration of a modest People. *Aristotle's* Decision of this Point, differs little from what hath been here establish'd; who terms *Tyranny*, *Oligarchy* and *Anarchy*, (for as to this latter word, he useth the general Name of *Polity* for a sound Popular Government,) παραβόλις *Deviations* or *Degene-*

(a) Such was the Authority of the Priests amongst the People of *Meroe*, mention'd by *Diod. Sic.* 1. 3. c. 6. and *Strabo*, 1. 17. p. 566. Ed. *Genev. Casaub.* to whom the Kings themselves were accountable. (b) *De Cive*, c. 7. f. 2.

(1) See *Hobbes's Leviath.* B. 2. c. 19. (2) *De Cive*, ubi supra. (c) So that we cannot universally allow that of *Lyfias*, *De Populari Statu*, Orat. 24. *No Man is more inclin'd by Nature either to a Popular, or to an Aristocratical State; but every one endeavours to establish that Form of Government, which tends most to his particular Advantage*. With whom *Isocrates*, *De Pace*, p. 320. joins his Opinion: *No Man hath a Natural Affection for any of these States; but All love that best in which they themselves meet with the greatest Honour and Esteem*.

(d) In *Cicero*, *Tusc. Quæst.* 1. 5. c. 36. *Diog. Laert.* 1. 9. in *Heraclit.* f. 2. *Strabo*, 1. 14. p. 441.

(e) *Quint.* *Calaber.* 1. 5. (f) In *Phalarid.* 1. pag. 735. tom. 1. Ed. *Amst.* (g) *Contra Ctesiphont.*

(h) *Ald. Cornel. Nep. Miltiad.* c. 8. n. 3. (i) Of the Tyrants of *Heraclea*, c. 5.

racies from a Kingdom, an Aristocracy and a Democracy (a). And who will pretend that a bare *Deviation* is sufficient to constitute a new *Species*. As for that Latitude of which the Word *Esse* or *Species* is capable, we think it not considerable enough to afford any just Matter of Dispute (b).

XII. But when we meet with such a Government, as we can neither bring under any of those Forms which are sound and regular, nor yet explain how it differs from them, by the bare Notion of a Disease or Deviation, then the Learned are put upon a more laborious Enquiry. Most Authors judge it the shortest way of getting over this Difficulty, to call such Governments *Mixt States*; as if they were the Result of the more regular Forms, allay'd and blended together. *Aristotle* is call'd in by many to countenance this Project; and therefore it may be worth our while to examine his Opinion in the Case. First then, as for what he delivers, in the Fourth Book of his *Politicks* (c), concerning the several Kinds of Democracy and Aristocracy, it bears no Resemblance to the Mixture proposed by our modern Designers. The chief thing he there insists on, is the reckoning up of certain Conditions and Qualities, to be found in those who are to be admitted into the Popular Assembly, or into the Ruling Senate. By which means, neither is the Sovereignty it self any way varied, nor are the Parts of it torn and wrested from each other, nor the State rent into two or more distinct Bodies; but the Forms of Government which he there mentions, are only hereby slightly diversified according to their several *Accidents*, or circumstantial Differences. Thus, although in the Definition of a Democracy, the chief Authority should be said to reside in a *General Council*, or a Council made up of *all* the Members, and at the same time tho' it be true, that Women and Children have as much Interest as others in the Common Welfare; yet who will maintain that a new Form of Government is establish'd, when the Women, the Children and Servants are excluded from the publick Debates? Tho', in our Judgment, 'tis sufficient for the constituting a Democracy, if those Persons are allow'd the Privilege of Votes, who by uniting together, first compos'd the State, and after them their Successors, to whom their Places and Rights properly descended. But now it's manifest, that Civil States were originally compos'd by Fathers of Families, who held the inferior Train, before mention'd, under their Domestical Sway, and certainly did not intend to relinquish all Authority over them, or to set them on the level with themselves. It was necessary therefore, that Persons who were thus in Subjection, should be debar'd from giving their Suffrage with their Lords. After the Democracy was once settled, 'twas in the

Power of the Members to receive others into the State or not; to give them a full or imperfect Right; to let them have the same Share with themselves in the Administration, or utterly to exclude them from it. Whence it may happen, that in free Governments, many shall want the Privilege of a Voice, whilst yet the popular Establishment continues as perfect as ever. On the other hand, 'tis possible indeed, that a State at first, Democratical, may, by receiving large Additions, and by shutting out all these new Comers from their Honours and their Councils, at length commence an Aristocracy. In the same manner, the Species of Aristocratical Government will not be multiplied, though, in one place, Virtue and Merit should be a sufficient Qualification for a Senator, in another, the Estate and Family should be likewise consider'd. No more could it be said, that there were so many several distinct Forms of Democracy; if, under one State, every Free Denison had a Vote in the Assembly; under another, none but Men of such and such Fortunes were admitted; under a third, some particular Profession rendred Persons incapable of this Honour. Much less do any new Forms or Species (properly so call'd,) arise from the different Laws of Democracies, relating to the Election of Magistrates; whilst in some places, for Instance, all Persons promiscuously have a Right to bear these Employments; in others, again, an Estate, to such a Value, is made a necessary Condition: as suppose, under one Government, the Rich were allow'd to absent themselves from the publick Councils without Censure, the Poor not; or *vice versa*. And indeed, this whole Matter is plain beyond Dispute. What Judgment we ought to pass on the Mixtures, supposed to be in the Commonwealths of *Sparta* and *Crete*, as described by *Aristotle*, we shall elsewhere discuss. The *Athenian State*, which *Aristotle* (d) and *Isocrates* (e) describe and commend, was in all respects truly *Popular*. *Polybius's* Opinion (f), concerning the mixt Government in the *Roman Commonwealth*, comes under our Examination in another place.

XIII. As for the Moderns, some of them have invented many kinds of mixt States; yet so as that, upon the whole, rejecting the greatest part of them as inconvenient, they applaud two ways, as especially proper and useful. The first is, when the parts of the Sovereignty reside Separately and Independently in different Persons, or Bodies of the same Commonwealth, so that each Person or Body hold their respective Parts, by their own proper Right, and administer it according to their own Judgment, whilst in respect of the other parts they are altogether in the Nature of Subjects. Much after this manner, was the Disposal of the Kingdom of *Numidia*, by

(a) *Vid. Polit. l. 3. c. 7, 8.*

*Themistius, Orat. 16. p. 336. Edit. Petav.*

(b) *Add. Sallust. Philosoph. de Diis & Mundo, c. 11. and to the same purpose,*

(c) *C. 3, &c.*

(d) *Polit. l. 2. c. 9, 10.*

(e) *In Arcopagit.*

(f) *L. 6. f. 20.*

*Scipio*, after *Masinissa's* Death; his three legitimate Sons being all allow'd to bear the Regal Title and Dignity; but with this Difference, that the Elder Brother *Micipsa* should keep his Court at *Cirtba*, the ordinary Seat of the Kings; that *Gulusa*, the next to him, should have the chief Command of War and Peace; and that the Youngest, *Manababales*, should preside in Judicial Affairs (a). The other way which they propose is, when the Sovereign Authority inheres indivisibly in many together, yet so as that neither the most considerable Majority, without some few dissenting Members, nor indeed All the rest, when any one of the Number stands out, can act to any purpose, or exercise any part of the Supreme Power. And this again is subdivided into Two Models, either that all the Members shall have equal Power; or that some one or two of the Number shall be invested with certain extraordinary Rights and Prerogatives, which they may use without the Assistance of their Brethren. They proceed to alledge many Authorities from the Ancients, where Mention is made of *Mixt* Common-wealths; with regard to which Authorities we have already observ'd, that what is deliver'd in them, concerning the *Mixture* of Governments, doth not in the least belong to the Division of the Sovereign Power amongst several Persons or Councils; but either to the settling the due Qualifications of those Persons of whom the Governing Council is to be composed, or to the joining together of several good Institutions, drawn from different States. Besides, we are of Opinion, that some Examples of these Mixtures, might receive a convenient Explication, by distinguishing between the Sovereignty it self and the manner of administering it. So that we may affirm those States to have mingled, as it were, somewhat of others in their Composition, in which the Method of Administration seems to have been borrow'd from another Form: as suppose, for Instance, in a popular State, the main Business should be dispatch'd by some one principal Officer, or by a Senate; or if under an Aristocracy, one Magistrate should be invested with extraordinary Authority, or the People consulted, in many important Affairs; or if, in a Kingdom, the Difficulties of publick Business should be refer'd to the Debates of a Senate or of a popular Assembly. And if this come not up to a full Solution of the Passages cited from Antiquity, the Point will be thoroughly clear'd from what follows. We have above demonstrated, that in order to completing the Effence of a just and regular State, such an Union is required as shall make all things, which belong to the Government of it, seem to proceed from one Soul. Now hence it is manifest, that the former way of Mixture constitutes such a Body as is held together not by the Bond of one Supreme Authority, but barely by Compact; and which therefore is to be

rank'd, not amongst the regular, but amongst the irregular States; being but weakly guarded against foreign Assaults, and very obnoxious to inward Disorders and Convulsions. As to the other kind of Mixture propos'd, we think it ought to be consider'd, whether those Persons, in whom the Sovereign Power is said thus indivisibly to reside, do make up a standing Senate, which is to guide and direct the whole State, as one lasting Body. If so; the Form will be Aristocratical; yet such as must be very unfit for the Dispatch of Business, whilst some few, or but one, of a contrary Judgment, may vacate the Resolutions of all the rest. Again, if those particular Members, in other respects equal, do each of them hold some part of the Government, yet so as that the Sovereign Acts cannot be exercis'd without the unanimous Consent of the whole Number, then the State is *Systematical*, according to the proper Notion of that Word; yet such as will likewise have great Disadvantages, as to the Management of Affairs, by reason of this very great and unnecessary Streightness. If some one Person be endued with high Degrees of Authority, and several parts of the Supreme Power above others in the Council, then the State will be plainly Irregular, lying between such a Monarchy as is over-awed by an assuming Senate, and a *Systematical* Form. And this Irregularity will in Proportion be the greater, in Case more than one are invested with these signal Prerogatives above the rest.

XIV. For our part, as we envy no Man the Praise of his Constancy and Resolution, who will on no account lay aside the Term of a *mixt* State; so we think it the more commodious and easy Method, and the more expeditious for the Explication of certain *Phænomena* in particular Common-wealths, to call those Governments *Irregular*, in which we can neither discover any one of the three Regular Forms, nor yet any proper Disease or Deviation; and which at the same time cannot with due Exactness, be rank'd amongst the *Systematical* Models. Concerning which, we may in general observe, that they differ from Regular States in this respect, that all things do not seem to proceed in them from one Soul and one Will, nor all and each of the Members to be ruled by one Common Power. Again, they vary from *Systematical* Forms, because they are not compos'd of several compleat and distinct States. Lastly, they do not fall in with *Diseases* or *Deviations*, because a distemper'd State always appears under Circumstances of Ignominy, and hath, as it were, somewhat of the Bastard in its Countenance; in as much as it proceeds, either from the ill Management of a good and regular Frame, or from incoherent Laws and improper Institutions. Whereas the Irregularity of a Government doth not only affect its Frame after an intrinsic and secret manner, but being openly confirm'd, and, as it were,

(a) Appian. in Lybic. *Bell.* p. 64. Ed. H. Steph.

declar'd Legitimate, shews it self in publick without Shame or Guilt. Therefore the former, or the *Disease*, cannot be suppos'd to have entred into the Intention of those who first founded the Common-wealth, ever appearing as a subsequent Vice or Defect: but the latter, the *Irregularity*, owes, if not its Original, yet at least its Confirmation, to the Will and Approbation of the first Authors. It is just the same Difference, as may be observ'd between two Buildings, one of which is design'd according to the Rules of Architecture, but either the Materials are naught, or through the Negligence of the Inhabitant, the Roof gapes, the Walls shake, the Beams crack, the Foundation sinks and gives way: in the other, either the Builder, at first, propos'd a Model not agreeable to the common Rules; or some great Fault, which afterwards happen'd, hath been cured and made up after a strange and unseemly manner. Farther, some Irregularities appear'd upon the first Settlement of a State, others crept in by silent Steps, and in long Progress of Time. For it might so happen, that the Authors, or the Reformers and new Modellers of a Common-wealth might not be able to introduce a regular Frame, either on account of Ignorance, or because the present Posture and Exigence of Affairs would not suffer them to consider of a more accurate Constitution (a). Sometimes too, Persons, who have been the chief Leaders and Assistants in winning a Kingdom, have beforehand contracted for such Lordships, or such Privileges in it, as that they cannot be rank'd in the Number of true and proper Subjects. Again, many times, either through Neglect of the Governours, or upon some other Occasion, a Distemper seizeth a State, and having taken so deep root that it cannot be removed, without the Destruction of the publick Frame, there remains no Cure for it, but this; to divest it, as it were, of its Faultiness and to vindicate it from Censure, by turning it into a solemn and legal Appointment; by which means what was before term'd Usurpation, Faction, or Contumacy, shall, for the future, bear the Style of a just Right and Privilege.

XV. These Irregular Forms (1) of Government can neither be brought within any certain Number, nor divided into proper Kinds, by reason of that great Variety, which either really occurs in Fact, or at least may be framed in our Imagination. So that we have scarce any other means of discovering their Nature, but by gathering it from particular Instances, and the Illustrious Examples in Story. Such an Example we endeavour'd to exhibit in the *Roman* Common-wealth: as the like hath been attempted in the *German* Empire by *Severinus de Monzambano* (2). At present, 'twill be sufficient to offer a Remark or two concerning the

Irregularity, which some observe, in the Government of *Rome*, under the ancient Emperours: whilst sometimes the State appear'd a Monster with a double or triple *Body*, one Prince ruling the East, another the West, or three dividing the World amongst them; sometimes, again, with a double or a triple *Head*, whilst two or three of the Royal Family held the Sovereign Power, as Copartners, and govern'd in Common. Now as to the former of these Cases, we may note, that whilst two Emperours presided, one over the Eastern, the other over the Western World, separately and independently from each other, then there were really Two distinct Kingdoms, which, taken both together, still retain'd the Name of the *Roman* Empire, out of which they had been compos'd. Besides which Agreement, as to their Original, the Resemblance of Laws and Manners, the Natural Relation between the respective Sovereigns and between their Subjects, the strict League and Alliance, which ensured their mutual Help and Support, all concur'd to make up some Appearance of Unity. But what Name we are to impose on that Form of Government, when Two or Three Royal Partners administr'd Affairs in Conjunction, it is not easy to determine. Certainly *two* Persons cannot make an Aristocracy. For since each is invest'd with equal Power (upon which Supposition the Case before us proceeds,) they cannot be united otherwise than by Covenant; and there could be no Expedient found out for the Dispatch of Business, should they happen to disagree about any Proposal, there being no third Person to turn the Scales. And tho' the same Inconvenience may seem to attend any ruling Council or *College*, where the Members are of an even Number; yet it cannot so frequently happen, that upon a Division in Judgment the Votes shall be equal. Besides, in this Case it is not difficult to bring over some one out of such a Number, to the Opposite Sentence: or, if this can't be done, the next Expedient is to let that Opinion prevail, which declares against Innovation, and would have things continue in their present state. Farther, neither can we, properly speaking, affirm the united Government of three *Cæsars*, reigning together, to have been *Aristocratical*. For this Royal Triumvirate did not compose such a *Collegiate* Body, as was to determine state Affairs by the Plurality of Voices, or where two Members, agreeing in Opinion, might by their proper Right and Authority compel the third, who dissented, to follow their Resolution. And in all Cases, a Council or Body of Men, in which the Major part cannot influence and draw over the rest, seems to be held together, rather by bare Compact, than by any Government or Command. We may therefore say, as to the Question before us, that the Sovereign

(a) *Add. Hobbes Leviath. c. 29. post princip.*

(1) Our Author in his Dissertation, *De Republica Irregulari*, treats of this Matter more fully.

(2) This Work is attributed to our Author, and justly, as Mr. Barbeyrac observes, from the Style and Character of it.

Authority did truly and radically inhere in that Person alone, who assumed the other into a Partnership with him; tho' both might seem equal as to the exterior Ensigns of Majesty. Thus the Historian (1) tells us of *Lucius Verus*, *That he lived not as a Free and Sovereign Prince, but under Marcus, invested with the like Imperial Authority.* Nor was it easy to suspect, that any Man would be guilty of so notorious Ingratitude, as to oppose the Will of his Patron, to whom he owed his Promotion and Honour. To which we may add this Consideration, that for the most part the Persons thus sharing the Government, were either Father and Son, Father-in-Law and Son-in-Law, or two Brothers; so that the Party admitted as a second in the Dignity, might be farther restrain'd by the Ties of Blood, or the Alliance of Marriage, from abusing the Power which had been given him, to the Prejudice of the Donor. Whence it appears, that this Practice of assuming a Colleague was not any Partition of the Sovereignty, but as it were the Designation of a Vicar General and an Heir Apparent, who was immediately receiv'd into the Business of State, and join'd with the other in the Administration; being likewise invested with the most shining Ornaments and the richest Trappings of Greatness. Now that which put the Emperours upon this Method, was the inconstant Humour of the Souldiery; who, on frequent Occasions, took a Pride in complementing their Leaders with the Imperial Title (a). If this Explication will not satisfy some Men, or if it seems not applicable to every particular Instance which we find upon Record; we have no way left but to affirm, that the Government

then commienced *Irregular*, when more Persons than *one* held the *Monarchy*, (if it might still deserve that Name,) in Conjunction; and yet were engaged to each other only by Compact or Faction. Amongst whom if any Dissention or Hatred should chance to arise, the Consequence could be nothing less than mutual Suspicions, Plots, and Designs, and in the final Issue, a Civil War (b). Such an Irregularity the *Roman* State was evidently sensible of, whilst *Romulus* and *Tatius* sat as Partners in the Throne (c). In general, we may apply to all these *Polyarchical* Governments, what *Solyman* the *Turk* observ'd in the *German* Empire; that it might be well compar'd to a Lute, which costs a great deal of Labour and Skill to put it in Tune, and is very easily put as far out of Tune as ever (d).

XVI. When several States are, by some special Band so closely united, as that they seem to compose one Body, and yet retain each of them the Sovereign Command in their respective Dominions; these we term *Systems* of *States*. Whence it is, in the first place evident, that when a State is composed of several subordinate Bodies, we must not on this account presently give it the Name of *System*: tho' Mr. *Hobbes* (2) is pleas'd thus to style it, and to compare the said Parts with the Muscles in the Body Natural. No more are we to apply this Term, in general, to all those larger States, which have vastly increased their Dominions by swallowing up their little Neighbours, and by reducing them into the same Body with themselves. Which we may observe to be done chiefly in the following Methods. First, when the Victor either removes the Van-

(1) *Julius Capitolinus*, c. 1. (a) *Themist. Orat.* 16. *Fratres Amantes*, p. 76. B. Ed. *Parisi.* speaking of *Valentinian*, who had admitted his Brother *Valens* into a Partnership with him in the Empire, useth the following Expression: *He receiving the Whole and giving the Whole, at the same time a Brother and a Father, the one by Nature, the other by his own Act and Choice, tho' he hath confer'd an equal Share of his Power, yet, in effect, he still keeps it entire; by reason of the Obedience and Compliance of him on whom it was confer'd.*

Thus *Solinus*, c. 8. reports of *Aeneas*, that he reign'd with *Latinus* three Years, *sociis potestate*, as his Fellow or Equal in the Supreme Authority. (b) *Lucan*, l. 1. v. 92, &c.

*Nulla fides regni sociis; omnisque potestas  
Impatiens consortis erit* —————

To trust a Partner's Rule, impairs our own:  
And Empire hates a Consort in the Throne.

*Statius*, *Theb.* 1.

————— *Sociisque comes discordia regnis.*

————— *Howe'er the Crown is shar'd,  
Discord's a Partner.* —————

(c) *Via.* *Plutarch.* *Romul.* *Add.* *Eryc.* *Putean. Hist.* *Insul.* l. 2. the Story of *Pertharite* and *Gundebert*, joint Kings of *Lombardy*. *Procopius* relates a like Case; *Hist. Goth.* l. 1. *The Goths*, says he, and *Odoacer's Army* came to this Agreement, *That Theuderick and Odoacer should reign in the City Ravenna with equal Power.* And for sometime the Compact was faithfully observ'd; but the Issue was, *That Theuderick, according to the vulgar Report, inviting Odoacer to a Banquet treacherously slew him.* 'Tis a true Remark of *Euripides*, *Andromach.* v. 471, &c.

Two Tyrants can no more be born than one,  
But press the Subjects with a double Load;  
Till Discord and Sedition work their Fate.

*Plin. Paneg.* c. 8. n. 4 *What a small Difference there is between laying down the Imperial Honour and sharing it with Another; unless the latter be difficult and dangerous?* *Add.* *Herodian.* l. 4. c. 1, &c. (d) We do not think that we ought to admit, under the Head of *Irregular* Forms, what *Francis Carron* reports of *Dayro* in *Japan*; who, he says, was the true Heir of the Crown, yet was put off by the Prince in Possession, with the outward Majesty, and empty Badges of Honour. Much to the same purpose, *Alexander de Rhodes* relates, That in the Kingdom of *Tonquin* there are two Kings, one called *Bua*, the other *Choua*; yet so as that the former barely enjoys the Title, the latter really holding the Command; only *Bua* hath the Power of conferring the Degree of Doctor, and receives the Oaths of the Subjects, when they renew their Yearly Allegiance; as to other Matters, he passeth his time shut up in an old Palace, without Action or Business, *Itin.* par. 2. c. 6. (2) *Leviath.* c. 22.

quish'd into his own Territories, or however gives them the same Privileges with his former Subjects. Secondly, when the conquer'd Nation is left to possess its ancient Seat, but utterly losing the Sovereignty which it held before, is rendred purely the Subject of the Conquering People. In both Cases, the State thus subdued loseth its Name; but in the former, the Conquer'd are made equal to the Conqueror; in the latter, they are put under an inferior Condition, being reduced into the Form of a *Province*. Tho' it often happens, that the Vanquish'd are partly left in Possession of their ancient Laws or Privileges, how different soever from the Manners and Institutions of the conquering State (a). For in order to preserving the Unity of a Common-wealth, 'tis not required, that all its particular Parts shall use the same positive Ordinances, or shall stand exactly upon the same Bottom; but 'tis enough, if they depend upon one Government. And it's frequently the Art and Policy of a Conquerour, to make no Alterations in the Customs of those who are fallen under his Dominion: or, at least to accommodate himself to them for such a time as he thinks convenient.

In relation to the Government of Provinces, we are to examine what Mr. *Hobbes* delivers on that Subject (b). *Whereas*, says he, *heretofore the Roman People govern'd the Land of Judæa (for Example,) by a President; yet was not Judæa therefore a Democracy, because they were not govern'd by an Assembly into which any of them had Right to enter; nor by an Aristocracy, because they were not govern'd by an Assembly, into which any Man could enter by their Election: but they were govern'd by one Person: which tho' as to the People of Rome, it was an Assembly of the People, or a Democracy; yet as to the People of Judæa, which had no Right at all of participating in the Government, was a Monarch. For tho', where the People are govern'd by an Assembly, chosen by themselves out of their own Number, the Government is call'd a Democracy or Aristocracy; yet when they are govern'd by an Assembly, not of their own choosing, 'tis a Monarchy; not of one Man over another Man, but of one People over another People.* So that Mr. *Hobbes* seems to look on these Provinces which are dependent on some Aristocratical or Democratical State, as so many distinct Monarchies. Now tho' we easily allow, that 'tis the more usual Practice to govern *Provinces* by one Man, than by an Assembly consisting of many, as the same Author shews at large (c); yet we think it needless to enquire what Form of Government is establish'd over a dependent People. For *Provinces* have lost the Nature of *States*, and are made the Appendages of other *States*, having no kind of Sovereign Authority in themselves. Whether therefore such a Pro-

vince is govern'd by a President, or by an Assembly, is an indifferent Point, which doth not in the least affect the proper Sovereignty; in as much as both *He* and *They* bear only a subordinate or delegated Power. So that the Sovereignty, exercis'd over these additional Dominions is exactly of a piece with that of the main State, and cannot, without Impropriety, obtain the distinct Name of a Monarchy or an Aristocracy; which are Terms belonging to true and independent States, such as really possess a Supreme Government of their own.

XVII. Of *Systems* properly so call'd, these Two kinds do especially fall under Notice: One, when two or more States are subject to one and the same King (1); the Other, when two or more States are link'd together in one Body by virtue of some League or Alliance. In regard to *Systems* of the former kind, 'tis observable; that it implies no Contradiction in *Moral Bodies*, to have but one Head over several of them together, and consequently to have one Person the Head of many distinct Bodies; which, in *Nature*, would bear so monstrous an Appearance. But because the Union of these *Systems* is founded either in the sole Person of the Prince, or in his Family, hence it comes to pass, that when the Person is deceas'd, or the Family extinct, the respective People recover their particular Right of settling their own Government, and are no longer obliged to make Use of a Common Head. Nay, during the Continuance of the said Head, the States are really distinct from each other. The Causes whence such Combinations arise, are various; but the most frequent seem to be the Marriages of Princes, and the Right of Inheritance. For there are many States, in which the Crown descends to the Female Issue of the Royal House, not only when the Male Line is utterly extinct, but when there is no Male Heir in a nearer, or in an equal Degree. Now here if the Lady Sovereign happen to take another Sovereign for her Husband, the two Kingdoms will come to a Conjunction, if not in their Persons, at least in their Common Issue. For it is not necessary, that in a Match of this Nature, the Princess should put her self, and her Dominions in Subjection to the Prince. So likewise in one undivided Kingdom, where the Hereditary Succession is establish'd, (2) either according to the plain and direct, or the lineal Course, if one of the remote Heirs any way become Master of another Crown, and the Rule of Succession (all the rest failing who stood nearer,) call him to receive that of his own Country, the two Kingdoms will by this means be united under his Reign. The Consequence is the same, if a People Choose for their King one who bears the same Character elsewhere, in Possession, or

(a) *Hobbes Leviath.* c. 26. (b) *Leviath.* c. 19. (c) *Ibid.* c. 22. (1) For Example, *Great-Britain* and *Ireland*, See our Author's Dissertation, *De Systematib. Civit.* S. 9, 10. (2) See the Seventh Chapter of this Book, S. 12, 13.

<sup>1</sup> n Reversion. Again, two or more Nations may engage by League to elect one Prince over both by joint Suffrages, and yet, as to other Matters, continue separate Kingdoms, without transacting their Affairs in a Common Assembly. Lastly, such a *System* doth then arise, when a Prince, constituted by the free Consent of the People, subdues by Arms another People, in his own Name, and at his own Hazard and Expence; not in the Name, or at the Charges of the State over which he presides. For that this is no impossible Case, *Grotius* (a) hath sufficiently made out, against the Opinion of *Hottoman* the Civilian (b).

As for the Dissolution of these *Systems*, 'tis manifest it must happen, either upon the Death of the Prince, if the Union was founded in his Person only; or upon the Extinction of the Royal Family, in case the respective Kingdoms were all entail'd in the way of Inheritance. For then, each separate People recover their Right of constituting a new King, or of introducing what Form of Government they think fit, without consulting the rest; they being supposed to have no other Bond of Union. If a Prince holds one Kingdom by Right of Inheritance, and another, by free Election; upon his Decease the Union between them will be broken, and the latter Kingdom shall have no Obligation to advance his Son to the Crown.

But if this Union depend upon a League between the Kingdoms, 'tis no less manifest, that if the Agreement happen to be violated, especially in the principal Articles, then the injured State may disengage it self from the other. Yet here we ought carefully to distinguish between the Obligation by which particular Kingdoms are tied to their respective Kings, and the Obligation by which the same Kingdoms are united amongst themselves. A King once elected, and who hath receiv'd the Fealty and Allegiance of his People, may not afterwards be deserted on account of any Misbehaviour, or any Action contrary to his Engagement, so long as he doth not profess open Hostility towards the State. Unless perchance the Compact, between the Elected King and the People, had this conditional Clause expressly annex'd to it (1), that the Obedience of the latter should be due on no other account, but upon the former's performing all, and each of the Articles settled betwixt them. On the contrary, the Engagements, by which united Kingdoms are held together, may be renounced on that side, to the Prejudice of which the Laws of the Union have been violated, tho' the Injury be not very considerable; in case the other Kingdoms concurr'd in the Action, or if it was undertaken for their Sake, or converted to their Use and Service. Wherefore upon the Decease of the Common Prince, the

injured State may disclaim the Union, reserving a Right to prosecute the Authors or Abettors of the Fact, and to recover what is lost by their means. If, by the Marriage of Hereditary Princes, several States are conjoin'd, which observe a different Course and Order of Succession, the Union will be dissolv'd, if such a Case happen, as that the same Person proves incapable of succeeding to both Crowns according to the publick Laws. Let us suppose two Kingdoms in Conjunction, one of which, receives the Method of Lineal Descent by *Agnation*, the other, by *Cognation*. Here, if it so fall out, that the Common Prince decease without Male Issue, the latter of the Two Kingdoms shall pass to his Daughter, the former to the Heir Male in the next Degree. But if an Union, at first contracted on the Occasion of Marriage, shall be afterwards confirm'd, and turn'd into a perpetual Establishment, by means, either of a solemn League passing between all and each of the Kingdoms to this purpose, or of a Decree made by the Common Sovereign, with the Approbation of the respective States; then any difference, which was before observ'd in their way of Succession, shall be understood to be actually taken off. And, for the future, such a Method shall be followed, as is expressly specified in the League, or in the Decree; or such as the Authors of the Union appear to have been most inclined to; or such as is most agreeable to Reason, and most conducive to the Safety of the united States. But when one Kingdom happens to be join'd to another, in the manner of a *Province*, the Union founded on a precedent League expires, and a much closer Bond succeeds in its room, by means of which, they unite into the same Civil Body.

XVIII. The other kind of *Systems* is, when several States are join'd to each other by a perpetual League or Alliance (2); the chief Occasion of which seems to have been, that each particular People loved to be their own Masters, and yet each was not strong enough to make Head against a Common Enemy. The Purport of such an Agreement usually is, that they shall not exercise some part of the Sovereignty there specified, without the General Consent of each other. For the Leagues to which these *Systems* owe their rise, seem distinguish'd from others (so frequent amongst different States,) chiefly by this Consideration; that in the latter, each Confederate people determine themselves by their own Judgment to certain mutual Performances, yet so as that, in all other respects, they design not in the least to make the exercise of that part of Sovereignty, whence those Performances proceed, dependent on the Consent of their Allies, or to retrench any thing from their full and unlimited Power of governing their own States. Thus

(a) L. 1. c. 3. f. 12.

(b) Quæst. Illustr. 1.

Examples of this Conditional Clause in B. 5. c. 5. f. 4. and c. 10. f. 14.

(1) *Lex Commissoria*. V. *Grot.* L. 1. c. 3. f. 16. n. 5. See

Provinces of the Netherlands, the Swiss Cantons, &amp;c.

(2) As for Examples, the United Pro-

we see that ordinary Treaties propose, for the most part, as their Aim, only some particular Advantage of the States thus transacting; their Interests happening at present to fall in with each other: but do not produce any lasting Union, as to the chief Management of Affairs. Whereas in those Leagues we are now speaking of, the contrary is observable; they being carried on with this Design, that the several States shall for ever link their main Safety one within the other, and in order to this mutual Defence, shall engage themselves not to exercise certain parts of their Sovereign Power, otherwise than by Common Agreement and Approbation. For the Promises made in the two Cases, here compared, run in very different Terms; in the former thus: 'I will join You as a Confederate in this particular War, and the manner of our Attacking the Enemy shall be concerted by our Common Advice: in the latter thus; none of us, who have entered into this Alliance, will make use of our Right, as to the Affair of Peace and War, except by the General Consent of the whole Confederacy. We observ'd before, that these Unions submit only some certain parts of the Sovereignty to mutual Direction. For it seems hardly possible, that the Affairs of different States shall have so close a Connection, as that all, and each of them must look on it as their Interest, to have no part of the chief Government exercis'd, without the General Concurrence. Or, if there be any Communities thus mutually depending, it had been the wiser Course for them, rather to have incorporated themselves under the same Government, than to rely on the bare Engagement of a League. The most convenient Method therefore seems to be, that the particular States reserve to themselves all those Branches of the Supreme Authority, the Management of which, can have little or no Influence (at least directly) on the Affairs of the rest. The same must be said of such publick Business, as either occurs every Day, or else requires so speedy Measures as to prevent a General Debate. But then as to all Affairs, on which the Safety of the Allies hath a joint Dependence, these ought, in reason, to be adjusted by common Consultation. And in this Number, War, whether Offensive or Defensive, seems to claim the first place; and after that, Peace, as the Result and Issue of War. To which, we may add Taxes and Subsidies, as they contribute to the mutual Support; and Alliances with Foreign States, as they promote the common Safety. It falls under the same Head of Duties, that in case any Dispute arise amongst the Confederates themselves, the other Members, who are unconcern'd, shall immediately interpose their Mediation, and not suffer the Controversy to come to Blows. Thus the wise Prince *Philip of Macedon*, declares in the

Historian (a), that *The mutual Wrongs of his Allies so particularly concern'd himself, as that he could not but use his best Endeavours for a Composition, by Words to the present, and by Letters to the absent Parties: whereas those other Dangers or Injuries, which affected the whole Confederacy, belong'd to the Care of the Common Assembly, and were thence only to receive their proper Redress.* As for other Matters, which seem not so necessary to be transacted in Common, as Negotiations of Traffick, Subsidies for the particular Occasions of any single State, the Constituting of Magistrates, the Enacting of Laws, the Power of Life and Death over the respective Subjects, the Ecclesiastical Authority, and the like; there is no reason but that they may be left to the Pleasure of each distinct Government: Tho', at the same time, particular States ought so to manage these Privileges, as that they shall cause no Disturbance in the General Union. Whence 'tis evident, that one or more of the Allies cannot be hindered by the rest from exercising, according to their own Judgment, such parts of the Civil Administration, as were not in the Treaty of Alliance, refer'd to the Common Direction. Yet as to the Power of Life and Death, some Scruple may be made, on account of that Passage in the Civil Law (b) (1): *At sunt apud nos rei ex Civitatibus fœderatis, & in eos damnatos animadvertimus, But some Persons, Members of our Confederate States, are here arraign'd in Judgment, and receive from us both their Condemnation and Punishment.* Grotius (c) hath taken a great deal of Pains to solve this Difficulty; but whoever thoroughly considers his Discourse, will find that he hath labour'd to little purpose. For he certainly leaves the following Question unanswered; How that State can entirely preserve its Liberty, the Subjects of which are liable to be arraign'd under another Government, and to be punish'd upon Conviction. We find that the Freedom of the *Achaians* was look'd on as considerably impair'd, when, by the Treachery of *Callicrates*, the most worthy Persons in that Commonwealth were accused of favouring *Persus's* side; against the *Romans*, and were cited to *Rome*, there to answer the Charge; upon Occasion of *Xenon's* Protestation, who under a just Assurance of his own Innocency, happen'd to declare, that if any Man had Thoughts of impeaching him amongst the rest, he was ready to take his Tryal, not only in the Common Assembly of his Countrymen, but amongst the *Romans* themselves (d). On another Occasion, the *Achaians* seem to have made a Breach on the Laws of Regular Government, when they demanded those *Spartans* to be deliver'd up into their Hands who had been the chief Instruments in promoting the Siege of *Las*, a *Laconian* Town (e). Whereas the Cause ought first to have been

(a) Polyb. l. 4. c. 24.

(b) L. 49. t. 15. l. 7. f. 1. D. De Captiv. &amp; Postlim.

(1) This Law is more naturally brought in hereafter, in the Eighth Book, c. 9. f. 4.

(c) L. 1. c. 3. f. 21.

(d) See the Case at large in *Pausanias*. (*Achaiac.*) It is likewise touch'd upon by *Polybius*. (*Excerpt. Legat.* 105.)

(e) Liv. l. 38. c. 31.

heard

heard in a Common Council of both States, and, upon Conviction, the *Spartan* Government should have been moved either to punish the Criminals, or to surrender them to their Accusers. As for the place alledg'd from the *Civil Law*, we think this the clearest way of replying to it; that whereas the precedent Discourse had explain'd what the Nature of Leagues would bear, and what *ought* to be done, the Words here cited declare what *was* actually done, in later Times; when the *Romans*, growing insolent on Success, used their Allies, who by free and voluntary Leagues had engaged their Friendship, with the same Treatment as those whom they had conquer'd by their Sword. Of which Injustice *Cicero* himself complains (a).

XIX. Since, in these *Systems*, 'tis necessary there should be a Communication of certain Affairs express'd in the League, and since this cannot be done so conveniently by Letters, a determinate Time and Place ought to be settled for the holding Assemblies, and one or more Persons appointed, who shall have Power to call the States together, in case of any extraordinary Business, which will not admit of Delay. Tho' it seems a much more compendious Method, to fix a standing Council, made up of Persons deputed by the several Confederates, who shall dispatch Business of daily Occurrence, or of less Importance, according to the Tenor of their Commission; who, in Matters of greater Consequence, shall make report to the States, and shall publish and execute such Decrees as are return'd to them on these Occasions; to whom the Ministers of the Confederacy, in Foreign Parts, shall give an immediate account of their Proceedings, and who shall treat with the Ambassadors of other Nations, and conclude Business in the general Name of the Confederates: but who shall determine nothing that exceeds the Bounds of their Commission, unless all the Subjects have been first consulted on the Point. How far the Power of this Council of Delegates extends, is to be gather'd either from the Words of the League it self, or from the Warrant by which they act. This is certain, that the Power, whatever it be, is not their own, but derived to them from those whom they represent; and altho' the Decrees, which they publish, pass solely under their own Name, yet the whole Force and Authority of them flows from the States themselves, by whose Consent such a Council hath been erected. So that the Deputies are no more than *Ministers* of the Confederate States, and are altogether as unable to enjoin any thing, by their own proper Authority, as an Ambassador is to command and govern his Master.

XX. Yet it may still appear doubtful, whether or no the whole Body of the Associates,

or the Majority of them, have not a Power over particular States, or over those whom they exceed in Number, with regard to such Matters as were the first Occasion of the Alliance, and which by the express Terms of the League were appointed to be managed in a Common Assembly; so far as that the few dissenting States shall be bound, tho' against their Will, to do as the Major Part have determin'd. Here, in our Opinion, the Negative side of the Question ought to be prefer'd; if we speak of Regular Systems, and where the particular States reserve to themselves the entire Possession of their former Liberty. In as much as the Liberty of a State, which is nothing else but the Power of finally resolving and determining, according to its own Judgment, all Matters in which its Safety is concern'd, cannot be understood, in case the State may, by virtue of the Authority held over it by some other, be compell'd to certain Performances against its Will. Nor can any reason to the contrary be drawn from hence, that in the League 'twas agreed not to exercise some particular parts of the Sovereignty there express'd, unless by common Consent. For 'tis one thing to say, *I engage not to use my Right unless you are willing*; and another to say, *I give you a Power of compelling me to use my Right, tho' against my Inclination*. Now the first of these Forms is only implied in the League, not the latter. For the clearer Apprehension of which Point, it ought well to be observ'd, that when the Wills of many Persons are bound to conspire in one, this must arise, either from a Compact between them to this Effect, or because one of them hath submitted his Will to the Will of the other. An Union or Concurrence of Wills, grounded on bare Compact, doth not, in the least, destroy the Liberty of which we have been now speaking. For they agree before-hand in settling those Affairs, which are refer'd to their joint Management; or if any new Business offers it self to their Debates, they desire to be influenced not by Authority, but Argument and Reason. But when I have submitted my Will to the Will of another, and by this means have given him a full Authority over me, I may then be obliged to things, which are very inconsistent with my good liking. Nor doth *The Right of the Majority* (b), (which some may urge,) oppose our Judgment in this Case. For, first, *The greater part draws the less* only in Bodies already constituted, not in those which are still to be established. And then farther, the Prerogative of the Majority, in a settled Council, to oblige the rest, is really owing to Human Compact and Institution, not to Nature; tho' Natural Reason adviseth the Reception of this Method (as the most convenient) in numerous Assemblies, and where

(a) *Offic.* Add the Story of *Decius Magius*, who was laid in Irons by *Hannibal*, *Livy*, l. 23. c. 7, 10. and *Scipio's* Advice to the *Romans*, that they should not hear the Informers against the same great Enemy; *Livy*, l. 33. c. 47.

(b) See B. 7. c. 2. f. 15.

Business of various kinds, and of every Days Occurrence, is to be dispatch'd. Now in order to this, 'tis necessary that each Member do in such manner submit his Will to the Will of the whole, or of the major Part, as that he, tho' himself of a contrary Opinion, shall be bound absolutely to follow what they determine; which we cannot conceive, unless, at the same time, we suppose the latter to hold a Command or Authority over the former. Besides, in an Assembly of Confederates, there seems to be no Occasion for this Right of the Majority; inasmuch as they are seldom composed of any considerable Number of States, and are chiefly united by the Prospect of General Advantage, which 'tis presumed none in their Wits will obstinately oppose. Yet if any, through a malicious and unreasonable Perverseness, shall refuse to join in the whole, some Counsels of the rest, and, by this means, shall endeavour to betray the Common Safety, or Interest; it will be then lawful to apply the same Methods of Redress, as they who live in a Condition of Natural Liberty are allow'd to use, against the Violators of Faith and Contracts. Unless it be judg'd the more eligible Course, utterly to purge the Society of so intractable a Partner. To all which we may add, that it must frequently occasion great Injustice, if in a confederate System, the Plurality of Votes were to bind the whole Body: as when the Allies are disproportion'd in their Wealth and Strength, and consequently some contribute more than others to the Common Defence. For tho' we may be apt to imagine, that they who contribute, according to the Proportion of their Ability, do really bring equal Shares; yet it may happen very frequently, that one who hath but slender Fortunes may be more willing to expose them to Danger than another who hath larger Possessions. Thus let us suppose, that in a Confederacy, some one State contributes more to the common Security, than All taken together; here it would be a manifest (a) Breach of Equity, if this State should, by the Agreement of the rest, be compell'd to engage in any Action, the chief Burthen of which must lie upon its own Shoulders. On the other hand, if the Votes were to take place according to the Proportion of Force, or Treasure supplied to the common Cause; then the more powerful State would actually obtain a Sovereignty over All besides (b). So that we may conclude from the whole, that where-ever Business is decided by Plurality of Voices, in such a manner as that the dissenting Parties are likewise bound to stand to the Resolution; there the Regular Form of *Systems* or Confederacies is deserted, and the Members either break into an irregular Body, or close together in one undivided State.

XXI. The Dissolution of these Systems hap-

pens, when some of the Confederates voluntarily quit the League, and govern their own States apart; which they are induced to, chiefly by this Motive, that they hope to receive more Advantage by a Separation, than they could expect under a Conjunction, and apprehend their Allies to be rather a Burthen to them than an Assistance (c). Intestine Wars are another Cause which must necessarily break these Unions, unless, upon the Establishment of the Peace, the League be also revived. If a Confederate Power happen to be overcome in a Foreign War, it is sometimes a Policy of the Conquerour to cut the Knot, and to make each Government independent of the rest: as the Romans did, in the Case of the vanquish'd *Achaians* (d). We are farther to observe concerning those Dissolutions, which arise from external Force, that the Enemy by possessing himself of one or two more of the united States, acquires no manner of Right over those that remain, nor can demand to be admitted into the Confederacy, by virtue of that League which engaged the conquer'd States to the others. But a new Agreement must necessarily pass, before any such new Member can be receiv'd into the Alliance, in the room of those whom he hath subdued. Thus we find King *Philip*, by a Decree of the *Amphictyonsians*, obtaining a Seat in their Common Assembly, in the room of the *Phocæans* (e). For altho' the League, by which the several States are thus combin'd, may seem to be a real lasting Engagement (1), and tho' a State doth not cease to be the same, upon the Alteration of its Government; yet the Alliance must always be presumed to expire, when any one People are brought under a Foreign Yoak, or made the *Accession* of another Kingdom. Because, the League being made between *Free States*, consider'd in that Capacity, whenever this Condition fails, the League must fail with it. Nay tho' we should go so far, as to suppose, that in the Terms of the League there was an express Clause, that the Change of Government, in any State should not exempt it from the Engagement, yet the Change, here spoken of, must be presumed to be made in a lawful manner, and with the Consent of the People. And consequently neither an unlawful Usurper, nor any Foreign Enemy, shall have a place in the Congress of Allies.

On the other hand, these *Systems* do more closely unite, and are incorporated into the same Civil State, by the following means. Either if all the Confederates, by a voluntary Submission, put themselves under the Government of some one Person or Council. Or if some one People which hath the Advantage in Strength and Power, shall reduce the rest to the Condition of dependent Provinces: which usually happens, when weaker States allow any

(a) *Vid. Grot. Apologet. Cap. 1. sub fin.*

(b) *Add. Diodor. Sic. l. 15. c. 28.*

(c) *Add. Liv. l. 38. c. 31, 32.*

(d) *Comp. Xenoph. l. 4. 5. Rer. Græc. where he speaks of the Peace with Antalcidas.*

(e) *Diod. Sic. l. 16. c. 61.*

(1) See hereafter in B. 8. c. 9. f. 6.

lasting Preference or Prerogative to those that are stronger, and engage themselves in unequal Alliances (a). Lastly, if some particular Man invade the Sovereign Command; through the Favour of the Souldiers, the Esteem of the Commonalty, or the Strength of a prevailing Faction.

XXII. To conclude; The last Dispute upon this Head commonly is, concerning the Excellency of particular Forms of Government, and which ought to be preferr'd to another: whether that under which the publick Welfare may, with more Expedition, and more Certainty be procured, or that, where the sovereign Authority is less exposed to Corruption and Abuse. Now as to the Point of Comparison, thus much, in the first place, is evident, that no Frame of Civil Constitution can be so exactly model'd, and so well guarded by Laws, but that, either through the Negligence or the Wickedness of those who bear Rule, the same Government, which was instituted for the Security of the Subjects, may turn to their Prejudice and Mischiefe. The Reason of which is, because Government was first establish'd as a Defence against those Evils, which Men were capable of bringing on each other. But at the same time, they who were to be invest'd with this Government were likewise *Men*, and consequently not free from those Vices which are the Spurs to mutual Injury. *Vitia erunt donec homines* (1), *Whilst there are Men in the World, there must be Faults*: and therefore we cannot but, sometimes, suffer from their Hands the very Evils from which they ought to protect us. Hence the old Remark is so often true,

*Quicquid delirant reges, plectuntur Achivi* (2).

The Kings grow frantick, and the People smart.

As therefore the Condition of Human Affairs will not bear an absolute Perfection; so 'tis controverted, between many Persons, what Form of Government seems to have the fewest Imperfections (3): and the Generality of Judges pronounce in Favour of Monarchy (b). It is not our Design to examine the particular Allegations of each Party. Only thus much we would observe, that Arguments of this kind are by no means so very strong and conclusive, as that the Inferences, drawn from them, must necessarily fall out in all places and at all times: and that the Actions of one or two Governors are no manner of Proof, that all others of the same Order, or Title must needs follow their Example. And in our Judgment, the wise Speech of *Marcellus*, in *Tacitus* (c), is what

every good and useful Subject ought to meditate upon: He said, 'He could not but remember that happy Age, under which he himself came into the World, and that Form of Government which had been instituted by their Forefathers; yet 'twas his Principle, *Uteriora mirari, presentia sequi; bonos Imperatores voto expetere, qualescunque tolerare*: To admire what was past, but to follow what was present; to wish for good Emperours, but to bear with any.

It may not seem improper, on this Occasion, to shew briefly the Reason why, amongst the ancient *Grecians*, such Persons, as under a *Democratical*, or *Aristocratical State*, assumed a *Monarchical Power*, met with so universal Hatred and Censure: and what Motives induc'd them to maintain their Authority by such evil Arts as we find described in *Aristotle* and other Authors; on account of which, the Name of *Tyrant* hath been branded with an indelible Mark of Detestation. Now the *Grecian States* seldom stretched their Dominion beyond the Compass of a single Town. And to such, the most agreeable Government was, either a Democracy, or an Aristocracy moderately exercis'd; or, lastly, what *Aristotle* terms an *Heroical Kingdom*, a princely Sway, founded rather upon the Authority of Perswasion, and upon the general Character of extraordinary Vertue, than upon any proper Sovereignty, or Force of Command. Besides, the *Grecian Nation*, being of a haughty Spirit, and of a stirring and restless Temper, was most in love with such a Constitution, under which every Man might bear a part in the Government. Wherefore in a State of this kind, he who had taken on himself a Regal Authority, a thing so odious to the People, against their Consent, was obliged, for his own Security, to awe the Town with a Castle or Cittadel, and to place a strong Guard round his Person; and then this Guard was to consist of Foreigners, because it had not been safe to trust his own Subjects, and because he had not the means of bridling one Province by another, by interchanging the Native Forces. Farther, the Truth and Loyalty of the Guard was not otherwise to be purchased than by the Largeness of their Pay: and hence, for the raising of sufficient Funds, the Subjects were to be drain'd by constant Impositions. Again, it was no less necessary, that the Natives should be disarm'd, and render'd as weak and little as possible; that the *Heads of the Poppies* should be cut off; that all Meetings of the wealthier Subjects should be suppress'd; and that Informers and Court-Spies should be maintain'd and encouraged. So that

(a) Vid. *Grot.* l. 1. c. 3. f. 21. n. 10. circa fin.

(1) *Tacit. Hist.* l. 4. c. 74.

(2) *Horat. L.* l. 1. Ep. 2. v. 14.

(3) Mr. *Montaigne* says, that *Democracy* is the most Natural and most Equitable Government. See *Sidney's Discourse* upon Government, *Chap.* 2. S. 16. (b) Vid. *Isocrat.* (in *Nicochl.*) *Herodot.* (*Thalia*) where the *Persian Nobles* debate about establishing a Form of Government, after the *Magi* had been kill'd. *Euripid.* (*Supplicibus*, vers. 405, &c. *Bodin de Rep.* l. 6. c. 4. *Arniseus, Relict. Polit.* l. 2. c. 7. f. 2.) and many Others. On the other hand, the *Dutch Writer* of the *Political Balance*, seems to have omitted nothing that Malice or Envy could suggest against Monarchy. A great part of whose Arguments may be turn'd upon him by what Mr. *Hobbes* observes, *De Civ.* c. 10. & *Leviath.* c. 19. (c) *Hist.* l. 4. c. 8.

'twas not Injustice only, but down-right Mad-ness, in these *Tyrants*, to affect such a Govern-ment as was to be preserv'd by evil Arts, which could not be lasting, and under which 'twas impossible for them to gain the Love of their Subjects. And it is equally absurd to institute a Monarchy in a State, confin'd to a single Town; and a Democracy in larger Territories, and vastly extended Dominions. But since Princes who stand possess'd of wide and spacious Realms, have no need to make use of these Arts for their Support, inasmuch as they may be able to poize and balance one Province with another; those Persons are guilty of no less Baseness and Wickedness who suggest any such Practices of Tyranny, to the Imitation of

Great and Potent Monarchs, than those who make it their Endeavour to turn the *Odium* of the old *Grecian* Tyrants upon Monarchy in general. And hence likewise it is evident that Princes live much more securely in ample Dominions; because there, the disobedient and rebellious cannot so easily communicate their Designs, unite their Strength, or touch and taint the Loyalty of others. Whereas when a whole State is confin'd within the same Walls; the way lies ready for a handful of Mutineers to spread the infectious Madness, and to corrupt the whole Body of the Subjects, before the Government can either prevent, or apprehend the surprizing Danger.

## CHAP. VI.

### Of the Affections or Properties belonging to Sovereignty.

WHEN we would enquire into the *Affections* and *Properties* of the *Supreme* Power, the first Point, which falls under Examination, is how it comes to obtain that Name and Title. And the chief reason seems to be this; because 'tis impossible, that one Man should bear a greater Sway over another, than that the latter shall be obliged to imploy his Strength, and his Fortunes for the Advancement of the Publick Good, as the ruling Party directs, and shall farther be obnoxious to Capital Punishment, upon Default. To which may be added this Consideration, that as setting aside the Divine Sovereignty, particular Men cannot enjoy a higher Degree of Liberty, than the Power of guiding and applying, by their own Judgment, their Actions, Persons, and Goods; so the Freedom of a Community or Body of Men consists in their being able, by their own joint Discretion, independent of the Will of any Superior (1), to resolve and decree such Matters as appear conducive to the general Benefit and Safety. And hence, likewise it follows by necessary Consequence, that such a Power being *Supreme*, or, not acknowledging any Superior upon Earth, the Acts which proceed from it, cannot be disannull'd at the Pleasure of any other Mortal (2). But that a Person or a State should be able to alter the Decrees and Resolutions of their own Will, is so far from abridging, that it really inhanceth their Liberty.

II. For the same Reason must the *Sovereign* be acknowledg'd *Unaccountable*: that is, not obnoxious to Human Judgment, or Human Punishment (3). For both these suppose a Superior; but a Superior to the Supreme, in the same Order of Men, and the same Notion of

Government, is a Contradiction. But it will be proper here to observe, that I may give an Account two ways, either to a *Superior*, who, upon his Dislike, may reverse all my Acts, and farther inflict a Punishment upon me: or else to an *Equal*, whose bare Approbation of my Proceedings I am willing to obtain; only to keep up my fair Character with him, and to justify my Integrity and Honour. In the former manner, Supreme Rulers are not accountable to any Earthly Power. But in the latter way, Princes, who are tender of their Reputation, commonly endeavour to lay open their Actions and Counsels to the View of the whole World: which being done only to secure the Credit of their Reign, cannot imply the least Shadow of Subjection. In the same manner, I may expend my Money and Fortunes at my own Pleasure, and as I see Occasion; and yet I am willing to keep Books of my Accounts, to satisfy my Friends, that I am no ill Husband.

And then as for the other Point, the being obnoxious to Punishment, this cannot affect Him, who owns no Court that can give him his Tryal, no Judge, that can pronounce or execute Sentence upon him. For the Courts of Justice, in a Common-wealth, reach no farther than the Subjects, and are beholden to the Sovereign for all their Authority and Power. But if, as it frequently happens, Princes condescend to answer an *Action* in their own Courts, in Matters of Debt and the like Cases; this is not done, as if they acknowledged any Superior Force, that could oblige and compel them, but only expresth their Desire of seeing the Plaintiff's Pretensions

(1) If this be true, then Princes, whose Power is limited, are not Sovereigns; since They can't do any thing Effectually without always consulting an Assembly of the People, or of those who represent them: But our Author, in the Tenth Section of this Chapter, asserts the contrary. (2) Vid. *Grot. l. 1. c. 3. f. 7. n. 1.*

(3) See Sir *George Mackenzie's Jus Regium*, and Arch-Bp. *Usher* of the Obedience of Subjects to their Princes, and the Homily of the Church of *England* against Rebellion.

clearly made out; which if they once appear just, they are ready to satisfy and discharge, in a voluntary manner. Yet we speak here of Human Punishment only, inflicted by a Superior Earthly Judge. For the Divine Justice finds many ways of shewing it self on those high and potent Sinners, who violate the Laws of Nature, in Contempt of all Earthly Tribunals. *Reges in ipsos imperium est Jovis* (a). *Princes are but the Subjects of Heaven.* As to what History (b) tells us of the *Egyptians*, that when their Kings had been ill Governours, they denied them the usual Honours of Burial: this piece of Disrespect can scarce fall under the proper Notion of Punishment.

III. Farther, when a Civil Power is constituted *Supreme*, it must, on this very Score, be supposed, exempt from Human Laws, or, to speak more properly, *above* them. As for the Laws of GOD and Nature, to bring them into the Question, would be no less absurd than impious (c). Now Human Laws are nothing else, but the Decrees of the Supreme Power, concerning Matters to be observ'd by the Subjects, for the publick Good of the State (r). That no such Edicts can directly oblige the Sovereign is manifest; because his very Name and Title supposeth that no Bond or Engagement can be laid on him, by any *other* Mortal Hand: And for a Person to *oblige himself* under the Notion of a Lawgiver, or of a Superior, is an impossibility (d) (2). Yet, in an indirect manner and by way of Reflection, the Force of his own Ordinance frequently reacheth the Legislator, on account of natural Equity, and publick Decorum; to excite and encourage Obedience in the Subject, by acting that himself which he prescribes to others, as expedient for the common Interest; and least, by forbidding such Practices, as he is himself observ'd passionately to pursue, he should seem to envy others the Sweetness of Vice, and engross it all for his own Possession and Prerogative. *The Life of a Prince* (says *Pliny* (e)) *is a perpetual Censorship: by this, we are turn'd and directed in all our Proceedings; and, to secure our Obedience, we have ever more need of his Pattern than of his Prescriptions. For, Fear is a most unfaithful Guide to Vertue. Men are much better influenced into Goodness by the Power of Examples: which, at first sight, discover this Advantage in*

*themselves, above all other Methods of Instruction, that they shew the Possibility of obtaining what they advise us to pursue.* There is a Remark, not unworthy the Majesty of Kings, which *Athenaus* (f) hath made from the Reports of more ancient Histories, that of the two great Monarchs in *India* and in *Persia*, the former was absolutely forbid to exceed the moderate Bounds of Drinking; and the latter allow'd his Liberty in this Respect, but one Day in a Year, at a solemn Sacrifice and Festival. *Claudian's* Admonition to the Young Emperour was wise and proper;

*In commune jubes si quid censesque tenendum,  
Primus jussa subì: tunc observantior equi  
Fit Populus, nec ferre negat, cum viderit ipsam  
Authorem parere sibi: Componitur orbis  
Regis ad exemplum; nec sic inflectere sensus  
Humanos edicta valent, ac vita regentis* (g).

Would You Your Publick Laws should sacred stand?  
Lead first the way, and act what You command.  
The Crowd grow mild and tractable to see  
The Author govern'd by his own Decree.  
The World turns round, as its Great Master draws,  
And Princes Lives bind stronger than their Laws (h).

IV. For the better asserting and vindicating the just Pre-eminence of the Supreme Power, especially in Monarchical Governments, it will be proper to take under our Censure that vulgar Distinction of Sovereignty into *Real* and *Personal*; which seems, in our Judgment, to be not only very absurd, but of very pernicious Consequence, if applied to this Sense, that there shall be supposed, at the same time, in the same Monarchy, a *Real* and a *Personal Sovereignty*; the latter to be lodg'd in the King, the former in the People, as opposed to the King; and that in this, as in most other Cases, the *Real* Authority and Right shall have the Ascendant of the *Personal*. Nothing can be more evident, than that such a Notion contradicts it self, turning every Kingdom into a Monster with two Heads, and exposing it to utter Convulsion and Ruine. The Necessity of this Distinction doth by no means appear from the Reason commonly alledg'd, that the King, or the Royal Family being extinct, the People so far return to their first Right and Freedom, as that they may, at their Pleasure,

(a) Hor. Ode 1. v. 5, 6. L. 3. (b) Vid. Diodor. Sic. l. 1. c. 72. (c) Plutarch. Ad Princip, Indoct. p. 780. G. *Who then shall govern the Prince? That Law which Pindar calls the Supreme Directress of Gods and Men: not written in Books, or engraven in Tables, but imprinted in a lively Sense upon the Reason, ever residing and keeping a constant Watch, nor suffering the Mind to be one Moment without a Guide and Ruler.* Senec. *Thyest.* v. 610.

Omne sub regno graviore regnum est.

Monarchs must answer to a higher Throne.

(r) See Mr. *Barbeyrac's* Second Note upon this Section.

(d) Vid. *Hobbes De Cive*, c. 6. s. 14.

(2) V. *Grot.* L. 2. c. 4. f. 12. n. 1. See Mr. *Barbeyrac's* Fourth Note upon this Section. (e) In *Panegy.* c. 45. n. 6. (f) L. 10, ex *Otes.* (g) *De IV. Consul. Honorii*, v. 296, &c. (h) *Liv.* l. 26. c. 36. *Would You lay an Injunction on an Inferior? The most lively means to engage his Obedience, will be to apply Your self, and those about You, to the same Practice.* *Plin.* l. IV. *Epist.* 22. towards the End. *As in a Body, so in a Government, the most dangerous Disease is that which flows from the Head.* Vid. *Justin.* l. III. c. 2. n. 8. The Old *Persian* Proverbs to this Purpose, carry much good Sense in a very odd Dress: *If a King pluck but an Apple in a Subject's Garden, his Servants will root up the Tree.* *If a King allow his Soldiers the stealing of half a Dozen Eggs; their next Exploit will be to visit the Camp with Hens.* *Rofar. Persic.* c. 1.

either choose a new King, or set up another form of Government. It may as well be affirm'd, that we ought to suppose a *Real Power* in a *Servant*, contradistinct to the *Personal Power* of his Master, meerly because, if the Master dies without Heirs, the *Servant* is at his own Disposal. Nor can any better Argument be drawn from the Position of *Grotius* (a) and others, that there is a twofold Subject in which the Supreme Power resides, one *Common*, the other *Proper*; the former, the whole State or Kingdom, the latter, a single Person, or a Council, whether consisting of many, or of few. For the Sense of that Observation can be only this, if we ask in a general and confused manner, Where the Supreme Power is lodg'd? The Answer will be, In the whole *Common-wealth*: but if we propose the same Question distinctly, and enquire What *Person* bears the Sovereignty in the State? It will be answer'd, The King, or, the Senate, or the People. But who will hence infer, two distinct Sovereign Powers, one *Real* in the People, another *Personal* in the Prince? This would be no less ridiculous, than to conceive two distinct *Sights* in a Man; one residing in a *Common Subject*, the Person; the other in a *Proper Subject*, the Eye.

V. Many have taken the Liberty to assert, that the Power of the Prince neither can, nor ought to be Superior to that of all the People. *Aristotle* seems very much to countenance this Opinion, in the sixteenth Chapter of his third Book of Politicks (1). And in the fifteenth Chapter of the same Book, he discourseth to this purpose (2), *A King ought indeed to be invested with Strength and Power; but in such a Degree, as that he shall be greater indeed than single Persons, and than many in Conjunction; yet still inferior to the whole Body of the People.* *Grotius* (b) hath undertaken the Controversy with these Men; and the first Argument he urgeth against them is, that as each particular Man may give up himself in personal Servitude to Another; so a whole People or Nation may transfer on a single Governour all their Right and Power over themselves, without Limitation or Restriction (c). Tho' indeed, in other respects, it seems by no means fair to compare the Condition of Subjects, under an *absolute Monarch*, with that of Slaves. For as *Claudian* (3) well observes.

*Fallitur egregio quisquis sub Principe credit  
Servitium: nunquam libertas gratior extat,  
Quam sub Rege pio.* —————

They grossly err, that think a slavish Chain  
Binds them beneath a vertuous Monarch's Reign.  
When Justice, Piety and Goodness sway  
The Regal Power, 'tis Freedom to obey (d).

*Grotius* proceeds to reckon up several Causes and Occasions, which may induce a People to renounce all their Right in this manner, and yield it up into the Hands of an absolute Lord. Many of these we find put together by *Tully* (e): *Men*, says he, *subject themselves to the Power and Command of Another, for several Reasons. They are led by Kindness and Good Will, by extraordinary Benefits, by superior Worth and Excellency, by the Hopes of Advantage, and by the Fears of Compulsion; large Promises of Bounty and Favour; and lastly, as we have seen it often happen in our Common-wealth, by downright Wages and Hire.* But those Cases which *Grotius* chooseth to insist upon, are; if a People should chance to lie under manifest Danger of Ruine from an Enemy, and have no other means of being deliver'd, than to put themselves, without any reserve, under the Command of their Protector (f): Or, if being in Distress with violent Want, they cannot otherwise procure Sustenance and Support (g): If a Father of a Family, having large Territories, should refuse to admit any Person into his Lands, but upon Covenants of absolute Subjection: Or, if a Master, who possesseth a vast Number of Slaves, should give them their Freedom on the same Condition. Besides, it's possible, that such a Form of Government may suit with the Genius of some particular People. Nor ought the Desire of living under an absolute Monarchy, be always judg'd a Token of a low and abject Spirit, tho' it hath usually lain under this Censure, in the Opinions of Persons born in Democracies; who, on that Score, will never pardon the *Cappadocians* for refusing Liberty, when offer'd them by their *Roman Conquerours* (h). But on the contrary to any People, amongst whom there are a Number of proud, insolent, aspiring Men, impatient of Equality, a popular Liberty must be the most pernicious thing in the World; and

(a) L. 1. c. 3. f. 7. (1) In the Beginning. (2) Towards the End. See Mr. Barbeyrac's First Note upon this Section. (b) Ibid. f. 8. (c) Vid. Exod. XXI. 6. Levitic. XXV. 39. Add. Selden. De J. N. & G. Sec. Heb. l. 6. c. 7. V. L. 40. t. 12. l. 37. D. De liberali causa, & C. L. 7. t. 16. l. 10. D. d. t. l. 7. & l. 33. & D. Quib. ad Libert. proclam. non licet. L. 40. t. 13. l. 4. & L. 28. t. 3. l. 6. f. 5. D. De injust. Testam. &c. Novell Leonis, LIX. *Cæsar* reports of the Ancient *Gauls*, that amongst them, most of the inferior Populacy, when oppress'd, either by Debts, or Taxes, or the Injuries of too powerful Neighbours, fix'd themselves, as Vassals, on some of the Nobility, who enjoy'd all those Rights over them, which Masters ordinarily bear over their Slaves. De B. G. l. VI. c. 13. n. 2. (3) De laudibus Stilicon. L. 3. v. 113, &c.

(d) There is an excellent Saying to the same purpose in *Philostrat. De Vit. Apollon. l. 5. c. 12. p. 245. B. Ed. Morel.* As some one Man in a *Common-wealth*, highly surpassing others in Wisdom and Vertue, seems by his good Management to turn the Popular Government into the Command of a single Person; so a single Person reigning Sovereign in a State, if he direct all his Counsels to the Publick Good, seems to express, in his Authority, the Freedom of a Popular Government. Add. *Hobbes De Cive, c. 10. f. 8.* (e) *Offic. II. c. 6.* (f) Vid. *Liv. l. 7. c. 31.* (g) Vid. *Genes. XLVII. 19.*

(h) Vid. *Strabo, l. 12. p. 273.* & *Justin. l. 38. c. 2.* 'Tis a Saying of *Euripides*, in (*Helen. v. 283.*) and 'tis no more than what was the current Notion of the *Grecians*;

Τὰ βαρβάρων δούλα πάντα πλὴν ἑνός.

In Barbarous Kingdoms All are Slaves but One.

yet the same Men will very contentedly submit to a Monarchical Government. For they had rather serve One, and lord it over all others in the State, than live on the common Level; and, as *Ausonius* says (1), *For the Sake of Commanding, they are willing to Obey*. The Eastern Nations have been of old, and are still so accustomed to Monarchy, that we are told the *Chinese* could not form any Notion of the *States* of *Holland*, having heard of no Government, but that by Kings (a). And a *Venetian Traveller* (b) reports, that the King of *Pegu*, when he was inform'd, that the Sovereign Power, at *Venice*, was lodg'd in the *Senate*, burst out into a Fit of Laughter, taking it for a meer Jest in Politicks. On the other side, such Men are fit only to live in a popular State, as have moderate Spirits and easy Passions, and know how to rest satisfied with the same humble Condition as their Neighbours. Lastly, it often falls out, that free States are, by intestine Divisions, brought into such Circumstances, as that they cannot be safe otherwise than under the absolute Command of a single Person; and, as *Lucan* observes,

*Cum Domino Pax ista venit* (c). —

They gain a *Master* when they gain a *Peace*.

VI. It may, perhaps, seem more to the purpose, to examine the Reasons of those Men, who are so fond of exalting, above Kings, that *Real Sovereignty* of the People, which they have fram'd in their own Fancy. They tell us, then, that all Kings are Constituted by the People, and that 'tis Natural the Parties, who Confer the Dignity, should be Superior to the Parties who Receive it (2). Now, as to this Point, it must be observ'd, that altho', in the Constituting of all Kings, the People interpose their Consent, yet there is a great Difference in the manner how such Consent is obtain'd and applied. Some Nations take a King, upon their own free and voluntary Motion: others under the Distress of War, or some other great Necessity, receive the same kind of Government; which they would have been very far from desiring, had they not been driven to it by these Misfortunes. It is agreeable to the common Usage of Speech, to say, that those Princes only are Constituted by the People, whom the People appoint by their own free Act. On the other hand, those who extort the People's Consent, by Arms, or the like means, are not said to have been made by the People's Appointment, but to have subjected the People to their Command. But, farther, then only the Parties who constitute Another are properly Superior to Him, when it is al-

ways in their Power to determine how long he shall possess the Dignity with which they have once invest'd Him. Whereas, in many Cases, it is at first a Matter of free Pleasure and Choice to appoint the Person, and yet the Appointment, being once made, becomes necessary and irreversible. Others answer the same Argument, with this Distinction; a Man may Constitute Another, either over a third Person, or over himself. In the former Case, the Constituting Party is Superior to him whom he thus Constitutes. For 'tis suppos'd, before-hand, that the third man, both was, and still is, under the Power of Him, who thus sets a new Ruler over Him. Whence it follows, that this new Ruler must depend on the Will and Pleasure of the old. For since *no one can serve two Masters*, unless in Subordination; I cannot appoint another Lord over my proper Subject, without making him accountable to my self: and consequently, he is no more than a subordinate Governour. Thus a free State, when it gives a General, the full Command of its Souldiers, was, and still is Superior to him, and them. But he, who Constitutes Another with Authority over himself, can no more be suppos'd to continue Superior to him, than he can, at the same time, and in respect of the same Person, Command and Obey.

But 'tis farther urged on the other side (3), that since all Government is instituted for the sake of those who Obey, not of those who Rule; or, since the King is made for the People, not the People for the King; on that score, the People must be Superior to the Prince: In as much as, that for which another thing is ordain'd, seems more Noble and Excellent, than what is thus fram'd on its account. Here the Assertion, if held in General, is false; for all Government or Command, is not instituted for the sake of those who Obey; as is clear in the Authority of Masters over their Servants: altho' the Master cannot, indeed, well enjoy the Fruits of his Sovereignty, unless he take some Care of those, who are thus placed in Subjection under him. Besides, the Question is not, whether the Person of the Prince be of more value than the whole People; as is in case, either He or They were necessarily to perish: but, whether, since Civil Government is set up for the Benefit of the Community, the means of procuring this End, should be determin'd by the Judgment of those who have submitted their Wills to the Will of the Prince, or by Him, to whose Prudence and Conscience the Administration of Affairs hath been given in Charge.

Some, because we read of the People's being punish'd for their Prince's Sins, thence infer, that the People had a Power to restrain

(1) ————— *Et dominari*  
*Ut possint, servire volunt*, ————— *Idyll. 15. v. 37, 38.*

(a) *Neuhof. in Legat.*  
c. 3. f. 8. n. 13.

(b) *Caspar Balbi, in Itinerar.*  
(3) *V. Grot. ubi supra, f. 14.*

(c) *Lib. 1. Pharsal. v. 670.*

(2) *V. Grot. L. 1.*

them from finning, which cannot be supposed, without a Right Superior to the Regal Authority (1). For I am not chargeable with the Guilt of another Man's Action, when I contributed nothing to it. But 'tis impossible to conceive how the People can partake in the Sin of their Prince, at which they are heartily displeas'd, unless by neglecting to use some proper Method of Correction. In answer to what is thus urged, we take it for a certain Truth, that the Sins of the Princes do not, directly, and on their own account, derive any Guilt on the Subject, unless the Subjects themselves have contributed some positive Assistance to them (a). But they cannot contract a Guilt from the Omission of any Restraint or Punishment: because being inferior to the Prince, they had neither Power nor Obligation to apply such means of reclaiming Him. For as our Ability, so our Duty of hindring another Man's Sins ariseth from our Power over him, or, from such an Authority as implies our Right of directing, and controlling his Proceedings. Therefore, what the Prince Acts, before he receives that Dignity, certainly cannot affect the rest of the People; since *Equals* have no Command one over the other. No more can the Subjects be charged with what He commits after his accession to the Crown: since 'tis ridiculous to say, that those, who during his private Station, had no Command over him to restrain him from offending, whilst he was in all Points their Equal, should then at last obtain such a Command, when they gave up themselves to his Direction and Sway. Nor doth that Act or Covenant, by which Subjects invest a Prince with *Absolute* Power, by any means make them partakers of His Sins. For by such a Covenant the People do not indulge an Impunity to the King, but only leave him in Possession of that which he before enjoy'd by virtue of his Natural Liberty: since he could not exercise the Supreme Authority, were he not exempt from Human Punishment (b).

What some urge, that, as he who hath given himself up for a Slave, still keeps a Right of recovering himself from that State; so a People, who have submitted to the Yoak of Monarchy, retain an equal Right of reassuming their Freedom: This no Man in his Wits will allow for Truth, unless it be added, as a necessary Condition, that such a return to Liberty be made, with the Consent of the Master or the Prince, by their voluntary receding, from that just Right and Authority which they had before obtain'd, over the Servant, or over the Subject (c). Besides, 'tis a groundless

Affertion, to say, that a People, to whose Temper and Disposition, an absolute Monarchy was once agreeable, when they have, in Course of Time, worn off their servile Genius, may re-establish themselves in a Free Commonwealth. For if such a Case should happen, it will be incumbent on the Prince, so far as Prudence permits, to humour this Change of Inclination in the Subject, by softening the Rigour, and varying the Measures of his Reign. No less ridiculous is it to infer, that because a Master or Proprietor, who abuseth his own Possessions, may be punish'd, or deprived of his Goods, therefore a Prince too, who makes ill use of his Power, may be corrected and reduced to Reason. For that which makes such a Proceeding Lawful in the former Case, is the Prince's superior Right over the Goods of the Subjects, which 'tis the Interest of the whole Community to preserve from being thrown away to no purpose. But who will pretend, that the People have a kind of Prerogative, or a more eminent Right over the Rights of their King; or, that they are Masters to their own Master?

As for the Saying of some Princes, produced in favour of the opposite Opinion, it cannot be denied but that many such fine Speeches have been used, out of a principle of Ostentation. But they will all fall under this general Answer, that a Prince ought indeed to direct every thing to the Good and Safety of his People: but the People are not thereupon invested with a Power of punishing Him, as often as they shall judge that He applies wrong Means, towards the obtaining of that End. Alike senseless and trifling it is to argue, that, in as much as the People have not a Right of destroying themselves, or of practising any grievous Cruelty on their own Body, therefore they can transfer no such Right on the King. For who ever maintain'd, that Princes had a Right of destroying their People? We shall hereafter make it appear, that Absolute Government is by no means so formidable a thing, as these Men are willing to fancy: And how far a People may proceed, in case the Prince manifestly seeks their Ruine, will be likewise consider'd in its proper place (2). When we are told of the ancient *Consuls*, and other Magistrates, said to be placed over the People, and yet frequently reform'd by the People's Censure and Punishment; these Allegations are vain and idle, the Instances not coming up to the Question (3).

Lastly, as to what is objected from Scripture History, that the *Jews* threw off the Yoak of

(1) *V. Grot. ubi supra, f. 16.*

(2) *Euripid. Suppl. v. 879, 880.*

————— The State which suffers in its Fame  
For a Bad Prince, it self is Innocent.

(b) The Argument urged from the 2 *Sam. XXIV.* is sufficiently answer'd by *Grotius*, in the place above quoted. See a remarkable Passage in *Martinus's History of China*, (l. 3. c. 1.) applicable to the same Chapter, v. 17.

(c) *Vid. Xenophon Cyrop. l. 3. princip.* (2) Chap. 8. (3) For those *Consuls* and *Magistrates* were not Sovereigns, but the meer Ministers of the People.

the *strange Nations*, when they seem'd to have been sufficiently Chastised for their Rebellion against G O D ; we thus reply, that either they still continued in a state of War with those Nations, never engaging their Faith, or submitting as true Subjects ; and so they had a Right of treating their Oppressors & Enemies : or else, they acted in these extraordinary proceedings by express Command from Heaven ; which if it seem to intrench on the common Measures of *Right*, is no Precedent for the Imitation of Others (a).

VII. To proceed, nothing is more apparent, than that in some States the ruling Power, (especially, if Monarchical,) is free in its Proceedings ; in others, it is restrain'd to a particular manner of acting : which Difference gave Occasion to the Distinction of Sovereignty into *Absolute* and *Limited*. And here we think our selves obliged, in the first place, to explain, with what Accuracy we can, the proper Signification of this Term *Absolute* ; which bears a hateful Sound in the Ears of Persons, born under Free Governments. Indeed the Word, if Falsly applied and understood, may encourage ill Princes to grieve and oppress the State, and to commit the worst of Disorders. Especially since there will be seldom wanting a Tribe of Flatterers, to second the Motion, and, under this Fair Pretence, to feed and inflame the Ambition, and other Vices of their Master. ' *You are Absolute*, will they say, ' therefore your Pleasure is your Law : therefore, waste your Subjects and your Neighbours with Unnecessary Wars, to procure your self the Name of a great Commander : therefore, take the Liberty of treating with Insolence and Abuse, whomsoever you think fit : therefore, drain your People with Rapes and Exactions, to supply your Luxury, or your Pride. A high Strain of this Parafitical Rhetorick was that which *Anaxarchus* used to *Alexander*, when under Discontent for his Murther of *Clytus* ; he told him, ' That Justice ' was therefore feign'd, by the Poets, to sit on ' the same Throne as the Gods, or to stand behind *Jupiter's* Chair, that Men might apprehend and acknowledge, whatever a King acts, ' to be Good and Right (b).

Nay, there are Authors, who upon profess'd Principles maintain the Absolute Right of Kings, by such Arguments and Reasons, as if they measured it only by a general Impunity, and a Licence to oppress and spoil the People. The true State of the Point, then, is this : As we cannot conceive, in single Persons, a higher and more absolute Liberty, than that they shall determine and dispose of their Goods, and Actions, not by the Will of another, but by their own Judgment and Pleasure, yet still

with a full Obedience to the Law of Nature ; and as this Liberty Naturally belongs to all Persons, who are not subject to the Command of Others : so, where many Men cleave together in an establish'd *State*, there too, as in a *Common Subject*, must necessarily reside the same Liberty, or the Power of choosing by their own Judgment, all Means and Methods tending to the Preservation of the whole Society. And this Liberty is attended with an *Absolute Command*, or a Right of prescribing those Means to the particular Members, and of compelling them to a due Obedience and Conformity. Therefore in every *State*, properly so call'd, there must always be such an *Absolute Authority*, at least in *Habit* and *Power*, if not always in *Exercise* and *Act*. For 'tis a Contradiction to say, that such a Community is obnoxious or subject to none, but purely free and independent, and yet that it hath not a Right of administering its proper Affairs by its own Inclination and Judgment. And that this *Absolute* Sovereignty implies nothing that can be term'd unjust or intolerable, we may easily apprehend from the End of Civil Establishments and Communities. For these publick Bodies were never instituted with a Design, that Men should throw off the Restraints and Commands of Nature, and run into all the Extravagancies of evil Lusts ; but that, by the united Strength of a Multitude, a better Provision might be made, for the Interest and Security of each Member ; and, consequently, that we might be put into an easier, and safer Course of observing the Edicts of Natural Law.

VIII. But when we consider the Supreme Power, as it inheres in one Man or in a Council, whether of all, or of few, as in its proper and peculiar *Subject* ; it is not every where thus free and absolute, but in some places we find it under the Restraint of certain Rules and Laws. Indeed, as for Democracies, the Distinction between *Absolute* and *Limited* Sovereignty is not in them so easily discoverable. For although, in every such free State, there must be some settled Rules, founded either upon Custom, or upon written Law, determining at what Time, and by what Persons, the People shall be call'd together, publick Affairs proposed, and the Resolutions executed ; (for we can form no Notion of a Civil Community, without these constant Methods of proceeding :) yet since the Council, in which the Sovereignty resides, consists of all the People, and consequently every Man is there who obtains any *Right* by such Rules or Orders ; therefore nothing hinders, but that the People thus assembled, may, at any time, alter or repeal them (c). *Anacharsis*, in *Plutarch* (d), laugh'd at *Solon* for hoping that he should be

(a) *Add. Sanderson. De Obligat. Conscient. Prælect. IX. S. 16, &c. & Prælect. X. S. 13, 16, 22, 23.*

(b) *Plutarch. ad Princip. Indoct. p. 780. And so in Sophocles, Antigone. p. 234. Ed. H. Steph.*

Kings have large Privileges ; and, in chief,  
The Power to act or speak what'ere they please.

(c) *Ald. Mauroceni Hist. Venet. l. 13. p. 517, &c.* (d) *In Solon, p. 81. A. B.*

able to curb the Injustice, and the other Vices of his Country-men, by written Ordinances, things of no more Strength than Cobwebs: Solon wisely answered, that Men commonly stand to Bargains and Agreements, when it is the Interest of neither Party to break them: and that he would so frame and temper his Prescriptions, as to make it evident to all Persons in the State, that it would be much more for their Benefit and Advantage to obey the Laws than to transgress them. But the Event of Things confirm'd the Judgment of *Anacharsis* rather than the Hopes of *Solon*. The most likely Means, that can be thought of, for the ensuring and perpetuating these Decrees, is for the People to bind themselves, by a solemn Act of Religion, that they will ever observe them: as was practis'd in *Rome*, with regard to the Law prohibiting Regal Government. Yet whether such an Oath is any longer Obligatory, when none of the Persons survive who first engaged in it, hath been the Subject of a former Enquiry (a). *Cæsar* found an easy piece of Sophistry to elude such a publick Constitution. The *Roman* People had laid up a certain Sum in the Treasury, with a solemn Execration of any one that should dare to touch it, unless in case of an Invasion from the *Gauls*: *Cæsar* laid Hands on the Money, and solv'd all Scruples with this *Bravado*, that by subduing the *Gallick* Nation, he had, at once, freed the Commonwealth from their Oath, and from their Enemy (b). *Herodotus* (c) informs us, that the *Athenian* Lawgiver but now mention'd, made his People swear, that they would not reverse one of his Ordinances within the Space of Ten Years. Others have endeavour'd to preserve such publick Rules, by decreeing a Penalty against any Person, who should move to have them repeal'd; tho' the Penalty, in this Case, may as well be abrogated as the Laws. Thus the *Thasians* made it Death for any Man to propose a League with the *Athenians* (d). And the *Athenians* themselves denounced a Fine against him who should prefer a Bill for the Recovery of the Island *Salamis* (e). *Charondas* decreed amongst the *Thurians*, that whoever attempted to correct, or alter the settled Laws, should come into the publick Assembly with a Halter about his Neck (f). In the same manner *Xenophon* (g) reports, that by an Order of War, in *Cyrus's* Expedition, it was declared Capital for any Person to speak of dividing the Army.

But in Aristocracies and Monarchies, where the Persons governing are different from those who are govern'd, and, consequently, where the latter may obtain a Right by the Pacts and Promises of the former, the Distinction between absolute and limited Sovereignty is clearly discernible. He then, under such

States or Kingdoms, is properly *Absolute*, who exerciseth the publick Administration by his Judgment, not according to any settled Rules or perpetual Decrees, but as the various Conditions of Affairs seem to require: or, in short, who procures the Safety of the Commonwealth, by such means as his own Prudence suggests, in every Exigency of Things and Times. And in this Sense the Term *Absolute* is so far from implying any thing that looks Odious and Tyrannical, that it lays on Princes a Necessity of applying a stricter Care and Caution, than those who proceed in all Business by constant Forms; if they would fully satisfy their Conscience and their Duty. *Dio* the Orator (h) speaks admirably to this purpose: *A good Prince*, says he, covets nothing, because he thinks himself to possess all things: he abstains from Pleasures, because he knows they are all within his reach, if he should be inclined to make use of them: he is juster than all Others, because he knows himself to be the Fountain of Justice to the whole State: he takes a Delight in Business and Labour, because he engageth in it by his own free Motion; and he loves the Laws, because he doth not fear them. And in this way of arguing, he proceeds truly and rationally. For who hath need of greater Prudence, than one who is to steer and direct such important Affairs? who of a stricter and more accurate Justice, than one who is above the Laws? who of a more tender Modesty, than one who hath a Licence to do all things? and who of a more resolute Courage, than one who is, by his Office, the Common Guardian and Protector?

IX. But since, in consulting the publick Safety, the Judgment of a single Person may easily be deceiv'd; and since all Men are not arriv'd at such a Strength of Soul, as to be able to rule their Passions under so vast and so tempting a Liberty (i); many Nations have thought it the more secure and prudent Course, not to put so unbounded a Power entirely into the Hands of one Man; who can neither be infallible in his Understanding, nor inflexible in his Will; but rather to prescribe to him a certain Method of Governing: it having been first discover'd, that these fixt Rules and Forms of publick Business, are agreeable to the Genius of the People, and the Constitution of the State. Nor is this Limitation of Power an Injury to those Princes, who owe their Crown to the free Gift of the People. For if they thought it hard to receive an Authority, which they could not exercise at their own Pleasure, they were at Liberty to have refused it. But when they have once accepted of the Sovereignty, under these Conditions, the solemn Oath, by which they engage to observe the Conditions, utterly forbids them to use any

(a) B. 4. c. 2. f. 17. (b) Appian. Alexand. de Bell. Civ. l. 2. (c) Clio. (d) Polyæn. Strateg. l. 2. c. 33.

(e) Plutarch. Solon. p. 82. B. (f) Diodor. Sic. l. 12. c. 17. (g) Περὶ ἀναβάσεως, l. 6. (h) Orat. 63. de Regno & Tyranno, p. 588. A. B. Ed. Morell. (i) This is what M. Antoninus acknowledges in Herodian, B. 1. c. 8. Edit. Oxon. Καλεπὸν δὲ μετρησῆναι τι, καὶ ὄρον ἐπιθῆναι ἐπιθυμίας, ὑπερτέρας ἐξουσίας. See Mr. Barbeyrac's First Note upon this Section.

Means, whether of secret Contrivance, or of open Violence, in order to subverting the Laws of the Kingdom, and rendring themselves Absolute. Because, as *Pliny* (a) observes, *No one ought more religiously to observe his Oath, than he who hath the greatest Interest in not being forsworn* (1).

'Tis a very poor Argument which some make use of, when they tell us, that since Princes are ordain'd by God, and since He hath commanded them fully to discharge their Duty, which cannot be done without the Exercise of the Sovereign Power; therefore we ought to suppose, that God, by the same Act, gives them such a certain Measure of Authority; of which as they ought not to suffer themselves to be, in the least, abridg'd; so the People cannot, with any Justice, desire to make an Encroachment upon it; nor, if they did, could they be able to bind the Prince, by a Contract so prejudicial to his Right, and to the Trust which he receiv'd from God. At the same rate, say they, a Wife might engage her Husband, by Covenant, to wink at her stoln Amours: so as to answer the Poet's Character (2).

————— *Doctus spectare lacunar,  
Doctus & ad calices vigilanti, stertere naso.*

Who his taught Eyes up to the Ceiling throws,  
And sleeps all over but his wakeful Nose.

Mr. Dryden.

Or the Bargain might be mutual;

*Ut faceres tu quod velles; nec non ego possem  
Indulgere mihi* (3):

The Parties should be pleas'd on either side;  
And both may for their private Needs provide.

Mr. Dryden.

But, as we have already evinced (4) the Origin of Sovereignty to be from God, so we take it for a certain Truth, that it was left to the Pleasure, and Judgment of Men to choose what particular Form of Government they thought most convenient: except where Civil Laws have been divinely instituted, by the extraordinary Interposition and Appointment of Heaven. 'Twas a wise Saying of *Melancthon* (b), *States and Kingdoms differ in their Frame, some admitting Liberty in one Degree, some in another. But God approves of all Forms of Government, which are agreeable to Nature, and to Reason.* None will pretend, that when a Free People are about to elect a King, one Candidate can plead the Divine Designation more than another: or that there is any peculiar Form of Words establish'd by GOD Himself, under

which the Investiture of Sovereignty must necessarily be made.

Nor will the famous Description of a King by *Samuel* (c), do these Authors any Service, which they expound as a general Right belonging to every Monarch; whilst others will have it to be a bare account of Matter of Fact, what some Kings will do, tho' none may justly do it. *Grotius* (d) takes the middle way, between these contrary Interpretations, and tells us, that the Prophet's Words do neither express a Matter of Right, nor yet a bare Fact, supposed to be wrong and injurious; but such a Fact as carries in it the Force or Consequence of a Right, tho' it hath not the Foundation; and this Force or Consequence is, that it obligeth the Subject to Non-resistance: In other words, that however the Prince may, in such Actions, violate his Duty, yet the People have no more Licence to oppose his Proceedings, than if he did nothing but what was highly just and equal. And on this Account he observes it to be, that *Samuel* foretels the People, they should cry to GOD under these Oppressions; intimating, that the Things were above Human Relief or Remedy. In fine, he says, such Acts as these in Kings may be term'd Right, by the same way of Speech, as when the Civil Law (e) affirms the Prætor *ius reddere*, to do Right, even when his Sentence is unjust. But the true Import of that place of Scripture may perhaps better appear, if we take this plain and easy Method of explaining it. The Jewish Nation had hitherto liv'd under a Democracy, but such a one, as often bore the Semblance of that kind of Government, on which *Aristotle* bestows the Title of Heroical. Their Judges, rais'd up for the most part by Divine Impulse, either deliver'd them from their Oppressors by War, or administer'd Justice in Peace: Yet, in ordinary Cases, they had more Authority to persuade, than Power to command: and no Taxes were allow'd them beyond the standing Revenues, to encrease their Strength, or to adorn their Dignity (f). At length the People grown weary of this Constitution, desir'd a King, after the manner of other Nations; that is, one who should shine with external Pomp and Grandeur, and should either keep a constant Body of regular Forces, or at least should train up the Subjects to Arms, that they might be ready to make Head against any sudden Invasion (g). When Matters stood thus in the People's Opinion, *Samuel*, to put them upon a serious Deliberation, before the thing was past Recovery, sets out to them, in lively Colours, the Rights of such a Sovereign, and the Inconveniencies which would attend the Government. You would have a King, says he, who should appear with State and Magnificence: why, to compass this End, he must be attended

(a) *Paneg.* c. 65. (1) See *Sidney* upon Government, C. 3. S. 14. (2) *Juvenal. Satyr.* i. v. 56, 57.

(3) *Juvenal. Satyr.* 6. v. 281, 282. (4) In the Third Chapter of this Book. (b) *In Epitom. Moral. Philos.*

(c) 1 *Sam.* VIII. 11, &c. (d) L. 1. c. 4. f. 3. (e) L. 1. t. 1. l. 11. D. *De Jus. & Jure.*

(f) *Add. Grot. ad Judic.* c. 1. (g) See 1 *Sam.* XIII. 2. XIX. 48, 52.

with a numerous Train of Guards (1); therefore, *He will take your sons and appoint them for himself, for his chariots, and to be his horsemen, and some shall run before his chariots.* You would have a King, who should be furnish'd with a standing Military Force: it will be necessary, therefore, for him, to *appoint captains over thousands, and captains over fifties,* out of your Sons; who might otherwise have been employ'd in the Improvement of your private Estates. Again, the Care of publick Affairs will not allow such a King to undertake the Culture of his own Lands; therefore he will take your Sons *to ear his Ground, and to reap his Harvests;* as likewise, *to make his instruments of war, and instruments of his chariots.* Besides, since his Court will be large and full, and since it will be beneath the Dignity of his Wives, or Daughters to govern the Kitchin, and to provide Sustainance for so vast a Household; *he will take your daughters to be confectionaries, and to be cooks, and to be bakers.* He will have Occasion for a Multitude of Officers, to inspect and regulate the Affairs of War and Peace; and all these must have their fix'd Salaries to reward their Service; for which purpose, *he will take your fields and your vineyards, even the best of them, and give them to his Servants:* and for the same use, he will require the *tenth* of your Cattel. And, after all if need be, he will not *stick to take your servants, and your beasts, and put them to his work.* In a word, if You resolve to have a King, You must maintain him like a King, and settle a large Revenue for his Support; and should You afterwards grow weary of the Burthen, You cannot lay him aside at Your pleasure; Your Election having given him such a Right to the Crown, as may not be taken from him without his Consent. It is plain then, on the whole, that this Passage in the Scripture History, doth by no means patronize ill Princes, nor doth contain any certain Measure and Standard of Regal Power, there prescribed by God in the manner of a Law, so as to be incapable of receiving Addition, or Diminution from any Human Agreement; but that the Prophet barely enumerates the Burthen and Charges of a Monarchical State, whether Absolute or Limited. 'Tis certainly therefore left to the Judgment of a Free People to determine, whether they shall confer the Sovereignty on a Prince in an absolute manner, or whether they shall bind him to certain Conditions; provided these Conditions imply nothing, which is either impious towards GOD, or destructive of the proper End of Government. For although it be true, that Men first entred into regular Bodies and States, upon their own free Choice, yet in as much as they were always under the Command of the Law of Nature, they ought, on all accounts, to institute such Rules of Sove-

reignty and of Civil Obedience, as should be conformable to that Law, and to the just Design of Political Societies.

X. But that we may rightly apprehend what Promise or Engagement, (for all have not the same Force,) is required to the rendring a Monarchy *not Absolute,* (and the same will hold of an Aristocracy;) we must observe that a King, at his undertaking the chief Government, binds himself to the due Discharge of it, either by a general, or by a particular Promise, to which is usually added the Confirmation of an Oath. A *general* Promise may be made either *tacitly* or *expressly.* A King, by the very Act of accepting the Administration, is supposed *tacitly* to engage, that he will conscientiously perform his Trust; altho' no *express* Promise be given (a). But the most common way is to make this Promise in *express* Words, with the Addition of an Oath, and the Solemnity of certain Rights and Forms. And nothing is more frequent, than to have the Princes Duty described, in these set Speeches, by way of *Periphrasis,* or an Enumeration of its principal Parts: As, suppose, that he will be diligent and watchful in promoting the publick Security, that he will protect the good, and punish the bad, that he will faithfully administer Justice, will not oppress the Subject, and the like. Now Promises of this kind, do not in the least prejudice the *Absoluteness* of a Sovereignty. The King is, indeed, obliged by them to govern well; but they leave it to his Judgment and Pleasure, to choose and apply the Means in order to the obtaining this End. A *particular* Promise, which specifies the manner and means of Governing, may be divided according to its different Force and Effect. For sometimes it only binds the Conscience of the Prince; sometimes it makes his due Performance the Condition of his Subject's Obedience. The former is done, when the Prince engageth, (for Instance,) that he will confine the Offices and Places of Trust to Men of such Rank, or of such Qualifications; that he will invest no Person with Privileges and Immunities, burthen some or prejudicial to others; that he will enact no new Laws, impose no new Taxes or Tributes, imploy no Foreign Souldiers, and the like. But then we suppose the People to demand all this of the Prince, without constituting any certain *Council,* to which he shall be bound to apply himself, in case the Necessities of the Common-wealth require a Digression from such Promises and Engagements; which are always to be understood with this tacit Expression, *unless the Publick Safety* (the Supreme Law,) *command the contrary.* Such a *Council,* we mean, as might proceed, not precariously, but by its own proper Right, in determining these Affairs, and without the Consent of which, the Subjects should not be

(1) See *Algern. Sidney's* Discourse upon Government, C. 3. S. 3, 4, 5, 7. (a) *Grotius* on the 2 Kings XI. 17. The People promis'd to take the King's Safety under their Care. So says *Josephus*; For that the King should promise any thing to the People, was not the Custom amongst the Jews: That is, by an express Promise, and such as should be made at the Coronation.

obliged to obey the Prince's Orders, in Points of this Nature. Now in such a State as we have been here describing, the Administration of the Government is bounded and confined by certain Laws; and the Prince, who shall act otherwise, except in Cases of Necessity, hath, no doubt, violated his Word and Faith. And yet the Subjects are not empower'd to reject his Commands, or to reverse his Proceedings, upon this Pretence. For whilst he declares, that the Safety of the People, or some extraordinary Benefit to the Publick, is the Cause and Motive of what he does, as indeed this Presumption always attends the Acts of Sovereign Princes; the Subjects are cut off from all farther Answer or Plea: inasmuch as they have no Authority to take Cognizance of those Matters, and to judge whether the Necessities of the Common-wealth require them or not. Whence 'tis easy to draw this Observation, That a People do not sufficiently guard and secure their Liberties, when they create a King only with a *Limited* Sovereignty, and yet do not appoint a *Council*, without the Approbation of which, those Acts, excepted in the Limited Grant, shall not be perform'd: or unless they oblige the King to hold an Assembly, in which those extraordinary Affairs may be debated. For this is a much better Expedient, than if the King should be only bound, in these Cases, to follow the Opinion of a smaller Council: since it might so happen, that the private Interest of those few Members, who compos'd such a Meeting, should interfere with the publick Good; whence they might be prevail'd on by the Motive of particular Advantage, to withhold their Consent from the salutary Proposals and Intentions of the Prince.

But Monarchy is brought into much narrower Bounds, and under much stricter Ties, if, at the first conferring of Sovereignty, it be expressly covenanted between the People and the Prince, that the latter shall govern according to certain Fundamental Laws, and in all such Affairs as are *not* left to his absolute Disposal, shall have Recourse to a Council of the Commons, or of the Nobles, and determine nothing without their Consent: that, in case he do otherwise, the Subjects shall not be obliged, by any of those illegal Commands. A People, who constitute a King over them in this manner, are supposed to have promised him Obedience, not absolutely and in all Points, but so far as his Government is agreeable to the Original Contract and the Fundamental Laws: from which, whatever Acts of his recede, are thereby rendred void, and lose all Force of engaging the Subjects to a Compliance. Nor yet can it be truly said, that

these Fundamental Laws render the Supreme Power lame and imperfect. For all the Acts of Government may be exercis'd here, as well as in an absolute Kingdom: only, that whereas in the latter, the Prince proceeds by his own sole Judgment, at least, as to the final Determination of things, in the former, there is a Council establish'd, which doth, as it were, bear him Company in the adjusting of Affairs; and on the Authority of its Decisions the Sovereignty depends; not as on the proper Source of Power, but as on a Necessary Condition. Neither are there in such a State two Governing *Wills*; since whatever the Common Body acts, it acts by the *Will* of the Prince: The Limitation of the Original Grant, only producing this Effect, That (unless under such a Condition) the Prince shall not incline his Will to some particular Designs, or that such Acts of his Will shall have no Force or Vertue. No more can it be pretended, that the King, in a Realm thus constituted, loseth his Sovereign Power, or that the Council is Superior to him. For these are very faulty Consequences, 'The Prince cannot act in every thing according to his own Pleasure; therefore he hath not the Supreme Authority: I am not oblig'd to obey him in all things; therefore I am his Superior, or, at least, his Equal: I can't command a Subject in an Arbitrary manner; and therefore he must have his Turn of peremptorily commanding me who am his Prince. There is a great deal of Difference (1) between these two Propositions, 'I am bound to act with this Person's Approbation, because I have engaged myself to it by Covenant: and, I am bound to follow this Person's Will and Pleasure, because, by virtue of his Sovereignty, he hath a Right of laying these Injunctions on me. *Supreme* and *Absolute* are by no means one and the same Term. For the former, only denies a Superior or an Equal in the same Order: the latter, farther imports a Power of exercising any Kind of Right, according to one's own Judgment and Inclination.

But what shall we say, if in the Original Agreement it was expressly (a) (2) made a Condition, that if the Prince acted otherwise, he should forfeit his Sovereignty. We have many Instances of this Practice in History. *Diodorus Siculus* (b) reports, that amongst the *Sabæans* the King, though in all other Respects Unaccountable, yet if he set a Foot beyond his own Palace, was to be stoned by the People. And this, he says, was ordain'd by the Advice of an ancient Oracle. The People of *Arragon* heretofore, when the King had taken an Oath to preserve their Privileges, engaged their Allegiance to him in this Form, *We, who have as much Power as You, make You our Sovereign*

(1) *Vid.* Grot. L. 1. c. 3. s. 16.

(a) We say expressly, for if the Clause run only thus, *In case the King act otherwise, the Subject shall not be obliged*; it will not amount to such a Peremptory Condition, as the *Civilians* call *Lex Commissoria*.

(2) *Vid.* Grot. d. 1.

(b) L. 3. c. 47. *Add.* Agatharcid. de *Mari Rubro*, c. 50. *Strabo*, l. 15. pag. 488. *Edit. Genev. Casaub.* tells us of a Custom much like this; that in *India*, if the Prince happens to drink to excess, the very Women have Liberty to kill him; and she that doth the Feat, for her Reward, may claim his Successor in Marriage.

Lord, upon Condition You keep inviolably our Laws and Rights, and not otherwise (a). Severus, when he entred upon his Reign, not only swore that no Senator should be ever put to Death by his Orders; but likewise publish'd a Decree to this Effect, That whatever Emperor should take off one of the Senatorian Rank, he himself, his Children, and the Agents he made use of, with their Children, should be declared Enemies of the Common-wealth (b). Though Julius Solon, who, by the Emperor's Command wrote this Decree, in a little time after, lost his Life. To come, then, to a Resolution of the Question before us, 'tis plain, that no Absolute Prince can receive his Authority under such a Clause or Condition as we have now described. Yet nothing seems to hinder, why a limited Government, and yet a true and proper Monarchy, may not be confer'd on a Person under the Terms of Restraint. For though we should allow, That a Temporary Authority cannot rightly be term'd Supreme, yet we must not call that Authority Temporary, which depends on a Condition in the Power of the Prince to perform. Nor do we by this means subject the Prince to the Judgment of the People, as if they were, in a solemn manner, to determine whether he hath broken his Engagement, or not. For besides, that the Condition we speak of, usually consists of such Matters as are clear and obvious to Sense, and therefore not easily liable to Doubt or Dispute; such an Act of the People, whereby they take Notice of the Prince's Mis-carriage and Forfeiture, doth not carry in it the Semblance of a judicial Proceeding, for the taking Cognizance of a Subject's Offence: but is no more than a bare Declaration, by which the one Party observes and protests, that it's manifest Rights have been violated by the other Party: and such a Declaration may be made by an Inferior (c).

Grotius (1) speaks somewhat obscurely, when he observes, that the Obligation, arising from the Promises of Kings, may restrain either the Exercise of the Act, or directly the very Power. That an Act, contrary to Promises of the former kind, is Unjust, and yet Valid; but an Act, repugnant to Engagements of the latter sort, is not only Unjust, but void and ineffectual. As if he had said, sometimes a King promiseth that he will use such a part of his Sovereignty only in a certain manner: sometimes he plainly abridgeth himself of such a part of his Power. Concerning which Distinction we may offer these two Remarks: First, that an Act committed against Promises of the former kind, may likewise be Void: for Instance, suppose a Prince hath engaged, that he will not levy new

Taxes without consulting the States of the Realm, we conceive that the Levies, which he shall make in this Arbitrary manner, are null and unbinding. And, Secondly, that as to the latter part of the Distinction, what Grotius there supposeth, cannot but maim and dismember the Sovereign Power.

XI. But to give us a deeper Insight into the Nature of Limited Monarchies, it will be useful to remark, that the Affairs, which offer themselves in the publick Administration, are chiefly of two kinds. Some may be settled and regulated before hand; because, whenever they happen, they have the same constant Nature. Others there are, on which, Judgment cannot be given, whether or no they are expedient to the publick Welfare, but at the very time when they appear: because the Circumstances which attend them, are not to be foreseen. Now a People, who have settled themselves in a Limited Monarchy, may provide, that in neither of these kinds of Affairs, any Prejudice shall arise to the Good and Safety of the Common-wealth. As to the former, by ordaining perpetual Laws, which the King shall be bound to observe: and as to the latter, by appointing a Council of Peers, or of Commoners, who shall always be consulted on such Emergencies. Thus a People, who are fully satisfied of the Truth of the Religion they profess, and likewise of the Decency of their External Rites, and their Ecclesiastical Polity, may oblige a Prince, when they invest him with the Government, to make no Alteration in the Establish'd Worship, by his own sole Judgment and Authority. Again, no Man is ignorant how much the Justice of a Nation suffers, when Causes are determin'd, not according to written Laws, but by the bare Sentence of the Prince, and by what they term Equity: since in this way of proceeding, Passion, or Ignorance must frequently get the Advantage over Reason (d). To avoid which Inconvenience, a People may engage the Prince whom they create, that he shall either observe the Laws already extant, or enact new and reasonable Statutes; and that according to these Constitutions, Justice shall be given by certain Colleges, or standing Courts; no Causes, except of very weighty Concern, or by way of Appeal, being allow'd to come before the King. Yet, as to this Point, Kings themselves are often fond of referring invidious Causes to the Decision of Others (e). And this Excuse is often serviceable, in putting off the importunate Intercessions of Great Persons on the Behalf of Criminals. 'Twas a brave Saying of the Emperor Andronicus Comnenius (f),

(a) See Hottomann. Franco-Gall. c. 12. (b) Xiphilin. Epit. Dion. in Sever. (c) Comp. Bœcler. ad Grot. l. 1. c. 3. s. 16. (1) Ubi supra. (d) Vid. Tacit. Annal. 13. C. 4 & 42. (e) Ovid. Metam. (l. 12. v. 626, &c.) makes Agamemnon use this wife Conduct in disposing of Achilles's Arms.

A se Tantalides odium invidiamque removit;  
Argolicosque duces mediis considerare castris  
Iussit, & arbitrium litis trajecit in omnes.

(f) Nicetas Acominas. l. 1. De Imper. Andronic.

The King throws off the Odium, and denies  
To sit sole Judge upon so vast a Prize:  
But cites a Council of the Martial Peers,  
And to the General Vote the mighty Cause refers:

That the Severity, and Authority of the Laws ought to be of more Force than his private Will and Inclination; and, that 'twas fit the Sentence of the Judges should over-rule the Opinion of the Prince. No less obvious is it to remark, how easily Luxury or Ambition may squander away what hath been got by the Industry and Sweat of other Men. On this Score therefore, lest the Riches of the Subject should serve only for Fuel to the Vices of the Sovereign, many Nations have wisely assign'd their Kings such fixt Revenues, as they thought sufficient for his ordinary Expences on the Common-wealth; and left the raising of larger Sums, when there should be Occasion for them, to the Consideration of a Council or Assembly. In like manner, since some Princes, out of too great a Fondness for Martial Glory, hazard themselves and their Realms by engaging in unnecessary Wars; it was a prudent Caution in those People, who, when they confer'd the Sovereignty on their Kings, obliged them not to enter upon a War, at least not on the offensive side, without the Advice and Concurrence of a proper Council. We are told of the Inhabitants of the Island *Borneo* (a), that they have such a Natural Aversion to War, and to Martial Princes, that when they find their Monarch to be of a fiercer Disposition, they oblige him to fight at the Head of his Army, where he may meet with the greatest Danger. In these therefore, and in all Instances of Business, which a People find to be of publick Use and Benefit, they may provide for their own Security, by settled Constitutions and Decrees: least if they should leave the absolute Disposal of such Affairs in the Hands of the Prince, the Common Interest might possibly sometimes suffer,

From what hath been observ'd on this Head, it appears in what Sense we ought to explain, that Common Assertion of the *Grecian* Politicians, and others who follow them, when they tell us, *That the Government of a State ought rather to be committed to Laws, than to Men.* For the only rational Interpretation of such a Maxim must be this, that it is more expedient the Rulers of Common-wealths should govern according to the standing Prescriptions of the Laws, than according to their own private and unconfined Pleasure. For, otherwise bare Laws are no fitter to govern a State, than the bare Needle to govern a Ship, without the Assistance and Direction of a Pilot.

Many Examples and many Methods we find in History, how the Regal Power hath been limited and restrain'd (b) (1). But perhaps no Relation is so extraordinary as that which

*Solinus* (c) gives us of the People of the Islands *Hebrides* in *Scotland*: Their King, says he, hath nothing of his own; all Possessions lie in Common: He is tied to Equity, by establish'd Laws. And least Covetousness should tempt him from Truth and Right, he is taught Justice by the Discipline of Poverty; having no fixt Revenues, nor private Estate, but owing his Maintenance to the Publick Stock. He is allowed no Wife, but makes free with any of his Subject's Beds, as he thinks convenient. And thus he hath no Hopes of a Family and Children, to engage or to ensnare him. *Apollonius Rhodius* (d) tells us a lamentable Story of the Kings of the *Mostynæci*, that if at any time they pronounced an unjust Sentence, they were immediately shut up in a Tower, and there starv'd to Death.

XII. But whereas, as hath been already shown, Princes, in a Limited Monarchy, are for the most part obliged in such Affairs as the People thought fit not to leave to their absolute Disposal, to apply themselves to a Council, either of all the Subjects in general, or of Deputies, representing the particular Classes and Orders; it is farther to be observed, that the Power of such Councils is not in all places alike. For there are Realms, where the King, being in other respects Absolute, appoints a Council or Senate, the Approbation of which he makes essential to the Validity of his Decrees (e) (2). Now a Senate of this kind is, as to its Authority, no more than a Board of Counsellors; and when it proceeds to take the Royal Edicts under Examination and Censure, and to reject such as seem less expedient to the Common-wealth, it does this, not by its own proper Right, but by a power delegated from the Prince; who makes this prudent Provision, that nothing may be enacted prejudicial to the Publick, either through his own Inadvertency, or through the Instigation of Flatterers. *Plutarch* (f) reports it as 'A Law of the *Egyptian* Kings, which they constantly observed, to bind the Judges by Oath, that they should not obey the Prince himself, if he desired them to pass an unjust Sentence. And on the same Occasion, he tells us, that *Antigonus* the Third, gave Notice to the States, 'That in case he should, by any Letter to them, command any thing contrary to the Laws, they should not perform such an Injunction, but should take it for granted that he had forgot himself (g). By this means too, Princes often get rid of bold Petitioners, whilst in Appearance they grant the Request, but at the same time know, that the Senate will cancel and reverse it (h).

Yet, under this Constitution, if, at any time, the Prince positively insists in having his Will

(a) *Franc. Lopez de Gomara Hist. Ind. Occidental. c. 95.* (b) How the Power of the *Egyptian* Kings was confined, see *Diodor. Sic. l. 1. c. 71. Add. Plin. Nat. Hist. l. 7. c. 22. in fin. & Solin. C. 66. Philostratus (Vit. Apollon. Thyan. l. 3. c. 10.)* reports, that the ancient Constitutions of the wise *Indians*, permitted the King to stay amongst them but a single Day at once. (1) *Grotius, B. 1. c. 3. f. 16.* is more worthy to be consulted upon this, than the Places just mention'd. (c) *Cap. 35.* (d) *Argonaut. l. 3.* (e) See what *Neuhof* relates of the Empire of *China*, *Descript. Sin. C. 1.* (2) See *Gror. B. 1. c. 3. f. 18.* (f) *Apophtheg. p. 174. B. 183. F.* (g) *Vid. C. L. 1. f. 19. l. 1. De Precib. Imperat. offerend.* (h) *Vid. L. 10. t. 12. l. 1. C. De Petit. Bonor. sublat. Bodin. de Republ. l. 3. c. 4. p. 455. Gramond. Hist. Gall. l. 5. p. 277, &c. Job. Labardæ, Hist. Gall. l. 3. p. 132, 133. Ed. Paris. 1671.*

take place, and doth not own the Reasons, urged by the Senate, to be of Strength enough to persuade the contrary; the Senate cannot proceed farther in opposing the Prince's Power. For it is not supposed, that he, in appointing such a Council, intended to give up irrevocably his absolute Right of governing, and of his own accord to make his Subject's Obedience only conditional, when he might have claim'd it without any such Terms of Restraint. The Senate therefore, in this Case, hath its Authority only by Commission from the Prince, who may consequently put a Stop to it, when he thinks fit: tho' indeed he ought not to think fit, unless on very extraordinary Occasions. But thus much may be done on the People's side; when one King hath, by his own free Act, constituted such a Senate, they may oblige his Successors, (by an Oath, at their Admission to the Government,) not to dissolve it.

A Senate thus form'd, and especially if it be left in the King's Power to suppress it, doth not hinder the King from being Absolute. For when we apply this Denomination to a Prince, we do not presume that he acts whatever he pleaseth, according as he is led by the Blindness of Lust, or the Rashness and Inadvertency of Passion; but only that he determines, by his own final Judgment, all Matters belonging to the Common-wealth: which is very far from being Inconsistent, with a Necessity of hearing good Reason and sound Advice. Hence, altho' the Council, which such a Senate offers the Prince, doth not oblige him by its own Force, or by any Authority inherent in it self, yet, it affords the Ground and Occasion of an *Obligation*, by representing to the Prince after what manner he may truly discharge his Duty, in the Business at present under Debate (a). For so, a Physician cannot be said to *oblige* a Patient by his own Power and Authority; yet when he shews him what will conduce to his Health, the Patient is bound to follow his Prescriptions, by the Law of Nature, which enjoins every one to take care of his own Health and Safety. The same must be said of the Assemblies of the Estates in a Realm; which serve only for a larger Council of the Prince, by means of which, the Complaints of the People, which are often neglected or suppress'd in private Councils, may be brought to the Prince's Ear; who hath the Liberty of taking what Method he pleaseth for their Redress (b). It is well observ'd by Mr. *Hobbes* (c), that unless we would rob the King of his Sovereignty, and make a State with two Heads, such an Assembly cannot undertake more Business than the King hath propounded to them: *Since the People cannot choose their Deputies to other Intent, than is, in the Writing directed to them from the Sovereign, express'd.* For the same Reason, when

the Sovereign shall declare, that nothing more at present remains to be propounded to their Debate, the Body is dissolved. Yet they are allow'd, of their own accord, to inform the King of some Matters in the way of Address and Petition.

But the Sovereignty may then properly be term'd *Limited*, when the People at first confer'd it on the Prince, under this Condition, that before he proceeded to the Exercise of certain Acts, he should consult the Assembly of the Estates, and that without their Consent his Decrees should be of no Force. Yet still we ought to leave it in the King's Power, to call this Assembly, and to dissolve it (1): as likewise to propose the Matters which are to be debated in it; unless we would give him the Name only and Shadow of a King, or would throw the Common-wealth into an irregular Shape. And altho' it be granted, that the Estates assembled may, of their own accord, lay before the King Considerations relating to the publick Safety, yet the Decrees, which they form on such heads, shall derive their Force from the Royal Assent and Ratification. The Difference between such a Body of Representatives, and *Counsellors* properly so call'd, is this, that although, in their Applications to the Sovereign, they both act in the same manner, by Reasons and Advice; yet the Sovereign may reject the Reasons of the latter, but not of the former. Nor ought the Prince to think it hard, if the Estates do sometimes deny their Concurrence to what he offers. For he hath engaged himself by his Promise, to have always an Eye, and Regard to the common Welfare, which in all Probability, must be better understood, and more surely consulted by a Number of select Judges, than by a single Man. The Prince, therefore, in case his Estates should thus happen to dissent from his Opinion, must attribute the Misfortune to his own Inadvertency or Passions, or to the ill Fate of the Kingdom. 'Tis an idle Fear, which possesseth some Men, that by this means we shall put it in the Power of the Estates, to preserve, or to destroy the Common-wealth, as they think fit. For 'tis ridiculous to suppose so much Imprudence, either in the King, as that he shall be unable to represent to the Assembly the real Necessities of the Kingdom; or in the Assembly, as that, when they see the Business thus clearly laid before them, they shall obstinately betray their own Security. But this is certain, since the Persons who first invested the Prince with a Limited Sovereignty, cannot be presumed to have been Desirous, either of overturning and destroying the Government, or of hindring; by their Acts and Covenants, the true End of Civil Communities from being obtain'd; it may hence be gather'd, that these original Covenants and Agreements

(a) Add 1 Kings XII. 7, 8. *Martinus* in his History of China (1. 5. c. 37. p. 122.) relates, that the better sort of Princes amongst that People, made it a Custom, when they were admonish'd, by Persons celebrated for Wisdom and Goodness, of shunning Vice, or of pursuing Vertue, or of any Affair relating to the Publick Welfare, to receive the Advice with bended Knee. Add. 1. 6. c. 1. p. 20. (b) See *Grut.* 1. 1. c. 3. f. 10. (c) *Leviathan*, c. 22.

(1) See *Sidney's* Discourse upon Government, C. 3. s. 38, &c.

are always so to be interpreted, as that they may consist with the publick Safety, and on no account contradict and oppose it: And, consequently, that the Persons thus Covenanting, must be supposed to have done all, with this Reserve in their Mind, that the Terms and Conditions, which they now settled, should not, in the least, prejudice the General Interest or Security, or cause a Convulsion or a Diffolution in the Common-wealth. If then, such a Case should happen, that the Covenants, first entred upon by the People, should afterwards, in any Instance, appear prejudicial or destructive to the publick Welfare, it will be convenient, if the Matters shall admit of Delay, to propose them in an Assembly of Estates. When this cannot well be done, the King hath it in his own Power to correct, by Wisdom and Art, those dangerous Establishments. And the same Rule will hold, with regard to the standing Laws; which are now and then enjoyn'd Silence, by the Supreme Law, the Safety of the People. Thus *Agésilæus* commanded the Laws to *Sleep one Day*; that those who had fled in the Battle at *Leuctra*, might have Leave to return, without the usual Penalty and Disgrace. In the same manner, the ordinary Course of Judicial Proceedings is often hindered, either by the Necessity of the Times, or by the Condition of the Parties offending; who perhaps, were they to be formally Arraign'd, must first be vanquish'd as Enemies, before they can be Try'd as Criminals. Therefore Mr. *Hobbes's* Position will not stand, without some Grains of Allowance, when he asserts (a), *That the Evil inflicted by Publick Condemnation, is not to be styl'd by the Name of Punishment, but of an Hostile Act.* He speaks Truth, in case there was no precedent Crime: but when the Offence is evidently proved, the Evil inflicted will be truly and properly a Punishment, tho' the present posture of Affairs hinder the Offender from being Condemn'd in the Common Method of Justice.

XIII. But Mr. *Hobbes* seems inclin'd to allow no Distinction between Supreme and Absolute Power; or rather to make all Power Absolute, that is, Supreme. To whose Notions this general Remark may be applied, that what he so crudely delivers, should be limited with this Condition, *So far as the End of Civil Government will admit*: As, for Instance, when he says, that *He, to whom the Right of Punishing belongs in a Common-wealth, may justly compel all Men to all things that he pleaseth* (b). And indeed he himself inserts this Restriction; for he tells us, that by *all things*, he means, *all things that are necessary to the Common Peace and Security* (c). And so again, he observes, that *There is connected, with the Right of the Sovereign, so much Obedience in the Subject, as the Government of a State necessarily requires.* By the same Rule therefore,

when he affirms (d), that *He, who hath in such a manner subjected his Will to the Will of a Prince, as that the Prince may, without Restraint, do what he lists; make Laws, judge Causes, inflict Punishment, use the Strength and Riches of the People at his Pleasure, and all this by Right; hath certainly granted the highest Power of Sovereignty that can be given*: we are to consider, with what Purpose and Intention Men first applied their Minds to the constituting of Civil States: And then we shall suppose no Person to have voluntarily transferr'd on the Prince any farther Degree of Power, than appears conducive to that End, in the Judgment of any Wise Man: tho' to determine what is thus conducive according to particular Circumstances and Occasions, doth not belong to those who transfer their Right, but to Him, on whom it is transferr'd. The Sovereign therefore hath a Right of compelling the Subjects to all such things as he judgeth to be of any Consequence to the publick Good. But to constrain them, to that which is inconsistent with the Safety of the Common-wealth, or with the Laws of Nature, is what he ought not to entertain, even in Thought and Inclination. And if he should engage in any such Attempt, no doubt he transgresseth the proper Bounds of his Authority.

It may not be amiss, if we here examine the Arguments alledg'd by the same Author (e), by which he endeavours to make out, that it would be a vain Design to introduce a Limited Sovereignty. For, in this Case, says he, 'The Assembly, which prescribed Laws to the future Prince, had certainly an Absolute Power, at least actually, or virtually. If then, the Assembly continues; or, proroguing it self from time to time, meets again at a fixt Day, and a certain Place; this Absolute Power remains ever as it was first seated; and so the Prince will not have the Supreme Authority, but will be a bare Magistrate. (And thus much we grant, if the Assembly thus meets by its own Right, and hath the Power of determining all kinds of publick Business, and of calling the King himself, to an account.) But if the Assembly dissolves it self, unless the State be dissolv'd with it, there must be left somewhere a Power of punishing those who transgress the Law; which cannot be done without Absolute Authority: This Clause we deny, as utterly false; and we have no better Opinion of the Reason, on which he builds it: A Prince (says he) who hath so much Strength granted him in a rightful manner, as to enable him to punish any Subject whatsoever; enjoys the greatest Power, that a People can give. For the Weakness of this Argument will easily be discover'd by any one, who reflects on the Design of Civil Establishments, and considers, that by submitting their Will, and their Strength, Men do not turn themselves into

(a) *Leviath.* c. 28.(b) *De Cive*, c. 6. s. 6.(c) *G. 5. s. 6. & s. 9. in fin.*(d) *Ibid.* c. 6. s. 13.(e) *De Cive*, c. 6. s. 17.

meer Engines, to move no otherwife than as they are drawn; but that they only grant to Another the Use of their Powers under a Condition; so as that they themselves are to judge whether this Condition be made good, and if it be not, are at Liberty to retract what they gave. Alike absurd is it to pretend, that there is not more Security against the Abuse of Power in a Limited, than in an Absolute Government (1). He who hath Strength enough to defend his People, (as all Wise Subjects must allow their Prince) hath not always Strength enough to Oppress or to Destroy them. The Commands of a General may work with good Force upon his Souldiers, when he orders them vigorously to attack the Enemy: and yet they would be found very insignificant, should he bid them turn their Swords against each other. On the whole, he is a prudent Prince, who tho' intrusted with an Absolute Sovereignty, yet in some Instances waves his own particular Advantage, when he finds the Subjects are not to be brought to a Compliance, without endangering the publick Welfare. But they are no less a prudent People, who, well knowing what things would be inexpedient to their Constitution, have, by the means of Fundamental Laws, put it out of the Power of Princes to constrain them, in those Instances.

XIV. Lastly, It is incident to the Supreme Power, that it may be enjoy'd, either fully, or under more or less Degrees of Diminution: and this chiefly belongs to Monarchical Government. For some Kings possess their Realm in the way of Patrimony, Others in the way of Use only, not of Property; and this is either for the Term of their own Life, or with the Power of transmitting it to their Posterity under certain Conditions: and others are commission'd to hold their Sovereignty only for such a fix'd period of Time, which being once elapsed, their Power passeth away with it, and they return to the Condition of private Men. Indeed Mr. *Hobbes* (a) will have those Monarchs likewise to be call'd Temporary, who receive their power for Life, and affirms them to be properly no Monarchs, but only the Ministers (b) of the People. But it is contrary to the Common Custom of Speech to call him a Temporary Prince, who doth not lay down his Dignity, but with his Life: this Term being properly applied to those, whose Authority expires at such a certain and definite point of Time, not by Chance, but by Right.

XV. But Learned Men are not agreed to acknowledge any such Thing, as a Temporary Monarch. *Grotius* (c) will have the Dictator, amongst the *Romans*, whose Power lasted but six Months, to have been truly a Monarch: Because (says he) whilst this Period lasted, he

exercis'd all the Acts of the Supreme Authority, with the same Right, as those who are most justly and properly Sovereign Princes; neither could his Acts be revers'd by any other Power. But we understand the Nature of Moral Things by their Operations; and, consequently, those Powers, which produce the same Effects, ought to go under the same Name. Tho' the continuance of a Thing doth not change the nature of it (2), yet there is no doubt to be made, but that a Temporary Command is in Dignity much inferior to one Perpetual; since Men are wont to respect those with a much more solid Veneration, whom they apprehend to be incapable of returning to a private Condition, than those whom, in a little time, they are again like to see on the same Level with themselves. But indeed, *Bodinus* (d) before *Grotius*, and many good Authors since him, have shown, that the Dictator was by no means a Monarch, but only an Extraordinary Magistrate. Nor doth that Axiom stand on very sure Ground, *Those are the same Powers which produce the same Effects*: for it must be farther consider'd, whether the Person exerciseth this Power as properly his own, or as delegated to him by Others, to use in their stead. On which account, it is a Mistake likewise in *Grotius* (e), to rank those Persons in the Class of Temporary Monarchs, *Who, during the Minority of Kings, or in the time of their Captivity, or Lunacy, are appointed Protectors*: in as much as they are neither subject to the People, nor is their Power revocable, before the time fix'd by Law: For these Governours exercise the Supreme Authority, not in their own Name, but in Another's; and therefore can no more be term'd Monarchs, than we call a *Guardian* the Proprietor of the Goods of his *Ward*. And then, no Man, who is vers'd in the *Roman* History, will allow, that the Dictator, had all, and each precise part (3) of the Sovereignty so committed to him together, as that during the six Months Space, he might exercise it as he pleas'd. And as for what is urged, that *His Acts could not be revers'd by any other Power*; it is not absurd to suppose a Magistrate, so Commission'd and Impower'd, that, at least, in some certain Affairs, there shall lie no Appeal from his Sentence; and yet he shall be no more than a Magistrate (f).

It is worth observing on this Head, that the Power of the Dictators, and of all other Magistrates, appointed for a certain time, doth at that very Instance expire, and the Persons do, by Right, return to a private Station: And that therefore, what-ever they do, after this precise point of Time, is look'd on as a private Act, to which any Man may refuse Obedience (4); tho', perhaps they still bear the Ex-

(1) *V. Hobbes, c. 6. f. 13. ibiq. Annotat.* (a) *De Civ. ubi supra, c. 7. f. 16.* (b) *C. 9. f. 11.* (c) *L. 1. c. 3. f. 11.*  
 (2) See a Treatise of Mr. *Budde's*, intitul'd, *Jurisprudentiæ Historiæ Specimen*, c. 47. See His 43d Section to the 48. (d) *De Republ. l. 1. c. 8* (e) *Ibid.* (3) See *Rosin. Antiq. Rom. L. 7. c. 17.* (f) *Vid. Genes. XLII. 40, 44. L. 7. t. 62. l. 19. C. De Appell. & Consultat. L. 1. t. 4. l. 8. C. De Episcop. audient. V. Etiam t. 42. C. De Sentent. Præf. præf. & L. 4. t. 4. l. 17, 18. D. De Minoribus. Add. Livy, l. VI. c. 38. l. VIII. c. 33. l. XXII. c. 25. Valer. Max. l. 2. c. 7. f. 8. in fin.* (4) See *Sidney upon Government, c. 2. f. 24.*

ternal Ensigns of Power. Hence to abrogate the Command of such Representatives, there is no need of a new Decree of the People; but, if they refuse to resign, the old Decree is sufficient to be immediately put in Execution against them. For those Rights, the Validity of which depends on a certain Space of Time, as on a necessary Condition, do cease with the elapsed Time, without farther Process: But in Controversies about Rights, when the Quality of certain Actions is to be proved, there is need of long Debate, and of a formal Sentence. The reason of which Difference is this; there can be no Dispute whether such a point of Time is pass'd; but whether an Action was good or bad, may be argued with Probability on both sides (a).

But it is by many Men thought impossible to give an Instance of Temporary Sovereignty, if we speak of such Power as is properly Supreme, and not conferr'd by Deputation. For what we read of *Augustus* (b), that he would suffer his Empire to be granted him only for ten Years, and, upon the expiring of that Term, renew'd it again for ten Years more; was a meer Jest and a popular Cheat. *Nabarzanes*, in *Q. Curtius* (c), hid the vilest Treachery under the same specious Proposal: *Put Your Government* (says he to *Darius*) *into the Hands of Another, who shall bear the Name of a King, 'till such time as he shall have driven the Enemy out of Asia; and when his Victory hath secured the Kingdom, let him restore it to its proper Master. Let Bessus enjoy the Sovereign Command, during this Juncture; and when things are settled, let him deliver to You, the lawful Prince, that Power which he receiv'd only in Trust* (d). In *Nicephorus* (e) we find *Michael Palæologus* obliged by Oath, to administer the Government, 'till the lawful Heir and Successor should be grown up, and then to resign freely to him the Throne and all the Ensigns of Majesty. Tho' indeed his Oath was never kept. As for the Compact between *Eteocles* and *Polynices*, that they should Reign each a Year by Turns, this Instance may easily be Answered, by saying, that it was contrived only as an Expedient to keep the Kingdom undivided; each Brother thus possessing the entire Command, tho' in an alternate Course (f).

XVI. As for that way of possessing Kingdoms, by which they are said to be *in the Patrimony of the Prince*, we are first of all to observe, that a Man's Patrimony is not, strictly speaking, so much what he derives by Inheritance from his Parents, as what he enjoys with full Property or Dominion, by what-ever Means it came into his Hands. Hence, as

*Property* is chiefly applied to *Things*; so they too are especially term'd *Patrimonial*; in as much as they have no inherent Right, which might hinder the Possessor, either from employing, or from abusing them at his Pleasure. Afterwards Slaves came to be added to the Things or Goods, which compos'd the Patrimony of their Lords; who challeng'd so absolute a Right and Title over them, as to make the Servant not at all concern'd in his own Safety or Destruction, affirming the one and the other to be entirely the Master's Advantage and the Master's Loss. And within these Bounds did the Fathers of Families confine their Patrimonies in the early Times. For as to the Right of governing their Wives and Children, tho' this indeed belong'd to them, and to them alone; yet in as much as these near Relations were Persons considerable on their own account, they did not pretend to put them amongst their Possessions, or, to reckon them part of their Wealth and Estate(g). Nor are Men wont to set down their Learning and their Skill in the List of their Fortunes, however advantageous to them (h): tho' many a Person, by these Accomplishments, supplies the want of real Possessions, and comes under that Character in *Ovid* (i);

*Ars illi sua census erat.* —

— His Art was his Estate.

But when the Ambition of Princes began to rank amongst the chief Goods, a Power and Command over other Men; and many of them brought it into a Custom, to maintain their own Pleasures and Vices at the Subject's Cost; those Kingdoms came to be look'd on as Patrimonies, which the Sovereign had receiv'd a Power of alienating, as he should think fit: this being esteem'd the utmost Force of *Property*, and the very Effence, in which a real Possession did consist (i). Whereas other Monarchs, who had not obtain'd so vast a Privilege, and so unbounded a Power over their Realms, were said to hold them in the manner of *Personal Possessions*, and rather to have the *Use* of them than the *Property*. Which Distinction seems to have taken its Rise from the different ways of acquiring Government, especially Monarchical. For altho' no Prince can be lawfully Constituted, without the Consent of the Subjects, yet there are different manners of exerting and applying this Consent. So that, in some Cases, the King confers a Benefit on the People, in taking them under his Sovereignty: in others, the King is highly obliged

(a) *Vid.* Livy, l. III. c. 38, &c. (b) Dio. l. 53. (c) L. V. c. 9. (d) What we meet with in *Diod. Sic.* (l. IV. c. 23, & 33.) may be produced, with better Colour, for an Instance of a Kingdom *in Trust*. (e) L. IV. (f) *Vid.* Euripid. in *Phœniss.* Statius *Theb.* l. 1. (g) *Vid.* L. 50. t. 17. l. 126. f. 1. D. De divers. Reg. Jur. & ibi. Jac. Godofred. & L. 9. t. 2. l. 33. D. ad L. Aquil. (h) Philo Jud. *De Plantatione Noe*, p. 224. C. Ed. Paris. *The Painter reckons his Art, and every Mechanick the Mystery of his Calling, a kind of Inheritance or Fortune to him; not as an Earthly Possession, but as a free Reward. For these Advantages, tho' they do not fall under Property, yet are highly Beneficial to the Persons who enjoy them.* (i) *Metam.* l. 3. v. 588. (1) See the next Chapter, C. 11 and B. 8. c. 5. f. 9, &c.

and indebted to the People, for advancing him to the Throne. Those, who have given a Prince just Cause of proceeding to Hostility against them, in case they lose the Day, may by the Right of War, be deprived of all their Possessions, and of their personal Liberty it self. Therefore, if Men under these Circumstances are admitted to any Terms or Conditions, they are to acknowledge it as the pure Favour and Mercy of the Conquerour: who, tho' he leaves them to enjoy their Life and personal Liberty, and private Estates; yet is supposed to challenge the Sovereignty over them in the fullest and most irrevocable manner, for himself and his Posterity. The same Claim is presum'd to be made by a Prince, who receives a People into his Protection, when they had otherwise been inevitably ruin'd (a). Now the Effect, resulting from a Sovereignty thus obtain'd, is chiefly seen in this, that not only the Condition of the Subjects depends entirely on the Pleasure of the Prince; but that the Prince may transfer his Right of governing such a Realm, on any Person whom he shall choose; and consequently may appoint any Method of Succession, that shall be agreeable to his Judgment or Inclination.

XVII. But where the King receives his Crown from the Grant of the People, there, each Person, thus concurring, is supposed to have reserv'd and secured to himself so much of his former Rights and Privileges, as is consistent with the Nature of a Civil State. And therefore, the Condition of the Subjects, under such a Constitution, rather depends on their own Choice, than on the Prince's Pleasure. Yet they could not but find it necessary, to abridge themselves of their Natural Liberty in such a Degree, as the Form of Government required which they are now about to introduce. Farther, since in conferring Sovereignty by a voluntary Act, Men are usually prevail'd upon, by the Consideration of some peculiar Merit or Advantage in the Person, and therefore would not perhaps submit to the Authority of *Another*, as they are willing to yield to *his*; it follows, that according to the regular Course, the People are to determine on whom the Crown shall devolve, after the Decease of the King now elected. And here, if the People should not think it proper to constitute every new King by a particular Election, it shall be in their Power to settle the Method of Succession; and the Prince's Nomination shall, in this point, by no means hold good against their Act. Upon this account chiefly it is, that many Authors have affirm'd these Monarchs to hold their Realms *jure usufructuario*, by the Right of *Use* and *Profit*; as we have already hinted: in as much as by their own Pleasure, and without the Consent of the People, they can settle nothing, either in regard to the in-

ward Frame and Constitution of the State, or to the alienating and transferring it on any Person (b) (1). We are by no means for extending the Comparison farther, between Princes, constituted by the free Grant of the People, and those Persons, whom the Civil Law terms *Usufructuarii*, Possessors of things with a Title only to the *Use*. And therefore we utterly dislike the Assertion of Mr. *Hobbes*, which we meet with in his Book *De Cive* (c); *If*, says he, *the People, e'er they departed from the Election of a Temporary Monarch*, (that is, in his Notion, a Prince who receives the Government for Life,) *made a Decree to meet again at a certain Time and Place after his Death; then, so soon as he shall happen to decease, the Sovereignty returns in full to the People; not by any new Act of theirs; but by the Right which they before enjoy'd. For during that whole Interval, the Supreme Dominion was in the People, as to the Property, and only as to the Use and Exercise, in that Temporary Monarch.* This Notion, if taken in the gross Sense in which it is deliver'd, we cannot but look upon as highly dangerous and prejudicial to all those Limited Princes, who are ordain'd by the voluntary Donation of the People, and bound up to certain fundamental Laws. And the rather, because, since he hath taken the Liberty to call a King for Life, a *Temporary Monarch*, others may with as much reason extend the Name to those who receive the Sovereignty, with the Privilege of transmitting it by Inheritance, yet so as to keep it within their own Line and Family. Besides, since Mr. *Hobbes* hath not determin'd how far he would stretch the Parallel which he useth, he may easily be intangled in a Train of very pernicious Consequences. For since Property consider'd in it self, is a much more noble Right, than that of Temporary Use; some Men may on these Principles, conclude that the People are Superior to the Prince, and have a Power of bringing him to Correction, in case he doth not govern according to their Pleasure and Humour. On the like Score, we ought to reject what the same Author lays down in his *Leviathan* (d); that *Elective Kings have not the Supreme Power; that They, who have the Privilege of appointing a Successor after the Death of the present King, do really hold the Sovereignty even in his Life time: since none have Right to give that which they have no Right to possess.* For as to the Power of a Sovereign over his Subjects, it matters little what Provision is settled, or what Method agreed on, in Case of an *Inter-regnum*. And even when this Point is stated and determin'd by Law, the Subjects may nevertheless yield a most strict Obedience to the Prince, and be far from invading any part of the Sovereignty, or from thinking of a Successor, or of a new Form of Government, during the Life of their present

(a) The reasons urged against Patrimonial Kingdoms by *Franc. Hottomann. Quæst. Illustr.* 1. are answered by *Grotius*, l. 1. c. 3. s. 12. (b) *Comp. L. 7. t. 1. l. 13. s. ult. l. 15. s. 1. D. De Usufruct. & L. 3. t. 33. l. 9. C.*

(1) *V. Grot. ubi supra*, s. 13.

(c) *C. VII. l. 16.*

(d) *C. 19.*

Master. And then, besides, 'tis a very weak Consequence to say, that because an Elective Prince cannot appoint a Successor at his pleasure, therefore he hath the *Use* only, and not the *Property* of the supreme Command, and is no more than the Minister of a Power which resides in others. For all the Power which, in this Case, continues in others, is, that upon the Decease of the Prince, the Liberty of consulting their own Security, and of governing their Actions by their own Judgment, shall return to them. But for the maintaining of this Power, 'tis by no means necessary, so to break and divide the Sovereignty, as to say that the *χρῆσις*, the *Property* or real Possession

resides in the People, and the *χρῆσις* only, or the *Use*, in the Prince. Since even in the Case of an *Absolute* Lord or Governour, when he is extinct, the Person who was under his Dominion, falls again into the Liberty which Nature gave him, and the Force of which seems now to revive in him. Thus, who, for Instance, will pretend, that a Father hath only the *χρῆσις* of paternal Authority, because, upon his Death, the Children are at their own Disposal? Or that a Master hath only the *χρῆσις* of the Despotical Power, because in case he die without Heirs, the Slave recovers his Liberty?

## CHAP. VII.

*Of the Ways of acquiring Sovereignty, especially Monarchical.*

SINCE in examining how Sovereignty is acquired, it must (regularly) be supposed before hand, that the Person who acquires it, is different from those over whom he acquires it; 'tis manifest, that the Question before us, is but little concern'd with Democracies; under which those who command, and those who obey, are distinguish'd by a Moral respect only, and not a Physical. And though this Form of popular Government is sometimes set up, upon the Expulsion of a King, or of the Ruling Members in an Aristocracy; yet since still the governing and the govern'd Parties are the same, 'tis absurd to say, that the People have obtain'd the chief Command by a violent Course; or that the People have, by such Force as properly belongs to Subjects, erected a Sovereignty over themselves. In Democracies, therefore, (contrary to what we see in Monarchies,) the way of holding Sovereignty is ever one and the same. Yet these, as well as other States, may sometimes owe their *Increase* and *Improvement* to the Force of Arms, tho' never properly their *Original*.

II. In *Aristocracies* there appears some Difference, with regard to the manner of obtaining the Sovereign Power. Not only because, in some places, this Form of Government was introduced by the voluntary Act of the People, and in others by Violence; but likewise because, upon the Decease of any Member in these Ruling Councils, the vacant Seat is fill'd up in some Places by Election; and in some, again, Birth and Inheritance give a Title to the Honour. But in Monarchies, this Difference of Acquisition most visibly discloseth it self. For tho' all Princes in order to the Legal Establishment of their Authority have need of the People's Consent, yet this Consent is obtain'd

several ways; and even when the Sovereignty is confer'd by the free Motion and Grant of the People, there is still this Distinction, that some Princes are advanced to the Crown by Election, others by Succession (1).

III. The way of acquiring Sovereignty by Violence, is usually term'd *Occupatio*, or *Seisure* (2): which yet we must observe to be different from that by which we lay hold on things that want a Proprietor, and thus make them our own. For since, in things of this kind, there is no inherent Right, which might cause them to belong rather to one Man than to another, (excepting the Determination of Civil Laws,) hence to obtain the Property of them, there is no need of a particular Title, but it is sufficient barely to lay our Hands upon them, with a Desire of possessing them. But since every Man is, by Nature, equal to every Man, and consequently not subject to the Dominion of Others, therefore this bare seising by Force, is not enough to found a Lawful Sovereignty over Men, but must be attended with some other Title. When *Grotius* (a) therefore tells us, *That of Things which properly belong to no Body, Two are capable of Seisure, Sovereignty and Property*; we must not understand the word *Sovereignty* in the strict sense, for such as is exercis'd over Men; but for a Sovereignty over Lands, the Effects and Vertue of which amounts to this; That no Person ought to fix in such a Lordship, or District of ours, against our Consent, or unless he will yield himself a Subject to us. For Men cannot be said to *belong to no Body*; he is his own Man, who is not *Another's*. (b) And on this account the same Author (c) truly remarks, *That in case a Person dyes without Heirs, his Servants regain their Freedom, and his Subjects are left to their own Judgment*

(1) This manner of acquiring Sovereignty by the Right of Succession, takes place likewise in Kingdoms originally Establish'd by a forc'd Consent of the People, as will be shown hereafter in the 11th Section.

(2) See above in B. 4. c. 6. the last Section. (a) L. 2. c. 3. f. 4. (b) Xenophon. *Cyrop.* l. 4. p. 59. Ed. H. Steph. *Nothing is so much our own as our selves.* (c) L. 2. c. 9. f. 1.

and Disposal; inasmuch as neither of these fall under the Right of Seifure. But as for the Limitation which he adds, *unless they voluntarily relinquish their Liberty*; it might perhaps have been better omitted. For where can we find a Man, who will thus utterly wave and abdicate his Freedom? He may perhaps think it convenient always to be under some Master; but he will likewise claim it as his Privilege to choose one Service rather than another. Such *Occupancy* then, is a proper Means for the obtaining of Sovereignty as presupposeth a just Cause of the Invasion (1), and is confirm'd, by the Consent of the Subject, and by subsequent Articles and Covenants (a). For without these mutual Ties, the *State of War* continues; and there can be no Fidelity or Obligation, and therefore no true Authority or Command. On which Score *Hornius* (b) ought to fall under Censure when he asserts, *That he who subdues Another, upon precedent Injuries and just Provocation, immediately obtains a Lawful Dominion over the Conquer'd Party, and needs not to wait for his Consent*. For how is it possible to descend from the Condition of War to that of Peace, without some intervening Compact? Or how can Allegiance be owed to him, who hath not purchas'd and receiv'd it by some certain Terms of Agreement? All the Advantage which the Conqueror in a Just War, gains in this respect is, that he lies under no Necessity of caressing those whom he hath subdued, and of winning their Consent by Flatteries or Intreaties, but may extort it by denouncing the severest Evils. And therefore *Hornius's* Argument comes to nothing, when he says (c), *That if the Consent of the Conquer'd were, in this Case, necessary, a lawful Conqueror could never gain Dominion by Occupancy: in as much as the Occupancy would be of no force should this Consent of the Conquer'd be withheld*. For since such Occupancy supposeth the Victor to be superior in Strength to the Vanquish'd, and therefore able to set before them any Pains or Punishments; it cannot but have so much Effect, as to hinder them from with-holding their Compliance. Because, as there is no Man, who would not rather Conquer than be Conquer'd, so every wise Man, when he finds himself worsted, will be glad to come off as cheap as he can; and will by no means think himself prejudiced in yielding a Consent to the Victor's Sway (2), when without this he must have inevitably perish'd.

IV. But what shall we say in case the Dominion be *seised by Unjust Force*? As to this Question, it is first acknowledg'd on all hands, that a popular State, or the Majority in such a State, may for the avoiding any grievous Evil, (whatever be the occasion which threatneth it)

relinquish their present Liberty, and put themselves under the Command of a single Person, or of a select Council. And for the same Reason, that a People, subject to Kingly Government, may to escape Destruction, and when their Prince can no longer assist or protect them, submit themselves to another. But all the stress of the difficulty lies in this, that since Fear, unjustly caus'd, invalidates a Covenant, and since he who by his injurious Proceedings hath endamaged another, is obliged to make Restitution, how such a Consent of the Subject as is extorted by unjust Force, can confer the Sovereignty in so lawful a manner upon the Invader as to give him Quiet of Conscience in the Possession. For what *Hornius* says (3) is meer Trifling, *That since the Sovereignty which the Invader receiv'd by the Consent of the People, he did not take from the People, but was invested with it by GOD, therefore, were it to be restor'd, it must be restor'd to GOD, not to the People*. But we should rather conclude, that since the People, as *Hornius* himself allows, have the Power of appointing the Person in whom the Majesty should be infused by God; therefore, it is sufficient, if the Oppressor restores this Power only to the People. For if the People do but recover the Privilege of marking out the Person who is to govern them by their own free Choice, they will not think themselves much concern'd whether the Invader retains the pretended Majesty he hath seised, or restores it to Heaven. Our Judgment on this Point is, that we ought first, to consider, whether the forcible Invader, hath turn'd a Democracy into a Monarchy, or whether, he hath driven out a Monarch, and settled himself in his room. In the latter Case, the Obligation to Restitution doth not expire, till the Expel'd Prince and his Heirs, who had a Right of succeeding, are all deceas'd; or, till such an unfortunate Prince hath quite abdicated, or relinquish'd his Claim to the Kingdom: and this he is presumed to have done, as by other Indications, so if in a long course of time he hath made no Effort towards the recovering of his Crown (d). And in the mean time, even whilst the Invader's Title and Conscience are both unsettled, the Allegiance promis'd by the Subjects to him, holds strong and binding; provided they did not give it, till they had done all that could be requir'd of them towards serving their old Master (4). As for the former Case, this seems the most probable way of determining it, to say, that since a Nation may live, in all respects, as happy under a Monarchy, as under a Democracy, 'twill be easy for them to digest the Loss of their popular Liberty, if their new Sovereign proves a good Governor. And we may pre-

(1) Of this we shall treat in the Sixth Chapter of the Eighth Book, S. 21. (2) It was a wise Rule with the Incas of Peru, to advance the Empire, by the slowest and most insensible Degrees, and rather to invite new Subjects by Clemency and Kindness, than to compel them by Arms and Violence. *Vid. Garcil. de la Vega, Com. Reg. l. 2. c. 19.* (b) *De Civitate, l. 2. c. 9. f. 2.* (c) *Ibid.* (3) See our Author's Abridgment, *De Offic. Hom. & Civit. l. 2. c. 10. f. 2.* (4) *Ubi supra.* (d) *Vid. Justin. l. 4. c. 2. n. 3. Ed. Grav.* (4) *Comp. Grot. l. 2. c. 4. f. 14 & l. 1. c. 4. f. 19.*

sume they are thus satisfied, when their quiet Depoartment and long Use seems to have reconciled them to the Alteration. As for the few Murmurers and Malecontents which remain, they are not worthy to fall under regard: since there will not want some of this uneasy Temper, in every Form of Government, however freely and fairly constituted by the Community. But in case the Invader, after having made this Change and Revolution in the State, should treat his Subjects in a wicked and injurious manner, we can scarce conceive, that they are by any intrinsical Obligation engaged to obey him. We must not therefore grant *Hornius* (a) what he asserts without Proof, *That it doth not belong to the Nature of Sovereignty; to consider what way it was obtain'd: inasmuch as at all times, and in all places, it demands the same Correspondent Obedience.* For indeed, when a Person hath not only intruded into the Throne by Force or Fraud, but likewise still grievously oppresth the People, and seems to make open and arbitrary Violence the Standard of his Reign; this is a Guilt which seems incapable of being purg'd by any Course of Years, tho' Time in other Cases be thought sufficient to found a Right of Prescription. For long Possession is here nothing else but a long continued Injury (b) (1).

V. To these Enquiries another may be added, By what means and at what times a Community which hath thrown off Monarchical Government, is confirm'd in its new Democratical Frame? In resolving which Doubt different Judgments must be given, according to the difference of the Cases that may arise. *First*, then, if a City or Country hath on any Occasion whatsoever discarded the Sovereignty it once stood under, and set it self up for a Free Independent State, upon supposition that it hath transacted the Affair in a friendly manner with its former Lord, and hath by him been acknowledg'd for a Free Common-wealth, it immediately commenceth such, with the fullest Right of Liberty, and need not wait for the tedious Confirmation of Prescription and Use. *Secondly*, if a Sovereign hath upon just Reasons been divested of his Power, the Liberty is presently valid so soon as it is actually asserted; Nor is there any Necessity of its being either confirm'd by long Possession, or acknowledg'd for lawful by the former Lord; except so far as this last Circumstance may be a means of preventing all unjust Claims and quarrellsome Pretensions for the future (c). *Thirdly*, if the Constitution be alter'd by an unjust Rebellion, the Liberty thus usurp'd so long continues Unlawful, as the Rightful Prince shall labour to reduce the Rebels to Obedience, or at least by solemn Declaration shall protest and preserve his Right over them; till by long Acquiescence and Silence he may be presum'd to have given up his Claim. *Fourthly*,

if it so happen that a City or Country being in great Distress and Danger from an Enemy, shall in vain beg the Assistance of its Sovereign, who is unable to afford any Shelter or Support, so as to be put on its own Defence, and oblig'd to seek for Safety from its own Strength and Counsel; we are of Opinion that the Right of the said Sovereign doth expire, when for a considerable time the People have manag'd their own Affairs in a separate manner, and have no Intercourse, or Communication with their former Governour: inasmuch as this manifestly argues a *Dereliction* or *Desertion* on the part of the Sovereign. For tho' a King, or a Common-wealth should be forc'd, by the most pressing Necessity, thus to abandon a City, or a Country under their Dominion, to its own Care and Defence (d); yet so soon as they recover out of that Necessity, they ought immediately to return to the Exercise of their former Sovereignty. Otherwise how can he pretend to be my Prince, who, for a long time, hath neglected every part of his Princely Office, towards me, when 'twas in his power to have perform'd it (e)?

VI. The manner of acquiring Sovereignty by *Election* is, when a People already incorporated, or now about to incorporate, do, by their own free Choice and Judgment, *design* or *nominate* a certain Person for the supreme Command; who, upon receiving such a Decree of the People, or of their Representatives, together with the Promise of their Obedience, and having accepted the Offer, is thereby invested with the governing Power. *Election* is usually divided into *Free* and *Limited*. By the former, any Person, without Exception, may be *design'd*, who either is, at present or probably will be hereafter, in all natural respects, fit for Empire. By the latter, no Person can rightly be pitch'd upon who is not of such a Nation, or of such a Family, or indued with such a particular Qualification. But indeed, if we consider the Right of Electing, as it radically and fundamentally inheres in the People, every Election will appear to be, in it self, *Free*. For tho' an Order may have been once made, excluding such a certain kind of Men from the Crown; yet nothing hinders but that this Order may be repeal'd and disannul'd. But if the People devolve their Right of Electing on a few Deputies, they commonly tie them up to certain Laws, defining the Conditions and Requisites to be consider'd in those who are Candidates for the Sovereignty. In some Places the Government is confer'd by a kind of Mixture of Election and Succession: when the Crown descends, in course, to the Sons of the deceas'd Prince, yet so as that the Consent of the People, or of the Nobles, shall first intervene. Which Consent is not a bare Ceremony, like that of Inauguration, or of doing Homage, but hath the Force and Vertue of a Negative

(a) *De Civitate*, l. 2. c. 9. s. 4. (b) *Vid. Justin.* l. 3. c. 5. (1) *Comp. Gros.* l. 2. c. 4. s. 14. & l. 1. c. 4. s. 19.

(c) *Vid. Baudium de Induciis Belli Belgici*, l. 3. p. 178. (d) *Vid. Liv.* l. 3. c. 6. l. 23. c. 21.

(e) *Vid. Liv.* l. 35. c. 16.

Vote. As supposing a People to have first confer'd the Government on the Author and Founder of the present Royal Family, under this Condition, that he should transmit it to his Descendants, provided they appear'd fit to receive it: in such Kingdoms, the People, or the Nobles assemble on the Vacancy of the Throne, not properly to choose a new Prince, but only to declare, that they find no Objection in the Son to hinder him from inheriting his Father's Crown.

VII. An Election may be made, either in a rising State, now about to be set up, or in one formerly erected and establish'd. In the former, after the Original Compact between the Members thus uniting, and after a Decree pass'd for the introducing of such a Form of Government; the Community or the deputed Representatives proceed to Election. Which being finish'd, and the Grant accepted, and a Covenant thereupon ratified between the Prince Elect, and the People, there immediately commenceth a State perfectly Monarchical. But, in a Kingdom already establish'd, it may happen, that the Monarch deceaseth before his Successor is appointed; and then the Nation is said to suffer an *Inter-regnum* (1). Now what Frame a State falls into during such an Interval, may easily be apprehended, if we consider what those Bonds were which held it together, in its former more regular and perfect Condition. Since then the Intrinsic Perfection of the State, and the actual Existence of the Sovereign Power, were both owing to the latter Compact between the Prince and People; it follows, that the Person, in whom the Sovereignty properly resided being extinct, the Kingdom sinks into an imperfect Form, and is united only by the first antecedent Pact, by which we conceive the particular Members of the Community to have agreed to incorporate in one Society. Not but that this primitive Pact uniting the general Body, is during the time of an *Inter-regnum* considerably strengthen'd and assisted, by the Endearment of a *Common Country*, and that kind of Relation or Affinity which results from thence: together with this Consideration, that the Fortunes of most Men are fix'd and rooted in that particular Soil, and the Effects of others not easily to be transported or removed (a). And this too is the reason why a Common-wealth, under an *Inter-regnum*, holds more firmly together than an Army, (especially if compos'd of Mercenaries,) when it hath lost its General: inasmuch as the

Persons, who compose the latter Body, are such as either have no proper Country, or else a Country at a Distance. But now the wealthy part of a Nation, to preserve and secure what they possess, will be ever most forward in maintaining a good Agreement, and most industrious in re-establishing and settling the Government.

Tho' we may, with *Livy* (b), call a Nation, during an *Inter-regnum*, *A State without Government*, and as it were, an Army without a General; yet because Communities, at their first uniting, before the Sovereignty hath been confer'd, either on a single Man, or on a Council, seem to bear the Semblance of Democracies (2); and farther, since it is Natural, that all Persons, upon the Decease of Him to whom they committed their Guidance and Safety, should take Care of themselves; therefore an *Inter-regnum*, regularly speaking, hath the Appearance of a kind of Temporary Democracy: at least so far, as that the Consent of the whole People is to determine all Points, both in regard to the Administration of publick Affairs, and to the Creation of a new Prince; unless they are more inclin'd to introduce some other Frame and Constitution. And yet it is not properly a perfect Democracy; in as much as no Decree hath yet pass'd to fix the Sovereignty in a Council of the whole People, by perpetual Right; and because the Laws and publick Institutions are still adapted to Monarchical Government. Tho' it may likewise happen, that when a Kingdom consists of very large Integral Parts, as suppose of diverse Nations, Provinces or great Cities, it shall, in case of an *Inter-regnum*, appear like some Collective or *Systematical* Form (3).

Hence 'tis evident in what sense we are to expound that Assertion, laid down by *Grotius* (c) and others, *That when a King dyes without a Successor, the Sovereignty returns to the People*. That is, altho', during an *Inter-regnum*, the Sovereign Authority may so far be said not to be properly in the People, as that they have not receiv'd it in a formal manner, or by a perpetual Decree; yet they may in the mean time, either by themselves, or their Delegates, exercise all those Acts of Sovereignty, which appear conducive to their Safety and Preservation. For those Authors are manifestly in an Error, who assert, that upon the Extinction of the Royal Family, the *Sovereignty* doth not return to the People, but only the Power of designing and choosing a new King. As if, in the Case of an *Inter-regnum*, the People were Ne-

(1) See a Discourse of our Author's, *De Inter-regnis*, which is amongst his Academical Dissertations.

(a) *Lyfias contra Philon. Orat. 30. c. 2. p. 471.* Those who are Natural Subjects, but yet of such an Opinion, as to esteem any Country their own where they can promote their own Interest and Gain, must certainly neglect the Common Good of the State, to serve their own private Advantage: since 'tis not the Place where they were born, but the Fortunes and Riches they possess, which they look upon as their Country, and their dearest Concern. *Livy, l. 2. c. 1.* well observes, *That the Minds of Subjects are engaged and united by the dear Pledges of Wives and Children, and by a kind of Natural Affection to the Soil where they have so long taken Root.*

*Antiphon, Orat. 16.* Nor was it an easy thing for him to desert the City; his Children and his Wealth being sufficient Pledges for his Stay. Hence, as *Plutarch* remarks, (in *Mario, p. 410. A.*) the Romans chose Men in their Army according to their Estates; these being Pledges and Securities for Fidelity, whilst they seem'd now to have pawn'd or staked all they were worth. (b) *L. 1. c. 17.* (2) See above in *Ch. 5. S. 6.* (3) Upon this, see above in *Ch. 5. S. 16.* See a Discourse of our Author's, *De Systematibus Civitatum*, which is amongst his Academical Dissertations.

(c) *L. 1. c. 3. f. 7.*

cessarily obliged to constitute another Monarch! And as if they could not confer the ruling Power on a select Council, and so make an Aristocracy; or, establish the present Democracy, for a regular and standing Government!

VIII. But those States have consulted their own Peace in the safest manner, which, to avoid the Inconveniences usually arising from an *Inter-regnum*, have ordain'd, before-hand, on what Persons the chief Administration shall fall, when there happens to be a Vacancy in the Throne. And these, by whatever Names or Titles they pass, whether of *Inter-reges*, Protectors, Regents, or the like, are Temporary, (or, as we may say, *Provisional*) Magistrates, who, by the Authority of the whole People, are to perform, during the present Exigency, the Acts of the Supreme Power, at least such as are necessary to hold the Community together; yet so as to be accountable for their Management to the People; which account the new King doth, as in the Name of the People, demand. The Power of these Officers, upon the Election of another Prince, or the setting up another Form of Government, presently expires.

In those Kingdoms where there are constant and perpetual *Senates*, yet such as, in the Lifetime of the Prince, do not hold the Sovereign Authority; upon the Prince's Death, the Senate cannot, by any proper Right, claim that Authority, which before they wanted. Yet 'tis most convenient, that in case of an *Inter-regnum*, the chief Administration of Affairs shall, for that time, be delegated to them; as they were before employ'd by the King to assist him in his Counsels and his Cares. But then, the Power which they exercise on this Occasion, shall be supposed to be confer'd on them by the Grant of the whole People. For whatever Authority they receiv'd from the King, as a Body of Magistrates, expires upon his dying without a Successor (a); and if they are allow'd to proceed in the Exercise of their former Function, the Privilege is not owing to the Commission of the Prince, but to the Favour of the People (b). And therefore they can hold their Power no longer than the Community pleaseth; much less can they challenge a perpetual Sovereignty, or, by their own Authority, erect themselves into an *Aristocratical* Body, or a select governing Council. For 'tis the Prerogative of the Community, to establish what Frame of Government they think fit; unless they have, by Oath, obliged themselves to avoid some particular Constitution. *Dionysius Halicarnassens* (c) reports, that when the frequent Changes of the *Inter-reges* displeas'd the *Romans*, who seem'd thus to have brought a hundred Kings upon themselves by getting rid of one, the Senate refer'd it to the

Judgment of the People to put the Commonwealth into the hands, either of Kings or of Annual Magistrates; as should suit best with their Inclinations. Tho' indeed we find the People returning the Complement and leaving this Option to the Senate (d).

IX. To give farther Light to this Enquiry, it may be worth our while to examine the *Case* which Mr. *Hobbes* (e) puts, and the Issue of his Opinion upon it. *If*, says he, *the People assembled, deliver the Sovereignty to one particular Man to hold, only during his Life; and when they have so done, depart, without ordering any thing about the Place where they shall meet to make a new Election after his Death; they will be no longer one Compound Person, but a loose independent Multitude: in which it shall be lawful for any Man to meet and consult with any others, at any Time, and at any Place.* Whence he concludes, that such a Monarch is, by the Law of Gratitude, obliged to take Care that the State be not dissolv'd upon his Decease: either by fixing a certain Time and Place, when and where as many of the People, as think fit, may meet and form an Assembly; or else by nominating a Successor, according as the Interest of the Commonwealth shall seem to require. Now here Mr. *Hobbes* is in a Mistake, whilst he thinks, 'That the People by departing from one Assembly, without appointing the Time and Place for another, do disband and separate into a disorderly Multitude; applying it, as he doth, to those, who in choosing a King, have establish'd themselves into a regular and perfect State; and not to those who have it still under Doubt and Consultation, what State or political System they shall introduce. For when a Multitude come together on the last account, and depart without agreeing to meet again, 'tis plain they are dissolv'd *res seorsim*, and consequently remain in the same divided independent Condition in which they were before. But they who have once incorporated themselves into a regular Commonwealth, have subjected themselves to a King, and have fix'd all their Fortunes in this Seat, cannot be presumed guilty of such a Folly, as to desire, that upon the King's Decease, the State shall likewise be extinct, and themselves thrown into the natural Condition of Anarchy, not without manifest Danger of losing the Security, which they enjoy under the present Establishment. Therefore, if they have not conferr'd the Sovereignty on the Prince, with the Right of Inheritance, or with a Power to dispose of the Succession, as he shall think fit, they must be supposed, at least, to have tacitly agreed, that immediately, upon the Prince's Death, they will hold an Assembly, either at the usual Place, or where the Prince kept his Court. Nor will there be wanting, in a whole People, some Persons of great Authority and

(a) *Vid.* Connestag. *de Unionis Lusitan.* l. 3. p. 116. (b) *Add.* Bodin. *de Republ.* l. 3. c. 2. p. 417. (c) *Vid.* l. 2. & Liv. l. 1. c. 17. (d) See the History of the *Inter-regnum* in Poland, upon the Death of King Sigismund. in Paul. Piatec. *ad Ann. Christi*, 1632. (e) *De Cive*, c. 7. f. 15, 16.

Worth, whose Influence will be able to keep the Multitude in good order, and to bring them, as soon as possible, to a general Consultation, for settling the Common-wealth. Hence too it is evident, how far we are to admit of another Assertion of Mr. *Hobbes* (a), that *When a Monarch renounceth and abdicates the Government, for himself and his Heirs, the Subjects return to their Absolute and Natural Liberty.* For it can never be true in this Sense, that the People, on such an Occasion, relapse into a confused Multitude, without any Tye or Relation to each other; but only that they receive an absolute Right of lifting and disposing themselves a-new, under any Frame and Constitution.

X. In Hereditary Realms, there ariseth some Semblance of an *Inter-regnum*, when the King dyes leaving his Queen with Child, or, at least, under probable Hopes of Breeding. Now by the Consent of most Nations, a Right may be transfer'd even on un-born Heirs, so as to give them the just Title and Property, tho', as yet, incapable of the Use or Exercise (b). But now, whereas there is a proper *Subject*, in which the Supreme Authority resides, there cannot really be an *Inter-regnum*. On which account, neither the Minority, nor the Captivity of Princes create an *Inter-regnum*, in the strict Sense of the Word. Yet as to the latter Case, it hath been a frequent Practice in the World, for the Relations of a Captive Prince, to hold him for dead, and to proceed accordingly; whereas they ought rather to administer the Government in his Name, 'till he shall return from his Imprisonment, or dye under it (c). Now altho', before the Royal Issue be brought into the World, it cannot certainly be known whether the Child will prove alive or dead, a Son or a Daughter, (in Nations where the Fair Sex is excluded from the Crown :) yet till this Point is clearly determin'd by time, the People can by no means challenge such a Right, as they obtain in a proper *Inter-regnum*; but the Kingdom must, in the mean while, be govern'd in the same Method as is wont to be observ'd, during the Minority of a Prince (d).

XI. By the way of *Succession* or Inheritance, the Sovereign Right, which one Person hath

obtain'd or receiv'd, is continued to his Posterity. This Succession (1) is appointed, either at the Pleasure of the Prince, or at the Pleasure of the People (2). Those Princes, who possess their Realms after the manner of *Patrimonies*, have a Right to dispose of the Succession, according to their own Inclinations; and when they have once declared their Pleasure in this Point, it ought no less strictly to be observ'd, than the last Will of any Testator. And in this Case, a King may divide his Dominions amongst his Children by equal Portions, and without regarding the Difference of Sex. Or if his Legitimate Issue fail, he may transmit the Crown to his Natural (e), or to his Adopted Son; nay, if he thinks fit, to one no way related to his Family (f). But when such a Monarch hath made no Provision about the Succession, it must then be consider'd, what Person the common Course and Order of Nature calls to inherit the Throne. For though the Prince, in his Life-time, did neither by Testament, nor any other way, signify his Resolution in this Affair; yet we must presume, that he did by no means desire the State, should, upon his Decease, fall into Anarchy: Common Humanity not suffering him to leave his Subjects in a Condition of Misery and Ruine. Especially since, if he purposely declin'd to make a future Settlement, it had been easy for him to have given the People Notice; so that, upon this Intimation, they might have agreed on some Expedient for their own Security. Besides, we ought in Reason to suppose, that Princes, as well as other Persons, are unwilling that the Rights or the Possessions, which they have acquired, should, at their Decease, either be imbezeld, or left, as it were, to the first Taker; but that they would have them devolve entire to their dearest Friends. Therefore when such an Omission happens in Patrimonial Kingdoms, the same Order is to be observ'd as in Private Inheritances; except so far as the Disposition and the Safety of the Nation make it advisable to recede from that Method. For although 'tis very likely, that a Father bears an equal Affection towards all his Children, yet if he be wise, he will so far moderate and restrain it, as not to weaken the Hereditary Estate,

(a) *Leviath.* c. 21. (b) Hence the *Persians*, when their Prince *Harmisdas* died, leaving his Queen with Child, proclaim'd the unborn King, and crown'd Him too, by fixing the Diadem on the Royal Burthen: nay, they voted the Infant a particular Name, firmly believing it would be a Son. And this proved the Great *Sapores*, so renown'd in Story. *Agathias*, l. 4. c. 10. (c) *Vid.* *Justin.* l. 36. c. 1. *Trebell. Poll.* in *Gallien.* c. 1. We have a Story to this Purpose in *Dion Cassius*, l. 36. *Tygranes*, the *Armenian* Prince, had vast Treasures, laid up in the fortified Places of *Sophene*. When *Pompey* demanded all his Wealth to be delivered up to him, by those who had it in Charge, their Answer was, *That they would do nothing without express Orders from their Master.* And when *Tygranes*, though against his Will, commanded them to open the Castles, they still refused to comply, urging that the King laid this Injunction on them, not voluntarily, but through Compulsion. Yet they afterwards were oblig'd to deliver all up, when they found their Prince was severely used, and thrown into Chains upon their Refusal. *Demetrius*, being made a Prisoner by *Seleucus*, commanded his Son, with his Captains and Friends that were at *Athens* and *Corinth*, not to believe his own Writing, or Seal when they should be shown to them: but to keep for *Antigonus* his Towns, and the Remains of his Kingdom, as if he were actually dead. *Plutarch.* in *Demet.* p. 914. D.

(d) *Vid.* *Serran. Hist. Gall. in Philipp. Valef. ab init.* (1) *Vid.* *Grot. l. 2. c. 7. s. 12, 13.* (2) See Mr. *Budde's* Dissertation, *De Testamentis Summorum Imperantium, & speciatim Caroli II. Hispan. Reg. c. 1. f. 21, &c.* See likewise *Sidney* upon Government, c. 3. s. 18. (e) Thus *Alphonfus*, King of *Arragon*, gave the Kingdom of *Naples*, which he had conquer'd, to his Base Son *Ferdinand*: whereas others pretended, that it ought to have been united to *Arragon*, by the Arms and Wealth of which Nation, it had been subdued. *Guicciardin.* l. 5.

(f) *Add.* *Justin.* l. 41. c. 5. n. 10.

on which the Security and Honour of the Family in a great measure depend: and he shall be presumed to have taken this Resolution, if he hath not expressly declar'd any thing to the contrary. From these Considerations it follows, that such a Prince as we are now speaking of, is desirous to have the Monarchical Frame of Government preserved after his Death; in as much as he shew'd his Approbation of it by his own Example, and did not afterwards reverse or alter it, by his Word or Deed. And farther, since Men are naturally inclin'd to wish best to those, from whose Success, some Honour and Glory is reflected on themselves, rather than on others; and since the Power of Children casts the brightest Glory on Parents, after their Decease; it must be concluded, that a Father is more heartily concern'd for the Happiness and Greatness of his own Issue, than of Strangers. If he had any other Design, he ought in express manner to have declared it: since, commonly speaking, we do not suppose a Man to have been so little Master of his Wits, as to deprive his Children of so fair an Advantage, and to leave it, as it were, on purpose to create Quarrels and Disputes. But Mr. *Hobbes* is in the wrong, when, amongst the Tokens which a Reigning Prince may give of his Resolution not to transmit the Crown to his Family, he reckons (a) for one, *long Custom*, 'In as much as he who says nothing 'about his Successor, is supposed to consent to 'the ordinary Custom of the Kingdom: Which 'Custom, whether it derives its Original from 'the primitive Founder of the Race, or from 'any of his Posterity, hath in time, pass'd 'into the Force and Authority of a Funda- 'mental Law. But the Enquiry which we are now upon is, What Order is to be observ'd in the Succession, when it is neither determin'd by the Appointment of the last Prince, nor by the Law or Custom of the Nation. To proceed then, our *Silent* Monarch must be presumed to desire, not only that the Kingdom shall preserve its regular Frame, that is, that the Sovereignty shall not be divided into Shares amongst his Sons, or near Relations, nor yet held in Common by them All, with equal Power; but likewise that the State shall not be parted into distinct Governments, and many Kingdoms introduced instead of one: In as much as either of these Alterations would draw after it, not only the exceeding great Hazard and Detriment of the Realm, but also the utter Convulsion of the Royal Family. The next thing which, in this Case, must be presumed to have been the Will of the Monarch is, that notwithstanding the Prerogative of Age, his Sons should be prefer'd before his Daughters; because Men are, for the most part, much fitter to command, and the Government of Women is generally attended with a long Train of Inconveniencies, which must

needs be increas'd, if the Brothers are to be set aside to make room for a Female Sovereign. Another thing to be taken for granted on these Occasions must be, that amongst Children of the same Sex, the Eldest is to be advanced rather than any of the rest: and this not only, because he is judg'd to excel the Younger in Wisdom, as well as in Years, but because, if we consider them with Relation to the Father, all Brothers are equal: And were the Crown to be bestow'd on the most Worthy of them, they could not avoid falling into Irreconcilable Differences and Contentions. A famous Instance of which Truth we have in the Revolutions, that not long since happen'd in the Empire of the *Mogul*, described at large by Monsieur *Bernier*. To prevent therefore all such Confusions, it is the best and safest Method to follow the Order of Birth, which is embraced by the universal Agreement of all Nations, as a Rule which Nature her self seems to have prescribed (b). Yet here it will be necessary, that the Eldest Son, who is thus prefer'd to the Crown, take effectual Care for the honourable Subsistence and Support of his Younger Brothers. But that he should be obliged to make their Fortunes as large, as if the Kingdom were to have been divided into equal Shares, is both needless and indeed impossible. For let us suppose four Brothers; whence can the Elder, who is to fill the Throne, procure so much Treasure, to pay the Portions of the rest, as shall be equal in Value to three Parts of the Realm (c)? If, in Monarchies of this kind, the Prince dies without Issue, his Brothers or Sisters are to succeed; and upon Failure of these, the next in Blood to the Deceas'd King; with due regard still to the Prerogative of Sex, and of Age. Nay the Government may, at length, devolve to those who were accidentally related to the last Possessor, tho' of a different Blood from the Author of the Regal Line. And this, not only, if the Deceas'd Prince thus declared his Will, but if, by the Custom of the Country, the same Method of Succession obtains in private Inheritances: for then, we must suppose, that the Prince would have the Custom hold in regard to his own *Patrimony* (1), as well as to those of others, when he hath made no express Disposal to the contrary.

Mr. *Hobbes* seems to have carried this Point a little too far, when he tells us (d), *By the same way as the Sovereignty descends, the Right of Succession likewise descends: For in case the Eldest Son dies before his Father, he shall be supposed, unless the Father hath made any other Settlement, to transmit the Right of Succession to his own Children: and therefore the Nephews and Nieces shall sooner come into the Succession, than their Uncles by the Mother's* (he means by the Father's) *side*. It cannot indeed but be acknowledg'd, that this Right of the Children

(a) *De Cive*, c. 9. f. 15. (b) *Add. Xenophon. Cyropæd.* l. 8. p. 139. Ed. H. Steph. in *Cyrus's* last Speech.  
 (c) *Add. Bœcler ad Grot.* l. 2. c. 7. s. 13. (1) *V. Grot.* l. 2. c. 7. f. 11. n. 2. (d) *De Cive*, c. 9. f. 19.

to represent their Father, and come into his place, looks very fair and equitable (r); and that his untimely Death should not be the Cause of a new Loss and Prejudice to them, seems to be but a reasonable Favour. And yet, since the Son, during the Father's Life, hath not a full Right to the Inheritance, but only a just Hope and Expectation; and since it doth not appear, that this bare Hope can be so well transmitted to Children, as the Right it self might be; we may with more Probability conclude, that, by the meer Right of Nature, the Nephews have not the Precedency of their Uncles; unless their Title is strengthen'd and supported by the Laws, or Customs of the Kingdom (a).

XII. But, in Kingdoms which were first constituted by the voluntary Act of the People, the Order of the Succession doth likewise, originally, depend on the People's Will. And, if they expressly confer on the Prince, not only the Sovereignty, but likewise the Right of nominating his Successor (which is seldom done, unless upon a very extraordinary account,) then he shall leave his Crown to whom he pleaseth. But, if the People themselves settled the Succession, they either were willing to have it pass in the usual way of other Inheritances, so far as that Method can conveniently be applied to Kingdoms: or else they appointed a particular Course, by which it should be regulated and determin'd. Now the Safety of the State requires, that the Succession of a Kingdom, *simply Hereditary*, (or where it is barely appointed that the Crown shall pass from each Prince to the next of his Kin,) should vary from the Order and Method of private Inheritances (2), chiefly in the following respects. *First*, That the Kingdom shall not be divided amongst several Brothers, or other Joint-heirs (b), equally distant in Blood from the deceas'd Prince. In as much as this Prohibition is highly conducive to the Agreement of the Subjects, and to the Support of the Nation and Government. *Secondly*, That the Succession shall stop at those Persons who are descended directly from the Monarch; and not pass to the Collateral Line, much less to the Degrees of Affinity (c). For the People, by their primitive Grant, design'd only to confer the Kingdom on such a Person and his Posterity; upon Failure of which, they again recover the Right of settling the Common-wealth as they judge convenient. *Thirdly*, That no Persons shall be capable of *succeeding*, but such as are born according to the Laws of the Country. By which Caution are excluded *Natural* or

*Base* Sons, however they stand in the Father's Affection, who may perhaps equal them to his Legitimate Issue. For, in those Nations at least which have any Honour or Spirit, such Men must lie open to Contempt, whose Mothers were not thought worthy of Legal Matrimony, and were used rather for occasional Instruments of Pleasure, than for agreeable Companions of Life. Besides, since the Ladies of that Profession are seldom famous for Constancy and Fidelity, and since they want the Advantage of a fix'd Cohabitation, it cannot so very certainly be known, whether the Prince be really the Father of this unworthy Progeny, which they charge upon him. But now 'tis highly expedient, that the Person of a King should be Awful and Venerable, and as little as possible, exposed to Controversy and Doubt (d). For which reason, 'tis the Custom, in some Nations, for the Queens to be *deliver'd* in an open Chamber, to take off all Suspicion of a supposititious Birth. And we read that Queen *Constance*, Mother of *Ferdinand* the Second, was brought to Bed of him, when she was past Fifty Years old, in a Pavilion erected in the most publick Part of the City, before a large Assembly of the Nobility of both Sexes (e). *Adopted* Sons come likewise under this Rule of Exclusion: as well because to be descended from the true Regal Line makes a Prince more respected, and fills the Subjects with better Hopes, that he will resemble his great Ancestors, no less in Virtue than in Blood: as because the People originally conferr'd the Crown on the immediate Race of the first Possessor; designing, when that should prove extinct, to resume the Power of settling the Government for the future. But allowing Adoption to give a Right to the Kingdom, this Power of theirs might be for ever forestall'd and eluded. *Fourthly*, That in the same Degree of Kindred, whether amongst the Children or the Grand-Children of the last Monarch, the Males shall be preferr'd to the Females, tho' the latter happen to be their Superiors in Age (f). *Fifthly*, That in the same Degree, and the same Sex, the Advantage shall be given to the Elder (g). *Lastly*, The Succession of such Realms differs from the Course of vulgar Inheritances in this, that altho' they are deliver'd, as it were, *from hand to hand*, and do not devolve to a new Possessor, 'till the Death of the former; yet of these Persons, the one is the *Occasion* only, and not the proper Cause, of transmitting them to the other: whereas common Inheritances pass to a *new* Proprietor by the Right, the Will and the Favour of the *last*. For 'tis not the

(1) See above in B. 4. c. 11. s. 12. (a) *Add. Bodin. de Repub. l. 6. c. 5. p. 144, &c.* (2) *V. Grot. d. l. s. 14, &c.*  
 (b) *Vid. Justin. l. 21. c. 1, 2.* (c) *Add. Bœcler ad Grot. l. 2. c. 7. s. 15.* (d) See a famous Instance of this in *Marrinius's History of China, l. 6. c. 1. p. 202.* When *Perseus* and *Demetrius* disputed which should succeed *Philip*, it was urged on behalf of the latter, that although he was the Younger of the Two, yet he was Born in honest Wedlock, whereas *Perseus's* Mother was only a Mistress of the King's: and that, for Evidence of this Distinction, *Perseus* had no Mark of *Philip* in his Body, whilst *Demetrius* exactly resembled his Royal Father. *Livy, l. 39. c. 53.* Add the Story of *Ferdinand King of Naples* in *Paul. Jov. Hist. Neapol. l. 2.* (e) *Pandulf. Collenut. Ret. Neapol. l. 4.* (f) *Add. Bœcler ad d. l. Grot. s. 17.* (g) Thus *Perseus* urgeth against his Younger Brother *Demetrius*, Competitor with him for the Crown, 'That he endeavour'd to invert the Order of Age, of Nature, of the Customs of *Macedon*, and of the Laws of Nations. *Livy, l. 40. c. 11.*

Pleasure of the Prince, under these Governments, which bestows the Crown on the next Wearer: but it descends in the Royal Line, by virtue of the original Act and Constitution of the People. And, for the same reason, it is not necessary, that the Prince who succeeds, though the nearest in Blood, should take upon himself the private Affairs, Incumbrances, and Debts of the Deceas'd. But, if he thinks fit, he may take Possession of the Kingdom, and refuse the Inheritance of the private Patrimony (1), to which that nobler Right of the Crown is by no means inseparably united; but is of it self an entire, distinct, and transcendental Inheritance. For the People must be supposed willing, to have the Crown descend by a clear and unquestion'd Title: but as for the peculiar Estate and Fortune of the Prince, they are not in the least concern'd or affected with it. Besides, it might prove a Burthen to the Nation, were the Royal Heir, at his Entrance on the Government, obliged to discharge such Debts as his Predecessor personally contracted: since in Case the private Patrimony would not hold out, the Deficiency must be supplied by the publick Stock. To conclude, the chief Reasons, which move any People to establish such an Order of Succession as we have been all along describing, seem to be these: That the Throne may be fill'd without any Controversy or Doubt; and the Inconveniences of new Elections avoided: that the Splendor of the Prince's Birth may increase his Respect, and his Race and Education give the Promise of more illustrious Vertue; and that the Reigning Monarch may still govern the Kingdom with more Vigilance, and defend it with more Courage, whilst he is to deliver it down to those Persons, who on the Score of Natural Affection, are the dearest to him in the World (a).

XIII. But since, in this way of Succession, which we call *simply Hereditary*, it may easily happen amongst Persons, far remov'd from the Author of the Race, that it shall not be clearly known which of the many ought to be prefer'd, if the Crown fell thus Absolutely to him who was next in Blood to the Deceas'd Prince; especially since the Favour of *Representation*, (or of letting the Children *represent* their Parents in *Right*;) quite vanisheth in these distant Degrees: to prevent any such Controversy, many Nations have introduced a more accurate Succession, which they term *Lineal* (2). Now according to this, all the Descendants of the Royal Founder, are conceiv'd to form a Number of perpendicular Lines, each of which approacheth nearer to the Throne, according as the Persons, in the same Degree, stand possess'd of those Natural Advantages,

the Prerogatives of Sex and of Years. And the Kingdom shall not pass into another Line, till the former is quite exhausted and extinct. It is needless therefore for Persons, in this List of Succession, to shew in what Degree they are related to the last Possessor, or to appeal to the Right of *Representation*; but, according as they are Born, the Law gives them a perfect Right of inheriting, in their proper Order: which Right, tho' they should happen themselves not to wear the Crown, they transmit, in the same Order, to their Children. Here then, the first Regard is to be paid to the Children of the Deceas'd Prince, and not to the Living only, but to the Dead, in case they have left Issue in any Degree whatsoever: for such Issue shall exclude all others, if their Parents were the nearest Lineal Heirs: yet so as still to allow in the same Degree of the same Line, a due Preference, first, to the Advantage of Sex, and then to that of Age. (For that the bare Prerogative of Age should out-weigh and overrule the Prerogative of Sex, can perhaps be instanc'd in no Example of History.) If the last Possessor dyed Childless, the Account passeth back to the next Line above him, and so on; still *ascending* from the *Deceas'd*; and not *descending*, from the first *Progenitor*: with the same Allowance as before to the two Prerogatives of Nature.

The two Species of *Lineal* Succession, commonly assign'd, are what they term *Cognatical*, and *Agnatical* (3): The former kind, which on account of its being receiv'd in the Kingdom of *Castile*, goes likewise by the Name of *Castilian*, hath this Peculiarity in it, that in the same Degree, of the same Line, the Younger Males are prefer'd to the elder Females; yet so as that no Transition is made from one Line to another on the bare Obstacle of Sex. Thus it doth not exclude the Women, but postpones them to the Men: and runs back to the Females again, in case the Males, who were superior or equal to them in other respects, shall happen to fail, together with their Issue. By Consequence, therefore, a Grand-daughter by a Son comes before a Grand-son by a Daughter, a Niece by a Brother, before a Nephew by a Sister. The other kind of *Lineal* Succession, or the *Agnatical*, differs from this, in that it excludes, from the Crown, the Females and their Descendants for ever. A Custom which seems chiefly to have been taken up, to hinder the Kingdom from passing, by Marriage, to Strangers; and to maintain the Ancient Stock in its due Veneration, which might be in danger of growing weak and despicable, by suffering so many Foreign Grains. This is commonly known by the Name of *French Succession*, having long obtained in that Nation. In

(1) See *Grot. B. 2. c. 7. f. 19.* with *Gronovius's* Note upon it. See *Mr. Barbeyrac's* 4th Note upon this Section.

(a) The *Persians* had a very extraordinary Custom, by which One-ey'd Persons, and those who labour'd under any other Corporal Blemish, were excluded from the Crown. *Protop. de B. Pers. l. 1. c. 11.*

(2) See *Grot. B. 2. c. 7. f. 22, 23.* (3) These Names come from the Words *Cognati* and *Agnati*, the former whereof, signifies the Kindred by the Mother's side; the latter, the Kindred by the Father's side. The latter only inherit the Crown by an *Agnatical* Succession, but one or other may obtain it by a *Cognatical* Succession.

some places the *Agnatical* Method is temper'd with this Reserve, that, in case all the Male-Line fails, the Right returns to the Females (a).

We may remark in general of Lineal Succession, that since 'tis so very plain and easy, it might be a principal means of deciding Controversies in Kingdoms, to enquire, first of all, what kind of Succession hath been there by Custom establish'd. A remarkable Instance of this the History of the last Age presents us with, in the Dispute about the Succession to the Crown of *Portugal*; when *Raynutius* of *Parma* stood on the Right of *Lineal*, the other Competitors on the Right of *Simple Inheritance* (b).

XIV. Another Method of Succession (1) may be introduc'd, by Virtue of which he shall always stand nearest to the Crown, who is nearest to the Founder of the Royal Family. Thus, then, the Founder's Sons are the first in the List; according to their Age; next to them his Nephews, with regard still to their Father's Age, and to their own: upon Failure of all these, the Founder's Grand-Sons come in, then his Grand-Nephews, and so on. This was the Course observ'd of old in *Numidia*, as we may gather from *Livy* (c). The like is practis'd in the Kingdom of *Siam* (d); and hath been in *Fez* and *Morocco* (e): as it was heretofore amongst the *Curacs* or petty Kings in *Peru*, under the Empire of the *Tucas* (f). Thus, in many Parts of the East *Indies*, especially on the Coasts of *Malabar*, 'tis the Custom for the Father to be succeeded not by his own Son, but his Sister's Son: the People fancying themselves to have more evident Proof, that the latter is of the Royal Blood than the former (g). In *Hispaniola*, the Nephews by the Sister are admitted for the same reason; tho' not till the direct Line fails (h). And amongst other *Indian* Nations, in that Neighbourhood, even in private Inheritances, the present Possessor prefers his Sister's Children to his own: excepting the Family of the *Tucas*, where the Son constantly succeeds the Father (i). The same Rule is follow'd in *Canada*, with regard to Honours as well as to Estates (k). *Strabo* (l) reports a very strange way of Succession amongst the *Chatramotita*, a People of *Arabia*. *The Crown passeth*, says he, *from the present Possessor, not to his Son, but to the first Nobleman that was Born in his Reign. For so soon as every new Monarch is settled in the Government, a List is taken of all the Wives of the Nobility, who appear then to be with Child; and Keepers are set over them, to observe which Lady is first brought to Bed of a Son: and the Child, which*

*thus gets the start, is declared lawful Heir, and educated in a Royal Manner, against the next Vacancy in the Throne.*

XV. 'Tis a Question usually canvass'd, who shall be Judge of the Controversy between two or more Competitors for a Crown; especially if the Kingdom be not Patrimonial (2)? For to try out an uncertain Title by the Sword, is a manifold Breach of the Law of Nature. Here then it is evident, in the first place, that Disputes of this kind cannot possibly be determin'd in the way of Jurisdiction, or proper Sovereignty: and that therefore they must be left to that Method of Decision, which holds amongst Persons, living in a State of natural Liberty, in subjection to no Judicial Authority (3). In which Sense we ought to understand what *Grotius* (m) hath deliver'd on this Point. Now those are said to live in a State of Nature, who are neither subject one to the other, nor both to a common Lord. And tho' the *Parties* themselves may perhaps, whilst they are contending, acknowledge a Sovereign; yet the *Cause* is of such a Nature, as not to bear the Sentence of any Person under the Notion of a Superior. First, a Foreigner cannot pretend to interpose as a Judge. Nor, Secondly, is the King himself, if the Controversy happen'd to be started in his Life-time, a sufficient Arbitrator: in as much as the People, in these Monarchies which we now speak of, are not suppos'd to have left the Method of Succession to the Pleasure of the Prince. Not but that we have many Examples, in History, of Kings, who relying on their own Authority and Worth have assumed greater Power in this respect, than the Constitution of Free Kingdoms would otherwise allow. Thus *Darius*, in *Herodotus* (n), decides the Quarrel between his own Sons: and, in *Plutarch* (o), *Artaxerxes* and *Cyrus* submit to their Father's Determination (p). And, Lastly, it may be maintain'd, that neither the People themselves can have such a Competition in an Authoritative manner. Yet not for the Reason assign'd by *Grotius*, *Because the People have transferr'd all their Jurisdiction to the King and Royal Family, and therefore can claim no Reliques of it for themselves, whilst any of that Line survive.* For Succession in such a Case doth not belong to that Jurisdiction, which the People conferr'd on the King: and if a Quarrel of this kind should arise, during an *Inter-regnum*, the People cannot be debar'd, at least, from a Temporary Jurisdiction. But the true Reason must be drawn from the Nature of these Disputes. For the Effect of Judicial Power, as exercis'd

(a) *Vid.* Guicciardin. l. 12. p. 367. (b) *Vid.* *Connestag. de Unione Lusitan.* l. 3. (1) *Vid.* *Grot.* l. 2. c. 7. s. 24.

(c) l. 29. c. 29. (d) *Jodoc. Schouten in Descript. Regn. Siam.* (e) *Thuanus l. 65. ad Ann. 1578.* & *Connestag. de Unione Lusitan.* l. 1. the last of which Authors seems to hint, that this proceeded from a particular Compact between the Brothers. (f) *Garcilass. de la Vega, l. 4. c. 10.* (g) *Petrus de Valle, l. 1. Par. III. Epist. 6.* & *Hieron. Orosius*, in several Places of his Work. (h) *Franc. Lopez de Gomara. Hist. Ind. Occidental.* c. 28.

(i) *Idem.* c. 12. (k) *Franc. Creuxius Hist. Canad.* l. 1. (l) l. 15. p. 528. Ed. *Genev. Casaub.* (2) The best way is to refer it to an Arbitrator that is of the same Royal Family. *De Offic. Hom. & Civ.* l. 2. c. 10. f. 12.

(3) See *Mr. Barbeyrac's* Second Note upon this Section. (m) l. 2. c. 7. f. 27. (n) *Polymnia, init.* Yet *Justin* (l. 2. c. 10. n. 9, 10.) reports that the Cause was refer'd by the Consent of the Brothers to their Uncle *Artaxerxes*, as to a *Domestical Judge.* (o) *Artaxerx. init.* (p) *Add 1 Kings I. 5. &c.*

over Subjects, is, that they shall be obliged to acquiesce in the Sentence given, and upon Refusal, shall by virtue of the Sovereign Authority be compell'd to submit. And this, because 'tis one part of Civil Subjection, to expect from their Superior, the Decision of any Controversy that may happen between them and their Fellows. But now, if we run over all the various Doubts which may be rais'd on the Point of Succession, we shall find that not one of them is capable of being solv'd by the People, in the same commanding manner, as the Causes of private Persons are ended by the Ordinary Judge. For suppose a Prince, already settled in the Throne, with the Approbation of the People, should have a Claim put in against him by another of the Royal Family, who pretends to be the nearer Heir: In this Case, the People having acknowledged the Prince in Possession, it cannot be imagin'd, that the new Claimant will appear, or stand to their Verdict. Nor, on the other side, will the Possessor of the Throne submit to be judg'd by those, who have already own'd him for their Sovereign. Much less have the People a sufficient Power to give Judgment, when they refuse to own the Person, who puts in his Pretensions. But if, upon a Vacancy in the Throne, Two Competitors offer themselves, and engage in a Dispute about their Title, and the People only stand ready to receive him for their Prince, who shall have the better Right; there is here no need of Judgment properly so call'd, or such as is given by the Sentence of the Court, to compose Matters between private Men. For in this Case the controverted Point must be one of these two; Either barely, which of the Rivals stands in the nearest Degree, or else, which Degree ought to have the Preference? When the former happens to be the Question, the contending Parties are to clear their Descent as well as they are able; and he who shall appear to the People to make out his Claim most evidently, ought to carry the

Day. Now tho', in this Method of proceeding, the People's Vote weighs considerably towards turning the Scale, yet it is not pronounced like a Sentence from the Tribunal, but only in the way of a bare Approbation: as a Debtor who is ready to pay, desires only to see the Bill, and to satisfy himself in the Truth of what he is charged with.

But if the Dispute be, which Degree, or which Line ought to have the Preference, this shall be adjusted by the Common Declaration of the People; since every one is presumed to understand what way he likes best; and since the People is still to be reckon'd the same as it was heretofore, when the Order of Succession was originally establish'd. Thus the Controversy between *Edward* King of *England*, and *Philip Valois*, as likewise that which happen'd before, between *Jane*, Daughter to *Lewis Hutin*, and *Philip the Long*, was discuss'd before an Assembly of the Estates of *France* (a). Thus we find in *Mariana* (b) nine select Judges settling the Succession in the Kingdom of *Aragon*. And in *Dionysius Halicarnassus* (c), the People end the Differences between *Sylvius* and *Iulus*, in favour of the latter; chiefly on this Argument, *That he was born of a Mother, who had been the True Heiress of the whole Kingdom*. And yet, when this Declaration hath no more of the Nature of a judicial Sentence in it, than when a Person who hath first conferr'd a Grant, afterwards explains some Terms that were thought ambiguous, or obscure in the Instrument of Donation.

In Case either of the Competitors shall represent it as a Grievance, that the Affections of the People seem prejudiced in favour of his Rival, it may be the most ready Expedient to refer the Contest to proper Arbitrators; such as are neither inclin'd to one Party more than to the other, and, in regard to whose Interest, 'tis an indifferent Matter which of the Two gets the Victory (d).

(a) See the *French Historians*, and *Polydor. Virg. Hist. of Engl. l. 19. ab init.* (b) *Hist. Hispan. l. 20. c. 2, 3.*  
 (c) *L. 1.* (d) *Vid. Conestag. de Unione Lusitan. l. 3 & 5.* The most usual Controversies that occur on this Head, see in *Grotius, l. 2. c. 7. f. 28, &c.* *Arniseus Relat. Polit. l. 2. c. 2. f. 10, &c.* and in other Authors.

## CHAP. VIII.

### *The Supreme Power is to be held Sacred in Civil States.*

AS Civil Empire, or Sovereignty, was first introduced to guard the Safety of Mankind, and to take off the almost infinite Miseries of a State of Nature, so that it be held sacred and inviolable by all Men, is highly the Interest of the whole World (a) (1). And thus much indeed every Man, in his Wits, will confess, that 'tis a Sin to oppose a lawful Ruler, whilst acting within the Limits of his

Authority. In as much as it appears evidently from the Nature and Design of Government, that there must of Necessity be join'd with it an Obligation to Non-resistance; or to a ready Obedience in performing or omitting any thing, which it shall command or forbid. The main Question therefore must be, whether in case the Sovereign should enjoin the Subjects what is unlawful, or treat them in an injurious

(a) *Add. Diodor. Sic. l. 1. c. 90.* (1) *V. Grot. l. 1. c. 4. f. 2.*

manner; He is then also to be esteem'd *Sacred*; and so, that the Subjects ought not, in a violent way, to resist and repel the Injury?

II. Mr. *Hobbes* (a) indeed maintains, that *A State cannot do Injury to a Subject, as neither can a Master to his Slave.* And he builds his Notion on this Argument, 'That no Covenant hath pass'd between the State and the Subject, (all Injury, according to him, consisting in the Violation of a Covenant;) and 'that the Will of the Subject is entirely submitted to the Will of the State, so that whatsoever the State acts, is supposed to be done with the Subject's Consent. But now that what a Man willingly consents to receive, can be no Injury to him, is a Maxim that every Body is acquainted with.' But we have already evinced (1), both that Injury doth not barely consist in the Violation of a Covenant, and that there doth really a Covenant (2) pass between the Monarch and his Subjects. And as for Subjects submitting their Will to the Will of the State, this must be interpreted, and restrain'd according to the true End and Design of Civil Communities; and then the whole Matter will come to this Issue: every Subject submits his Will to the Will of the State, in all those Affairs, which respect the Common Interest and Safety; and, in any Business of this kind, a private Member cannot complain of Injury, tho' he should happen to dislike the publick Proceedings. But since it is very possible, that the Sovereign Power may enjoin the Subject such Performances, or inflict on him such Evils, as bear no regard to the publick Welfare, but intrench on the particular Person's Right, whether acquired by Covenant, or by the universal Law of Humanity; there appears no reason why we should not affirm, that a private Member is capable of being *injur'd* by the State to which he belongs.

III. But here it ought well to be consider'd; that turbulent and querulous Subjects, are wont to censure many Actions of their Prince, as Injuries, which are by no means such. Every thing is by them condemn'd for Oppression, or Mismanagement, that doth not exactly suit with their private Judgment. Now as the great Variety of Men's Inclinations, and the Irregularity of their Aims and Wishes, make it impossible that the publick Administration should be equally grateful to all Persons; so he who exclaims against all Proceedings as injurious, which do not hit his particular Humour, is either contriving to overthrow the Constitution, or hath a Mind to be tampering in the Government himself. The last is the Case with many Murmurers; who are discontented only because the Common-wealth is not in their own Hands. Of this Number was

*Avidius Cassius* (b), who boasted that he took up Arms against *Marcus Antoninus*, because he was displeas'd at the Prince's Greatness, and could not bear the Name of an Emperor. The same Pretence was made use of by *Septimius Niger* (c), and by *Clodius Albinus* (d), in their Rebellions against *Severus*. Many complain of their Prince for employing bad Ministers; when if we search into the Bottom of their Discontent, we shall find it to be, only that they are not themselves prefer'd to a Share in the Ministry. The Common People often grumble at the Hardship of Taxes, when no more is demanded than what the present Occasions of the Publick, or such Necessities as are likely to arise hereafter, seem to require. And what Answer they ought to receive, *Mr. Hobbes* (e) will inform us. As for the strict and severe Execution of the Laws, no Person can make this the Ground of his Dissatisfaction, but such an one as desires a Liberty of committing Wickedness. After all, in case any Man looks on those Burthens as intolerable, which the Affairs of the Common-wealth make necessary, he hath the Privilege of quitting the State. And if he is not inclin'd to make use of that Privilege, he hath nothing to blame but the Common Condition of Mankind, who are not to expect in this World any Degree of pure and untainted Felicity. But should he think it allowable for him, on this account, to rid himself of the lawful Government by violent means; 'twere the same thing, as if he should resolve to improve his Fortune by Rapine and Theft, because he thinks it a Hardship, to maintain himself by his own Industry and Labour.

IV. Tho' all this must be acknowledg'd to be true; yet there is no doubt, but that a State, or the Sovereign Ruler of it, may do an Injury to a private Subject: since here the Parties are both under the same common Law of Nature, at least, which is sufficient to make them capable of being *injured* one by the other. Now a Sovereign may be conceiv'd to *injure* his Subjects two ways, if, in his Dealings with them, he violates either the Duty of a Prince, or the Duty of a Man; that is, if he either treats them *not as Subjects*, or *not as Men*. The Duty of a Prince respects either the whole People, or particular Persons. Thus much a Prince owes to the whole People, that he procure the Good and Safety, of the Community, either by his own Judgment, in case he be Absolute, or if his Power be limited by Laws, according as those Laws shall direct and prescribe. Therefore he *injures* the whole People, if he quite throws off all Care of the Government, in his own Person, and doth not so much as see that the publick Business be dispatch'd by his Ministers. As for Instance, if he should neither undertake the Defence of the Kingdom

(a) *De Cive*, c. 7. f. 14. & c. 8. f. 7. (1) In the Seventh Chapter of the first Book, *Señ. 13.* (2) See above in the Second Chapter of this Book, *Señ. 8. &c.* (b) In *Vulcat. Gallican.* c. 1. (c) In *Ælian Spartian.* (d) In *Jul. Capitolin.* (e) *De Cive*, c. 12. f. 2.

against Foreign Enemies, nor, by a due Execution of the Laws, secure its inward Peace; and yet in the midst of all this Neglect, should continue to enjoy the Titles and Revenues, and should judge the Greatness of a Prince to consist in the unbounded Extent of his vicious Pleasures. For if, together with the Administration, he lays aside the Honours and Profits of the Regal Office, he shall be supposed to have plainly abdicated the Government. Which Privilege of resigning the Crown, ought to be allow'd him, unless he hath first, by Evil Counsels, put the State under great Difficulties, and then would desert it in the midst of its Danger. And this must be own'd for a manifest Injury, thus to discharge no part of a Duty, and yet to desire the Reward and Advantage of it. But it will be a much greater Injury, should he, with Hostile Intentions, directly endeavour to overthrow the Common Safety; and put on the Person of an Enemy, which cannot possibly consist with the Person of a Sovereign (1). But such a Case as this can never happen, where a Prince is Master of his own Reason. For who, in his Wits, would ruine what belongs to himself (2)? Or where will he meet with *Subjects*, who use them as *Enemies*? Yet indeed, if he happens to enjoy two Kingdoms at once, 'tis possible that he may seek the Destruction of the one, to advance the Interest and Greatness of the other (3). But we have an Instance even of the former Madness, in the Story of a certain King of *Peru*, in the last Age, who by the Practice, as 'twas reported, of some Magicians, was possess'd with so utter an Aversion to his Subjects, that he took up a Resolution to make them all away; and in order to this, commanded that no Person, under Pain of Death, should Till the Ground, for the space of Three Years. Which occasion'd so grievous a Famine, that the People murder'd each other for Food (a). Again, a Prince injures the Community, if he subverts the Fundamental Laws, without the Consent of the People, and upon no urgent Necessity: or if he go about to change the manner of holding the Government. As likewise, if he should ruine the publick Patrimony; or if, by imposing greater Tributes, than the Occasions of the State require, he should first imploy the Subject's Purfes, and then squander away the Money in Extravagance, or send it out of the Realm: with many Acts of the same Nature. To all which may well be applied the smart Conclusion of the Old Greek Epigram (b).

Ἄλλα λύκος ἔργει τὶ δὲ τὸ πλέον, εἰ τὸ φύλαχθεν  
ὄμματα, εἴτε λύκοις, εἴθ' ὑπὸ τῷ φύλακός;

But he keeps off the Wolf: we own the Deed;  
But where's the Difference, if the Sheep must bleed,  
Whether the Keeper, or the Wolf they feed?

The Duty which a Prince owes to his particular Subjects, is, that he permit them to enjoy the same Rights with others of their Rank and Order; that he protect and defend them, and administer Justice to every one, so far as his regard to the publick Safety will allow him. If he fails in any of these Performances towards particular Persons, when the Condition of the Common-wealth would give him leave to discharge them, he certainly does the respective Persons an Injury (c). An Old Woman, who came with a Petition to the Emperor *Adrian*, and was told by him that he had no leisure, at present, to hear her, in a very angry mood made Him this smart Reply, *Ergo noli imperare, Therefore don't pretend to Govern* (d).

That Duty which the Prince stands under as a Man, he may violate several ways, in his Transactions with particular Subjects. As suppose he should undeservedly brand an honest Person with Disgrace and Ignominy; if he should with-hold the Reward promis'd to his Service; if he should refuse to discharge his Debts, or to fulfil his other Contracts or Engagements, or to repair a Damage, which he hath occasion'd by some extravagant Humour; if he should assault the Honour of chaste Virgins, should defile his Subject's Beds by Adultery, should hurt their Bodies, seize or destroy their Goods; lastly, if he should take away the Life of an innocent Person, either by direct and downright Violence, or by suborning false Witnesses against him, or by compelling the Judges, through Threats or Promises, to pass an unjust Sentence of Death: *Ammianus Marcellinus* (e) hath made a very sensible Reflexion on the Grievances last mentioned. *Amongst Arms and Trumpets, says he, the Equality of Condition makes the Danger seem lighter; and the Power of Martial Valour, either possesseth it self of what it attempted; or, if taken off by the Surprise of unexpected Fate, carries no Mark of Infamy along with it, but concludes Life and Pain together. But when the Pretence of Rights and Laws serves to cover and disguise wicked Counsels, when the Judges sit mask'd, in the severe Gravity of Cato or Cassius, but act every thing according to the Arbitrary Pleasure of their insolent Master, and the whole Affair of Life and Death is weigh'd and determin'd by his Humour, nothing else can ensue but Capital Destruction and precipitate Ruine.*

V. But 'tis a Point of greater Difficulty, to explain whether Subjects are obliged to endure all those Injuries without resisting, or whether, in some certain Cases, they may not repel them by Force? Our Judgment on the Matter is this: Since such is the Condition of Human Life, that it cannot be exempt from all Inconveniences, and since 'tis not easy to find a

(1) As the Emperor *Caligula*, who wish'd that the Roman People were but one Head, that he might dash its Brains out, as we have it related in *Sueton*. c. 30. (2) *V. Grov*. l. 1. c. 4. f. 11. (3) This is what *Philip King of Macedonia* formerly did, as is related in *Livy*, B. 40. c. 3, &c. (a) *Joan. Moquet. Itiner*. l. 4.

(b) *Antipater in Antholog*. (c) *V. Justin*. l. 9. c. 6. near the end. Tho' indeed *Pausanias's* Action is by no means to be commended. (d) *Xiphilin. Epit. Dion. & Zonar*. T. 11. (e) L. 26. c. 13.

Man in the whole World, who is so nicely exact in his Behaviour, as to give a compleat and universal Satisfaction; 'twould be equal Folly and Impudence, to oppose a Prince for every Fault: especially since we our selves, on the other hand, are not so very punctual in the Discharge of our Duty towards *Him*; and since even in private Persons, the Laws are wont to pass over slight Miscarriages. Therefore how much more just and reasonable must it be, to overlook the pardonable Failings of a Prince, on whose Care the Tranquility of the whole Nation, and the Security of every Man's Life and Fortune depends? And so much the rather, since Experience informs us, with how fatal a Destruction of the People, and how miserable a Convulsion of the State, the very worst of Princes have been dethron'd. We are to forgive, then, the slighter Injuries of Rulers; as well in regard to their high and noble Office, and to the many Benefits we constantly derive from them in other respects, as out of a due Concern for our Fellow-Subjects, and for the whole Common-wealth (a) (1). *We ought to bear, says Tacitus (b), with the Tempers of Princes; since frequent Alterations can never turn to the Advantage of a State.* 'Tis a sensible Argument, that which *Cerialis* (in the same Author (c),) useth to the Rebellious *Treviri*. *As you would endure, says he, the Barrenness of a Soil, the immoderate Force of Rain, and the other Inconveniencies of Nature, so endure the Luxury or the Avarice of Your Rulers. There will be Vices in the World so long as there are Men; but then these are not perpetual, and are amply recompensed by the Intermixture of better Qualities.* Plato (d) speaks admirably to the same purpose. *A wise Man will take up this Resolution in regard to his Country; then only to reprehend the Miscarriages in the State, when his Reproof is likely to meet with good Effect, and not to draw down certain Ruine on himself: but when a Reformation cannot be wrought without the Expulsion and Slaughter of many Persons, he will never attempt to introduce a Change in the Government by violent means; but will give himself up to Quiet and Retirement, and pray for his own and the Publick Happiness (e).* Besides, a Man consults his own Safety, when he chooseth rather to dissemble the Affronts of too powerful an Oppressor, than to draw on himself some greater Mischiefe, by unreasonable Resentments and Complaints (f). Add to this, that as we are commanded by the Holy Scriptures (2), so are

we advised by sound Reason, patiently to suffer the Moroseness and Severity of our Parents and Masters (g) (3).

Nay farther, this too is most certain, That when a Prince with plain Hostile Intentions, threatens the worst and most cruel of Injuries, it is better, if we can, to withdraw our selves from the Stroke, and either to secure our selves by Flight and Concealment, or to remove into another Country and Government, for Protection. But what if a Prince should with this Hostile Fury, attempt to destroy an innocent Subject, without leaving any Possibility of Escape? Many, as to this Case, are not able to conceive how the same Man can thus bear the *Person* of a Prince, and of an Enemy together, in respect of the poor Sufferer; or with what Face he can claim the Privilege of being held inviolable, who thus is bent on sacrificing a guiltless Member of the State, as a miserable Victim to his Lusts. But they are of Opinion, that if he who owes another his Protection and Patronage, shall upon no Cause at all, or upon an unjust one, assume the Mind of an Enemy towards him, he releaseth the other Party from his Duty of a Client or Dependent; so far at least, as that it shall be lawful for the latter to make use of Force in defending himself from the unreasonable Cruelties of the former. Which Defence may the better plead for Favour, the greater the Number is of those whom the Prince endeavours thus injuriously to destroy. But since 'tis hardly possible to find any Examples of Princes, who entertain a Design against the Lives of innocent Men, and openly profess that they do it out of meer Arbitrary Pleasure; a greater Doubt ariseth, what Course can be lawfully taken, when a Prince goes about to exercise Cruelty under the Pretence and Colour of Right; as suppose, in way of Punishment, for the Neglect of an unjust Command. Now here we, first of all, take it for granted, that since in conferring any Power, there is a *Salvo* made to the Right of all Superiors, therefore the Subjects, upon the establishing a Sovereign Civil Authority, neither could nor would, by that Act, renounce the Subjection which they before stood under to Almighty GOD; and consequently that they are not bound, by any Injunctions of the Civil Power, plainly repugnant to the Divine Commands. What a Subject ought to do, in this Case, if threatned with Violence on the account of his Christian Profession, it is not our Business to determine (4); in as

(a) V. Justin. l. 15. c. 4. (1) V. Grot. l. 1. c. 4. f. 4. See Mr. Barbeyrac's Second Note upon this Section. (b) Ann. 12. c. 11. (c) H. 4. c. 74. (d) Epist. 7. p. 1281. D. Ed. Wech. (e) Cicero produceth this Passage out of Plato in the Ninth Epistle of his First Book *ad Familiares*. (f) See the Sentences cited to this purpose by Grotius, *ubi supra*. Æschylus *Prometh. Vinct.*

— ἐν ἑν πρὸς κέρτα, &c.

— When a self-will'd Lord  
Too big to be controu'd, and fiercely bent  
On Cruelty and Rage, ascends the Throne;  
Strive not in vain, nor kick against the Goad.

(2) 1 Ep. Pet. II. 17, 18. (g) Pliny, L. 3. Ep. 14. speaking of Masters being murder'd by their Slaves, says, *Non judicio sed scelere perimuntur*, They are kill'd, not in the Method of Judgment, but of Villany. (3) *Ut Parentum Severitiam, sic Patria, patiendo ac ferendo, leniendam esse*, Livy, l. 27. c. 34. (4) See Sir George Mackenzie's *Jus Regium*, p. 113, &c.

much as the same Scriptures, in which that holy Doctrine is deliver'd, may fully inform any Person, how infinitely it concerns him, not really, nor so much as seemingly, to act any thing contrary to his Religion (a), and at how great a Price, if Occasion be, he ought to purchase his Innocence. But that, upon the Apprehension of certain Death, a Man may undertake the Performance of an Action, in it self repugnant to the Law of Nature, without any Sin on his part, we shall by and by make out (1). Yet if the Action enjoin'd be such, as I cannot perform without deriving Guilt on my self, or such as I esteem to be, in its own Nature, more bitter than Death, and at the same time no reason is shown, nor so much as Probability pretended, either from some Fault of mine, or from the publick Good, why I should be put under this Necessity of doing what might either have been done by another, or ought not to be done at all; it is manifest, that the whole Design of such a Command, is, that I may be destroy'd, who have committed no Offence, purely to gratify the Will of the Enjoiner, and his cruel Disposition towards me. By which Act, since he lays aside the *Prince* to put on the *Enemy*, he is suppos'd at the same time, to have remitted the Obligation, which lay on the part of the Subject. But still, as far as 'tis possible, we are to avoid this Danger by Flight, and to seek the Patronage of some third Person, who is not by any Ties engaged to the same Prince. Nay, if all means of escaping are cut off, we ought rather to be kill'd than to kill (2): yet not so much out of Veneration to the Person of such a Ruler, as out of regard to the Commonwealth, which, on such an occasion, cannot but be imbroil'd in the most unhappy Troubles. But when a Ruler proceeds against a Subject, in way of punishment, for a real Crime, altho' here the Subject is not bound to meet the Mischief, by voluntarily appearing and offering up himself; yet the Reason why he cannot, in this Case, defend himself by Force is, that the Prince acts nothing here but what is consistent with his Right; and therefore it would be highly injurious, whatever the Pretence might be, to offer him any Hurt on such an account. It ought farther to be observ'd, that altho' we should grant never so fully, that a particular Subject may, in some Cases, guard his Safety, by Violence, against the injurious Assaults of his Superior, and this without Sin; yet it doth not hereby become lawful for the other Subjects to throw off their Allegiance, or protect the innocent Party by forcible means. For besides, that they ought not to make Inquisition into these Acts of the Prince, which he exerciseth as it were by Virtue of his Judiciary Power, and that many guilty Persons to draw *Odium* on the Government, make high Pretensions to Innocence; tho' the Person should happen to be really injured, the rest of the

People are not at all releas'd from their Obligation to Obedience. And that for this Reason, Because, in the first Contract, every particular Subject engageth the Prince's Care and Protection only for himself, and doth not suppose it as a Condition of his own Obedience, that all and each of his Fellows shall be justly treated. Nor is the Fear of being hereafter used in the same manner, sufficient to break off this Obligation in the other Subjects; First, because it is uncertain; and, Secondly, because 'tis possible the Prince's Hatred, to this Person, might be founded on some particular Reasons, which do not appear in others. But whilst the Subject's Obligation towards the Prince remains in Force, it shall not be lawful for him on what Pretence soever, to make any violent Resistance.

VI. Now, as what hath been hitherto deliver'd is, in the Opinion of many Men, not at all derogatory from the Sacredness of Princes: so, on the other hand, those Persons are not to be endur'd, who assert in gross, that a King, when he degenerates into a Tyrant, may be deprived of his Crown, and brought to Punishment by the People. For since the Acts of Civil Government are, for the most part so obscure, that the Multitude (3) cannot apprehend the Equity or the Necessity of them, and often, through Prejudice or Passion, will not apply their Minds to a Discovery of the Truth; and since, generally speaking, it makes for the Interest of the Commonwealth to let the Reasons of the State and the Grounds of publick Counsels and Proceedings, be known but by a very Few; it will be a most difficult Task, to point out exactly those several Actions, on the Performance of which, a Prince may justly be call'd a Tyrant, and as justly be oppos'd by the People, with any Violence whatsoever (b). Whence it may easily come to pass, that an *Odium* of this Nature shall be brought even on a good Prince, by such as either dislike his Person, or the present Constitution: since Men have been now long accusom'd in the Use and Signification of Words, to make them stand not only for the real Nature of Things, but for their own Humour or Affections. Thus much is acknowledg'd by general Opinion, that neither private and personal Vices, nor smaller Neglects in the publick Administration, are sufficient to denominate a Tyrant. Are heavy Taxes impos'd? The Subjects, who are not admitted to Council, cannot possibly judge whether the Necessity of the State requires this Provision or not. Are severe Penalties executed? Why, if this be done upon some precedent Offence, and according to the Laws; no Man can with Justice complain; tho' perhaps the Case would better have allow'd of Mercy and Pardon. Are some great Men innocently taken off, on the account of private Hatred or Suspicion; which, in vulgar

(a) See *Matth. X. 31, &c.*(1) *B. 3. c. 1. f. 6.*(2) *V. Grot. 1. 2. c. 1. f. 9. cum not. Gronov.*(3) See Mr. *Barbeyrac's* First Note upon this Section.(b) *Comp. Boecler. ad Grot. l. 1. c. 4. s. 14.*

Estimation, passeth for the highest and most provoking Grievance? Yet, if Plots against the Prince's Government, or other Crimes are, in pretence at least, laid to their Charge, or the ordinary Course of Judgment observ'd in condemning them; although perhaps the Persons themselves, and some few others may be thoroughly satisfied of their Innocency; Yet how is it possible that the rest of the People should have the same Certainty and Assurance? Especially since the Presumption of Justice always lies on the Prince's side. Well, but perhaps, Promises are broken, or Privileges formerly granted, retrench'd. Still, if the Prince be Absolute, 'tis but to alledge some Offence in the Parties, or some signal Advantage to the Commonwealth, and then he shall be supposed to have acted according to his Sovereign Right; and whether these Pretences be real or no, the Subjects are not able clearly to judge. And all Privileges must be construed with this Limitation and Exception, *Unless the Safety or Necessity of the Publick forbid them to hold any longer*. No small part of the Arguments usually brought for the opposite Opinion, fall of their own accord, if it be well consider'd, that these are two very different things, a People have power of applying Force to their Rulers, and of reducing them to Amendment, when they do not govern according to their Will; and, there is in the People, or in particular Persons, a Right of defending their Life and Safety against their Prince, upon the Approach of extreme Danger, and when the Prince is manifestly turn'd an Enemy towards them (1). For the Reasons which prove the latter of these Positions, do not in the like manner evince the former: and yet many Men confound the one with the other. And thus too when it is said, that a People, who have given themselves up to Slavery, have not thereby lost all Right of rescuing themselves into Liberty and Security; the Assertion will hold true only in this Sense, that a People may defend themselves against the extreme and unjust Violence of their Prince: which Defence, if it succeeds prosperously, brings Liberty along with it, as a necessary Attendant. In as much as the Lord, by thus changing himself into an Enemy, seems to absolve the Subjects from their Obligation towards him: so that they are not bound to return under his Yoak, tho' he should alter his cruel Resolutions. Excepting in this Case, a People who have given themselves up for Slaves, or rather, who have put themselves under the Command of an absolute Sovereign, have no more a Right of regaining their Liberty by Force, than I have of recovering a thing by Force, which I have already, upon Bargain, deliver'd to another Man. For this Civil Servitude is not so abhorrent from Nature, as some imagine; as that a Person who at one time, to avoid a greater Evil, finds it

necessary for him to consent to it, may afterwards, when Occasion favours him, throw it off again, by the Right and Privilege which Nature allows him. And altho' the State of Slavery, should be contrary to the Inclinations of a particular People, either from the beginning, or upon the changing of their Minds; yet 'tis by no means Lawful barely on this account, to deprive the Prince of that Right which he hath already obtain'd: no more than it is lawful for the Seller to take away from his Chapman what he before deliver'd to him upon Contract; tho' he should happen to find that the Sale did not prove to his Advantage.

VII. *Grotius* (a), in adjusting these Matters hath taken a Course, not very different from that which we have here follow'd. Amongst other things, he well observes, that whether or no the extreme Injuries of Sovereigns may be forcibly resisted, is best to be understood by considering, as well the Nature of Sovereignty, as the presumed Design of those who first incorporated themselves in a Civil State. As for the former, 'tis not in the least, repugnant to the Nature of Sovereignty, that all the Actions of the Subjects should by it be directed towards the publick Good, and that those, who oppose its Decrees, should undergo the severest Punishment; without allowing it the Power to murder Men out of meer Humour, so as on no account to be resisted. Nor is there any Natural Connexion between an absolute Power of procuring a Man's Safety, and an absolute Power of destroying a Man at pleasure. And 'tis impossible to make out, what such a Power in the Sovereign, or such an Obligation in the Subject, can contribute to the Peace and Security of the Commonwealth. On which Score it is evident, how false that Inference is which some Men make; the Supreme Authority is accountable only to God, therefore we have sufficient Reason to conclude, that the Persons, who first united in a Community, design'd to reserve to themselves no Degree of Right, which should hold good against the Ruling Power. As if to defend ones Life against an injurious Assailant, were to proceed against him in a judicial manner (b)! Nor is their Scruple of any Moment, who disallow the Liberty of resisting Governours, in Cases of Barbarous Cruelty, on this Argument, *Because we cannot frame to our selves any lawful Call, that the Subjects have to take up Arms against the chief Magistrate; since no Mortal can pretend to have any Jurisdiction over a Person of that Character*. As if Defence were the Effect of Jurisdiction! Or, as if he who sets himself to keep off an unjust Violence, which threatens his Life, had any more need of a particular Call, than he who is about to fence against Hunger and Thirst with Meat and Drink (c)!

(1) See Mr. *Barbeyrac's* 2d Note upon this Sect. See the Homily of the Ch. of England against Rebellion, the Second Part. (a) *L. i. c. 4. f. 7.* (b) *Comp. Bœcler ad Grot. d. l.* (c) *Comp. Ziegler ad Grot. d. l.*

As to the latter Consideration proposed by *Grotius*; about the Design of Societies, he rightly judgeth, that if those Persons, who by incorporating themselves in States, gave the first Rise to Sovereign Power, had been ask'd, whether they intended to lay this Burthen on all their Consciences, that they should rather choose to die, than in any Case to oppose, by Arms, the unjust Violence of their Superiors; they should certainly have answer'd, that it was never in their Thoughts to enjoin such a Hardship. For this would indeed have been a greater Inconvenience, than that which they endeavour'd to avoid by entering into a Civil Community. For before, they lay open to the Injuries of many, but still with the Right and Power of resisting them: whereas, by this means, they must have bound themselves quietly to suffer any Injuries from Him whom they had arm'd with their own Strength. And no doubt Fighting and Contention is a less Evil than certain Death.

VIII. But this Sacredness, which we have been hitherto touching upon, doth not belong to any Kings, but those who are really and strictly such. It cannot therefore be claim'd by those, who though they bear the Title of Kings (1), are yet subject to the Power of the People; as were the Ancient Kings of *Sparta*, and many elsewhere; invested rather with Authority to persuade, than with Power to command (2). Such a King was *Mezentius*, in *Virgil* (a), against whom

—*furiis surrexit Etruria justis,*  
*Régem ad supplicium præsentis morte reposcens.*

By just Revenge the *Tuscans* set on fire,  
With Arms their King to Punishment require.

Those Princes do likewise forfeit this Sacredness, who have either laid down their Dignity (3), or have utterly deserted and abandon'd the Kingdom; against whom, in case of grievous Injuries offer'd by them to others, it is lawful to proceed altogether in the same manner, as we might against private Persons. Not though, as *Semiramis*, who having prevail'd with her Husband to resign the Sovereignty to her for Five Days, made use of the Grant to take away the Life of the Giver; this Story proves nothing else, but the great Wickedness of the Wife, and the no less Folly of the Husband (b). Yet it sometimes happens, that those who have either voluntarily laid down their Authority, or have been deprived of it by some Misfortune, are still permitted to enjoy that formal Veneration of the People, which used to be paid to Princes, and all other external Badges of Majesty. Which Privilege,

as it is to be look'd on as meer Imagery, made up of nothing but the Regal Trappings and Ornaments; so unless it hath been confirm'd by some Pact and Agreement, it must be conceiv'd to depend entirely on the Favour and Complaisance of others (c). Thus *Labardée*, in his History of *France* (d), rightly observes, that whilst *Sedan*, and the Territories depending on it, was neither Feudatory to the Emperour, nor to the King of *France*, nor to any other Monarch or State, the Lords and Proprietors were truly Sovereign Princes. But after that *Frederic Maurice*, Duke of *Bouillon*, had resign'd this City, with its Dependencies, to *Lewis* the Thirteenth of *France*, receiving in lieu of it, certain Lands belonging to the *French* Crown; he required Security to be given him, that he and his Posterity should retain the Title and Character of the former Dignity: which could not be afterwards reckoned a true independent Honour, such as accompanies Sovereign Power, but only a nicer Shadow of Princely Greatness, having no farther Effect, than the obtaining such a certain place among the Noble Families of *France*, and some other ornamental Privileges. And the Truth of this appears evidently from that Act of the Duke, in desiring Security for his Titles, when he gave up his Dominions. Since those, who truly and properly possess the Sovereign Dignity, have no need thus to bargain for the safe Enjoyment of it.

Another way by which a King falls back (4) into the Condition of a private Man, is in case his Kingdom be seiz'd upon as forfeited; either by *Felony*, committed against him whose *Fief* it is; or by vertue of some Clause inserted in the Donation of the Crown, importing that, if the King should act thus or thus, the Subjects should be immediately releas'd from all Obligation to Obedience. So likewise if, in conferring the Sovereignty, it were expressly agreed, that the Prince, in some particular Designs or Practices, might be resisted; such a Covenant may no doubt be put in Execution. Lastly, if a Prince constituted by the People, shall go about to alienate his Kingdom, or to change the manner of holding the Government, 'tis manifest, not only, that any such Act of his is null and void, but likewise that in case he endeavour to compass his Design by Force, the People may oppose him in the same manner (e).

IX. It is another difficult Question, what may lawfully be done, and what not, against Invaders and Usurpers of Sovereignty; and this, not after that long Possession, or some subsequent Pact, hath given them a proper Right to govern, but so long as the unjust Cause of their possessing the Throne continues, and

(1) *V. Grot. l. 1. c. 4. f. 8.* (2) This is what *Tacitus* relates of the Ancient Kings of *Germany*; *Max Rex vel Princeps, prout Decus bellorum, prout fecundia est, audiuntur, autoritate magis suadendi, quam jubendi potestate. De Morib. Germanor. c. 11. Vid. etiam, c. 7.* (a) *Æn. 8. v. 494, 495.* (3) *Vid. Grot. d. l. f. 9.*  
(b) *Diodorus Sic. l. 2. c. 18.* (c) An Instance of which we have in *Dairo* of *Japan*. (d) *L. 10. p. 684.*  
(4) *Vid. Grot. ubi supra, Sect. 12.* See our Author in the Sixth Chapter of this Book, *Sect. 10, 11.*  
(e) *Add. Bacler ad Grot. l. 1. c. 4. f. 10.*

whilst they seem to be supported only by Strength. On this Head, we are first of all to enquire, whether the Commands of such Usurpers, whilst in Possession, have the Power of obliging? And here we must recollect, from what hath been formerly observ'd, that no Obligation to Obedience can be produced in me, unless the other Party had a lawful Authority over me. Meer Violence may indeed lay on a Man some extrinsecal Necessity of doing this or that; but it cannot impose an Obligation; which is an intrinsecal Engagement, so binding to the Mind, as to make the Neglect or Omission of it, sinful. When therefore a Man is threatned with Violence from a stronger Hand, he is perhaps compell'd to perform those things, to which he hath no Obligation, and which he really hates and abhors. But if he afterwards find Opportunity, no Man will censure him for breaking his way through these unjust Impositions. But what is to be done, if a Person, who at first indeed seiz'd upon the Government by Violence and evil Arts, would yet be thought to obtain it by Right, and tho' he reposes his Confidence in Arms, yet professeth to be no Enemy, but a true and proper Prince? as to such Cases, this seems in general to be the most probable Solution, that he who actually possesseth the Sovereignty, by whatsoever means he acquires it, is so long to be acknowledg'd by the Subjects, for their lawful Prince, as there appears no one who can claim the Crown by a better Right. For then it is consonant to Reason, that the Possessor's Power shall hold good, provided he act like a Legal Governour: it being the Common Interest of the People, that the Care and Direction of the State should rather lie in any one Person, than that, on the account of having no certain Head, it should be involv'd in endless Disputes and Disturbances. Since therefore the Subjects must be, in this Case, supposed to have, at least tacitly, consented to the Authority of their new Master, they shall be truly oblig'd to yield Obedience to him (a). Thus 'tis well known by what means the Family of the *Cæsars* rais'd themselves to the Imperial Dignity: and yet *St. Paul* (1) ascribes the ἐξουσία, the proper Power to them, as those who were to be obey'd for Conscience sake. And 'twas our Blessed Saviour's Command, *Render unto Cæsar the things that are Cæsar's* (2). For, at that time, there was no particular Person who had a better Title to challenge the Supreme Authority; and as for the *Senate* and *People of Rome*, they had receded from their

Ancient Right, though more out of Fear, and for want of Strength to make Opposition, than because they approved of this Alteration in the Government. It was a remarkable Law of *Henry VII of England*, which enacted, that no Person, who had follow'd the Party of the Prince then reigning, should be ever impleaded or condemn'd for that Act as Criminal, either by legal Process, or by Act of Parliament. The Reasons of which are discuss'd by my Lord *Bacon*, in his History of that Reign (b). After the same manner in an Hereditary Kingdom, when the Right seems to lie doubtfully between two or more Competitors; whilst the Controversy is yet in Agitation, and 'till such time as it may be determin'd, either by an amicable Accommodation, or by Arms, 'tis the safest Course to obey him who hath the actual Possession (c). And much more will this Conduct be justifiable in Strangers, whom it doth not concern to examine the Titles by which the Sovereignty hath been obtain'd, but who barely go along with the Possession; especially when the Possessor is supported by Great Strength and Power.

X. But when a Person, driving out the lawful Prince, seizeth the Government, and sets himself up for King, tho' he be really the Usurper of another Man's Right; what Course shall an honest Subject take under this Difficulty; in as much as he seems still to owe Allegiance to his rightful Sovereign during his Life? On which Point it appears reasonable to affirm, that things may often come to such an Issue, as shall make it not only allowable, but good and necessary to obey the Ruler in Possession, by what means soever the Possession was gain'd. As, if the Lawful Sovereign be reduced to such Streights, that he can no longer exercise any part of the Regal Office towards his People. For then, tho' the Commands of the Usurper, being destitute of Legal Power, are not, in themselves, obligatory; yet it becomes a wise Man to consult the Welfare of himself and his Affairs, to make Provision against the Future, and with Wariness and Caution to reflect on his present Condition; that he may not rashly thrust his Life and Fortunes into Danger: As he would do, should he, by vain Obstinacy and Opposition, draw the Usurper's Rage upon his own Head, without procuring the least Advantage, either to his Country, or to the Ejected Prince. Some are willing to deduce this Doctrine from the 13<sup>th</sup> Chapter of the Epistle to the *Romans*, where the Apostle says we ought to obey, ἡ μὲν δὲ τῷ

(a) *Aristophanes* (in *Ranis*, Act. 5. Sc. 4. v. 21, 22, 23.) hath a notable Remark to this Purpose: 'Men should not breed up a Lion's Whelp in their City; but if he be once bred up, his Temper must be complied with.'

(1) *Rom.* XIII. 1, 5. (2) *Matt.* XXII. 21. (b) 'Tis *Irene's* Advice in the Historian, (*Nicet. Choniat.*) *Nec Imperatorem qui absit, quærendum, nec qui adsit, pellendum esse*; Neither to seek after a Prince, who hath deserted the Crown, nor to disturb a Prince who possesseth it.

(c) *Cassius Clæna*, who had stuck to the Party of *Niger*, against *Severus*, thus makes his Defence to the latter: 'I own'd neither You nor *Niger* for my proper Master; and tho' I appear'd on the other side, yet my Aim and Endeavour was, not to oppose You, but to vanquish *Julian*. Since then my Design was the same with Yours, I am, in this respect, certainly Guilty of no Fault. Nor am I more worthy of Blame, for not revolting afterwards to Your Party. For You would not Your self have been willing, that any Friend of Yours, should have relinquish'd Your Cause, and gone over as a Defserter to *Niger*. *Xiphilin. Epit. Dion. ad Ann. 194. & Zonar. Tom. 2.*

try, not only for wrath; as if he should have told us, it was not the part of a prudent Person to provoke the Anger of him who bears the Sword, by an unnecessary Stubbornness; and that therefore, out of regard to our own Safety, we should be subject *mis vous êtes*, to the Powers which are in being, that is, which have the present Possession. Since then a State cannot subsist without some Government, and since he who actually wears the Crown, doth, at least in some tolerable Measure, maintain the publick Security; an Honest Man and a Lover of his Country ought not, when the Posture of Affairs requires this Proceeding, by an useless Resistance give Occasion to farther Troubles. But what seems hardest of all to be resolv'd is, how the Subjects can, at the same time, keep up two contrary Obligations, one to the Lawful Prince now expel'd, and the other to the Possessor, who hath constrain'd them to swear Allegiance to him, and for the present executes the Regal Office. For how can a Man pay Fidelity to two together, who are bent upon mutual Destruction? And yet, on the other Hand, the Covenant made with the Usurper by the Subjects, and the Faith, which they have engaged to him, seem utterly unable to take away the Rights and Pre- tensions of the Lawful Sovereign: as the Composition which a Country-Man makes with Robbers, to hinder them from waiving his Estate, is incapable of extinguishing his Landlord's Right and Property. *Grotius's* Opinion on the Case is this, that *Whilst the Usurper is in Possession, the Acts of Sovereignty which he exerciseth have a Power of obliging; not by Virtue of his Right, (for Right he hath none) but because 'tis in the highest Degree probable, that he who hath the just Right to the Throne, had rather, as things now stand, that the Commands of him, who is thus in Possession, should hold good, than that by the ceasing of all Laws and Justice, the Common-wealth should be thrown into utter Confusion* (a).

And indeed, we ought by all means to presume, that every Prince hath so much Humanity, as to desire that his Subjects should be preserv'd by any Method whatsoever, rather

than by striving in vain with their ill Fortune, and unseasonably expressing an Affection without Strength to support it, they should give themselves up for a fruitless Sacrifice (b). When the *Romans*, being themselves in Distress, were petition'd by their Allies, the *Petili*, for Relief, their Answer was, 'They confess'd themselves to be no longer in a Condition of supporting their distant Dependents, and therefore desired the Petitioners to return Home, and, since they had already given the utmost Specimen of their Fidelity, to consult amongst themselves, for the Future, how to make the best of their Affairs (1) (c). There appears nothing therefore, that can with more Probability be affirm'd, in the Point before us, than this, that if the Lawful Prince be brought into such Streights, as that neither he himself is able to afford his Subjects due Protection, nor they, on the other hand, able to resist the Usurper, without their imminent Ruine; it must be taken for granted, that he hath for a while releas'd his Subjects from their Obligation towards him, till such Time as Providence shall open a way to his Restauration; so far as is necessary to secure them from Destruction and Danger. And thus too, the Fealty promis'd to the Usurper, seems so far only to be binding, as that it shall be a kind of temporary Engagement, to expire so soon as the expel'd Prince shall recover his Dominions; and consisting not so much in any internal Necessity laid upon the Conscience, as in the Force of that Terrour under which they now stand. *Grotius* (d), in another Case, allows of an External Right and Property; and we see no Reason why there may not be admitted some kind of External Obligation, not affecting the Conscience (e). If we put all these Considerations together, we shall find, that there is scarce any Case in which a private Person may, by his own Authority, disturb an unjust Possessor of the Sovereign Dignity: especially since Experience witnesseth, that such Conspiracies do commonly exasperate the usurping Powers, to greater Violence and Oppression (f) (2).

(a) L. 1. c. 4. f. 15. Add. l. 2. c. 4. f. 14. (b) Comp. 2 Sam. XV. 25, 26. 1 Kings: II. 26.

(1) Vid. *Livy*, L. 23. c. 20. (c) Add the Speech of King *Ferdinand*, when he fled from *Naples*, in *Guicciardine*, Book I. near the End. (d) L. 3. c. 7. f. 6.

(e) See 2 Kings XI. 2 Chron. XXIII. on which Place Mr. *Hobbes* rightly observes, that *Athaliah* was dethron'd, not by any Right which the High Priest had in that Capacity, but by the Right of the Young King. *Leviath.* c. 44. What Opinion we ought to entertain of those Laws, which permit or reward the killing of Tyrants, see in *Baile* on *Grat.* l. 1. c. 4. f. 17. (f) Vid. *Justin.* l. XVI. c. 5. sub. fin.

(2) See Mr. *Barbeyrac's* Second Note upon this Section.

## C H A P. IX.

## Of the Duty of Sovereigns.

**I**T remains that we take a View of the Duty of Supreme Governours; which ought to be explain'd with especial Care and Diligence: as well in regard, that the Neglect of this Duty is the Occasion of so many Mischiefs in the World (1), as because to deliver the Rules and Measures of it, is the proper Business of this general Part of Civil Knowledge, it being placed beyond the Bounds of Municipal Laws. Yet in as much as others have frequently inculcated these Points, we shall reckon our Task discharg'd, in barely repeating the chief Heads (2). The Precepts, then, which unite in the making up of this Duty, may easily be gather'd, by examining the Nature and End of Civil Communities, and the proper Offices belonging to the Sovereign Power.

II. Here, then, it is, before all things, necessary, that Governours industriously apply themselves to the Understanding of every thing, that falls under the compleat Discharge of their Trust (3); since no Man can manage, with Commendation, what he hath not first rightly learn'd and consider'd (4). This was *Virgil's* Advice,

*Tu regere imperio populos, Romane, memento,  
Hæ tibi erunt artes; pacique imponere morem,  
Parcere subjectis & debellare superbos* (4).

Thee Heaven, Brave Roman, form'd for High Command,  
Be these thy Arts; form thy Victorious Hand  
To make glad Nations own their Peace bestow'd;  
To spare the Suppliant, and pull down the Proud.

*Isocrates* (b) hath a wise Remark on the same Subject: *It's certain, says he, that according as Princes cultivate their own Minds, so they must expect to find their Kingdom. And therefore no Champion, at the Games, hath so much need to exercise his Body, as a Governour hath to exercise and improve his Wit.* And the Admonition of the Satyrist, as it belongs to all Mankind, so especially it affects Princes.

Disce \_\_\_\_\_  
\_\_\_\_\_ quem te Deus esse  
Jussit, & humanâ quâ parte locatus es in re (c).

Study Thy self, what Rank or what Degree  
The Wise Creator hath Ordain'd for Thee,

And all the Offices of that Estate  
Perform, and with thy Prudence guide thy Fate.  
Mr. Dryden.

That those things, which appear necessary to be known, in order to the well-governing of a State, are not so very trite and vulgar, so obvious to all Capacities, may be gather'd from what Mr. *Hobbes* hath particularly deliver'd on this Point (d). *Isocrates* (e) calls a Kingdom, *The Greatest of Human Affairs, and such as requires more than ordinary Degrees of Prudence and Foresight: being not like the Offices about the Temples, within the Power and Ability of any Person to Discharge.* And *Xenophon* rightly concludes, that *Man is able more easily to govern any other Animals than those of his own kind* (f). Tho' there are many who think the *Italian* Proverb not altogether groundless. *Pochissimo cervello basta à governar tutto le mondo; There needs but a very little Brains to rule the whole World.*

From these Considerations it follows, that a Prince ought to abridge himself of all those Studies and Pursuits which contribute nothing towards this good End: in as much as the Art of Governing is so very difficult, as to require the whole Man, tho' of the greatest Parts and Abilities (5); who therefore must, as it were, forget his own Person, and live for the Sake of the People. Much more are Governours concern'd to retrench their Pleasures and useles Diversions, so far as they intercept their main Employment. For the same Reason, they ought to admit into their Familiarity Men of Wisdom and Experience (6); and on the contrary, to Discountenance and Chase away all flattering (7) Parasites, all trifling Genius's, and such as are Skill'd in nothing but what is Empty and Insignificant. *Receive into Your Friendship* (says *Isocrates* (g)) *not every Body, but such only as are worthy of Your High Birth and Station; nor those with whom You might pass Your Life most pleasantly, but those by whose Assistance You may best govern the Commonwealth. Use Your self to take Delight in such Company, as may both increase the Stock of Your Wisdom, and raise the Character of Your Vertue amongst Others.* Yet it were to to be wish'd, that *Carneades's* Observation were not too

(1) See Mr. *Barbeyrac's* Note upon this Section. (2) See *Charron* upon Wisdom, B. 3. c. 2. *L. Bacon's* *Serm. fid.* c. 19. (3) *V. Virgil. Æn.* 6. v. 848, &c. and Mr. *Barbeyrac's* Second Note upon this Section. (4) See *1 Kings*, III. 9. (5) *Æn.* 6. v. 852, &c. (6) *Ad Nicoclem.* (c) *Perfius, Sat.* 3. v. 71, 72. *Add. Phil. de Comines, l. 1. p. 342. l. 3. p. 388.* (d) *De Cive, c. X. f. 10.* (e) *Ad Nicoclem.* in the Beginning. (f) *Cyropad.* l. 1. *imit.* *Add Socrates's* Dispute with *Glaucon* in *Xenophon's* *Ἀπομν.* l. 3. (g) See Mr. *Barbeyrac's* First Note upon this Section. (6) See Mr. *Barbeyrac's* Third Note upon this Section. (7) See Mr. *Barbeyrac's* Fourth Note upon this Section. (g) *Ad Nicoclem. p. 34. Ed. Paris.*

often found true, that *The Sons of Princes, and other* (a) *Wealthy and Great Men, learn no Art well, but that of Horsemanship; because their Horse cannot Flatter them* (b).

III. The general Rule, which Sovereigns are to proceed by, is, *Salus Populi suprema lex esto* (1); *Let the Safety of the People be the Supreme Law.* 'Tis Plato's Description of a Prince (c), that *He neither thinks nor commands what may advance his own private Interest, but what may promote the Benefit of his Subjects: and whatever he says or does, is said or done for their Advantage, and for their Ornament and Grace* (2). For the Authority which Governours bear, was first conferr'd on them with this Intention, that it might prove a Means of procuring that End, for which Civil Societies were Establish'd. And therefore they ought to esteem nothing as contributing to their own private or personal Good, which is not, at the same time, profitable to the Common-wealth (3). *Would it not seem a Wonder to You, (says Socrates in Xenophon (d)) if he should be own'd for a good Herdsman, who lessens the Number, or multiplies the Ill Qualities of his Drove? 'Tis a much greater Wonder, if he who hath the Command of a State, and both wasts the Strength, and corrupts the Manners of his Subjects, doth not blush at his Mismanagement, and confess himself an Ill Governour.*

IV. In order to the internal Tranquillity of States, it is necessary, that the Wills and Inclinations of the Members be so moderated and directed, as shall appear conducive to the Safety of the whole Body. Hence it is the Duty of Supreme Rulers, not only to prescribe Laws fit for the obtaining of this End, but likewise so to keep up the Strictness of publick Discipline, as that the Subjects may conform to the Laws, not so much out of fear of Punishment, as out of Habit and Custom: In as much as bare Penalties are not so apt to produce a Care of doing well, (this being the proper Effect of Reason and Institution,) as a Sollicitude to avoid Discovery in doing ill. 'Tis Aristotle's (e) Maxim, that *The best Laws can operate with no Success, unless the Subjects be well Train'd and Educated from their Youth.* So Horace (f),

*Quid leges sine moribus  
Vanæ proficiunt?*

*Laws without Manners are but Words and Wind.*

There's one Part of the Character given the Ancient *Athenians* by *Isocrates* (g), which is admirable to this purpose: *They censured those (says he) as guilty of extreme Ignorance,*

*who imagin'd, that where there were the most accurate Laws, there must needs be the most excellent Men; when 'tis evidently so very easy a Matter to borrow and transcribe the good Regulations of other States. Therefore they concluded, that Virtue did not derive so much Advantage and Assistance in its Growth, from good Statutes, as from good Custom and Practice. That, the greatest part of Men must, of Necessity, frame their Morals according to those Patterns by which they were first taught and instructed; but that a numerous and accurate Establishment of Laws was really a Sign of the ill Condition of a Common-wealth: Edicts and Ordinances being then heap'd upon one another, when Governments find themselves obliged to endeavour the restraining of Vice, as it were, by Banks and Mounds. That, it became wise Magistrates, not to fill the publick Places with Proclamations and Decrees, but to take care, that the Subjects should have the Love of Justice and Honesty firmly rooted in their Minds. That, not the Orders of the Senate, or People, but good and generous Education, was the thing which made a Government Happy: In as much as Men would venture to break through the nicest Exactness of Political Constitutions, if they had not been bred up under a strict Obedience to them: whereas, those who had been form'd to Virtue, by a regular and constant Discipline, were the only Persons, who, by their just Conformity, could make good Laws obtain a good Effect.*

Towards the accomplishing of so good an End, in States, where Christianity is profess'd, this Religion it self doth in a high manner contribute; provided it be such as is preserv'd in its primitive Sincerity, purg'd from Human Corruptions, and inculcated, both by the Doctrine and Example of a Learned and Pious Clergy: In as much as that Holy Institution, doth not only comprize all the Points conducing to Eternal Salvation, but likewise the most perfect Scheme of Moral Precepts, which are admirably useful in disposing the Minds of Men to a Compliance with Civil Life, and yet which cannot so conveniently be establish'd by the bare Force of Civil Laws (4). For this reason, in all Christian Governments, which we are acquainted with, the Exhortatory part of the Law of Nature is given in Charge to the Ministers of the Church, to be by them press'd and enforced upon the Conscience; tho' the Dogmatical part belongs rather to those who have made this Science their peculiar Profession (h). Of great Advantage to the same Design are publick Schools; if employ'd for the teaching not of useless Trifles,

(a) *Add. Diodor. Sic. l. 1. c. 71.* The same Author (l. 12. c. 12.) reports that *Charondas*, amongst his other Institutions, order'd an *Action of ill Company*, and set a very severe Penalty on those who, being prosecuted upon this *Action*, should be convicted.

(b) *Plutarch. De Discrim. Amic. & Adulat.*

(1) *Cicer. De Legib. l. 3. c. 3.* (c) *De Republ. l. 1.* (2) See *M. Antonin. B. 4. c. 12.* See Mr. *Baynac's* First Note upon this Section. (3) See his Second Note upon this Section.

(d) *Ἄπομν, l. 3.* (e) *Polit. l. V. c. 9.* (f) *L. 3. Od. 24. v. 35, 36.* (g) *Areopagit. p. 254, 255. Ed. Paris.* (4) See *Montaign's* Essays, B. 1. c. 22. towards the End. (h) *Add. Grot. De Jure Sum. Potestat. Circa Sacra, c. 1. n. 13.*

and the Inventions of idle Brains, the Reliques of *the Kingdom of Darknes* (a); but solid Learning and Knowledge, the Use of which, diffuseth it self through all the Business of Life. Amongst these Studies, the chief is that which, upon sound and rational Principles, explains the Right of Sovereigns, and the Obligations correspondent to it in the Subjects (b). Another thing which adds Strength and Vigour to publick Discipline, is the Example of those who hold the Supreme Authority. *The Manners of the whole State* (as *Isocrates* (c) well observes) are drawn and express'd from the Pattern of the Prince. And therefore *Spartian* (1) had reason to say of *Caracalla*, when he married his Mother-in-Law, *He engaged in such Nuptials, as, had he understood himself to be a true Law-giver, he, of all Men, ought to have prohibited.* To see, then, that all these Particulars are duly regulated in a Common-wealth, should be the Care of the Supreme Directors.

V. Of great Service and Benefit it is, in order to the same End, to have a System of just, plain, and perspicuous Laws, for the settling of such Affairs, as the Subjects are most frequently concern'd in with one another. 'Tis the Advice of *Isocrates* (d) to a Young Prince, *As for Laws, seek those in general which are equitable and useful, and such as may render the Differences amongst the Subjects, as few as possible, and the Accommodation of them no less easy and expeditious.* The Marks which the same Orator hath set (e), to distinguish good Laws, are, that they be *Few in Number* (2), yet *satisfactory and intelligible to those who are to use them; just and profitable, and consonant to each other; and rather directed towards keeping up the publick Institutions, than towards preventing the petty Frauds of private Dealings* (f). It ought to be a settled Rule in this Point, not to Enact more Laws than conduce to the Good of the Subjects and of the State. For since Men, in their Deliberations about what they ought or ought not to do, are more frequently guided by their Natural Reason, than by reflecting on the publick Constitutions (g);

where-ever there are more Laws than can easily come within the Compass of their Memory, and those prohibiting such things as Reason, of it self, doth not prohibit, here the Subjects must through meer Ignorance, without any ill Intention, fall into the Laws as into so many Snares. And by this means, the Government brings the People under an unnecessary Inconvenience; which is contrary to the original Design of Civil States. Moreover, the ordinary Form and Course of Justice ought to be fix'd in such a manner, as that every Subject may recover his Right, by as short and as cheap a Process as can be contrived. The *Persians* have a Proverb, that *Short Injustice is better than tardy and tedious Justice.*

VI. And because 'tis in vain to enact Laws, if Governours suffer them to be transgress'd with Security; it is therefore their Part carefully to put their own Decrees in Execution, and to inflict due Punishments (3), according to the Nature and Circumstances of the Fact, and the Intention and the Malice of the Offender. In which Affair, they ought so to proceed, as that the true Force of the Laws may be exercis'd, not only upon the Subjects of moderate Fortune and Condition, but upon the Wealthy and Powerful; whose Riches and Honours ought on no account to give them the Privilege of insulting over their Inferiors with Impunity; especially since Commonwealths are never in more Danger, than from the Fury of the Populacy, exasperated by Unreasonable Oppressions (h). Nor ought Indulgencies or Pardons to be allow'd without very sufficient Cause: since not to treat alike those who, *ceteris paribus*, have deserv'd alike, is not only unjust, but hath also a peculiar Efficacy towards inflaming the Minds of the Subjects (i).

VII. But as nothing is to be guarded with penal Sanctions, which doth not contribute to the Advantage of the State, so in the annexing of those Punishments, such Moderation is to be used, as that they may bear a just Proportion to the same End; and consequently, that they

(a) Vid. *Hobbes Leviath.* c. 46. & *Lucret.* l. VI. v. 981.

(b) Vid. *Hobbes Leviath.* c. 30. There is a famous Passage, relating to the Instruction of Youth, in *Dio Cassius*, (l. 52.) in *Mecenas's* Speech to *Augustus*. Add the Dispute about suppressing the University of *Comimbra*, in *Comestag.* De *Unione Lusitan.* l. 8. Nor is that to be disregarded which *Gramond* in his *History of France*, (l. 3.) offers concerning the Number of Schools.

(c) *Ad Nicoclem.* p. 36. (1) *C.* 10. (d) *Ibid.* c. 31. (e) *In Panathen.* p. 453. (2) *Corruptissima Republica plurimæ Leges, dicit, Tacit. Annal. L.* 3. c. 27. (f) *Lycurgus* (*Orat. contra Leocrat.*) says that *Laws, by reason of their Brevity do not teach* (as is done in the Science and Study of Law) *but command Men how to act.* *Quintil. Declam.* 264. *Where's the Difference, whether there be no Laws, or such as are ambiguous and uncertain?*

(g) *Hobbes De Cive,* c. 13. f. 15. *Leviath.* c. 30. (3) We shall treat more largely of Punishments in the Third Chapter of the next Book. (h) *Leviath. ibid.* (i) *Pindar. Olymp. Od.* 13. v. 6, &c.

Εὐνομία βάδεν πολίων, &c.

Good Law, the Basis of a State,  
Here with her Sisters takes her Seat;  
Strict Justice, with unhaken Mind;  
And Peace, engaging to be kind.  
Through their fair Hands the Treasure flows,  
Which Heaven on craving Men bestows;  
Daughter of *Themis*, who presides  
In Councils, and wise Motions guides.

may be no more to the Grievance of the Subject, than to the Benefit of the Publick. In general, if it be desired, that Punishments should obtain their due Effect, they ought to be rais'd to such a Degree of Severity, as that the Pain and Sharpness of them may out-weigh the Profit or Pleasure, which might arise from the Transgression (a).

VIII. Farther, since Men first incorporated themselves in Communities, to obtain Security against the Injuries of Others (1): it concerns every Government to forbid the mutual Injuries of Subjects, so much the more strictly and severely, as their perpetual living together affords more easy Opportunities of Hurt and Mischief. Neither ought the Distinction of Orders, or Dignities to be allow'd such a Force, as to encourage the Great and Powerful in tyrannizing over those of meaner Condition. The way to purchase an *Honest Popularity*, is, (in *Isocrates* his Words (b)) *Neither to let the Commonalty grow extravagant and abusive, nor to let them suffer from the Insolence of the Superior Order; but to bestow Honours always on Persons of the greatest Merit, and to see that the rest are not wrong'd and trampled upon.* 'Tis a good Saying of the Historian (c), *Tho' it be enough for Private Men to do no Injury themselves; yet 'tis the Duty of Princes to take care farther, that others do none.* It is likewise repugnant to the End of Government, to allow Subjects in revenging, by their own private Force, the Injuries which they think themselves to have suffer'd.

IX. Besides, altho' a single Ruler cannot, in Person, discharge all the Affairs of an extended Realm, so that he must, of Necessity, assume Ministers into the Partnership of his Cares; yet these, as they derive all their Authority from their Master's Commission; so whatever they act, whether well or ill, must, finally be set to his Account. And therefore *Isocrates* (2) prudently adviseth; *So appoint others over the Business which You can't execute Your self, as considering that whatever they perform, will be ascribed to You.* And again, *If You happen to obtain a Magistracy, never use the Service of a wicked Person in exercising Your Office: For in whatsoever Point he Offends, the Guilt will be laid to Your Charge* (d). For which reason, and because as the Ministers are, so the Business will be well or ill managed (e), Governours are obliged to employ, in publick Trusts, Men of Integrity and Ability; often to inspect their

Proceedings (3), and to reward or punish them, according as they find them deserve; to the end that the rest may understand how strictly they stand engaged, to apply no less Fidelity and Diligence to the Affairs of the State, than they would to their own personal Concerns. The *Chinese*, to avoid all Inconveniences that might arise from Favour on the one hand, and from Resentment on the other, allow no Man to bear an Office in the place where he was Born: it being most likely that he should there meet with Persons whom he particularly loves or hates. Thus too, since wicked Men are tempted to the Commission of the greatest Sins, through Hopes of Impunity, which they easily entertain, where the Judges lie open to Bribery and Corruption; it's the Duty of Sovereigns severely to punish such Judges, as the Patrons of all those Villanies which disturb the publick Security (f), and to revoke their unjust Sentences and Proceedings. For the Practice said to be observ'd in *Aragon* seems unreasonable; to punish the Judges for a false Sentence, and yet to put the same Sentence in Execution. Besides, tho' the ordinary Management of Affairs is entrusted in the Hands of Ministers, yet the Supreme Rulers themselves, ought never to disdain the lending a patient Ear to the Complaints, or Requests of their Subjects.

What Qualifications Sovereigns ought to regard in those, whose Advice they would use (4) in the dispatch of publick Business, and what seems the most convenient way of getting out their Opinion, Mr. *Hobbes* (g) hath shewn at large. As to the latter Point, there's a remarkable Instance in *Davila's* History of the Civil Wars of *France* (h), where the Pope consults the Cardinals, not in a Consistory, but each a-part, about the Absolution to be granted King *Henry*. *Isocrates* (i) calls a Counsellor, *The most useful of all Treasures or Possessions, and the most worthy of a King.* *Neuhof* (k), in his Description of *China*, reports many things very worthy of Observation, concerning the Magistrates of that wise People. Nor ought we to undervalue the Directions of King *James* the First of *England*, in his βασιλικὸν Δώριον (1); that a Prince should choose his Counsellors chiefly by his own Judgment, not at the Pleasure of Others; and that he should take them indifferently out of all Orders of the People, in as much as he is the Common Father of All. In the same piece, the King hath assign'd the

(a) Add. *Hobbes* *Leviath.* c. 30. (1) See Mr. *de la Bruyere's* *Caractères Ou Mœurs de ce Siecle*, p. 334.

(b) *Ad Nicoclem.* p. 31. (c) *Xiphilin. Epit. Dion. in Galba.* (2) *Ad Nicoclem.* p. 35.

(d) *Themist. Orat.* 8. p. 117. When *Satibarzanes* petition'd his Master *Artaxerxes* for the Government of a certain Province, of which he was very incapable, together with the Sum of three Thousand Pieces of Gold; the King granted the latter part of his Request, but denied the former: for, *says he*, to give You so much Money will not make me more indigent, but to give You such a Government, would make me more unjust. *Euripides* (in *Rhes.* v. 626.) Every Man ought to be assign'd that Part in which he is capable of doing most Service. *Libanius* (*Legat. ad Julian.*) According as the Man is, whom You place in the Box, accordingly the Chariot will be guided. (e) Add. *Xenophon. Cyropæd.* l. 8. *post princip.*

(3) See *Charron, de la Sageffe*, B. 3. c. 2. (f) *Vid. Diodor. Sic. l. 1. c. 75, 76.* (4) *Charron, d. l.*

(g) *Leviath.* c. 25, 30. (h) *L. 14. p. 966.* (i) *Ad Nicoclem.* (k) *Descript. gen. Sinic. C. 1.*

(1) *L. 2.*

Reasons, why Men of moderate Condition should be pitch'd on, for the Offices relating to the publick Money (a).

X. Since the Subjects are obliged to the bearing of Taxes, and the like Burthens, on no other account, but as they are necessary to defray the publick Expences in War or Peace; it is the Duty of Sovereigns, in this respect, to draw no farther Supplies (1), than either the meer Necessity, or the signal Benefit and Interest of the State shall require (b). And then they are to see that these Impositions be levied according to the justest Proportion; and that no Immunities or Exemptions be granted to certain Persons, to the Defrauding or Oppressing of the rest (c) (2). Farther, that the way of gathering them, be with as little Charges as possible, and that much do not stick to the Collector's Fingers: Least it should happen to the Treasury, as it fares with Buckets in a Fire; they are fill'd to throw upon the Flames, but by passing through so many Hands, and being frequently shook from side to side, they are scarce half full, when they reach the place, which requires their Service. 'Twas a notable Answer, that which *Hybreas* the Orator gave *Mark Antony* the *Triumvir*, when order'd by him to double the Tribute in *Asia*; *You should, at the same time, command us* (says he) *to have a double Summer; and a double Autumn this Year* (3). Care ought likewise to be taken, that what is collected, be laid out on the Occasions of the Common-wealth, and not wasted in Luxury, Donatives (d), superfluous Magnificence, or idle Vanities. Lastly, Matters are to be so order'd, as that the Expences, as near as possible, keep a proportion to the Revenues; or where they fail, the Defect must be made up by frugal Management, and by retrenching unnecessary Charges. 'Tis of pernicious Consequence to affect more Pomp and State than the ordinary Income will support: and he doth, in Reality, live *Great* enough, who gives every one their Due. Nor ought we to be moved with that Sentence of *Tully* (e), *'Tis no great Commendation in a Prince to be reputed a frugal Man*: Which *Mr. Hobbes* (f) thus explains; *Frugality, tho' in poor Men a Virtue, maketh a Man unapt to atchieve such Actions, as*

*require the Strength of many Men at once: for it weakens their Endeavours, which are to be nourish'd and kept in Vigour, by Reward.*

XI. Tho' Rulers are not bound to afford Sustenance to their Subjects, (only, so far as Charity commands them to have a particular regard to those, who, by some undeserved Calamity, are rendred insufficient for their own Support (g); ) yet, in as much as the Sums, necessary to the Common Safety, are Collected from the Ability of private Persons; farther, since the Strength of a State consists in the Valour, and the Wealth of the Subjects; and because,

— *gravis est domino que servit egestas* (4);

*Poor Vassals are a Burthen to their Lord;*

Therefore, so far as in them lies, they are to take care, that the Estates and Possessions of their People be well cultivated and improved. *Isocrates* (h) is admirable in his Advice to this purpose; *Keep a strict Eye, says he, over the Fortunes of private Men; believe the Prodigal to spend out of Your Stock, and the good Husband to encrease Your Wealth. For all the Substance of the People is (as it were) the Domestick Treasure of a good Prince.* It will contribute much towards this End, if the Subjects be encouraged to take as plentiful Supplies as possible, from the Land, and from the Water; to improve industriously the Materials of their own native Growth, and never to hire other Hands, for those Works which they can conveniently perform themselves: and this is done by furthering, and promoting Manual Arts (5). And, in pursuance of the same Design, it will be of mighty Use, to advance the Exercise of Merchandise, and Navigation, in Maritime Countries (i). Nor is it enough to banish Idleness, but Men are to be brought to a frugal Method of living by *Sumptuary Laws* (6), which may forbid all unnecessary Expences; especially, those by which the Wealth of the Natives is transferr'd to Foreigners. 'Twas a Saying of *Mecenas*, that *Great Riches are gather'd, rather by spending little, than by receiving much* (k). Yet, in this respect, the

(a) *Add. Liban. Orat. 5. De Affessorib.*

(1) See *Mr. Barbeyrac's* First Note upon this Section.

(b) *Vid. Phil. De Comines, l. 5. c. 18. circa fin. Grotius on Luke III. 13.* 'Tis the Duty of Princes to adjust the publick Burthens, according to the publick Necessities; so as that they may lawfully provide for their own Support, in a way agreeable to their Quality; but not to make the Luxury and the Lust of themselves, and their Court-Slaves, the Measure of what they demand, which are indeed without measure.

(c) *Add. Tho. Mori Utop. l. 1.* (2) *V. Hobbes De Cive, c. 13. f. 10.* (3) *Plutarch. in Marc. Antonin. p. 926. B.* (d) *Drepan Panegy. c. 27. It is the last Defence and Refuge of Wicked Princes, to take away from some, what they may bestow on others. Add. Montaigne's Ess. l. 3. c. 6. p. 175. Add. Machiavel Princ. c. 16. Plin. Panegy. c. 41.* (e) *Orat. pro Rege Deiotaro, c. 9.* (f) *Leviath. c. 11.* (g) The *Yncas* of old in *Peru*, amongst all their Titles, delighted chiefly to be styl'd *Lovers of the Poor*, as *de la Vega* informs us; (*Comment. Reg. l. 2. c. 14.*) who likewise reports, (*l. 4. c. 7.*) that the Lands of Widows, in that Kingdom, had more Privileges than those of their *Ynca* himself.

(4) *Lucan. Pharsal. l. 1. v. 152.* (h) *Ad. Nicoclem. p. 33.* (5) Upon this Subject see *Parrhasiana, Tom. 1. p. 264, &c. & Tom. 2. p. 291, &c.* (i) See an Instance of this, in the Diligence of *Sesostris*, by which he rendred *Egypt* capable of Trade, and convenient for the Communication of Goods and Products. *Diodor. Sic. l. 1. c. 57.* Add the Rules laid down by *Mr. Hobbes*, (*Leviath. c. 30.*) to be observed in Relation to the Companies of Merchants.

(6) See the next Book, c. 5. f. 3.

(k) *In Dion Cass. l. 52.*

Example of Sovereigns hath more Efficacy, than the Force and Authority of any Laws (a). But if a Country abound with Men and Money, it is there convenient to tolerate some unnecessary *Consumptions*, and such as may seem to border upon Luxury; that the Common People may hence be furnish'd with Opportunities of maintaining Themselves, and that the vast Stock of Money may not lie dead and useless. Provided, that no Encouragement be given to Extravagance and Excess, and that those Commodities be not idly wasted at Home, which might be exported with Advantage to Foreign Parts.

XII. Farther, since the internal Health, and the Firm and Robust Habit of a Commonwealth depends on the Unity of the Subjects (1), the more exactly which Unity is observed, the more effectually the Force and Authority of Government diffuseth it self through the whole Body of the State; it is, for this Reason, incumbent on Sovereigns, to prevent all Factions amongst the People (2), from which 'tis but an easy Slip into Sedition, and Civil War; a Condition so much worse than a War carried on, with universal Consent, against Foreigners, as War is, in general, less amicable than Peace (b). As likewise to take care, that the Subjects do not bandy and associate themselves by particular Covenants and Engagements (c); and that neither the whole People, nor any part of them, place a greater Dependence, or rely more for Defence and Succour on any other Person, within or without the Realm, under any Pretence whatsoever, whether Sacred or Civil, than on their Lawful

Prince. And that, on the contrary, there be no Person to whom *Seneca's* Description may be applied,

—*Stat ingens arbor, atque umbrâ gravi  
Sylvas minores urget* (d).

———— He stands a mighty Tree,  
The *Underwood* oppressing with his Shade (3).

XIII. Lastly, since the Condition, under which different Nations and Kingdoms stand, in regard to each other, is but a deceitful kind of Peace, and such as cannot be relied on with any Security; it is a part of the Office of Supreme Governours to take care, that as well the Courage of the Subjects, as their Skill in Arms, be kept up and improved (4); and that all things, necessary to be employ'd against an invading Enemy, as Fortified Places, Arms, and Men, be provided betimes; for, to use the Old Proverb in *Plautus* (e): 'Tis a lamentable Work to begin digging a Well, when we are almost Dead with Thirst. But to be the Aggressor in a War, how just soever the Occasion of it may be, is what ought not to be practis'd (5), unless a very fair Opportunity offer it self, and when the State of the Commonwealth may, with Convenience, bear such an Undertaking. To the same End, the Counsels and Motions of the Neighbouring Governments are nicely to be dived into, and observ'd; (in which respect, the *Perpetual Residence* now fix'd in most Courts, are of very great Use;) and Friendships and Alliances prudently to be Contracted (f).

(a) *Tacitus Ann. L. 3. c. 55.* *Vespasian* was the principal Author of these strict and grave Fashions; himself using the Ancient Habit, and the Ancient Diet: hence there arose in Men a desire of expressing, by such Observances, their Duty to their Prince, accompanied with a Love of Emulation, stronger than any Fear of Law or Punishment. Add *Bernier's* Description of the Empire of the *Mogul*, near the End; where he speaks of the Causes contributing to the great Consumption of Gold in that Kingdom.

(1) See *Parrhasiana*, Tom. 1. p. 289, &c. (2) See *Hobbes De Cive*, c. 13. f. 12. (b) *Herodot. (Uran)* init. Add *Evagrius (H. E. l. 4. c. 13.)* concerning *Justinian's* Favour to the *Faſtio Veneta*, with the Mischiefs that arose from it; as likewise *Procop. Hist. Arcan. & De Bell. Perf. l. 1. c. 24.* & *Bacon's Serm. fid. c. 15. & 49.*

(c) *Vid. Diodor. Sic. l. 1. c. 21.* (d) *In Oedip. v. 542, 543.* (3) *Vid. Bacon's Serm. fid. c. 35.*

(4) See *Charron, de la Sageſſe, B. 13. c. 3. f. 18, &c.* (5) See *Mr. Barbeyrac's* Second Note upon this Section.

(e) *In Mostillar. Act. II. Sc. 1. v. 32, 33.* (f) *Vid. Marselaer Legat. l. 2. c. 11.* Add *Hobbes De Cive, c. 13. f. 7, 8.* and *Bacon's Serm. fid. n. 29.*



# Of the Law of Nature and Nations.

## B O O K V I I I .

### C H A P. I.

#### Of the Power to direct the Actions of the Subject.

I. **H**AVING explain'd what related to the Nature of *Sovereign Power* in general; I come now to consider the most material Difficulties that arise upon the particular Parts of it. And since I at first supposed, that the Power to direct the Actions of the Subject, was that from which all Civil Laws were derived; to what I have already said of Laws in general, (1) I shall now add what more particularly relates to Laws *Civil*, and the Commands of the *Sovereign Power*. A Law therefore is call'd *Civil* either with respect to its *Authority* or to its *Original*. In the former Sense, all Laws may be call'd *Civil*, which are the Rules for the Administration of Justice, in *Civil Courts*, from whatever *Original* they arise (a). The Laws of God and Nature, it must be own'd, are of universal Obligation, and they that break them must expect to be punish'd by Divine Justice. But it is the *Civil Power* that gives them the force of Laws in *Civil Courts*. And the same Power must determine, what Crimes are to be punished by the *Civil Justice*, and what shall be left to the *Divine*; as also, upon what natural Obligations an *Action* may commence in the *Civil Court*; and what will not bear an *Action*, but must be left to the Common Ingenuity and Probity of Mankind. Hence under *Civil Governments* no Man is call'd to account, or can properly speaking be Punished, for the Violation of those Laws of Nature which have not the Authority of *Civil Laws* stamp'd upon them. For the Evils that attend such Crimes are only such as are usually called *Natural Punishments*. (2) Those Laws of Nature indeed, upon the Observation of which, the common Quiet of Mankind entirely depends, have in all Commonwealths the Force of Civil Laws. But there are others that have no such force allow'd them, either in express Terms, or in any *Practice of Civil Courts*; as well because the Controversies about the Violation of them would be very perplex'd and

intricate, as to prevent the Multiplication of litigious Suits; and also that the Good and Virtuous might not be deprived of the most valuable part of their Character, the doing well out of Reverence to their Creator, without regard to the Fears of Human Penalties; for this they must necessarily lose, when there is no Distinction made whether a Man doth well out of Love to Virtue, or out of Fear of Punishment. 'And indeed, as *Seneca* saith, how cheap a thing is it to be good only as far as the Law obligeth us, when the Rule of our Duty is of so much wider Extent? For how many things do Piety, Humanity, Justice, and Fidelity require of us, which yet are without the Reach of the Law (b) (3)? *Civil Laws* with respect to their *Original*, are such as flow entirely from the Will of the *Supream Civil Power*, and respect only such things as are left indifferent by the *Laws of God and Nature*, and which particularly conduce to the Benefit and Advantage of the Commonwealth. And these demand the same Obedience from the Subject as other Laws do. Since it must evidently be more for the Good of Society, that in indifferent things the Determination of the Government should take place, and the Subjects should look upon that to be good which is thought so by their Governors, than that there should be endless Disputes between them about it, which do not usually end but in War and Bloodshed, certain and undeniable Evils. 'The Publick Good, saith *Cicero*, ought to be the End of all Laws, and is the best Comment upon, and Interpretation of them; and we do not desire the Preservation of our Laws merely for the sake of the Laws themselves, but for the common Interest and Advantage (c). And hence the Constitutions of particular Commonwealths, made for the Publick Good, are call'd by some *Appendages to the Law of Nature* (d). But it must be observ'd, that tho' all these Laws put

(a) *Vld. Grov. de Imper summar. Potest. circa summa. c. 3. n. 3, 4, 11. & c. 4. n. 1.* (b) *Sen. de Ira, l. 1. c. 27.*

(c) *Cic. de Invent. l. 2. c. 38.*

(d) *Philis Judæus de Josepho. p. 531. B. Ed. Paris.*

(1) *B. 1. chap. 6.* (2) See above in *B. 2. chap. 3. §. 21.* (3) *Quod non vetat Lex, hoc vetat fieri Pudor* *Senec. Troad. v. 332. V. Grov. L. 3. c. 10. §. 1.* See likewise what has been said above in *B. 3. c. 4. §. 6.*

together are commonly call'd the *Civil Law*, yet, that there are several Particulars contain'd in the *Bodies* and *Codes* of the *Civil Law*, which are not properly and strictly Laws. For besides *those Commands* which the *Sovereign Power* lays upon the Subject for the particular Utility of the Commonwealth, there are many other things insert'd, which should be reduc'd properly to the *Law of Nature*. What belongs more particularly to the *Civil Law*,<sup>(1)</sup> may be reduc'd to these two Heads. First, to certain *Forms* prescribed, and certain *Methods* to be observ'd in *Civil Affairs*, either in *transferring Rights*, or else in laying *Obligations* upon *Persons*, which shall be look'd upon to be valid in the *Civil Court*: And Secondly, To the several Ways how a Man is to *prosecute* his *Rights* in the same *Courts*. So that, if we give the *Law of Nature* all that belongs to it, and take away from the *Civilians* what they have hitherto engross'd and promiscuously treated of; we shall bring the *Civil Law* to a much narrower Compass; not to say at present, that whenever the *Civil Law* is deficient, we must have recourse to the *Law of Nature*; and that therefore in all Commonwealths the *Natural Laws* supply the Defects of the *Civil*. For which reason *Hobbes* calls the *Law of Nature* the unwritten *Civil Law* (a).

II. But notwithstanding, *Hobbes de Cive* c. 14. §. 10. will maintain this strange sort of Opinion, 'That it is impossible any *Civil Law* should be made repugnant to that of Nature, except it be to the Dishonour of God. The Argument he uses to prove it, is this: Men, saith he,<sup>(2)</sup> when they enter into *Civil Societies*, oblige themselves by *Compact*, to obey his Commands who hath the *Sovereign Power*, that is, to obey the *Civil Laws*; and this *Compact* they are oblig'd by the *Law of Nature* to observe. But since the *Compact* it self, and consequently the *Obligation* to obey the *Civil Laws*, was antecedent to the *Promulgation* of the *Laws* themselves; by the Force of the same *Law of Nature*, which commands not to violate our *Compacts*, we are oblig'd also to obey every *Civil Law*. For where we are oblig'd to Obedience before we know what will be commanded, there we are oblig'd to obey *universally* and in every Respect. But the Truth is, it must be presum'd, that when Men enter into *Civil Societies*, they have already a competent Knowledge of the *Law of Nature*; and that one of the chief Ends of erecting *Civil Governments* was, that the *Laws of Nature*, upon which the common Peace of Mankind is established, might be obey'd without danger. And in short, that there is nothing in the *Laws of Nature* which

is any way repugnant to the Nature and End of *Civil Society*, but on the contrary that they are entirely necessary to assist and promote it. And therefore when Men form'd themselves into *Civil Societies*, and oblig'd one another by *Compact* to obey the *Civil Laws*, we must suppose that they took it for granted, that nothing would be established by the *Civil Law*, which was contrary to the *Natural*; and that the particular Advantages of the Commonwealth could not be contrary to the common End of all Government. It is possible indeed that a *Civil Law* might be made in Opposition to the *Natural*; but no Man in his Wits would ever attempt to make such a Law, unless he resolv'd to ruin and overturn the whole Commonwealth. And therefore *Stratocles* was very justly taken for a Madman when he publish'd his Law at *Athens*, that whatever (b) King *Demetrius* commanded, should be Law to Gods and Men. And *Parysatis* was guilty of detestable Flattery, when she perswaded *Artaxerxes* to marry his own Daughter and despise the Greek Laws; adding, that Heaven had made him the Persian Law, and the proper Judge of Good and Evil (c).

III. The same Author argues further in defence of his Opinion, *de Cive* c. 6. §. 16. c. 14. §. 9, 10. 'That tho' Theft, Murther, Adultery, and all kinds of Injuries, are forbidden by the *Law of Nature*; yet that what is to be call'd Theft in a Subject, what Murther, what Adultery, and what an Injury, is not to be determin'd by the *Law of Nature*, but by the *Civil Law*. For barely the taking away what another Man is in Possession of, is not Theft, but only to take away that which of right belongs to another. But what of right belongs to me and what to another, is a Question of the *Civil Law*. And in the same manner, barely to Kill a Man is not Murther, but to Kill him the *Civil Law* forbids. And so also, no Act of Generation is Adultery, but that which the *Civil Law* declares such; and lastly, Breach of Promise is indeed an Injury where the Promise it self is lawful; but where there is no Right to make an Agreement, there no Right is transferr'd, and consequently no Injury follows; but what we may make Agreements about, and what we may not, depends upon the *Civil Law*. To which I answer, that all that believe the *Scriptures*, as to several sorts of Crimes, are sufficiently assured, both from the Laws of the *Jews* which were of Divine Institution, and from other Parts of the Holy Books, how God the Author of the *Law of Nature* would have them desin'd? So that tho' the *Civil Government* should *de facto*, make some particular Acts not

(a) *De Cive* c. 14. §. 14. Vid. *Quintil. Decl.* 252. *Actio inscripti Maleficii*; upon which Law *Quintilian* says, That the Old Romans seem'd to have made it with the greatest Wisdom possible: For since, saith the Declaimer, they knew that no Prudence or Foresight could be cautious enough to prevent all the several Ways of Mischief that bad Men devise, they made this Law for an universal Security, that what Crimes escap'd the others might fall under the reach of this.

(b) *Plut. Demetrius.* p. 900, 901.

(c) *Plut. Artaxerxes.* p. 1022. B.

(1) See our Author's Abridgment, *De Offic. Hom. & Civ.* B. 2. c. 12. Sect. 6, 7, 8. (2) *Ibid.* Sect. 9.

Criminal, yet they would nevertheless be contrary to the Law of God. Especially since there can be no sufficient Reason given, why God in his Laws should give such Definitions of such Actions, unless they ought equally to be observ'd in all Nations. The *Spartans* allow'd the Frigid and Impotent to supply their Deficiency in the Conjugal Duties, by the Assistance of the Young and Vigorous (1): And this was done at *Sparta*, without any bad Imputation on the Husband, the Wife, or the Gallant, when they had no Hopes of Children otherwise: Because the *Civil Laws* of that State did not comprehend that Method of answering the Husband's Part at his own Request, under the Name of Adultery. And yet, since it is evident from the Laws of God, that by the Law relating to Adultery, any Familiarity of the Bed with a Woman actually married to another is forbidden; it is evident, that those Assurances also were contrary to the Law of Nature. But if it be reply'd, that the *Definitions* of particular Acts in the Scriptures were intended for, and only belong'd to the *Jewish Commonwealth*, and so are of positive Institution; yet thus much however must be allowed, that the *Civil Law* ought to have so cautious a Regard to the *Definitions* of Acts forbidden by the *Law of Nature*, as not to defeat the Intention and End of it, the Preservation of a Peaceable Society and Honourable Correspondence among Men. And therefore if any *Definition* of the *Civil Law* be opposite to this End, it must be granted, that it is also contrary to the *Law of Nature*. For Example; If the *Civil Law* should define Adultery to me, by telling me that it is *when a Man invades another's Bed against his Wife's Consent*; or of Theft, that it is *when a Man takes away something from another by Night*; or of Murder, that it is *when a Man openly assaults another and kills him*: It is manifest, that the Publick Quiet and Security of the Commonwealth could not long subsist under such Methods of Government. For we are not to imagine, that the *Universality* of such *Definitions* would sufficiently secure the Publick Peace; that is, that tho' particular Persons might perhaps sometimes be sensible of Inconveniencies from them, yet that at other times they might not find Advantages proportionable; and that the *Equality* of *Right* which such Laws would settle among the Subjects, would take off all occasion of Complaint: For tho' perhaps a Man might desire that some particular things might be lawful only for himself; yet if others should have as large Immunities granted them in Opposition to him, he would soon be willing to throw up his Privilege. And should the *Civil Laws* make any such Establishments, it must be impossible that the Peace and Order, which Nature intended, should be preserv'd. And if the *Equality* of such *Laws* alone were

Reason enough to introduce them, why must we any longer be confin'd by any Laws at all, since by taking them wholly away, we should make the greatest Equality; which it is impossible any Man in his Wits should think of doing? In some Accounts of the *Tartars* (a) we are told, that they are utter Strangers to all Justice; and that when any of them wants any thing, he may take it without fear of Punishment wherever he finds it: (2) And when the Party robb'd, complains to the Magistrate of the Injury done him, the Other doth not deny the Fact; but pleads only that he wanted what he took; and then 'tis usual for the Magistrate to give Sentence, That the Party who complains, may if he pleases, right himself in the same manner upon others. There are Others indeed (b) who give a more favourable Account; telling us only that the *Tartars* are very free in communicating what they have to Strangers; but that they will expect a Return of the same kind, or else will take it by force. A *Tartar's Definition* therefore of *Theft* would be, When something is taken away without the Consent of the Proprietor, which the other had need of; a *Definition* evidently imperfect, and which manifestly subverts the *Law of Nature* relating to *Theft*. 'Tis certain, none but the worst of Men could wish for such a Law, since it might often happen, that a Man might have the Ill Fortune to be robb'd of That which of all things he was most unwilling to lose, and which he either might never find another Man possess'd of, or else so secured, that he must despair of being ever able to take it from him. But besides, the Supposition Mr. *Hobbs* goes upon is false; that what belongs of *Right* to me, and what to another Man, is a Question of the *Civil Law*; and that out of Civil Government there is no *Propriety*: For tho' Men that live under it have a more secure Enjoyment of their *Proprieties*, than they that live out of it; since the *first* are defended in their Rights and Fortunes by the united Strength of a Number of Men, besides the Assistance of the Magistrate; and the latter can support themselves only by their own single Power; yet notwithstanding, there can be no Grounds of Proof to assert that there was no *Propriety* before the Institution of *Civil Government*. For all Sovereign Princes and Commonwealths are now actually in a *State of Nature*, and their *Proprieties* are not determin'd by any common Law or Judge, but solely by Compact, and the natural means of *Acquisition*; and yet I believe no Body ever imagin'd that Princes might ravage, or steal from one another, without incurring the Guilt of *Rapine* or *Theft*. So that admitting, that a Man cannot make any Compact that will be valid about what is forbidden by the *Civil Law*, yet certainly it cannot be denied, but that they who

(a) Sigismund. Baro. Herberstein de Rebus Moscov.

(b) Haytho de Tartaris. c. 43.

(1) See above in B. 6. c. 1. §. 15. It was sometimes common among the Romans to lend their Wives to Persons comely and well-born. See Plutarch in Numa, p. 78. D. & in Catone, p. 771. A. (2) This Permission takes place likewise in Cholchis; See Busbequius's 3d Ep. p. 155.

live in a *Liberty of Nature*, may make certain *Compacts*, which it will be an *Injury* to violate. And therefore it is false to say we must be obliged entirely to the *Civil Law*, to know what an *Injury* is. Besides, neither will it, I think, be denied, that a Man is guilty of *Homicide*, tho' he be only under the Government of the *Law of Nature*, when he takes away another's Life without making War upon him, or in his own defence. Nor is it difficult to understand barely by the *Law of Nature*, without any Assistance from the *Civil*, that *Adultery* is the *Violation of Conjugal Faith*: But that the *Civil Laws* may superadd certain *Obligations* to the *Matrimonial Contract*, for want of which, the *Marriage* may be look'd upon to be null and void in the *Commonwealth*, or be deprived of certain *Effects*, was never deny'd. But further; it may be necessary to distinguish between what is commanded by the *Civil Law*, and what is only permitted, (1) and not forbidden by the *Sanction* of any Penalty to be inflicted by *Civil Justice*. For a *Prohibition* of the *Law of Nature*, and a *Permission* of the *Civil* about the same thing, are not oppos'd to one another; for a *Permission* of the *Civil Law* doth not make any Act not to be contrary to the *Law of Nature*, that really is so, or excuse the Man that is guilty of it from Sin against God: But it only declares, that the *Civil Power* hath laid no restraint upon the Person that will commit such Acts; that if a Man doth commit them, he is not to be punished on that account; and that *Human Justice* alloweth such Acts to have the same Effects with other Acts, that are agreeable to the *Law of Nature*. And therefore the *Laws of Tartary* do not, ('tis presum'd,) command Men to steal, nor I suppose, forbid the *Proprietors* to defend their own: Only the Person that robs is not liable to be Punish'd, nor obliged to make *Restitution*; so that according to the common *Justice* of that Nation, *Robbery* and *Stealing* are look'd upon to be lawful ways of *Acquisition*. And the same may be said for the *Children at Lacedæmon*; for we need not translate that Sentence of *Plutarch* (a) κλέπτειν νεώμοιο τῶν παίδων, the *Children were commanded by the Law to steal*; since the Sense of it may as well be, That they were permitted by the *Law*. *Xenophon* indeed (b) says, That it was so far from being thought scandalous for the *Children to steal at Sparta*, that they were under a necessity of doing it: But this was spoken only in a way of *Raillery*, and to mortify *Chirofophus* the *Lacedæmonian*. Neither was that Practice so inexcusably bad as some believ'd it, or to deserve so severe an *Invective* as *Isocrates* gave it (c). For the Truth of the matter was, that the *Liberty* the *Boys* were allowed in was only that of robbing *Orchards*, and stealing *Victuals*;

and then too if they were taken, they pay'd severely enough for it (d). We are told too of *Dionysius* the Tyrant, That tho' he punished other Crimes very severely, yet he would often pardon them that stole Cloaths, in hopes that by this Method he might restrain the *Syracusians* from the Riot and Drunkenness they were given too. Neither do I think, that the *Laws of Sparta* before-mention'd, laid any Command either on the Husband, or Gallant; that matter seems to have been no more, than that if they two agreed, the *Law* did not interpose; but look'd upon the *Children* so begotten to be Legitimate, and admitted them Heirs to the Estate of the Family. So also, where *Duelling* is permitted, the Blood which is shed in them may be excused from the Punishment of Murder at the Bar of *Civil Justice*, but will not be so acquitted hereafter at the *Divine Tribunal*. That the *Civil Power* may with Justice permit things of such a nature, and that not by bare Silence and Connivance only, but by express mention made in the *Publick Laws*, is what I dare not affirm; by such a Method, the *Civil Power* would seem almost to invite the Subjects to transgress the *Laws of Nature*: Possibly it may be excusable to dissemble things, where the Times or the Humour and Dispositions of the People will not endure a Reformation by direct Remedies. And so there was good Reason why the *Roman Law* (2) call'd that, *Actio Rerum amotarum*, when there was indeed a real Theft committed.

IV. Our Author also, de Cive c. 14. § 9. Affirms, that the *Precepts* of the *Decalogue* are merely *Civil*, and not *Natural Laws*, and that they are to be explain'd after this manner. You shall not deny your Parents the Honour the *Civil Law* alloweth them. You shall not kill any Man, the *Law* forbids you to kill. You shall avoid every unclean Act which the *Law* forbids. You shall not take away what belongeth to another Man against his Consent. You shall not frustrate the end of *Law* and Judgment, by bearing false Witness. But it will here be easily observ'd, that he depends upon an utterly false *Hypothesis*, and supposeth what will never be allow'd, that there's no *Propriety*, no *Marriage*, and that every thing is lawful for every Man before the Institution of *Civil Governments*. It is certain, the *Precepts* he speaks of, are obligatory, and bind even those Persons to one another, who do not live under any common Government, but only in a *State of Nature*, and are guided purely by the Directions of the *Natural Law*. For certainly Men could, and actually did divide things between one another by Compact even in such a State: and therefore would have sinn'd as much against the Eighth Commandment, if they had either openly or secretly robb'd one another, as they do that

(a) Plut. Apophth. Lacon. p. 175. F.

(b) Xenop. περί ἀναξίας. l. 4.

(c) Isocr. Panathen.

(d) Vid. Plut. Lycurgus. Xenophon de Repub. Lacedæmon. Busbequius gives a much worse Account of the Liberties allow'd to Theft among the Mengrelians, Ep. 3. p. m. 155. Vid. Lib. 11. t. 5. l. 1. D. de Aleator.

(1) See Mr. Barbeyrac's 1st Note upon this Section.

(2) Lib. 25. t. 2. Digest.

rob their Fellow Subjects in Civil Governments. It may also be perhaps denied, that a Man, in a State of *Nature*, is guilty of *Adultery*, when he violates his Neighbours Bed: But the answer may be seen, *Gen. 20. c. v. 3. 26. c. v. 10.* And further, since *Arbitrators* must be often made in a *State of Nature*, to decide Disputes about *matters of Fact*, by intervention of *Witnesses*, as Mr. *Hobbes* admits himself, *de Cive c. 3. § 23.* we may hence find the use and necessity of the *ninth Commandment*. In general, the *Precepts* of the *Decalogue*, it is evident, may be reduced to the *Law of Nature*; but when they are consider'd as written in *two Tables*, and promulg'd to the *Israelites* by *Moses*, they may properly enough be call'd *Civil Laws*, or rather the *general Heads of the Jewish Civil Law*, which are afterwards divided into particular *Laws*, with penal *Sanctions* added to them (a). Upon which Account, *Grotius* saith (b) the *Decalogue* does not in express Words comprehend every Crime, nor even all those which are punishable by the *Civil Law*, but only such in every kind as are most *Heinous* and *Malignant*. For there is no mention made of *Wounding*, but only of *Murder*; nor of any other sort of *Gain made by another's loss*, but that of *Theft*; nor of any other *Falsity*, but *False Witness*.

V. It may be proper in the next place to consider, that the same Author in his Book *de Cive*, c. 12. § 1. among those *seditionous Doctrines* he supposes to be the *internal Diseases*, and *Causes* of the *Dissolution* of a *Commonwealth*, sets down this for the *First*, 'That every private Man is Judge of Good and Evil. For, (saith he,) the Measure of Good and Evil, Just and Unjust, is the *Civil Law*; and whatever the *Legislator* commands must be look'd upon as just and Good, whatever he forbids as Unjust and Evil; and therefore it is a very ill Maxim, that we are to obey our Sovereign only when his Commands are just. There was nothing Just or Unjust before *Civil Government*; their Nature relates to the Commands of the *Sovereign*: and every Action is in its own Nature indifferent; that it becometh Just or Unjust, is owing to the Will of the *Sovereign*. And therefore lawful Princes make those things just, which they command, by commanding them; and those things which they forbid, unjust, by forbidding them. But while private Men assume to themselves the *Cognizance* of Good and Evil, they affect to be like the *Sovereign*, which it is impossible should be consistent with the *Quiet and Peace* of any *Commonwealth*. In Answer to him, It may be readily allow'd, that *Sovereign Princes* have indeed Power by annexing or taking away the *Penal Sanction*, to give or take from the *Laws of Nature*, the Force of *Civil Laws* in *Human Courts of Justice*; as also to make many things

which do not belong to the *Law of Nature*, Just, by commanding, and Unjust, by forbidding them. But to say that before *Civil Governments* were erected, there was nothing Just or Unjust, either defin'd by *Nature*, or obliging *Mens Consciences*, is as false, as to assert, that *Truth* it self hath only a precarious *Arbitrary Dependence* upon the *Pleasure* of Men, and is not founded in the *Nature* of things; or that *Sovereign Princes* may fashion and dispose the nature of things as they please, or that the same *Truth* may be different from it self. And indeed the thing it self sufficiently confutes *Hobbs*. For is it at all probable, that those *Masters of Families*, who at first united, and form'd themselves into *Commonwealths*, should, all the time they liv'd separately, behave themselves only like so many wild Beasts; break all manner of *Compacts* they ever made; rob one another of *Life and Fortune* at pleasure, upon every pretence of a *Right*, and that all their *Actions* were to be thought purely indifferent? Upon the same grounds, *Sovereign Princes* now, who are still with Respect to one another in a *State of Nature*, should not be thought Guilty of *Injustice*, when they break their *Compacts*, and invade one another's *Rights*: And yet it is certain, They are not subject to *Civil Laws*. But on the contrary, it is not to be conceiv'd, that *Civil Governments* could ever have been establish'd, or after their *Establishment*, preserv'd; if there had not been something Just or Unjust antecedent to their existence. For 'tis certain, *Compacts* must have been made use of at the first forming of *Commonwealths*. But how could Men persuade themselves, that such *Compacts* could be of any Force, except they knew before, that it was Just to observe them, and Unjust to do otherwise. And if it be no Justice to stand to *Compacts* antecedently to the *Definition* of the *Civil Laws*, there can be no reason why Subjects may not, when they please, renounce their *Obedience*, dissolve *Civil Government*, and so utterly abolish all the *Distinction* between Just and Unjust. For it is Extravagant to imagine, that such Numbers of Men, as a *Commonwealth* consists of, will always be kept in *Subjection*, by no other restraints, but *Fear and Power*. Nor therefore can I believe there was ever any Prince heard of so far depriv'd of *Reason*, as to have commanded what the *General Laws of Nature* forbid, or forbid what They commanded; for Instance, that it should be unlawful to perform *Trust* or *Promise*, or to give any Man his due; that it should be a Crime to live with any Respect to *Reason* or *Justice*, that every Man might have full Liberty to do all the *Mischief* he could, and the like. But now, why might not such *Laws* have been made, if there had been nothing Just or Unjust, antecedent to the *Determinations* of the *Civil Laws*? 'Tis certain the *Command* of the *Civil Power*,

(a) Vid. Philon. Judæum, de Decalogo;

(b) Grot. ad Math. 5. 27.

may as well make Poison it self wholesome, and necessary Food, as make such Things as these, *Just* and *Good*. And therefore *Polybius* was equally in the wrong, when he seems to derive the Original of Justice and Injustice from *Civil Government* (a). In another Sense indeed, what Mr. *Hobbs* saith, may be safely enough admitted; that is, supposing that by *Good* and *Evil*, we understand no more than the *advantage*, or *disadvantage* of the Commonwealth. For then it will really appear to be a *sedition Doctrin*, That every private Person is Judge of *Good* and *Evil*, meaning by it, of what is for the *Advantage* or *Disadvantage* of the Commonwealth: That is, that every *Private Man* is a competent Judge whether those are proper Means, which the *Prince* commands shall be made use of in promoting the *publick good*; and that in Consequence, every *Man's* Obligation to Obedience may depend upon that Judgment. For it is necessary that Subjects (as *Orho* in *Tacitus* told his *Souldiers*,) should be ignorant of some things as well as know others. For if every one should have the Liberty to dispute what he was commanded, Obedience and Authority would soon sink together (b). It was *Cato's* Saying, that the *Tenant* ought not to think himself wiser than his *Landlord*; and of *Plato*, that no *Man* should pretend to be wiser than the *Laws* (c).

VI. Our next Consideration shall be, whether a *Subject* may be guilty of Sin, in executing the Commands of his *Prince*; supposing he pretends, that he barely undertook the Performance of the *Action*, and left the *Design*, *Contrivance*, and the *Necessity of Account*, entirely upon him who gave the Command? For there is a Difference between the *Laws* and the *Commands of Princes*: The *Laws* are General Precepts, which affect every Subject; the *Commands* are only occasionally imposed, upon particular Persons; but have the same effect the *Laws* have in obliging those they are directed to. In this Case it is the known Opinion, that a *Man* may sometimes sin by obeying the *Commands* of the *Civil Sovereign*, and therefore that the *Subject* may and ought to examine such *Commands*, by his own Conscience rightly inform'd (d). For certainly it ought to be supposed that *Good Men* promise Obedience, upon Certain conditions only; that, since they are sure to give an Account of their

*Actions*, at the *Divine Tribunal*, and since all the Governments of this World are under an infinitely great overruling Power; they are always ready to obey the *Commands* of their *Sovereign*, except when they contradict or interfere with the *Laws of Nature*, or the *manifest* *Laws of God*. For without Dispute, should a *Prince* give out any Command contrary to the *Civil Laws*, he may be obey'd without Sin. But on the other Hand, Mr. *Hobbes de Cive* c. 12. § 2. declares this for a *Seditious Doctrin*. 'That Subjects are guilty of Sin, when they obey those Commands of their *Sovereign*, which they think unjust. And it may indeed be allowed to be dangerous not only to the Commonwealth, but also to the Consciences of *Private Subjects*, to believe, that upon any *Scruple* or *Doubt*, concerning the *Equity* of what is *Commanded*, Obedience may lawfully be refused. For should this *Doctrin* be admitted, it must often necessarily happen, that a *Man* must be reduced to a *Necessity* of *Sinning*; if he obeyeth, he must act contrary to his *Conscience*; and contrary to his *Allegiance*, if he doth not. For I think it is on all Hands allowed, that in Cases where the Conscience is doubtful, the best resolution a *Man* can come to, is to take that Side where there will be least danger of Sin. But now the danger of Sin is in a much nearer View, when upon an uncertain *Doubt*, a *Man* quits his *Allegiance* which he hath expressly sworn to keep; since the *Commands* of *Superiors* are always attended with the *Presumption* of being just, and are often built upon *Reasons*, of which *private Persons* cannot be allowed to be Judges. And therefore what the same Author says a little after in the same Book, may deserve to be consider'd. 'That that is my own Sin, which when I commit, I think my own; but that which I think is another *Man's* Sin, I may sometimes commit without deriving any Guilt upon my self. For if I am commanded to commit that which must be the Sin of him that commanded it, so he be my lawful Governor, I do not sin if I obey him. So an *Ambassador* is supposed to speak the Sentiments of his *Master*; and whatever bears an ill Sense in them, is not to be imputed to him that speaks, but to him that gave him his *Instructions*. Since such *Ministers* are under a *Necessity* of conforming to the *Directions* of them that send them (e).

(a) *Polyb.* l. 6. where he is transcrib'd with very little Judgment, by *Machiavel Disc.* in *Liv.* l. 1. c. 2. Vid. *R. Cumberland, de Leg. Nat.* l. 5. c. 5.

(b) *Tacit. Hist.* l. 1. c. 83. *H. L.* 2. c. 39. It is one part of the Character of a good Souldier, that he had rather put his *Generals* Commands in Execution, than make any Debates upon them. *Cato de Repub.* c. 5. And so far *Terentius* was in the right. *Tacit. Ann.* 6. c. 8. We are not to examine whom you prefer, or upon what account Heaven hath given you the supream Disposal of things, and it is our Glory to obey.

(c) *Plat. Polit.* p. 555. *D. Ed. Wech. Arist. Rhetor.* l. 1. c. 15. To endeavour to be wiser than the *Laws*, is what the best *Laws* take care to forbid.

(d) *Sophocles, Antigone,* v. 458. &c Nor could I think your *Edicts* of such Force, as to oblige me once to violate the fix'd unwritten *Laws* of Heaven.

(e) *Procop Hist. Goth.* l. 1. p. 175. *Ed. August. Vindel. Senec. Tro.* v. 868, 869. The Guilt of a Crime forced upon a *Man*, recoils back upon the Authors of it. Vid. *Lib.* 3. t. 2. l. 1. *D. de his qui infam. not. Quique suo nomine non jussu ejus.* &c. *M. Senec. l. 4. Contro.* 27. That *Woman* is not immodest that hath been corrupted in her Chastity by a *Tyrant*; neither is he guilty of *Sacrilege*, that takes the Offerings of the *Gods*, and brings them to the *Tyrant*, or that sets up his *Statue* among the *Images* of the *Deities*.

I will not deny but Man may engage barely for the Execution of an Action commanded by his Prince, the Guilt of which shall be imputed solely to him who commanded it, and not to him who was the Instrument in the Execution of it. (1) But then it will be necessary for him to take with him these Cautions. (2) First, that he be commanded barely to execute the Action, that is, only to apply the Strength of his Body to the Performance of the Action, and neither give Occasion to it, or furnish Pretext, or make use of any Excuse for it, but undertake it as an Action that belong'd wholly to another Person, and which he will not take upon himself. Secondly, That he should show his unwillingness to be employ'd, in such a Service, and desire earnestly to be excused from it (a). And Lastly, That upon declining the Action, he be threaten'd with present Danger of Life, or some other great Evil, which he is not oblig'd either in Justice or Charity, to suffer for another Man, and which the Person that commands him hath Power to inflict it; and especially if he sees that tho, he refuseth his Assistance in the Action, it will be executed by other Hands. It is undoubtedly true indeed, that no Commands of Men, contrary to the Law of God, can have any binding Force, that is, lay any Intrinsic Necessity of Obedience on the Conscience, and that therefore it can be no Crime to refuse to obey them. But there is a wide Difference, between being bound in Conscience to do a thing, and being able to do a thing without Sin, to avoid some very great Evil. For there are several things which We are under no manner of Intrinsic Obligation to do; which yet upon pressing Necessity We may lawfully undertake. And in this Case the Question is, not whether We are bound to do such a thing, but whether We can do such a Thing without any Guilt of our own, when We see we must otherwise lose our Lives to no purpose. Neither is any thing I have here said, in the least weaken'd by what Pliny saith, Ep. 9. l. 3. 'Where he tells his Friend of a very ill Cause he had been engaged against, that he had prov'd before the Senate, that it was Criminal even to have assisted in it. (*Ministerium etiam Crimen esse.*)' For the Persons he pleaded against, had not been barely the Instruments of another Man's Crime, but had charg'd Innocent Persons with False Crimes, that the Proconsul might take occasion to seize on their Fortunes and Estates; And their informing against, and wrongfully accu-

sing them, was entirely their own Act; the Impeachments they made, were all in their own Names, and not in the Proconsul's, nor were they pretended to have been made at his Command; neither were they forced to be Delators, by any immediate fear of Death, if they had refused to be so. They pleaded indeed, that they were Provincial Subjects, and therefore were oblig'd by Fear to be absolutely at the Command of the Proconsul. But what look'd most probable was, that the Expectation of the Gain they hoped to make, was their greatest Encouragement; tho' perhaps it might be true too, that the Proconsul had given them reason to be afraid, if they refused to obey him; yet it is not likely he should threaten them with Death, and that there was no other possible Method left for them to escape it (b). And in this Case, the Desires, or Intreaties of Superiors must not be supposed to have the same Force in them as Necessity or their Commands (c), though in others it may sometimes be true, that the Intreaties of Tyrants are mixt with a sort of Necessity. Neither is the Example of Doeg, 1 Sam. 22. v. 18. any Objection against what has been said. For it was expressly added, that a Man ought to desire earnestly to be excused, as Saul's Guards very honourably did: (And thus the Midwives were commended for defeating the barbarous Command of Pharoab, tho' it were with an Untruth, Exod. 1.) But Doeg on the contrary, show'd himself ready and willing to put the King's Command in Execution upon the Priests, tho' we do not find that any Threats were added to it, when he had himself before, falsely accused them, insinuating that they had entred into a Secret Conspiracy with David, against the King: For it is evident from 52 Psal. that he had brought some false Accusations against them. But notwithstanding, it must be confess'd, that there are some Actions, the bare execution of which, a Man would rather die than undertake: Such as to Murther Parents, or Children; to commit Incest with a Mother, or Daughter, or to lie with a Beast. A small Stock of Courage would make a Man prefer Death, to the guilt of being an Instrument in such Actions. And I cannot but think it was a noble Spirit of Constancy and Bravery in those Romans, 'who when singled out by Hannibal, to fight with one another, Brothers with Brothers, Fathers with their Children, and Kinsmen with their near Relations, chose rather to die under Torture, than be stain'd with Blood which Nature

(a) We have a remarkable Instance of this Nature in Olearius's Travels into Pers. l. 5. c. 32.

(b) Vid. Tacit. Ann. L. 13. c. 43. Where Sullius pleads that he had done nothing out of any Design of his own, but that all was entirely out of Obedience to his Prince. Afterwards he pretended the Commands of Messalina, and wav'd his Defence. For why was there no body else made choice of that would sell his Voice to oblige that cruel and impudent Woman? But it is necessary the Instruments of Oppression and Tyranny should be punish'd: For when they have receiv'd the Rewards of their Wickedness, they shift the Crime over upon some body else: And therefore Jul. Græcinus very well deserved Commendation, who was commanded to accuse M. Silanus, and was kill'd for refusing Tacit. Agricola; and Seneca gives him a very great Encouragement. De Benef. l. 2. 21. (c) Iliad Epist. 7.

(1) See Mr. Barbeyrac's 4th Note upon this Sect.

(2) See Mr. Barbeyrac's 5th Note upon this Sect.

'had so nearly ally'd.' (a) Neither can I think it at all lawful, that to save my own Life, I may assist to take away another Man's; for that would be to make another's Life the Price of my own: And there are many things which we cannot do for Price, which upon other Considerations we may (b).

VII. But in general, that a Man may not at the Command of a Superior undertake an Action, as his own, which is repugnant to the Dictates of a good Conscience, is what no Man that hath any Sense of Religion can deny. The Judges therefore Josephus speaks of (c) (To consider some Examples under this Head) refus'd to condemn the Innocent Zacharias, tho' they were sensible what danger threaten'd them from the Fury of the Zealots. And on the other hand the Judges mention'd 1 Kings, ch. 21. were certainly guilty of a very great Sin; because they pass'd Sentence not by Order from the King, but as the pure Result of *Judiciary Process* upon the Evidence of the Crime; nor can the Witnesses be excused from an equal share of guilt. Nor were the Detectors Persons whose Business it was to charge false Accusations upon the Great and Rich, that ill Princes might have a Pretence to ruin them in Circumstances less criminal. Marcellus Eprius was once a Person very well known by that Character, but more particularly infamous, for the *Impeachment of Thraseas*: tho' Tacitus tells us he pleaded in his Excuse for that, that his Accusation charged no more upon Thraseas, than what the Judgment of the whole Senate confirm'd; which was only to spread the Crime wider, not to clear himself. 'Tis true indeed, as the Historian says, That Nero endeavour'd only to disguise his own natural Cruelty, under the Formality of set Accusations (d). But still it was the Avarice and Ambition of such Auxiliary Villains which provoked and encouraged him. Others engaged in the same Practices, excused themselves by saying, that in those Times They were under a necessity to do what they did to secure their own Honour and themselves. A kind of Defence which means no more than that they chose rather to expose others to Danger, than hazard themselves. Neither did Curtius Montanus (e), as the same Historian says, allow it to be a tolerable Excuse, because he thought the Persons that used it not to be Criminal in the Occasion of it; but in a Rhetorical way he chose to pass by some things, that

he might press others with more Vehemence. And the Senate acted with great Justice, when after Nero's Death, they decreed his Instruments the Informers should be punish'd as a Race of Miscreants who lived upon private Ruin (f). The Emperor Titus with the same Justice commanded all such Persons to be publickly whipt and beat in the Forum, then dragg'd through the Amphitheatre, made Slaves and Sold; and some of them to be transported to uninhabited Islands; and after him Trajan sent away Numbers of them in a few shatter'd Vessels, that they might be left to the Mercy of the Sea, and be shipwreck'd whereever the Waves threw them (g). Neither could the secret Command of Tiberius excuse Piso from the Guilt of Germanicus's Death, if he was really the Cause of it: And if he had confess'd such a Command in the Senate, tho' that must have been enough to have put even Tiberius to the blush, and depriv'd him of all his Shifts, to excuse himself for commanding so barbarous an Action; yet the Senate had still Power very justly to condemn him as the Criminal, because he did not pretend any Publick Authority for it, but voluntarily undertook an Action which Tiberius had not the least Pretence of Justice to command, only that he might engage the Emperor to him, by such an Act of Villany (h). Neither do I think that Joab was absolutely free from the Guilt of Uriah's Murther, 2 Sam. c. 11. 14, 15, 16. tho' Chap. 12. 9. David only is mention'd as the Principal in it. And it was very brave in Papinian to refuse to defend the Murther of Geta, with that noble Saying, *That it was easier to commit Parricide, than to excuse it.* Others tell the Story, that he refused to speak an Oration for the Emperor, in which he would have had him inveigh against his Brother; and that he excused himself by saying, *That to accuse a mur'der'd innocent Person would be a second Parricide.* But Spartianus in his Life of Caracalla, (1) denies this Account, because he says, Papinian could not, as being *Præfēt*, make any such Oration (tho' it doth not appear why it might not have been extraordinarily commanded him) and only adds, that it was certain he was put to Death, for being a Favourer of Geta. However this be, that Man is certainly in the right, who refuses to prostitute Wit and Parts to defend Wickedness, tho' the Defence be publish'd afterwards in another's Name. For the Invention of Specious

(a) Vid. Diod. Siculum. l. 25. in excerpt. Peirescianis. Vid. Laonic Chalcondyl. l. 1. where Amurath Emperor of the Turks, commanded that the Parents of all those who had been in the Insurrection with Sauzes, should kill their Sons with their own Hands. There were two Fathers that would not obey so cruel a Command, and were therefore cut to pieces at the same time with their Sons. For Amurath used to say, That the Sons would not have join'd with Sauzes, without the Advice of their Parents.

(b) Abr. Rogerius, in his Account of the Bramins, saith, That the Bramins believe that the Wife may do any thing, tho' never so bad, which the Husband commands her, without Sin; for the Sin, they say, cannot be imputed to her, but is to be charg'd upon the Husband, whom she is oblig'd to obey.

(c) Josephus de Bello Judaic. l. 4. c. 19.

(d) Tacit. Hist. 4. c. 8.

(e) Tacit. Hist. 4. c. 42.

(f) Tacit. Hist. l. 4. c. 42.

(g) Suetonius, Titus c. 8. Plin. Pan. 34. 35.

(h) Tacit. An. i. 3. c. 16.

(1) Chap. 9.

Arguments set off with the Art and Dexterity of an Eloquent Speaker, can never be supposed to be barely the Execution of another Man's Action. In this particular Case, the Thing would have appear'd otherwise indeed, if *Caracalla* had only commanded some Person to have recited such an Oration in the Senate, as a Piece of his own, or some other Man's Composure, under a *Capital* Penalty, if he refus'd it (a). But still it must be remember'd, that where the Actions of Princes do not plainly appear to be Unjust, Subjects ought to be very Cautious, and especially *Publick Ministers*, how they give them an ill Character; because it is their Duty, always to presume for the Justice of their Master (b).

VIII. Upon the same grounds we may determine, whether a Subject may lawfully bear Arms in an *Unjust* War, at the *Command* of his *Prince*. *Gratius*, L. 2. Cap. 16. §. 3, 4. is of Opinion, that when it manifestly appears that the War is *Unjust*, it is not lawful for a Subject to maintain so bad a Cause: and that when the Case is doubtful, he ought to take the safest side, which is to sit still, and not engage himself at all in the War. But I think, a Man ought to be very cautious, how he resolves in such a manner, about Things of such Consequence as these. When according to this Opinion, the Power of the *Civil* Sovereign, and the Obedience of the Subject, in a Case of so great Importance, are made to depend upon every particular Man's Judgment; and when, especially, it would be easy for a Man to pretend scruple of Conscience, only to disguise his Fears and Cowardise (1). 'Tis true, where a Man is admitted to the *Counsels* and *Debates*, and hath a *Right* to give his *Voice* in them, if he is not obliged by the Determination of the *Majority*, without his own *Consent*, He cannot with Justice, so much as undertake any thing he doubts of only; and much less any thing manifestly *Unjust*. Which will hold true too,

if it be left to his Choice, whether he will take Arms or not: But if he should be commanded simply to Obey, in this Case it must be consider'd that all Nations, acted by any Sense of Justice or Honour, before they engage in a War, always suppose, that the Cause of it is Just; and where They do not, it is to no purpose to talk of Conscience. But the Point in dispute, turns chiefly upon this, Whether in regard of certain particular Circumstances, it be convenient for the Government to begin a War, notwithstanding the truth of such a *Pretence*. In this Case, the Person particularly intrusted with the Government, of the *Common-wealth*, entirely acquainted with its Strength, must be presumed to see better what will be for the Advantage of the *Publick*, than any private Man can. And if a Man, admitting the *Justice* of the Cause, should yet doubt whether it might not be better to neglect, or forgive, the Injury done the *Common-wealth*, than Revenge it with a War; it must be told him, that this is by no means a sufficient Reason, for a Subject to refuse to obey his Sovereign, and provoke him to use Severity upon him, that he supposeth his Sovereign, hath not observed a certain *Vertue*, which hath only the *Force* of an *Imperfect Obligation*. And therefore the safest Method a Subject can take, is simply to obey, and leave his *Sovereign* to answer for the *Justice* of the War before GOD (c). But yet it must be observ'd, that what hath been said, affects only Subjects who take *Arms* at the *Command* of their *Sovereign*. For They that voluntarily put themselves into the Service of a *Foreign Prince*, ought by all means to be sure of the *Justice* of the Cause they engage in. And therefore the sensible part of the World will always justly condemn Those that set their Lives out to hire, without any manner of *Consideration* of the Cause they fight for (d).

(a) There are several Passages in Plato's Defence of Socrates, which might be applied this way: And to this we may refer the Account Dio Cassius gives of Sallust. l. 43. who he says was made Prefect of Numidia by Caesar, upon Pretence of his taking the Administration of that Province, but in reality only that he might squeeze all that he could from it. But after he was come Home he was accus'd of Extortion and Corruption, and of several Oppressions in the Province; and so was look'd upon to be more particularly Infamous, because having wrote an History, where he very frequently, and very severely reflects upon such as made their Fortunes by publick Rapine in their Governments, he himself had not made his Actions agreeable to his Writings, and therefore tho' he was acquitted by Caesar, yet he sufficiently publish'd his Crimes, by the lively Character he had drawn of them, in his own Writings. (b) See the Solacism in Politicks, Aligrius Chancellor of France was guilty of. Gramond. Hist. of France, l. 16. (1) See our Author's Dissertation De Obligations erga Patriam. l. 19.

(c) Hector in Homer saith very well, *Iliad*. 12. v. 243.

Ἦτε δ' ἄραδ' αἰσῶν ἀμύραδ' αἰσῶν ἄραδ' αἰσῶν.

In Tacitus Hist. L. 3. c. 25. it is call'd a publick Crime, when a Son had kill'd his Father in the Fight. Vid. L. 9. t. 4. l. 2. f. 1. D. de noxal. act. L. 9. r. 2. l. 37. D. Ad L. Aquilianam. (d) Gunther. Ligurinum, l. 7.

*Ære dato conducta cohors, & bellica Miles,  
Dona sequens, pretioq; suum mutare favorem  
Suetus, & accepto pariter eum munere bello,  
Hunc habuisse, dator pretii quem jufferit, hostem.*

Lured to the Field by Pay, and hopes of Spoil,  
In servile Arms the Mercenaries toil;  
Inconstant, False, and Faithless to their Trust;  
The Cause that is most Gainful seems most Just:  
He that first hires, Commands them to the Wars,  
And those he calls his Enemies are theirs.

## C H A P. II.

## Of the Power of the Sovereign, over the Lives of the Subject, in Defence of the Common-wealth.

I. Tho' the *End Men* propos'd to themselves, by entering into *Civil Societies*, was, to provide, not only for the *Security* of their Estates, but more especially of their Lives; yet it was found necessary to the Preservation of *Civil Government*, that the *Sovereign* should have some *Power* over the Lives of his Subjects; and that for these two *Ends*. *First*, To guard the *Common-wealth* from Evils and Dangers; and *Secondly*, To suppress *Disobedience* to the Laws. By the *First*, The *Sovereign* hath *Power* to hazard the *Lives* of his Subjects in Defence of the *Common-wealth*, and to assert the *Rights* that belong to it; since in War Men always propose to take away one another's Lives. And since the *Art* of War it self is not to be learn'd without Experience, it was *Plato's* Opinion (1); that the Lives of the Subjects might be expos'd to some Danger for the Attainment only of the *Military Accomplishments*, (tho' I confess I am not of his mind) and accordingly he proposes that the Weapons us'd in all *Military Exercises*, should differ little from the real and dangerous ones, such as might strike some Apprehensions of Fear into the Persons that us'd them; and he afterwards adds a Law, *That if any Man happened to be kill'd in those Exercises, that the Person who kill'd him should be acquitted by the Law, and be look'd upon as innocent.* For, saith he, the *Legislator* ought to consider, that tho' perhaps he may lose some few of his Subjects by this Method, yet that the rest will suffer nothing by it; but that if there were no Apprehensions of Danger in these Exercises, there will be no way to distinguish between the *Brave*, and the *Coward*; and the want of such a *Distinction* would certainly be of worse Consequence to the *Common-wealth*, than the other Evil. And such *Military Exercises* we are told are now in use in *Japan* (a). *Demosthenes* mentions an *Athenian Law* (b), by which if a Man kill'd another accidentally in any Exercise, he was not to be banish'd: 'The reason of which was, saith he, because Law doth not consider the Event, but the Intention of the Person, which was only to overcome his Adversary, not to kill him: but if his Adversary was too weak to bear the Fatigue a Victor must expect, the Law thinks him the Cause of the Misfortune which befalls him. And indeed there is very

good Reason that even the *Exercise* in *Military Duties*, should be under a severe *Discipline*, since in War the Fate of things may frequently turn upon a very small Neglect. And therefore tho' *Civil Courts* are sometimes easily induced to make Allowance for those Passions, that have generally a violent Influence upon us, yet a *Court Martial* hardly will ever afford them any Favour. And hence *Military Judicature* makes it Capital to desert the Post a Man is commanded to, tho' perhaps to avoid present Death (c). (Though some have thought the Shame of some ignominious Punishment might be a better Expedient to prevent Cowardise.) And therefore to refuse to List into the *Military Service*, hath in some Nations been severely punished (d). There was a Law at *Sparta*, which made it Death for any Man to refuse to hazard himself for his Country; so that as the Orator speaks upon it, 'The Occasion of their Fear was made their Punishment; and there being two such Extremities in view, there would be hardly any Man who would not sooner venture the loss of Life among Enemies, than suffer it to be taken away by the Laws in his own Country (e). 'Tis true there are few Nations in which there are not Numbers of Subjects by their Years and Strength of Body fit to bear Arms, who have nevertheless *Immunities* from that Service granted them, either out of Respect to their way of Life, or upon some particular Indulgence of the State; but it must be understood that all such *Privileges* are to continue no longer in force, than while there are other Subjects enough, or else *Allies*, or hired Forces in readiness to defend the *Common-wealth*: In Cases of the last *Extremity*, They must be superseded; and they that enjoy them must Arm, as well as others, in the *common Defence*. For certainly it is more reasonable that such *Privileges* should be laid aside for a time, than that by an unseasonable Superstition for them, the whole *Common-wealth* should be ruin'd. And therefore at *Rome*, all *Exemptions* from *Military Service*, allowed to the *Old*, and the *Priests*, always ceased upon Expectation of a *Gallick Invasion* (f). It should too be observ'd as was a wise and good Institution made by *Solon* or *Pisistratus*, (which is mentioned by *Plutarch* in the Life of *Solon* (2),) *That such as were dis-*

(1) De Leg. l. 8 p. 907. A. B. Ed. Wech. (a) Vid. Bern. Varen. Deser. Japon. c. 19. (b) Orat. adv. Aristocrat. (c) Vid. Liv. l. 5. c. 6. Fustuarium moratur, qui signa reliquit aut presidio decedit. He deserves the Bastinado that flies from his Colours, or deserts the Post he was commanded to. Mich. Montaigne's Essays, l. 3. c. 12. p. 775. Justin. l. 32. c. 3. in fin. Ferdinandus Pinto, c. 10. (d) Lycurgus Orat. contra Leocrat. (e) Vid. Leg. Longobardorum, l. 3. Tit. 13. s. 1. (f) Appianus de Bello Civili, l. 2. p. 523. Ed. H. Steph. Vid. L. 10. t. 48. l. ult. C. de quibus muneribus. Nem. lic. se excusare. Andræas Maurocenus Hist. Venet. l. 4. p. 147. (2) Pag. 96. C.

abled in the Wars should be allowed Pensions out of the Publick Treasure. And indeed if the State of the Common-wealth will permit, there is all the Reason in the World that They should have some Consideration made them who are upon hard Duty, while others sit at ease, and are not only forced to neglect the Concerns of their Families, but to undertake a larger share of Service for the Publick than other Subjects (a).

II. And here it may be enquired, whether, if a Man detain'd Prisoner by an Enemy, to obtain his Freedom, promiseth that he will never for the future bear Arms against him, his own Country can afterwards oblige him, contrary to his Promise, to draw his Sword against the same Enemy? Some, I know, suppose, that such a Compact in it self, is void, because it is contrary to the Duty every Subject owes the Common-wealth: But, I should not think it so sufficient an Answer, to say that every thing contrary to Duty is therefore immediately Void and Null; as to deny that it is contrary to the Duty a Subject owes the Common-wealth, to procure himself Liberty, by promising that which is already in the Enemies Power. For except the Enemy give the Captive his Liberty, he can never bear Arms against him. And therefore the Common-wealth loseth nothing by such a Compact; for unless the Captive recover his Freedom, he must be considered as lost already. And therefore when the Common-wealth receives him again from his Captivity, it is suppos'd to receive him upon such Terms, as leave him Power to keep his Promise with his Enemy, especially if he gain'd his Liberty by his own Interest only, without any Publick Assistance from the Common-wealth. But cannot the Transcendental Power of the Sovereign rescind such an Obligation, when the common Safety requires it; as suppose the Common-wealth be in eminent Danger, except he in particular take Arms? In this Case, I think, that since it is next to a Contradiction for me to be a Subject, and yet to be under an Obligation which must make me unserviceable to the Common-wealth in the greatest publick Extremities; no less absurd is it for me to imagine it possible, that I should be obliged by a simple Compact, not to resist the unjust Violences of a Person, that attempts the Ruine of my self and all that belongs to me: therefore the Force of such a Compact extends to the Offensive only, and not the Defensive Wars; especially if the hazard of the Common-Safety of the Whole State be like to endanger mine too. For to what purpose did my Enemy grant me my Liberty, if he intended to tie me up so that I should have no power left me to make any opposition against him, if he should ever after, design any thing against my Life and Fortunes. And therefore such a Compact is no Objection

against my taking Arms at my Sovereign's Command in Defence of the Common-wealth. It is a Question something like this, Whether a Captive that hath his Freedom given him by his Enemy upon a certain Condition, upon Non-performance of it, be obliged to return to his Captivity? And it is affirmed of Private Persons: But *Bussieres Hist. Franc.* l. 16. speaking of King Francis, doubts whether it may be so of Sovereign Princes. I shall not determine the Controversy: But I think it would be the safest and wisest way, not to let a Captive Prince have his Liberty, before the Conditions of it are actually performed.

III. From what hath been said it follows, That tho' the Necessities of the Commonwealth do not at present require Military Service from the Subject, yet that it is a Crime which ought to be severely punished; for a Man to make himself or others unfit for that Service; For tho' other parts of my Body, as *Seneca* saith (b), are my own, yet my hands belong to the Publick. Instances of this sort of Cowardice are frequent to be found even among that Martial People, the Romans themselves. *Suetonius* tells us the reason why *Tiberius* reform'd the Houses of Correction in Italy, was, because the Keepers of them were suspected, not only to have often taken up Travellers, but to have conceal'd Persons that fled to such Holes for fear of being impress'd Souldiers (c). And This might perhaps be the reason why the Emperour *Hadrian* afterwards suppress'd all those Houses (d). *C. Vettienus* was Known to have cut off the Fingers of his left Hand, that he might be excused from serving in the Italian War: and his Goods were confiscated for it by the Senate, and himself condemned to perpetual Imprisonment. And *Augustus* expos'd a Roman Knight, with all his Estate to Sale, for cutting off his two young Sons Thumbs, that they might not be forced into the Wars (e). And therefore *Ammianus Marcellinus*, speaking of the Dispositions and Manners of the Gauls, saith, That none of them ever cut off their Thumbs, to make themselves incapable of Military Duties, as the Italians had done. And accordingly there were several Laws made among the Romans, to restrain such practices. *Trajan* made a Law, That the Person who disabled his Son, when any Levy was made for War, so that he could not be fit for Military Service, should be banished (f). And there is another of *Constantine's*, extant to this purpose. That the Sons of Veteran Souldiers fit for the Service of the War (some of which have refused to list themselves out of Sloth and Laziness, and others have been so cowardly as to maim themselves, only to avoid the necessity of that Duty) if they are thought incapable to serve in the Army, shall be forced to attend the most servile Offices about the Court (g). He that thinks to excuse himself from bearing Arms, by cutting off his own Fingers, shall not

(a) Vid. *Diodorum Siculum*, l. 1. c. 73. where he gives an Account of the Egyptian Laws relating to the Souldiery.  
 (b) *Seneca*, l. 1. Controv. 7. (c) *Suetonius*, *Tiberi.* c. 8. (d) *Spartianus*, c. 18. Vide Not. *Salmas.* in loc. *Faler. Mex.* l. 6. c. 3. (e) *Suetonius*, *August.* c. 24. *Am. Marcellinus*, l. 15. sub fin. (f) *L.* 49. t. 16. l. 4. f. 12. *D. de Re Militari.* (g) *V. Theod.* de fil. militar. apparitor. & veteran. l. 1. Et de *Tironibus*, l. 4. 10

escape what he designed to avoid by it, but shall with that Mark of Infamy be forced to undergo the Drudgery of the Service, since he refused the Honour of it. And further, Those Provincial Subjects that by such Practices are forced to make their Levies weaker, shall be allowed so much favour as to bring two Maim'd Persons for one whole. But the severest Law is that in *D. ubi supra*, l. 5. de Re Mil. If there be any Person that to avoid being Imprest for the War, bath, as he thinks secured his Body from danger, by cutting off his Fingers; he shall be condemn'd to be burnt, and the Master that doth not hinder him, shall incur a severe Penalty. But it is probable that this Punishment was to be inflicted only on Slaves, but the Laws before mention'd comprehended the Freemen. For it is very well known, that the Romans would not at first permit their Slaves to bear Arms, but in Cases of the greatest Extremity. Tho' it is manifest That this was not observ'd in the latter End of the Empire as appears from l. 16. C. Theodos. Tit. eod. where there is this Law of the Emperors, Arcadius and Honorius: Against the Irruptions of the Enemy we command, that not only the Persons, but their Abilities shall be regarded; and tho' we believe, that Freemen may be moved with a more generous Concern for their Country, yet by the Authority of this Edict, We command the Slaves also to List themselves with all speed for the War, and if they are found to be fit for the Service, they shall be rewarded with their Liberty, &c. For that Law in the Eleventh Book under the same Title, which is also extant in the Twelfth Book of the Codes of Justinian, Tit. 49. l. 2. speaks of Slaves that were *alieni juris*, belong'd to other Men, that the Person that offer'd to send them to the Wars, should be forced to pay a Libra of Gold into the Treasury. But the Eighth Law in the Theodosian Code under the same Title, doth not simply forbid the levying of Slaves for Souldiers, but only commands that no Slaves should be taken into the choice Companies. And † Vegetius complains that either by the Favour or Connivance of the Officers the new listed Men all pass'd the Muster, and that such as were not fit for their Master's Service, were taken to serve the Publick. But some will have it, that the Italians and French derive their word Poltrones from this cutting off the Thumbs: But I am inclin'd to think Menage is more in the right (a), in deriving it from the Italian word Poltro, which signifies one that always lyes at home upon his Couch.

IV. A Man therefore that is obliged to attend the War, is bound to defend the Post his Commander appoints him to, tho' perhaps he foresees he must in all probability lose his Life in it. And tho' in the general, all Burdens ought to be laid proportionably on the Sub-

jects, so that they may assist one another in the bearing them; or where that cannot be, or there is no necessity of it, that they may relieve one another by Turns, or else excuse themselves by an Equivalent another way, or else appoint every one his share by Lot, yet the Nature of War will not permit, that those dangerous Posts should always be appointed by Lot. And therefore it must be left to the Commander to choose the Persons he thinks fittest, or if there be any Number fit, which of them he pleaseth. Unless there be any that will Voluntarily undertake the danger, as Calpurnius Flaccus did (b), and before him Decius Mus (c). And no Man of Bravery or Spirit will ever complain that he is commanded upon such Duty, but will rather Commend his General's Judgment and Conduct in it (d). And besides, since 'tis by the Protection of the Common-wealth that we enjoy our Lives for a long space of time, which, if we had been exposed to a State of Nature, we should soon have been deprived of; we must not think it a Severe piece of Duty to part with them in defence of the Common-wealth, especially since we are so many other ways indebted to it. And therefore it is not at all unjust, that upon an extraordinary Command of the Common-wealth, and in its greatest extremities, we should hazard that Life in its Defence, which it doth in effect bestow upon us every day; and especially, since in a State of Nature every Man must be forced to defend himself with his own single Strength, unless he will choose to die, or be enslaved. But now in Common-wealths it is much better to hazard our selves with a Number, not only because the hopes of Victory are greater, but because, tho' a Man be kill'd in the fight, yet by the protection of the Common-wealth his Goods and Fortunes will be preserv'd for his Relations; which in a State of Nature there could be no hopes of. But however, it ought to be observ'd, that the Design of such Commands is not, or at least ought not to be, to take away the Lives of the Souldiers directly: I say, ought not to be; for we have an Instance in David, that Generals are sometimes guilty of such Crimes, 2 Sam. XI. 15. and he is therefore call'd a Murderer, Ch. XII. v. 9. And it is not uncommon to expose such as are less beloved where they must inevitably be cut off by the Enemy (e), as Micipsa sent Jugurtha to Numantia, that either his own Valour or the Enemies might be fatal to him. But the Design of such severe Commands, ought to be either to avert some great Evil, or to procure some great Good to the Common-wealth, and then the Souldiers may justly be engaged in such hard Parts of Duty; tho' it may happen, that they may fall in the Enterprize. For the

† Vegetius de Re Militari, l. 1. c. 7. (a) In Origin. Ling. Franc. (b) Flor. l. 2. c. 2. (c) Liv. l. 7. c. 34. (d) Seneca de Provid. c. 4. 'Why are the Bravest Men in the Army commanded upon the most difficult Enterprizes? It is the Choice of the Troops that the General sends out to Surprize the Enemy by Night, to observe their Motions, or to force a Party to dislodge them; and yet none of them that are sent, complain that their Commander deals hardly with them, &c. (e) Vide Q. Curtium, l. 7 c. 2. Polyb. l. 1. c. 9. Died. Siculum, l. 14. c. 83. Et l. 19. c. 48. Justinum, l. 12. c. 5; n. 8. Zonar. T. 2. in Mauris, Sallust. B. Jugurth.

Conditions of a decisive *Combat* are either, *kill your Enemy*, or *die with him*: For this is better than to fall alone. And therefore I think those *Commanders at Sea* may justly be quitted from the Guilt of *Self-Murder*, or that upon the exprefs Order of their *Superiors*, or at least upon a *Presumption* of it, from the State of the Engagement, *blow* themselves up with their *Ship*, rather than be made a *Prize* to the Enemies. For let us suppose the Number of Ships equal on both sides; when *one of ours* is taken, the Enemy hath an Advantage of *two Ships* more than We: if *ours* only be lost, then they have but *one* more; but if *both* sink together, the Strength on both sides will still be equal. And 'tis scarce possible if our *Ship* be blown up, but it must *ruine* one or more of the Enemies with it. For the greatest Danger of being taken, is when the Ships are Grappling, side by side; and generally the Enemy must suffer more than we by such an *Act*; For 'tis evident, they must have much the Advantage of us, when they force us to fly to so desperate an Expedient. But to *blow up* only to avoid being *sunk*, is I think a very ill Choice; because a Man may have some Hopes of escaping by *swimming* (a). It was an old Law among the *Chinese*, That the General should forfeit his head, that had the Misfortune to succeed ill in the Fight, tho' not through his own Fault, by which they design'd to oblige their Commanders, whenever they engaged an Enemy, to think of nothing but Victory, or Death (1).

V. But what if the Life of a *Subject* be demanded without the Hazard of a *Fight*; for Instance, to appease a powerful *Neighbour*, and in consequence to divert some imminent *Evil*, or perhaps prevent the *Ruine* of the Common-wealth? In such a Case, it must be consider'd, what *Reasons* such a Neighbour may have to demand the *Subject* to be yielded up to him. If it be for any *Crime* he hath been guilty of, tho' perhaps there may be some easy way, or other, for him to escape, yet he ought to be particularly cautious how he exposes the Common-wealth to Danger upon his *Account*. And therefore though we may suppose, that a Man under such Circumstances is not obliged to deliver himself up to his *Enemy*; yet he is bound to dispose of himself so as to bring no Inconveniencies upon them that give him *Reception*. And I make no doubt but his own Country and Common-wealth may for that reason *eject* him against his *Consent*: For perhaps it may be thought less Cruelty, to do so, than to surrender him up. But it may be supposed that the Lives of *certain Subjects* may be demanded for some *publick Crime* of which those particular Persons are wholly Innocent. Such a kind of *Calamity* is related to have be-

fallen the *State of Athens* for the Death of *Androgeos*: In Revenge of which *Minos*, after he had subdued the *Athenians*, demanded of them by way of *Tribute*, Seven Young Men, and as many Young Women, to be devour'd by the *Minotaur* (b). And in a Case like this, I do not see how any Subject can refuse to take the Chance which falls to his Lot, (which is the fairest way of Decision between *Equals*) unless there be a *Theseus* found who will voluntarily undertake to conquer the *Monster*. But the Difficulty will be greater, if we suppose the Life of an *innocent* Person to be demanded, or *some other Evil* threatned him as great as Death, without any pretence of *publick Guilt*, or *private Crime*. We have an Instance of such a Case in *Libanius*, Tit. 1. Decl. 27. where a *Tyrant* demands a certain beautiful young Man of a *Neighbouring City*, threatning War if he was denied. The City chooseth to hazard a *War* rather than deliver him up. But when It was closely besieged by the *Tyrant*, the Father of the young Man kills his Son and throws him over the Wall; and afterwards when the Siege was rais'd, he is accused of *Murder* (c). I shall not here either accuse, or defend the Father: he might possibly make a better *Defence* for himself than *Virginus* did in *Livy*, L. 3. c. 50. however, I think it is past dispute, that the Common-wealth is not obliged to protect such a Person to its own Ruine: For so the Common-wealth must be destroy'd, and the innocent Person be far from being secured by it. Neither can any Man desire that the whole Common-wealth should perish with him, and upon his Account. The only Refuge such an unhappy Person can take, must be either to provide for himself if he can, by *flight*; or else by attempting some bold and dangerous *Enterprise*. When all fails, he must submit to unavoidable Misfortune, in which it may be possible at least for him to preserve his Mind innocent (d); since it is utterly unlawful for a Man to destroy himself to avoid the most injurious *Usage*. And the Common-wealth, after it hath defended such an unfortunate Person to the utmost of its power, and endeavour'd as far as possible to assist his Escape some way or other; and all proves to no purpose, and imminent Ruine cannot be well otherwise avoided; may at the last forsake him; that is, not hinder his Enemy from taking him: For it is a cheap Peace that can be bought with the loss but of one Subject. But that the Common-wealth should deliver him up to his Enemy, or force him to surrender himself, is, I think, neither lawful or necessary. We have an Example of this Nature in *Megacles* of *Messana*, *Marselaer Legat.* l. 1. c. 33. and of something greater in the Story of *Sperthias*

(a) *Lucan*, l. 3. v. 706, 707.Non perdere letum  
Maxima cura fuit.Whose greatest Care  
Was not to be depriv'd of Death.(1) See our Author's Abridgm. *De Offic. Hom. & Civ.* l. 2. c. 13. f. 2. (b) *Vid. Virg. Æn.* VI. 20. *Hygin. Fab.* 41. *Orid. Met.* VIII. 170. *Plut. Theseus.* (c) *Vid. Boecler in Grot.* l. 1. c. 1. s. 6. p. m. 95. (d) *Vid. L. 3. c. 1.* l. 1. f. G. D. de Pestulando.

and *Bulis*, who voluntarily surrender'd themselves up to *Xerxes* to satisfy him for the Injury the *Lacedemonians* did him in killing his *Ambassadors* (a). But however the Commonwealth ought to set a greater Value upon the Lives of the Subjects, than to squander them away profusely upon the Fear of uncertain Danger, or upon prospect of unnecessary Good; neither is any *Subject* obliged to sacrifice himself upon such Occasions. And therefore the two *Brothers*, the *Philani*, did more for their *Country* than could have been desired of them (b). And *Caiaphas* made a very ill Application of what was otherwise a good Saying, *John XI. 50.* implying that it was lawful to take away an *innocent* Person's Life, that the *Romans* might not be jealous of any Revolt among the *Jews*, and so take an Occasion to bring a *War* upon them; especially since it would have been easy to have prevented such Suspicions by *Measures* much gentler than that of the Death of an *innocent* Man. And I do not see how the Action of *Darius* was excusable, when he threw away so many thousand Lives only to gain *Zopyrus* Credit among the *Babylonians* (c).

VI. It is also often necessary, that for the *Ratification* of *publick* *Compacts*, some of the Subjects be given for *Hostages* (1). And the *Civil Power* may force them to undertake this *Duty*, when there are none that offer themselves voluntarily. And if any over-powerful Enemy demand certain particular Subjects for *Hostages*, they cannot, I think, upon any pretence refuse. But where there is any Number of Persons proper to be given for *Hostages*, and it is indifferent to the Party we make the Agreement with, or our selves which of them be given to take away all Occasion of Complaint, or Suspicion of Partiality; the proper Method will be to determine the Matter by *Lot*. And if the *Hostages* are to be detain'd for any long time, it will be reasonable to relieve the *first*, by sending new in their places. As also to take Care, that the extraordinary Service the *Hostages* undertake, more than other Subjects shall be *compensated* to them some other way. And here it may be enquired, Whether the *Lives* or only the *Liberties* of *Hostages* are engaged? And, I think, it sufficiently appears, by giving up the *Hostages*, that thus much is actually done and intended: 'We deliver these Persons into your hands as a part of the Commonwealth we particularly value, and if we break the Articles of *Compact*, we leave it entirely to your Mercy to do with them what you think fit. Thus the City of *Liege* gave *Hostages* to *Charles* Duke of *Burgundy*, upon Condition, *That if they did any thing contrary to the Agreement, he might freely give himself Satisfaction upon the Hostages*; tho' the Duke afterwards dismiss'd them (d). And therefore since the *Breach* of *Compacts* of

this Nature is a just Reason for *levying* War against the *Party* which is Guilty of it; it is manifest, that after such *Breach* of *Compact*, and after the War is begun, that the *Hostages* themselves may be look'd upon to be Enemies, in the same manner, as all the Subjects of that Commonwealth, comprehending such as were no way *accessory* to the Occasion of the War. And 'tis certain that *Hostages* have often suffer'd in the same manner as *profess'd* Enemies. Tho' on the other hand there have been many others, who have thought it barbarous and inhuman, to revenge the Injuries others have done, with the Deaths of *innocent* and *unhappy* Persons (2). And it is certainly false to say, that the *Hostages* are given with Intention that they should suffer Punishment for the *Compacts* violated by the Commonwealth. For I cannot see how the End Men ought to propose to themselves from punishing, can possibly be obtain'd by the Punishment of an *innocent* *Hostage*, who did not properly consent to the Violation of the *Compacts*, but only did not refuse to suffer Evil in another's stead, which in it self is no Crime. And the *Hostages* will notwithstanding be a sufficient *Caution*, tho' by the *Law of Nature* they cannot properly be punished for another's Default: For it is enough that they are in such a State as leaves them at any time expos'd to the *Liberties* of *War*, and that their *Security* depends solely upon the pleasure of an *injured* and *angry* Enemy. But however, the Truth is, the Commonwealth directly engageth only the *corporal* *Liberty*, and not the *Lives* of its *Hostages*; because it firmly resolves, (or at least ought to do so,) to observe its *Faith*; and therefore *morally* supposeth no such Case by which it shall give the other Power over the *Life* of the *Hostage*. And without dispute, the Commonwealth offers great Injury to the *Hostages*, either by unjustly breaking *Compacts*, and exposing them to the Mercy of the Enemy; or by giving them up, only with a Design to betray *him* into *Security*, and so make the greater *Advantages* upon *him*. But on the other hand, let us suppose the Party that receives the *Hostages* may take Advantage from thence, either to employ them in some secret *Treachery* against us, or to provoke us with open Injuries, threatening *Death* to them, if we resist *him*: In such a Case, it must be thought reasonable that, if the *Injuries* are so great, as to make it more *supportable*, to hazard the *Lives* of *innocent* *Hostages*, rather than the Commonwealth should suffer them, we may very justly neglect the Consideration of their Danger, and make all the Strength we can to resist the Enemy. And the Commonwealth, in such a Case, doth no greater Injury to the *Hostage*, than it doth when in War; it appoints *particular* *Subjects* to certain *Posts*, in a brave Defence of which, They must either *Dye* or be made *Prisoners*. And the *Hostages*

(a) Herodot. Polymn. Grof. 1. 2. c. 25. f. 3.

(b) Vid. Sallust. de Bello Jugurth. Pomp. Mela. 1. 1. c. 7.

(c) Herodot. Thalia, in fin.

(1) See hereafter in C. 8. f. 6. and Grof. 1. 3. c. 20. f. 52. &amp;c.

(d) Phil. de Comines, 1. 2.

(2) V. Grof. 1. 3. c. 11. f. 18.

ought patiently to submit to such *fatal, unavoidable* Misfortunes, and not be dissatisfied with their *Country*, since it could not be supposed to foresee so *unexpected* a Case (a). Neither ought we upon this Account to set the less Value upon a *Civil State*, since such extraordinary Cases seldom happen in it: when in a *State of Nature*, it is impossible but such Inconveniencies must be very frequent. And

this Reasoning must determine the *Case* that happen'd to the *People of Utica*; some of the Subjects of which City, *Agathocles* intercepted, and tied them in certain *Engines* which he placed in the Front of the Battle, that so their Fellow-Subjects might be under a Necessity of killing *them*, whenever they attempted to beat him back (b).

(a) V. *Ammian. Marcellinum*, l. 28. c. 6. (b) V. *Diod. Sicul.* l. 20. c. 55. *Gunther. Ligurinum*, l. 10. *Grot.* l. 3. c. 20. f. 52, &c. *Bæcler. in Grot.* l. 1. c. 1. p. m. 102.

## CHAP. III.

## Of the Power of the Sovereign, over the Lives and Fortunes of the Subject, in Criminal Cases.

I. THE *Civil Sovereign* hath also a Power over the *Bodies*, and *Lives*, as well as *Fortunes* of the *Subjects*, in *criminal Cases*, which is usually call'd in short, *The Power of Life and Death*, (a *Power* manifestly different from *that* which God hath over his *Creatures*, *Psal.* 90. 3. or *that* of Men over *Beasts*.) And the *first* Dispute that riseth upon this *Subject*, is, How such a *Power* could by *Compact*, from particular Men, be *transfer'd* to the *Common-wealth*? For since *Punishment* is an *Evil* inflicted against the *Consent* of the Party *punished*, and that which a Man *inflicts* upon himself, cannot be said to befall him against his *Consent*; it will be some *Difficulty* to *account*, how a Man can have a *power* to *punish* himself, and consequently be in a *Capacity* to transfer such a *power* to another. For the *Severities* of the *Monastick* Life, and the *Pains* Men *inflict* upon themselves by *Ecclesiastical Discipline*, are either no *Punishments* properly speaking, but are rather applied by way of *Physick* to suppress the Force of *Lust*, or else are wholly *involuntary* and imposed by the *Priests* upon the Pretensions of the *Divine Authority* of their Office. And therefore it makes no Alteration in the *Nature* of the *Punishment*, that the *Stripes* are *inflicted* with their own hands, because the Fear of a greater *Evil* threatned to the *Disobedient*, forces them to execute that *Rigour* upon themselves: as we see *Malefactors* go to the place of *Execution*, who would be *drag'd* thither if they refused. So it is the *Cultom* in some *Nations* for the *Condemn'd Criminals* to *dispatch* themselves (a). And therefore as to the *matter* in Dispute, it will be easie to conceive, that as in *Natural Bodies*, the *Mixture* and *Temperament* of several *Simple* forms a *Compound*, in which we often perceive such *Qualities* as cannot be found in any of the *Ingredients* that compose the *Mixture*: So *Bodies Politick* which are *compounded* of a

*number* of Men, may have a *Right* resulting from such a *Composition*, which no one of the *particulars* was *formally* possess'd of; which *Right*, derived from the *Union*, is lodged in the *Governours* of such *Bodies* (b). Thus it never was pretended, that every particular Man hath a *power* to make *Laws* for himself, and yet when every Man submits his *Will* to *one*, 'tis confess'd there commences a *power* to prescribe *Laws* to all. After the same manner the *Head* of a *Body Politick* may have a *power* to inflict *Punishments* on the particular *Members*, though the *Members* had no such *power* before themselves. And *this* will be easy to account for, since every particular Man obligeth himself not only not to defend the *Person* that is to be *punished*, but if need be, to assist the *Sovereign* as far as he is able, against him (c) (1). And from hence the Reason is evident, why it does not follow, (as *some* suppose) that whatever the *Sovereign* takes away from the *Subjects* by way of *Punishment*, is done by their *Consent*, because *they* at first consented to allow of, and confirm every *Action* of the *Sovereign*: because, since *that particular Case* which gives the *Sovereign* a *power* over the *Life* of the *Subject*, is left entirely in the *power* of the *Subject* himself, so as he may for ever prevent it if he pleases; therefore such a *Case* is never consider'd by particular Men as ever like to happen. *Hobbes* indeed in the Beginning of his *Leviathan*, c. 28. asserts, That the *Right* the *Common-wealth* has to *punish*, is not grounded on any *Concession*, or *Gift* of the *Subjects*, but that the *Foundation* of that *Right* is built upon that other, which before the *Institution* of *Common-wealths*, every Man had to every thing, and to do whatever he thought necessary to his own *Preservation*. And therefore that *that Right* was not given, but left to the *Common-wealth*; which, yet since *it* has *power* sufficient, *it* may make use of, as *it* pleases, to the *Security* of the *Subject*.

(a) *Diod. Siculus*, l. 3. c. 5. speaking of the *Ethiopians* says, One of the Officers is sent to the Criminal to carry him the Signal of Death, upon the Sight of which he goes home and kills himself. (b) L. 41. t. 3. l. 46. D. de acquir. rer. domin. (c) *Conf. Hobbes de Cive*, c. 2. f. 18. (1) See above in B. 3. c. 7. f. 5.

To which it may be answer'd, That the *Right of Punishing* is different from the *Right of Self-preservation*: and by the Exercise of it upon *Subjects*, we can never understand what a *State of Nature* allowed where there is *Subjection*. But I must further add, That the *Punishments* I here speak of, are such only as *Human Legislators arbitrarily* prescribe against *Offenders*, and as are distinguish'd from those *Evils* which are the *natural Consequences* of Sin.

II. But in treating of the *Right of punishing the Subjects*, I will premise that I intend to confine my self to that *Right* only which one Man exercises over another, without Regard to the Methods and Proceedings of *Divine Justice*, which it must be allowed is in many *Cases* of a Nature much different from *human Judicature* (a). To begin therefore as high as we can; It must be observed, that, in general, in almost every Sin, but especially in such as bear *Relation* to another Person, there are two things considerable; *First*, the *Defect* or *Deviation* from the Law; *Secondly*, the *Harm* or *Damage* another Person sustains, either *directly* or *indirectly* by it. And so far we may be certain, That every Man is obliged by the *Law of Nature*, to make *Satisfaction* for the *Harm* or *Damage* another suffers on his Account; and in Case it proceeded from *malicious Design*, to give *Caution* for his good Behaviour for the future. But there is a Difference indeed between such *Caution*, when it is to be given by Men that live in a *Liberty of Nature*, and them that are *Subjects* of a *Common-wealth*. The *Law of Nature* seems to oblige the *First*, to give no other *Caution*, than that after they have express'd a *Concern* for what they have, and voluntarily offer'd to *compensate* the *Damage*, they should either by simple *Asseveration*, or at farthest by *Oath*, oblige themselves to forbear the like *Injuries* for the future. For a *voluntary* Repentance is a sufficient Evidence of an *Alteration* of Mind, and that their *Resolution* to abstain from Violence for the future is sincere (1). And therefore if the *injured* Party refuses to accept of such an *Accommodation*, and is either so *Diffident*, or so *Perverse* as to endeavour to force upon them *Articles* of larger *Extent*; since the *Others* are not obliged by the *Law of Nature* to comply so far; the *Blame* of *Breach* of *Peace* must lie on his side, and the others may justly resist him. And in such Circumstances the *Justice* of the *War* must be determined for them that offer'd the *Injury*, and the *Injustice* will be on his side that receiv'd it. But when a Man will give no *Satisfaction*, unless he be forced to it, since from thence he sufficiently discovers the *Obstinacy* of his *Temper*; and when no *Terms* of *Composition* will be accepted, unless the Party *injured* has Strength enough to overpower the *injurious*; it must be

left to the Pleasure of the *Conqueror*, to insist upon what *Propositions* he thinks most likely to secure his *future* Quiet. And when the Difference is grown to that height, the *Conqueror* may take the *Liberty*, not only to *disarm* his *Enemy*, to *demolish* and take Possession of *fortified Places*, to *condemn* him to *perpetual* Imprisonment, and the like; but may also put him to *Death*, upon sufficient Assurance, that if ever he recovers *Liberty*, he will renew his *Outrages*, and there can be no other effectual way found to prevent it. But then, as this *Caution* is demanded rather in a way of *War*, than *Punishment* properly so call'd; (though 'tis usual with some to call all manner of *Evils*, whether such as are the *natural Consequents* of Sin, or those that are inflicted in a *Liberty of Nature* for *Injuries* committed, by the Name of *Punishments*, in a more loose Sense of the *Word*) so it cannot properly be said that a Man is obliged to demand to it. Because it supposes and implies a sort of *Blemish* and *Stain* upon the Mind, and a *Sin* against the *Law of Nature*, in the Person 'tis extorted from, viz. his refusing to give a *voluntary Satisfaction*, and a violent *Defence* of his Fault. Nay, since the *Evils* that are the *Effects*, and *Incidents* of *War*, cannot properly be call'd *Punishments*; (as will sufficiently appear from what follows,) it is manifest, that *Human Punishments* in a *strict* Sense, or such as are derived from *Human Authority*, cannot affect them that live in a *Liberty of Nature*, though it cannot be denied, but that they too are subject to those *Evils* which flow by a *Natural* Connexion from Sin.

III. But in *Common-wealths*, if a Man suffer *Harm* or *Damage*, it is not only recovered with greater Ease, than in a *State of Nature*, by a *War* that must be supported by his own single Strength; but there is before hand as much Care taken, as the Nature of *Human Affairs* will permit, to prevent *Injuries* or *Harm* that be offer'd the *Subject*, by awarding *Punishments* to be inflicted by *publick Justice* on all *Offenders* against the *Law*. For since the *Wills* and *Inclinations* of Men are so easily Byass'd either to Good or Ill, it was certainly the most effectual Expedient that could have been pitch'd upon, to direct or restrain them, to set in View, the Dread of some *present Evil*.

IV. *Punishment* therefore, in general, may be thus defined; *It is an Evil of Suffering, inflicted for an Evil of Doing*. Or, *It is some uneasy Evil inflicted by Authority, in a compulsive Way, upon View of antecedent Transgression* (2). For though 'tis common to enjoin several sorts of *Labour* in lieu of *Punishment*; as suppose a Man be condemn'd to the *Mines*, to the *Gallies*, to the *Work-house*, to raise a *Fortification*, to

(a) And this, *Plutarch* seems in some measure to be sensible of, *L. de Sera Num. vindict.* p. 449. F. A Man can hardly conceive any thing of God with better Assurance, than that He is one that exactly knows the proper time for the Cure of Vice, that Punishment is the usual Remedy he applies to every Sin, which he does not always distribute in the same Proportion to all, or at the same time. (1) See above in B. 2. c. 5. f. 3. towards the End.

(2) V. *Grot.* L. 2. c. 20. f. 1.

cleanse the *Common-Sewers*, or the like; yet these are to be look'd upon only, as they are *hardships*, or *servile laborious* Employments, and cause an *Uneasiness* in the Person who is forced to submit to them; and therefore may be reduced to *Sufferings*. It is said therefore, That *Punishment is inflicted upon view of antecedent Transgression*; And hence it follows, that none of those *Inconveniences* a Man suffers by an *infectious* Distemper (1), by an *infirm* or *maim'd* Body (2), or by any *Uncleanness* (3), can properly be call'd *Punishments*. Many of this Nature are mention'd in the *Jewish Law*; As when the *Lepers* are commanded to be *separated from the rest of the People*; and when such as were *maim'd* or *blemish'd* in any Limb, were to be excluded the *Priesthood*, and the like (4); Which are no more *Punishments*, than it is for a Stranger, or a Person of *mean Quality* to be made incapable of *certain Offices* in the *Common-wealth*, or than it is for a Man to be in *pain* at the setting a broken Leg. Tho' sometimes such Misfortunes are improperly call'd *Punishments*, by the Resemblance they bear to the *real*. As we say in common Discourse of Persons *extremely infirm*, or *miserably deform'd*, that *their Life is Punishment to them*. And hence it also follows, that *Imprisonment*, the Design of which is only the safe *Custody* of the Party accused, is not properly *Punishment*, because no Man can be suppos'd to be *justly* punished, before he be *judicially* heard. And therefore whatsoever *Hurt* a Man suffers by *Bonds* or *Restraint*, before his Cause be heard, and he be declar'd *Guilty*, more than is necessary to *secure* his Person, is against the *Law of Nature*, and ought to have Satisfaction, or at least some Allowance made for it in the subsequent *Punishment* (a). I add, *Inflicted by Authority*, to distinguish *Punishment* from those *Evils* a Man suffers, either by *War*, particular *Quarrels* and *Self-defence*, or by private *Malice*. And therefore, there is no real *Disgrace* in losing an Ear, suffering the Blows of a Cudgel, or the like, but only in the Cause of it. 'Tis *Selden's* Opinion indeed (b), *That the Slaughter and Spoils committed in War are a sort of Punishments*; Which may be true enough in this Sense, that a just War, begun upon just Provocations, and the Calamities the *injurious* Party suffers by it, may be look'd upon as *Natural Punishments*, and that a Conscientious Warriour should endeavour to reduce the *Outrages* of War to the same Calmness and Proportion the *Civil Court* observes in inflicting *Punishments*. But 'tis evident, there are other Distinctions between the *Evils* of War, and *Punishments*; since as *Tacitus* observes, *In time of Peace the Cause and Merits of the Person are always regarded, when in War the Sword makes no Difference between the Criminal and the Innocent*. Neither does the *Civil Court* look upon

those *Evils* to be *Punishments* that are only the *Natural Consequents* of Sin; as when a Man loses his *health* by committing any unlawful *Act*, or by *assaulting* another, is beat himself; for these are *Evils* not inflicted by the *Authority* of the *civil Sovereign*. And therefore if a Man by ill Courses happens to weaken his Constitution, impair his Estate, or lose the good Opinion of his Friends, from whom otherwise he might possibly have expected Favours; this does not make him the less liable to *Punishment*. And lastly, it was necessary to subjoin, that the *Penalty was to be inflicted in a way of Compulsion*, or by *Force*: Because otherwise it would be impossible to attain the *End* design'd by *punishing*; which is to *deter* Men from *Offending* by the *Severity* of the *Punishment*. And therefore some have not thought it proper to allow the *Criminals* the Choice of their own *Punishment*; Because, as the *Declaimer* says (c), 'It might seem to give Countenance to Vice; and because it would take off those Fears that are generally the strongest Guard upon Men's Innocence, to allow *Delinquents* to suffer what way they pleas'd. For, (as he reasons,) a Man allowed the *Liberty* before-hand to compose himself to an obstinate resolute Temper of Mind, may defie all our *Racks* and *Tortures*. 'Tis a Mistake to measure the *Severity* of the *Punishment* by the *Terrour* only of the Name of it, for there can be no *Punishment* but that which a Man suffers *Unwillingly* and with *Regret*. And there can be no *Pain* but that which our own *Impatience* gives us. 'Tis our *Fears* only that make *Cruelty* it self look *terrible*. How can we call that a *Punishment* which Men will meet half way, and which they are ready to demand? *Condemned Criminals* should be drag'd to *Execution*, and not left to go as they please. But after all, such a Choice does not always make the *Punishment* involuntary, but only perhaps mitigates the Degree, or alters the Manner of it; still the *Punishment*, whatever it be, that at last determines the *Choice*, is certainly *involuntary* and the Effect of *Force* (d). And therefore it may be further inferr'd, that it is an *improper* Expression to say, a *Man is oblig'd to be punish'd*, or that such a one *owes a Punishment*; because, *Punishment* signifies *Harm inflicted against a Man's Consent*, and implies an *Aversion* of the *Will* to it. But now it is always suppos'd, that what we are properly *obliged* to, we ought to be ready and willing to *perform*. And therefore the Reason is plain, why, for Instance, in working upon a *Fortification*, a *Servant* at the Command of his *Master*, without any particular *Wages*, and a *Malefactor* condemn'd to that *Labour*, may be employ'd in the same *Service*, and the *Work* be a *Punishment* to one, and not to the other; because the *Servant* undertakes it upon the Obligations

(1) See *Levit. Ch. 13.* (2) See *Deuteron. XXIII. 1.* (3) See *Levit. Ch. 15.* (4) See *Levit. XXI. 17, &c.*

(a) *V. D. l. 48. t. 19. De Panis, l. 8. f. 9.* (b) *De J. N. & G. Sec. Heb. l. 4. c. 11.* (c) *Quint. Decl. 11. p. 156, 157. Edit. Lug. Bat.* (d) *Senec. L. 4. Controv. 24. p. 234. Ed. Gronov.* Imprisonment was no Punishment to me, I came thither of my own Accord. *Arrian. Epiet. L. 1. c. 12.* Where-ever a Man is detain'd against his Will, that Place is his Prison. *Add. Charron de la Sageffe, L. 1. c. 6. f. 8. & c. 39. f. 9.*

gations he is under to his *Master*, and is therefore supposed to do it *voluntarily*; but it is imposed upon the *other* as a Task, which he cannot submit to, but with *Unwillingness* and *Réluéctance* (a). And when we are told that in some Countries, (as particularly in *Japan*) the Condemn'd *Criminals* are their own *Executioners*, we are not to look upon that as a *voluntary* Action, any more than that with us, they usually go to the place of *Execution*; or than that in *Spain*, the *Executioner* suffers his *Prisoner* to be *unbound*, and only commands him to follow him; or when (as it was the old Custom in *Lithuania*) the *Malefactors* are forced to *erect* their own *Gibbets*, and *hang* themselves. For *these* can never be supposed to be properly the *Acts* of the *Criminals* themselves, but to be only *Compliances* they submit to, in hopes of avoiding greater *Evils* that might be the *Effects* of the *Refusal*. Thus it was very particular when *Gracchus* in *Livy* (b), is said to have made some of his *Souldiers*, who had not behaved themselves with the same *Bravery* as the rest of his *Army*, take an *Oath*, *That they would not eat or drink in any Posture but standing, as long as they should be in the Service*. For as they could not refuse the *Oath*, so they thought they ought rather to bear the *Disgrace* than be *perjured*. But further, neither can a *Man* properly be said to be punished, who is bound for another, and is afterwards forced to pay the *Bond*. For the other *Man's* *Misdemeanour* is only the bare *Occasion* of his sustaining that *Damage*, but the *Obligation* which he *voluntarily* took upon himself, is the proper and immediate *Cause* of it. Moreover from what has been said it follows; That, as a *Man* is not oblig'd to inform against himself, that the *Penalty* the *Law* appoints may be put in *Execution* upon him, after he has made *Satisfaction* for the *Damage* or *Harm* he has done; so for the same *Reason* he may lawfully endeavour to escape from it, either by *denying* the *Matter*, *concealing* himself, or *flying*, without the *Violation* of any *Obligation* whatever (c).

*Bœcler* indeed in his *Preface* before *Grotius* writes very obscurely upon this Subject, p. 9. 'The Merits of Human Punishments, says he, belong to the *Law of Nature*, both as it is a *Law*, and as it is *Natural*. If it be a *Law*, it produces an *Obligation*; but there can be no *Obligation*, neither can it be conceiv'd how there should be, without some *Penalty* attending the *Violation* of the *Law*. 'Tis beyond *Dispute*, that such as *Transgress* the *Law of Nature* must expect to be *punished*, because *Punishments* are unavoidably annex'd to every *Law*; and it is not in the least repugnant to *Nature* (1), that a *Man* that *does Evil*, should *suffer Evil*. But it would be false Reasoning

to infer, that because the *Law* produces an *Obligation*, therefore every *Man* that breaks it, is *obliged voluntarily* to deliver himself up to be *punished* by the *Civil Sword*. *Hobbes* in his *Book de Cive*, c. 14. § 7. says very well, That the *Second Part* of the *Law*, which is call'd the *Penal*, is *Mandatory*, and speaks only to the *publick Ministers*. There is no particular *Clause* in the *Law*, which commands the *Criminal* to go *voluntarily* to the place of *Execution*; but there is a particular *Injunction* to the *Magistrate*, to take care that *Malefactors* be *executed*. And therefore the *Delinquent* is not in fault, if he be not put to *death*, but the *Blame* lies wholly upon the *Magistrate*, who neglects a *Matter* of such *Concern* and *Importance* to the *Commonwealth*. *Socrates* when *Crito* perswaded him to make his *Escape* out of *Prison*, told him (d), that *That would be to break the Laws of his Country, which every good Subject was bound to obey; that every Man ought to yield to the Sentence the Government passes upon him; and not return the Injury upon the State, or pretend to show it has been unjust*. But these are only *Noble Sayings*, which perhaps in some particular *Circumstances*, a *Person* truly *brave* and *innocent*, might resolve to practise, but which can be of no *Force* (as I can see) against any thing here asserted. And therefore we may further conclude, That as no *Man* is bound to *Accuse* himself in the *Civil Court*, or to make any *voluntary Confession* of his *Crime*, so it is unjust in *Criminal Cases* to put the *Prisoner* to declare his *Innocence* upon *Oath*: Tho' this Custom was usual at *Athens* (e), and the *thing* might look very dreadful, when the *Party* was obliged at the *solemn Sacrifice* of a *Boar*, a *Bull* and a *Ram*, to *imprecate*, as the *Form* run, *Destruction to himself, his Race, and Family*. And hence *Hobbes* infers *de Cive*, c. 2. § 19. 'That the *Answers* which are forced from a *Man* in *Torture*, are no *Evidence* to the *Fact*; but only *helps* to find out the *Truth*. So that a *Man* has a *Right* to give a true or false *Answer*, or if he please, not to answer at all (f). 'Tis an odd *Story* to the *Purpose* we have in *Ctesias's* Account of the *Indies*; he says, 'That there is a *Spring* in *India*, the *Water* of which, as soon as drawn, turns into a *Curd* like that of *Cheese*, and that if a very little *Quantity* of this be infused in *Water* and so drank, there will follow a *Distraction* upon it, which, the same day, will certainly make a *Man* discover every thing he hath been *concern'd* in. He adds, the *King* takes the *Advantage* of this *Water*, when he would make a full *Discovery*, whether the *Party accused* is really guilty of the *Crimes* he is charged with, or no; and if a *Man* discovers himself to be guilty of what he is indicted, he is forced to be his own *Executioner*; but if

(a) *Vid.* L. 3. t. 2. l. 22. *D. de his qui Infam. not.* (b) L. 24. c. 6. (c) *Quintil. Declam.* 314. All Confession is of such a Nature, that a *Man* would be thought *Mad* that were guilty of it. *Id. Declam.* 328. Neither is there any *Man* so *Desperate*, or that hath so little *Love* for himself, that doth not commit his *Crimes* with a *Design* to deny them. (1) *V. Grot.* l. 2. c. 20. f. 1. (d) *Plato* in *Criton.* p. 37, &c. *Ed. Wech.*

(e) *Demosthen. contra Aristocrat.* (f) *Vid.* L. 48. t. 18. l. 1. f. 23. *D. de Questionib. Charron de la Sagesse,* L. 1. c. 4. § 7. f. 6. *Montaigne's Essays,* L. 2. c. 5.

his own *Confession* proves nothing against him, he is immediately *acquitted*. But it should be carefully observ'd, that generally in all *Laws* the *Dispositive part*, or that which contains the *matter* of the *Law*, and the *Comminatory*, or that which comprehends the *Penal Sanction*, are express'd by two *distinct forms* of words; As thus, *You shall not do this*; and, *He that does so, shall suffer the Penalty*. In some *Law* the latter part seems to be no more than the *Condition* of the foregoing *Prohibition*, thus, *You shall not do so and so, except you pay so much by way of Mulet*. And in *Laws* of *this* nature, that which looks like a *Penal Sanction*, is in reality no more than a *Tax*; since it is left to the discretion of the *Subjects*, whether they will pay the *Money* the *Law* demands, or forbear such a particular *Act*. And this is generally the method observ'd in *Sumptuary Laws*; the *design* of which is commonly *alternative*, either to induce the *Subject* to a *Frugal* way of *Life*, or to enrich the *Publick Treasury*. For to allow of any *price* for *Privilege*, or *exemption* from the *Law of Nature* is absolutely unlawful. But the *common design* of other *Laws* is only to dispose Men to *Obedience* by the fear of *Punishment*. And therefore that Person knew nothing of the true nature of *Punishment*, who when he had ask'd the *Magistrate* what was the *Fine* for striking a blow on the *Face*, threw down the *Money*, and struck the *Magistrate* himself. For the *Laws* were made to redress *Injuries*, not to allow of *Dispensations* to commit them upon the payment of a *Sum of Money*. And therefore it is evident, that those *Laws* only, where the *prohibition* is *alternative* or *conditional*, excuse a Man from the *Offence* who has paid his *Mulet*, or is in a readiness to pay it; which he is likewise obliged to do upon *Demand*; But not in other *Laws*, where the *Interdict* laid, is *absolute*. But it must be confess'd, that there ought to be no such *Laws* as the *purely penal*, or such as propose no other End, but to make Advantage by the *Fine*. Some indeed call'd such a *Law purely Penal*, which barely annexes a *Penalty* to a *plain Command*, and neither *expressly* commands or forbids any thing: and This is given for an Instance, A Person *elected Mayor of a Town*, *refusing the Office*, shall be *fin'd an hundred pounds to the Publick*. But in my Opinion, *This* and all other *Statutes* of the like nature, imply some such *Precept* as this: *No Man, when he is lawfully Elected, shall refuse to assist the Common-wealth*; so that, *That* before, seems to be a *penal Clause* annex'd to *This* (a).

V. But further; Since we look upon a *Judge* to be *just*, when he inflicts *Punishments* agreeably to the *demerit* of the *Offender*; and since *Justice* is said to be administred, whenever the *Penalties* are duly *allotted*; it has from hence been disputed among *Philosophers*, what *Branch*

of *Justice* the *Imposition of Punishments* belongs to; whether to the *Commutative* or *Distributive*; or as *Grotius* (1) changes the *Terms*, to the *Expletive* or *Attributive*. They that refer the *Infliction of Punishments* to *Distributive Justice*, give us these *Reasons* for it, that in the *Distribution of Punishments* as well as *Goods*, there is a proportionable regard had to the greater or less desert of the *Persons*. And since, according to their *Opinion*, *Distributive Justice* is concern'd in all those *Things* which the *Whole* applies to the *Parts*, or the *Common-wealth* to particular *Subjects*; it is evident that the *Common-wealth* inflicts the *Punishments* on particular *Subjects*. But it may be replied, That it is a *Mistake* to suppose that *Distributive Justice* takes place, as often as there is an *Equality* to be made between more than *Two Terms* (2), or whenever any thing is to be divided proportionably between more than *One*. For in *Partnership*, the *Dividends* of the *Profit* are shared among every one of the *Members*, according to their different *Proportions*; and yet in this *Contract*, the *Dividend* of the *Profit* becomes due a quite different way from that of *Rewards* and *Punishments*. For I think it is manifest, that *Punishments* are not consequent upon force of *Compact*, and that no *Man*, when he submits himself to *Government*, makes any particular *Agreement* to be *punished* for the *Crimes* he may commit (3) And therefore the *Imposition of Punishments* does not any way agree with the *description* of *Distributive Justice* which I gave before. But further; It is only by *Consequence*, and purely *Accidental*, that greater *Criminals* are *punished* with greater *Rigour*, and less, with *proportionable Severity*, not that it was *primarily* and *in it self* intended. For there is no necessity that in *awarding Punishment* to any particular *Crime*, the *Magistrate* should make a *Comparison* between that *Offence* and some *other*, and so *proportion* the measure of the *Punishment* for both, according to their different degrees of *Malignity*: But every *Crime* has, as it were, a separate *Punishment* allotted to it with more or less *Severity*, as the *Publick Benefit* requires it; tho' it usually happens, that the *Punishment* is either increas'd, or alleviated according to the different *degrees* of the *Transgression*.

Some *Persons* that reduce *Punishment* under *Commutative Justice*, consider it, as if *Punishment* were something *assign'd* to the *Delinquent* in the same manner as is usual in *Contracts*. A *Mistake* they were led into upon a common *Expression*, *That Punishment is the due of every Offender*; which is manifestly an *improper* way of speaking. For a *Man* that has any thing *due* to him has a *Right* over the *Debtor* to *oblige* him to the *Payment* of it. But I think there will be no *Body* so absurd as to say, that the *Delinquent* has a *right* to *challenge* his *Punishment* of the *Magistrate*. And therefore the

(a) Vide Sanderton de Obligat. Conscient. Prælect. 7. f. 13. seqq. (1) See above in B. 1. c. 7. f. 11. (2) See Grot. B. 2. c. 20. f. 2. (3) This is true: But, since upon a *Sovereign*, the *Right of Life and Death*, or, the *Right of the Sword* is conferr'd: His *Subjects* are oblig'd not to resist him, tho' he make Use of it upon their own *Persons*.

meaning of that *Saying* is only this, That the *Magistrate* may justly Punish a *Criminal* as the *Law* directs. *Grotius*, l. 2. c. 20. §. 2. says, 'That the *Distribution of Punishments* does originally and principally belong to *Expletive Justice* for this reason; because no Body can punish another lawfully, unless he has a *Right* to do it; which *Right* ariseth from the others *Crime*. But he was impos'd upon by the doubtful meaning of the word *Right*. For there is a very wide difference between a *Right to do a thing*, and a *Right to receive something from another*. The Meaning of the former *Right* is this, I have a *Power* to exercise this particular *Act*, and no Body ought to hinder me in it: the sense of the latter is this, I have a *Right to receive something from another*, and he at the same time is under an *obligation* to let me have it. Now when the Discourse relates to *Expletive Justice*, the word *Right* is not to be taken in the former signification, but in the latter. And this *Right* is fix'd in him that receives the Thing, and not in him that bestows it: As for instance; When I pay my *Servant* his *Wages*, I am engaged in an *Act of Expletive Justice*; not because I have a *Right* to Pay him his *Wages*, but because he has a *Right* to demand it of me. Thus, I may safely say I have a *Right* to command my *Servant* to take off my *Shoes*; but certainly 'twould be strangely impertinent to infer from thence, that therefore to command him that *Service* was an *Act of Justice*. And it is an Argument much of the same nature, to say, that because *Punishment* cannot lawfully be inflicted but by a Person that has *authority to do it*, therefore *Punishing* is a branch of *Expletive Justice*. Another Argument produced by *Grotius*, is this, 'That in *Crimes and Penalties* there is something that much resembles the nature of *Contracts*; For as the *Seller* of any *Commodity*, is supposed to have obliged himself to every thing natural to the *sale*, tho' he mention nothing particularly; so every *Delinquent* seems voluntarily to oblige himself to be punished; for every Man's Reason tells him, that it is absolutely necessary that every great *Crime* should be punishable; and therefore a Man that chooses to transgress, directly and deliberately, may by consequence be said to consent to be punished: And therefore in *Scripture* we find that *Sin* is frequently call'd by the name of a *Debt*, which we are as much obliged to discharge, as They are that are under *Bond* to their *Creditors* (a). To which I answer, That thus much is certain, that if a Man knows the *Penalty* the *Law* appoints for such a particular *Crime*, and yet is wilfully guilty of it, he can have no reason to

complain of *unjust Usage*, or to think himself hardly dealt with, when he is brought to punishment. But it cannot from hence be infer'd, that a Man gives a *direct* and *immediate Consent* to his own punishment; or rather, that he has obliged himself by his own *Consent* to suffer it. Since no Man is ever guilty of a *Crime*, but he has some hopes, either by concealing himself, or some way or other to secure himself from *Justice* (b). *Vasquius* indeed (c) attempts to prove, that *Criminals* are obliged by their own consent to suffer punishment, because the *Penal Laws*, as well as others, are made by the consent of the *Subject*; or at furthest, because the *Legislative Power* is derived originally from the consent and agreement of the *People*. But I think there is little or no force in the Argument: For as I have proved elsewhere, *Laws* are not *Compacts* or *Agreements*. And I think there is no Absurdity in the thing, that I should give my *Consent* to the *Establishment* of a *Power*, which may perhaps afterwards exercise certain *Acts* upon me, whether I will my self, or no. Only, I can pretend no reason of Complaint, if I do afterwards feel its severity, because I consented to such a *Power*. But *Sin* is compared to a *Debt*, not because a Man is oblig'd to consent to his own *Punishment*, but because the *Legislator* has the same *Right* to challenge the *Penalty* of the *Delinquent*, as a *Creditor* has to demand the *Money* lent to the *Debtor*; and because the *Body* and *Goods* of the *Offender* are no less liable to the *Magistrate* on a criminal account, than the *Goods* of the *Debtor* are to the *Creditor* in Cases of *Debt*. In the *Elements of the Roman Law*, (1) *Obligations* are divided into such as arise from *Consent*, and such as are the result of *Transgression*; but it should be observ'd, that from *Transgression* there arises an *Obligation*, only to make *Satisfaction* for the harm that is done, but not to suffer the punishment: And that *Obligation* it self is not properly founded upon a Man's consent to the *Penalty*; but upon that necessity of *Restitution*, which upon a Settlement of *Property*, evidently flows from the *Law of Nature*. Thus *Aristotle* distinguishes *Contracts* into the *Voluntary*, and the *Involuntary* (2). But his meaning may be thus explain'd; That as in *Contracts of Duty* there is a *Return* made of *Equal for Equal*, so in *Criminal Cases*, the *Satisfaction* ought to be an *Equivalent* to the *Damage*. But the reason why he calls the obligation to make *satisfaction*, an *Involuntary Contract*, is, because, for example, in *Cases of Debt*, it depends upon the *Creditor's* pleasure whether the *Debtor* shall receive the *Money* or no: But, for example, the *obligation*

(a) V. L. 49. t. 14. l. 34. D. de Jure Fisci. L. 9. t. 8. l. ult. C. ad L. Juliam Majestatis. In Tacitus, Ann. 12. c. 53. The Woman that Married another Man's Slave without the Knowledge of his Master, is said to have Consented to her own Slavery. (b) Thucydides, l. 3. c. 45. Edit. Oxon. init. There are several Crimes which the Commonwealth hath forbid under Pain of Capital Punishment; and yet Men have Hopes strong enough to persuade them to venture and run that Risk; and there is no Man that will undertake an hazardous Enterprize, when he despairs of the Success of his Plot. And we never heard that one State revolted from another, which did not imagine it self stronger and better prepar'd for War. (c) Vasq. Controv. Illustr. l. 1. c. 28. n. 12, 13.

(1) Institut. L. 3. t. 14. De Obligat. l. 2.

(2) See above in B. l. c. 7. l. 12.

a Thief is under, to restore me what he has robb'd me of, or the value of it, bears no manner of relation to any *consent* of mine, but he brings it upon himself much against my *will*. For 'tis certain, I had rather he should have left me in quiet *possession* of what was my own, than have given me the trouble of bringing an *Action* of *Theft* against him, especially where there is no hope of recovering more than barely the *principal* by it. But it may be further considered, that generally every *Right* has an *Obligation* that answers it in another Person. And therefore upon *commission* of the *Criminal Action*, the Party that is *injured* has a *right* to demand *Reparation* for his *loss*, or the *harm* he has *suffered*; and the *Injurious* is under *obligations* to make him *satisfaction*; and This is the matter which *Expletive Justice* relates to. But as the *Criminal Action* is a *Deviation* from the *Law*; the *Governours* of the *Common-wealth* have *power* to punish as they think necessary; but the *Delinquent* is under no *obligation* to offer himself *voluntarily* to be *punished*. For which reason the *Infliction* of *Punishments* cannot fall under *Expletive Justice*. So that, it may be said upon the whole, that *Punishment* does not belong to either *Species* of *Justice*, but makes a particular *branch* it self. Unless it may be thought more proper to say, that both the *Imposition* of *Punishments* and the *Distribution* of *Rewards*, which have not been determined before hand by particular *Compact*, are *parts* of *Prudence* necessarily belonging to the *Government* of others, and therefore should be rank'd under *Justice* in *General*.

VI. It will therefore, I think, be allowed by every Man that pretends to Reason, that tho' by Nature all Men are upon the *level*, and *Punishment* it self seems to be a severe and rigid sort of *Discipline*, while Men endeavour only to afflict and ruine one another; and tho' the wise *Creator* of the World hath so disposed the *Nature* of Man, and the *Events* of Things, that *ill Actions* are generally pursued by *ill Consequences*, which in a manner revenge themselves upon the *Causes* of them: yet that *positive Human punishment* after all hath nothing in it repugnant to *natural Equity*; but that on the contrary, it is absolutely necessary to the *Common Quiet* and *Security* of Mankind. For as it was requisite to the *Publick Peace* of the World, to put an *End* to the *Equality* of *Nature*, by erecting *Civil Governments*; so in the general *Loosness* and *Corruption* of Manners, and *Natural Aversion* to *Vertue*, the *force* of *Government* would soon be dissolved, if bad Men were not confin'd, and frighten'd into *obedience*, by the *Dread* of some *present Evil*. And since every Man is before-hand told publickly what he ought to do, and what forbear doing, and what *Punishments* will be *inflicted* on such as act otherwise, no Man can blame any body but himself, if by a wilful

*Transgression* of the *Laws*, he falls under the *Severity* of the *Punishment*.

VII. As to the *Persons* the *right* of *punishing* is to be *lodg'd* in, and *exercis'd* upon, 'tis *Grotius's* Opinion, *l. 2. c. 20. §. 3.* 'That *Nature* has not given any *Determination* upon it. 'So far indeed, says he, we may discover from *Nature*, that 'tis most convenient, some *Superiour* should be *impower'd* with it; tho' that is not absolutely necessary neither; unless we take the word *Superiour* in such a sense as will imply, that a Man which is guilty of a *Criminal Action*, shall be thought to have made himself *inferiour* to all the rest of *Man-kind* by that very *Act*. The *Consequence* of which is, that no Man ought to be *punish'd* by one equally *guilty* with himself (a). But I confess I cannot be perswaded but that the *power* of *punishing* is a *Part* of *Sovereignty*, and consequently that no body can *properly* be said to *inflict Punishment* upon a Man, unless he has *Authority* over him. For tho' upon a view of the ill *Dispositions* of Men, and how easily they are inclin'd to injure and molest one another, we find it absolutely necessary to the *Preservation* of *Society* in the World, that *Punishments* should be *inflicted*; and tho' every Man ought to *direct* his *Actions* to the support of *Society*, as the *general good* of all Mankind; yet it does not follow that every Man is *obliged* to undertake every *Action* that *tends* to advance that *End*; Since that would be to no purpose, without a *concurrence* of certain other particular *Requisites*. Thus, It is necessary Men should be under some *sort* of *Government* or other; tho' no Body imagines, that it is left at random for any Man to assume a *Right* or *Power* over others as he pleases. Now then, every *Evil* which is *inflicted* upon *antecedent Transgression*, cannot properly be called *Punishment*, but that which was *threatned* before, and is *inflicted* after the *Crime* is known. And therefore the *Evils* of *War*, and all *Acts* of *Hostility*, must not be call'd *Punishments*, tho' tis true that we procure *Caution* against *future Injuries* by them; for in a *state* of *War*, every Man provides *Caution* for himself by his own force, and in what manner he pleases; but the *Caution* an *injured* Person receives from *Punishments*, must be procured by the *Power*, and according to the *Determination* of the *Superiour*; In *War* the *injured* Party only, is *directly* concern'd to *punish*, and *suppress* his *Enemy*; but in *Civil Government*, the whole *Common-wealth* is as much *concern'd* as the Party that is *injured*, to *punish* a *Criminal*. Again, 'tis left to the *Discretion* of the *Injured* only, whether he will *revenge* himself upon his *Enemy*, with a *War*, or not; But 'tis left entirely to the *Superiour*, whether *Punishment* shall be put in *Execution*, or not; nay, he has *Power* to *inflict* it, tho' the *injured* Party desire the contrary. And lastly, the *quantity* of the *Punishment* is gene-

(a) See *John*, Ch. VIII. v. 7. *Rom.* II. 21.

rally determined, before the *Fact* is committed; but in *War* the *Caution* must be settled according to the Circumstances of my own, or my Enemies *Condition*. But besides, tho' *Nature* has not determined, whether I, or any other particular private Man ought to have the right of *inflicting Punishments*, any more than it has *design'd* us to be *Princes*; yet I think it is sufficiently clear from Reason, that *Punishment*, as it is the *Execution* of a *Judiciary Sentence* ought to be derived from some *Superiour*, or from a Person who has *Authority* over the *Criminal*. Neither is there any reason why we should be so *nice* in the Explication of the word *Superiour*: For 'tis absolutely false that every sin leaves such a *Blot* upon a Man's *Honour* and *Character*, that he must presently be thought no better than a *Beast*. Neither is it good Reasoning to infer, that because such a Man is guilty of such a *Crime*, therefore I have power to *punish* him. For if I suffer by the *Criminal Action*, in a *liberty of Nature*, I may demand *Satisfaction* of him for the *Injury*, and *Caution* for the future in a way of *War*; if the *Action* does not affect me, but some other Person whom I am not particularly *obliged* to defend; I can have no more pretence to engage my self in his *Cause*, than I have to prescribe *Laws* to those that owe me no *Subjection*. Ex. II. 14. It was a saying of *Democritus*, that it was most agreeable to *Nature*, that the most *deserving* Person should govern; which is perhaps true enough in this sense, that where the *Government* is to be conferr'd upon a single Person elected by a Plurality of *Voices*, and no one Man has any particular *claim* of *Right* to it more than another, it would be the most rational way of proceeding, to make choice of a Person of the greatest Merits, and that seem'd to be

best acquainted with the *Arts* of *Government*. But such a Person can pretend to no *Authority* over others, except they *voluntarily* submit to him. As for what *Grotius* says, that a *Criminal* ought not to be punished by a Person as guilty as himself; This does not properly concern them that have *publick Authority* to punish, but only affects such People as love to *censure* and *impeach* others, barely upon their own *private Authority*, and out of a pretended hatred to *Vice*, without *Warrant* from any *Obligations* they are under by the *Duties* of their *Office* and *Place*. Tho' without dispute it is very *unbecoming*, and must necessarily lessen the *Respect* that is due to the *Magistrate* and the *Laws*, when the Person that administers *Justice*, is guilty of the same *Vices* he *punishes* in others, for a Man that *Punishes* that in others, which he allows himself to be guilty of, does not seem to be out of love with the *Crime*, but to *envy* others the *enjoyment* of it (a.) Yet I don't think it had been unlawful for *Nero* himself, after he had *kill'd* his *Mother*, to have put others to *death* that had been guilty of the like *Crime* (b). And in this, *Hobbes* is of the same Opinion, *Leviath.* Chap. 28. That *Punishment* is derived from the *Superiour* as such. The *Definition* indeed, which He gives of *Punishment* is hardly so full as it ought to be, containing only those *Punishments* that are inflicted by the *Civil Power*, and making mention but of one End only. *Punishment*, says he, is an *Evil* inflicted by *Publick Authority* on him that has done or omitted that which is *judg'd* by the same *Authority* to be a *Transgression* of the *Law*, to the end that the *Will* of Man may thereby be the better disposed to *Obedience*. But he rightly infers from thence, That neither *private Revenges*, nor *Injuries* of *private Men*, nor

(a) Vide *Plin.* L. 8. *Epist.* 22. *Plato*, *Minoe*. He is a wicked Man that does one thing himself, and commands another. Add *Gratian*, *Caus.* 3. *Quæst.* 7. c. 3, 4. *seqq.*

(b) But yet not for *Domitian* to punish Women convicted of *Adultery*, when he Himself had *Debauch'd* them. *Zonaras*, *Tom.* 3. To this we may refer that which *Medea* saith in *Seneca's* *Trag.* v. 500, &c.

He did the Crime, that hath th' Advantage of it,  
He's Innocent to You, who only was  
Your Instrument.

And certainly all voluntary Informers and Censurers of others, ought to take care how they fall under the reach of what *Juvenal* saith, *Sat.* 2. v. 23, &c.

*Loripedem rectus derideat, Æthiopem albus:*  
*Quis tulerit Gracchos de seditione querentes?*  
*Quis calum teris non misceat, & mare calo,*  
*Si Fur displiceat Verri, aut homicida Miloni,*  
*Clodius accuset mæchos, Catilina Cæthegum,*  
*In tabulam Sylla si dicant discipuli tres.*

Let him cry Blackmoor-Devil, whose Skin is White,  
And Bandy-legs, who treads himself Upright;  
Let him Reprove that's Innocent. — In vain  
The Gracchi of Sedition must complain.  
'T would make you swear the Planets from their Spheres,  
Should *Verres* peach Thieves, *Milo* Murtherers.  
*Clodius* tax Bawds, *Cæthegus* *Catiline*,  
Or *Sylla's* Pupils *Sylla's* Rules decline.

And again the same Satyr, v. 38, &c.

— Felicia tempora; que Te  
Moribus opponunt: habeat jam Roma pudorem.  
Tertius e caelo cecidit Cato.

— Blest times  
That made Thee Censor of the Age's Crimes!  
Rome now must need reform, and Vice be stopt,  
Since a Third *Cato* from the Clouds is dropt.

Mr. Tate.

*Seneca*, *Controv.* l. 2. *contr.* 14. There is nothing more Despicable than a Man that chastizes Vice, and yet imitates it. *Cic.* *Tusc.* *Quæst.* l. 3. c. 30. It is the particular Character of Folly, that it discovers another's Faults, and forgets its own. *Plaut.* *Trucul. Act.* 1. *Scen.* 2. v. 58. He that accuseth Another of a dishonest Action, ought to be cautious Himself. *Ovid.* *Fast.* l. 6. v. 647.

*Sic agitur Censura, & sic exempla parantur,*  
*Cum Judex, alios quod monet, ipse facit.*

Unenvied he a brave Example stands,  
Who by his Deeds confirms what he commands.

*Pains*

Pains inflicted by publick Authority without precedent publick Condemnation; Nor Evil inflicted by usurped Power, nor Harms inflicted on the Subject without Regard to future Good, are properly Punishments, but rather Acts of Hostility. But it must be observ'd, That such false Punishments as these do not immediately place us in a State of War, or give us Licence to make use of the Liberties of an Enemy, or that a Man who has suffered such Evils is left to his Freedom to return Hostilities upon those that inflicted them. The same Author also excludes those Evils from being Punishments, which are the Natural Consequences of Evil Actions; 'As when a Man in assaulting another, is himself slain or wounded, or when he happens to fall sick upon the commission of some unlawful Act; tho' this indeed will look like a Punishment from God. Again, he says, that when the Harm inflicted is less than the Benefit that naturally follows the Crime committed, it is rather the Price or Redemption, than the Punishment of a Crime. And among his Acts of Hostility, he mentions the Excess of Punishment; or when a greater Punishment is inflicted than the Law allows of; and when Hurt is inflicted for a Fact done before any Law forbade it; and when any Evil is inflicted on the Sovereign; and when Harm is inflicted upon a declared Enemy. But what he adds to this afterwards; That One who has been a Subject, and declares himself an Enemy, is not to suffer as a Subject but an Enemy, and therefore that such as are guilty of Treason, may be made to suffer whatsoever the Representative of the Common-wealth will, or as Enemies, I cannot agree with him; because whatever punishment is inflicted upon Treason, is inflicted upon the Force of Authority, and proceeds from the Supreme Power, tho' the Traitor himself may rebel and deny his Authority, and sometimes put the Common-wealth to a Necessity of Suppressing him by Arms, before he can be proceeded against as a Criminal; as when a Man is in pursuit of his Slave who is run away, he does it by a Right of Property, and not of War. I may further add, That the Evils an Enemy suffers, are none of them thought to be Infamous, whereas the Infamy of it, is a particular addition to the punishment of Traitors.

VIII. The next Thing that falls under Consideration, is, the End (1) of Punishment, which every Man ought to propose to himself in inflicting it, after Satisfaction made for the Damage, or when the Nature of the Case will not admit of Satisfaction. And here my first Assertion is, That

tho' it does not appear to be unjust in it self, that the Man that did Evil should suffer Evil (a), yet that Punishment ought never to be inflicted without a prospect of making some advantage from it. And therefore Hobbes makes this one of his Laws of Nature, de Civ. c. 3. s. 11. That in Revenges or Punishments, Men ought not to look at the Greatness of the Evil past, but the Greatness of the Good to follow; whereby, we are forbidden to inflict punishment with any other design, than for the Correction of the Offender, or the Admonition of others. And 'tis Plato's Judgment (b), That a Man that acts with Prudence, will never punish barely for the past Offence; for it is impossible for him to undo what is done already; but he will always regard what is to come, either to prevent the same Offender from being guilty a second time, or else to frighten others from transgressing by his Example (c). It is indeed absolutely necessary, that some regard should be had to the Crime committed, because without that, 'tis evident, there can be no punishment; but then the End of punishment ought also to be considered, that a Man may not suffer Evil, for what is too late for him to remedy; for tho' he be a Criminal, yet he is of the same Flesh and Blood with other Men. And Hobbes proves this Law by these two Reasons; first, 'Because a Man is obliged by the Law of Nature upon Caution for the future, to pardon them that repenting desire it: And secondly, Because Revenge, as it respects only the Past, without regard to the Example and Profit to come, is only a Triumph and Glorifying in the Hurt of another, tending to no End, and is therefore vain, and contrary to Reason. It might perhaps be a Saying proper enough for an Attila (d); That he knew nothing sweeter than Revenge, and thought no Satisfaction in nature greater: But a Judge when he is forced to punish, ought by no means to take pleasure in the Sufferings of the Criminal (e).

*Qui fruitur pœnâ ferus est legumque videtur  
Vindictam præstare sibi; diis proximus ille est,  
Quem ratio, non ira movet: qui facta rependens  
Consilio punire potest.* —

'Tis cruel Pleasure to enjoy the Pain  
Our Sentence dooms the Guilty to sustain;  
Justice forgets her first and great intent,  
When to Revenge she turns the Punishment:  
But 'tis a Godlike happiness of Mind,  
Freely to judge, with Passion unconfined;  
To reason calmly, and as things appear  
In their true light, be gentle or severe.

(1) See Grof. B. 2. c. 20. Vid. Bacon. Serm. fid. c. 4. (a) Pindar. Nem. Od. 4. v. 52.

Ἡ δὲ τῶν κακῶν ἐστὶν ἡ ποινή.

He that doth Ill, 'tis just should Suffer.

Euripid. Hecub. v. 1250, &c. When you have had the guilty Confidence  
To do a Crime, learn to submit and bear  
The Punishment.

(b) Plato Protag. p. 226. A. B. Edit. Wech. (c) Seneca de Irâ, l. 1. c. 16. speaks to the same Sence. (d) Fortunandus de Rebus Geticis, c. 39. (e) Claud. de Conf. Mallii, v. 223. &c. Valer. Max. l. 2. c. 9. s. 3. Vulcat. Gallianus in Avid. Cass. c. 12. It never looks well for a Prince to be guilty of Revenge, purely to satisfy his own Re-  
sentments.

And therefore *Augustus* struck out the Names of such *Criminals*, that by their Meanness could afford their Enemies no other *Satisfaction*, than that of *Revenge* (a). 'And therefore when the *Magistrate* punishes a *Criminal* with *Death* or *Ignominy*, it is not because he takes any Delight in their *Punishment*, but because he intends such *Examples* for *publick* Instruction, and that the *Common-wealth* may make some Advantage by their *Death*, that did it no Benefit in their *Lives* (b). But I am not so far of *Hobbes's* Opinion, as to call it an *Act of Hostility*, whenever the *Government* punishes without considering the true *End* of *Punishment*; so the *Punishment* in other Respects be inflicted according to the *Laws* of the *Common-wealth* (c).

IX. But the true and genuine *End* of *Punishment* is *Precaution* against *Injuries*; which is obtained, either by the *Amendment* of the *Offender*, or by *detering* others by his *Example* from *offending* for the future; or by *inflicting* such *Punishment* on the Party *peccant*, as shall deprive him of a *Capacity* of *transgressing* any more; which *Grotius*, in other words, in the Second Book, Ch. 20. Sect. 6. expresses thus, *Punishment* either respects the *Persons* good that *offended*, or his, whose *Interest* it was he should not have *offended*; or *indifferently*, the *Good* of every one (d). The first sort of *Punishment*, is that which designs the *Amendment* of the *Offender*, or to *correct* his *bad* Inclinations by a contrary Method of *Cure*. For since every *Action*, and especially one which is *deliberate* and *repeated*, is apt to bias our *desires* to give us a *bankering* after it, and to grow into what we call an *habit*; it will be necessary to deprive *Vice*, as soon as we can, of all that looks *tempting* in it (e). 'And therefore, as *Socrates* said, of all *Delinquents*, he is certainly the most *unfortunate*, who never suffered for his *Crimes*, and he's sure to be less unhappy, when ever he does; since then he satisfies the *Justice* of *God* and *Man*; for he that suffers dischargeth the guilt of his *Conscience* (f). *Correction*, as *Seneca* says, well design'd, and used with *Judgment*, is sometimes absolutely necessary; there being no such hurt in it as is commonly imagin'd; for under an *appearing* evil, it carries with it a

very successful *Remedy*. For a *vicious* Disposition is reform'd by *Pain* and *Uneasiness* inflicted on the *Body*, after the same manner, as it is usual to bring *crooked* Timber to *straitness*, by *plying* it over *Fire*, or by opening its parts for use, by the *Wedge* and *Sawe*. Though we need not go so far, as to agree to what the same Author saith in another place; 'That when either by our Selves, or by *Friends*, we have *injured* another Person, it is our *duty* immediately to apply our selves to the *Magistrate* to be *Punish'd*, as we would to a *Physician*; lest the *injurious* Distemper should so far infect us, as to settle in an *incurable* Disease: For a Man that is of so good a Disposition, as to be in a readiness to deliver himself up to *Justice* to *punish* his own *faults*, has no need of making the *Magistrate* his *Physician*, but may be safely trusted with his own *cure* (g).

X. As to the *Person* who is to inflict this sort of *Discipline*, *Grotius* thinks (h), 'That 'tis naturally free, for any Man to *exercise* that sort of *punishment* which designeth only the *Reformation* of the *Offender*; provided he be Master of a *good* Judgment, and not guilty of the same *Faults*, or others of the like *Nature* himself. (For they are certainly the most *unpardonable* *Criminals*, who have the *Impudence* to *Impeach* others of *Crimes* they are guilty of themselves; and if a Man would reform others, he must first mend himself (i).) 'But that as to other sorts of *Punishments* which are of a *compulsive* nature, such as *Whipping*, *Beating*, and the like; *Nature* hath made no Distinction between the *Persons* that may, and those that may not, inflict them upon others. Except it be, that Reason hath particularly allow'd *Parents* the use of this *Right* over their *Children*, upon the force of *Natural* Relation. And therefore generally the *Civil* *Laws*, to prevent *Confusion* and *Disturbances*, have justly restrain'd the common *Affinity* of Mankind, only to the nearer *Branches* of Blood. But there does not seem to be much Satisfaction in This: For, as I said before, no *punishment*, whatever the end of it be, can be *inflicted*, but by the *Authority* of the *Sovereign*: And therefore all *Reproof* by words looks rather like *Counsel* and *Advice*, than *Pu-*

(a) Suetonius Aug. c. 32. (b) Senec. de Irâ, l. 1. c. 6. (c) Leviath. c. 28. Add. L. 18. t. 7. in fin. l. 7. D. de servis exportandis. (d) Conf. Senec. de Clem. l. 1. c. 22. (e) Plato, Gorgias, 325, &c. (f) Seneca de Irâ, l. 1. c. 5.

(g) Apuleius de Dogm. Plat. p. 615. Edit. in Usum Delph. There is more Disquiet and Uneasiness in the Impunity a Delinquent enjoys, than there is in the most severe Punishment. Plato de L. L. l. 9. in the Beginning. No Punishment appointed by Law is intended for an Evil, but only to effect one of these two Things, Either to make the Offender better, or at least not so bad as he was. Aristot. Eth. ad Nicom. l. 2. c. 2. p. 20. Ed. Paris. Punishment is a sort of Physick, and Physick commonly works by contraries. Alcicon de Doctrin. Plato, c. 32. 'Tis as necessary for an Offender to be Punish'd, as it is for a sick Man to apply himself to the Physician: For Correction is a sort of Remedy for a vicious Mind. Tacitus, Ann. III. c. 54. A debauch'd and debauching, a crazy and violent Temper, must be cooled and kept under by Restraints as strong as the force of its Lufts. Plato in Critias, in the Beginning. The proper Punishment, for one that transgresseth out of Negligence, is that which makes him cautious.

(h) L. 2. c. 20. f. 7. (i) Isocrat. de Permutatione, p. 539. Edit. Paris. Laëtantius Div. Inst. l. 4. c. 23. When Crispus in Tacitus, Hist. l. 2. c. 10. towards the End, Condemn'd Faustus, tho' he himself had been Employ'd and Rewarded for bringing in Accusations of the same kind before, 'tis said, That the Punishment of the Crime did not grieve Faustus so much, as it did that such a one should inflict it. Arnobius adv. Gentes, L. 1. It is great Injustice in you, to make that Criminal in us, which you do your selves; or to allow your selves in the Practice of those things, which you strictly forbid to others.

nishment; which when *vehemently* delivered and pressed in *harsher Language*, seems to be founded rather upon the particular *Laws of Friendship* (1), than upon any common right. And the *truth* of this appears from the common return that is made to any Man, who undertakes to *reprove* a Person he has no acquaintance with, (as *Terence* (a) represents it) *Have you so little Business of your own, as to intrude into another's, and meddle with what doth not concern you?* And therefore *Chremes*, in that Author, when he justifies his reprimanding *Menedemus*, appeals to the Right of a Neighbour, which he said, he thought *might claim the next title to Friendship* (b). But besides, 'tis a very necessary part of *Prudence*, to know how to apply our *reproof*; for an *unseasonable mistake* of this Nature, may be of very ill consequence to a Man's self, and *harden the Person* he intended to reform in the vicious course he was in before. *Parents* (c) indeed have a right to correct their *Children*, upon a double Account; both because the *Methods* of Education, which *Nature* obliges them to bestow upon their *Children*, would be to no purpose, if they had not the *liberty*, as they see occasion, to use them with a little *Sharpness* and *Severity*; and because, out of *Civil Government*, they would have an absolute *Sovereignty* over them. And though, in many *Common-wealths*, this power is reduced to a very little compass, yet they have so much almost every where left them, as giveth them leave to correct their Children at *discretion*, for those *petty* Misbehaviours, which are the effects rather of the *levity* and *imprudence* of *Youth*, than of any inveterate settled ill *habits* of the *Mind*; and which disturb more *domestick Quiet*, than the *publick Peace*. And 'tis as necessary, that such as in the *Parents* stead, have the *care* of educa-

ting young People committed to them, as *Tutors, Governours, and Masters*, should be allowed the same *Power*; because they can never discharge their *Duties* as they should, without the moderate use of gentle *Discipline* (d). But this sort of *punishment* *Grotius* says, *ought never to proceed so far as Death*; since 'tis very absurd to hope to reform a Man, by throwing him into a *Condition*, in which 'tis impossible for him to express any *Amendment*: though 'tis the Opinion of some, that when a Man is grown incorrigibly vicious, 'tis just and reasonable to deprive him of *Life*; especially since such sort of Persons are generally very bad Neighbours to others. So *Seneca* says, 'That *Death* is the best Remedy for an incorrigible Disposition; and that 'tis the safest way for him to leave the World, who is never like to be Master of himself in it (e). And *Plato* says, that a wicked Man had better not live, since he is under a Necessity of living ill. *Sulpitius Asper*, in *Tacitus*, gave this Reason for his engaging in the *Conspiracy* against *Nero*, that it was impossible for him to stop his *Cruelties* otherwise; or as *Suetonius* telleth the story in his *Life* of *Nero*, some of the *Conspirators* charg'd all the guilt of the Plot upon *Nero* himself; as if they could not have better express'd the respect they had for him, than by killing him, after he had dishonour'd himself by such variety of *Wickedness* (f). Yet *Charity* should persuade us not to be too easily prevail'd upon to give any Man over for desperate. But this sort of *punishment* may also promote the good of others. For 'tis certainly sufficient *Caution* to others, when a Man reforms upon the sense of the severity of his *punishment*: and when an *incorrigible* Person suffers *Death*, greater *Security* cannot be given that he will never create fresh Disturbances. And that none but such *incorrigible*

(1) Vid. *Terent.* *Heautontimor.* Act. I. Sc. I. v. 4, &c. (a) *Ibid.* Act. I. Sc. I. v. 23, &c.

(b) *Q. Curtius*, l. 3. c. 12. n. 16. speaking of *Hephestion*, No one could take that Liberty to Reprove the King which he did, which yet he was so tender of using, that the King seem'd rather to allow him in it, than he to assume it. *Cic.* *Off.* l. 1. c. 17. Advice, Perswasion, Exhortation, Consolation, and sometimes Reproof, are particularly used in Friendship. *Hom.* *Iliad.* l. 11. v. 792. ἄρα δὲ ὃ παρὶ φρασὶς ἔστιν ἑταίρος. And to this we may refer that of *Mufonius Rufus* in *Tacitus*, *Hist.* l. 3. c. 81. (c) *V. L.* 47. t. 10. l. 7. f. 3. *D. de Injuriis.* *Libanius* *Declam.* 20.

(d) *Seneca* de *Irâ*, l. 2. c. 27. The Corrections of Parents and Masters must be look'd upon to be of the same Nature with Cutting and Abstinence, and other severe Methods of Cure, which do us good when they hurt us. What Power other Relations have over others, in this Case may be seen. *L. 9. t. 5. C. de Emendatione propinquorum.* *Plato* de *L. L.* l. 7. p. 893. A. decrees, that in his *Common-wealth*, Since young People are as intractable as the wildest of Beasts, those Children that were Free should be subject only to the Correction of those that had the Charge of their Education. But that any Freemen should have the Liberty to chastise any Slave, whether Boy, Master, or Tutor, if he took him in any Fault. *Xenoph.* de *Repub.* *Lacedæmon.* *Lycurgus* made a Law, That no Man should command his own, or another Man's Children, to do any thing but what was Just. And that if a Child should be Beaten by another, and complain of it to his Father, it should be thought Mean and Irreputable, if the Father did not Correct him again. But what *Xenophon* says, l. 5. μεὶ ἀναλάσῃ: (That, if I strike any Man for his own good, I own I deserve to be punish'd, but then it must be so as Parents are punish'd by their Children, or Masters by their Scholars: For thus Physicians are allow'd to Cut and Burn their Patients, when it is in order to their Cure) was only to excuse that Severity, and *Moroseness* of Humour that was observ'd in him. But what may be Lawful enough for a General or a Commander to do, is not therefore Lawful for every one else.

(e) *Seneca* de *Irâ*, l. 1. c. 16. in the Beginning. You are now grown incurably Wicked, and are perpetually adding one Crime to another; you no longer give your self the Trouble to bring Excuses; (which ill Men are seldom without) for your Vices, but think the Sin it self, reason enough for you to sin on. You have such a Thirst after Wickedness, and have indulged, and pleas'd your self in it so long, that it is impossible you should quit it, till you take leave of your self. You will one time or other endeavour to lay violent Hands upon your self. Well we will be your Friends, and remove that Madness from you, which so disorders you; and since you are so deeply engaged in your own and other Men's Punishments, will shew you all the good that is now left for you, and that is, *Death.* *Senec.* de *Benef.* l. 7. c. 20. *Plato* in *Gorgia*, p. 349. B. *Tacitus*, *Ann.* XV. c. 53.

(f) *Sueton.* *Nero*, c. 36. *Iamblicus* in *Protrept.* c. 2. As it is safer to apply Causticks to a Swelling, than leave it to it self; so 'tis better for a wicked Man to Die than Live, *Rosar.* *Persic.* c. 1. When a Man is never Innocent but in his Sleep, 'tis better he should Die than Live, as *Plato* will have it, de *L. L.* l. 9. p. 928. D.

Persons should suffer *Death*, may perhaps be well enough admitted, in *Crimes* of a lower rank, and less malignity. But *Crimes* of a deeper stain, must not be allowed the same Privilege. For since no Man is to be declared *incorrigible* till he had been frequently guilty of the same Fault, it would be but little for the advantage of the Common-wealth, to defer the punishment of a *Criminal*, till he had frequently repeated perhaps the worst of Villanies.

XI. Another *End* of Punishment, is his good, whose Interest it was the *Criminal* should not have offended, or who suffer'd by the others Offence; that he may not for the future be in danger of the like injury from him or any one else (d). And this is to be obtained these three ways. First, by the *Death* of the *Criminal*: or Secondly, if he be allowed *Life*, by depriving him of *Power* to hurt; as by keeping him in *Custody*, taking his *Arms*, and other *Instruments* of *Mischief* from him, securing him in some distant place, and the like: or else Thirdly, by obliging him to learn, at his own Peril, not to incur further Guilt or Offend any more; which falls in with the *Amendment*, before treated of. But now there can be no effectual way to secure the Party injur'd from suffering the like from other Hands, but by such a punishment, as shall be publick, conspicuous, and make the *Criminal* an *Example*. And for this reason *Malefactors* are seldom executed in *Prison*, but in places of common resort, and with such frightful Solemnity, as may strike *Terrour* into the Multitude. And this is an *End* so natural to Punishment, that when in heat of *Passion* and *Revenge*, a Man thinks he hath had sufficient Satisfaction from the Person that had abused him, 'tis usual to add, as you like this, provoke me another time. But however, the *Sovereign* only, has just power to inflict this Punishment: Though *Legislators* in several Common-wealths, in compliance with the fierce and obstinate tempers of their People, have made several Allowances and Indulgences to that ill-natur'd *Passion* which urges Men to prosecute their own *Resentments* and do them-

selves *Justice*. The *Revenger of blood* in the *Divine Law*, seemeth to have been establish'd by such an allowance (a); except we rather think this to have been some remainder of the *State of Nature*. And some think they discover a *Custom*, like this in *Homer*, in that Passage which relates to *Theoclimenus*. Indeed, I think the *Law Euripides* mentions, can hardly be explain'd in any other sense (b), (*οὐρανὸν ὄσιον ἀνταποκρίσιναι τῷ μῶ,*) that is, they made satisfaction by banishment, and did not kill one another; implying that the old Custom of private *Revenge* was abrogated, to prevent the danger of its going too far; which in Punishments inflicted by the *Magistrates*, there is no fear of. It appears indeed from *Homer*, that it was usual to buy off the *Banishment*, by paying a pecuniary *Mule*, to the next of Kin to the Party kill'd (c). And at this day in *Morocco*, 'tis permitted the *Kindred* of the murther'd Person, either to compose all difference by an *Agreement* with the *Murtherer*, or to dispatch him without formal *Process*, if *Publick Justice* hath not apprehended him before; because it is there taken for a settled Rule, that *Revenge* is no sin. And *Tacitus* in his *Account of the Germans*, c. 21. tells us, 'That the Father, or the next of Kin, are under a necessity of engaging in the quarrel; but the difficulty of an Accommodation, (saith he) is not great, for 'tis usual to expiate a Murder, by a Present of a certain number of Sheep, and other Cattle, and then all of the Family will be fully satisfied (d).

XII. The third *End* of Punishment is the good of all indifferently; the *Severity* of the Punishment being sufficient *Caution* for every Man's *Security* (e). The design of which sort of Punishment is, either to prevent *Malefactors* that have done *Injuries* to some, from doing the like to others; an effect to be obtain'd, either by putting them to death, by confining or disabling them in such manner, as shall deprive them of the power of doing harm (f), or by the rigour of the Punishment, overcoming their *Inclinations* to transgress: or else to deter others, that might be encouraged by the impunity of

(1) See *Grot. B. 2. c. 20. f. 8.* (a) *Numb. XXXV. Deut. XIX.* Vide *Selden. de J. N. & G. Sec. Hebr. l. 4. c. 2. Grotius upon Exod. XXI. 12.* Add. *Rochefort Descr. Antill. p. 2. c. 19.* *Homer. Odyss. v. 276.*

(b) *Euripid. Orestes, v. 512.* (c) *Homer. Iliad. 9. v. 628.* Vid. *Apoll. Rhod. Argonaut. l. 1. v. 90.*

(d) Vid. *Dionys. Halicarnass. l. 1. p. 68.* Edit. *Lips.* Leaving *Numitor* to inflict the Punishments as he pleas'd, because he thought it reasonable, that the Party that was Injured should have the Right to Punish.

(e) *Plato de L.L. 11. p. 977. B.* Criminals are Punish'd, not because they have offended, for what is done can never be undone; but that for the future the Criminals themselves, and such as see their Crimes punish'd, may take Warning, and be put out of Love to Vice. *Tullus* in *Livy, l. 1. c. 28.* Let others at their Peril, attempt the like afterwards, when I have made him an Example to all Mankind. — And let the World learn, by your Punishment, to think those things Sacred which you have violated. *Liv. l. 1. c. 33.* *Ancus* built a Prison in the middle of the City, just by the Forum, to frighten the growing Boldness of Vice. Add. *Agathias, l. 4. init.* *Lucian. Phalaris, l. 1. p. 735. in fin.* It would be to no purpose to expect any Benefit from any thing, if *Malefactors* were not perpetually terrified by the Fears and Expectations of Punishments.

(f) *Gunth. Ligurinum, l. 1. v. 527, &c.*  
*Nec melius stultæ, furor atque superbia, plebis*  
*Puniri poterat, quam tanti ut causa tumoris,*  
*Eriperentur opes, ut, quos opulentia dudum*  
*Fecerat elatos, in se revocaret egestas.*

What happier Art could he have us'd t'assuage  
 A haughty Town, and a bold Faction's Rage;  
 Than to deprive them of that Wealth, from whence  
 The fatal Ills unhappily commence?  
 Seditions are by Wealth and Ease maintain'd,  
 But soon by Want and Poverty reclaim'd.

Speaking of the Citizens of *Utrecht*, who had been Fined a great Sum of Money by *Frederick*; for an *Insurrection* there.

Delin-

*Delinquents*, from hurting and disquieting their Neighbours. And this may be effected by *Publick Executions*, or as they are usually call'd, *Publick Examples*, at the sight of which others are to take warning (a). And the more publick the Punishment is, the greater effect it is like to have in reforming others. The *Lacedemonians* had a Custom contrary to the rest of the World, in punishing their *Criminals* in the *Night* (b); thinking perhaps that the *darkness* added something to the *terrou*r of the Punishment (c). And under this *End* of Punishment, we may comprise all those *Advantages* which result from the Support and Preservation of the *Authority* of the *Civil Government*, among all the *impudent* and violent *Invasions* upon the *Laws*, which so frequently disturb and weaken it. For 'tis the *Interest* of the whole *Common-wealth*, to be concern'd for the *preservation* of the *supreme Authority*; and as long as that continues entire, the most profligate *Criminals* may be kept under restraint. But besides these *Ends* of Punishment I have here mention'd, I see no necessity of allowing those other *Selden* mentions *de J.N. & G. l. i. c. 4.* as the *Satisfactory*, *Purgatorial*, or *Expiatory*, or either that the *deviation* from the *Law* may in some measure be made up, and the *inequality* of the *Action* be corrected. The Arguments he produces from *Scripture*, seem to relate only to *Divine Justice*, or the particular *Sanctity* of the *Jewish Nation*.

XIII. As to those *Exceptions* which *Grotius* (d) adds to this *Proposition*, *That the Infliction of all Exemplary Punishments ought to be lodged in the Government of every State*, it must be observed, that whatever is inflicted in certain Places and on certain Persons which are not subject to any determinate *Court of Judicature*, as for example upon *Pirates*, must be reduced under the *Right of War*, which is utterly different from the power of punishing. For *Pirates* and *Freebooters* are common Enemies, and every Man may draw his *Sword* against them. 'Tis good *Advice* indeed which *Grotius* gives afterwards (1), That it would be the most proper method for *Merchants* and *Seamen*, before they begin their *Voyage*, to procure *Commissions* for themselves from *publick Authority* to take all *Pirates*, where-ever it be their fortune to come up with them, that so, when they are obliged to it, they may engage them, not as by their own, but upon the *publick Authority*. The *Law* mentioned in *Deuteronomy*, chap. 13. v. 9. doth not give every private Man *right* to kill the Person that would lead him into *Idolatry*; but only to bring him forth to *Justice*, that upon *cognizance* of the matter, the *People* should stone him. But yet, admitting that every private Man had power given him to punish one convicted of such

a *Crime*, the establishment of such a Power by a *previous Law*, makes the private person an *Instrument* of the *Government*; and what *Actions* he undertakes on this account, must be look'd upon as commanded by *publick Authority* (e). The *Action* of *Phineas* (2) tho' favour'd by God's particular *approbation*, is not an Argument to be insisted on; For such a *Zeal* allow'd to any Man indifferently at other times would soon confound and distract all *Civil Order*, and give Colour and Protection to every one's *Rashness* and *Passion* (f). The *power of Life and Death*, which in some *Common-wealths*, *Masters of Families* have over their *Children* and *Servants*, tho' it do's not originally flow from the *Common-wealth*, yet under *Civil Government*, we may imagine it to be a *branch* of *publick Authority*, which the *Sovereign* permits *Heads of Families* to exercise over those under their Charge. And there is no reason to the contrary, why there may not be a *Magistrate* in every *Common-wealth*, who in certain *Cases* may be allow'd power to punish *Criminals* extraordinarily, without any *judicial hearing*, provided care be taken he shall not abuse an *Authority* of so large extent. Thus when the *Government* sets a certain price upon the Head of a *Traitor*, the person that kills him, is suppos'd to do it by *publick Authority*; for altho' such a *Declaration* has not always the force of a *Command*, yet when the *Traitor* is kill'd upon view of that *encouragement*, the *action* may be defended as undertaken by *publick allowance* and *authority* (g). *Grotius* in his *Comment* upon *Esther*, cap. 9. v. 10. observes, That it was an Opinion which obtain'd of old among the *Jews*, that if any Man attempted to betray an *Israelite*, or his *Estate* to the *Gentiles*, or put any publick *Affront* upon the whole *Body* of their *Nation*, that it would be no *sin* for a *Jew* to kill him, his *estate* being left his *heirs*. But the *liberty* which the *Jews* at that time took in the *execution* of their *Revenge*, does not seem to be agreeable to the nature of the *Civil Government*. There is a *Law* mention'd in *Andocides Orat.* 1. 'That if any Person attempted the *Subversion* of the *Democracy* of *Athens*, or if any Person, upon the dissolution of the *Popular form* of *Government*, should create any *Magistrate*, he should be pronounced an *Enemy* to the *State*; and no body that kill'd him should be punishable; and then follows the *Oath* which all the *Athenian Tribes* engag'd in, to kill the Person that should do so. And *Valerius* instituted a *Law* at *Rome*, 'That no *Magistrate* should ever be created, from whom there should lie no *appeal*; and that it should be lawful to kill any Person that should make such a *Magistrate*. And that it should not be *capital* for

(a) Vide L. 9. t. 27. l. 1. C. ad L. Jul. repetund. L. 9. t. 20. l. 7. C. ad L. Fabiam. de Plagiar. Quintii. Declam. 274. When Criminals are executed, the most publick Places are chosen, where there will be the greatest Number of Spectators, and so the most, for the Fear of Punishment to work upon 'em. Senec. de Ira, l. 3. c. 19. The more publick the Punishments are, the greater Effect will they have upon the Reformation of others.

(b) Herodot. Melpom. p. 107. Edit. H. Steph. (c) Comp. Val. Max. l. 2. c. 9. f 3. (d) L. 2. c. 20. f. 9.

(1) Ubi supra, f. 14. (e) See Grotius upon the Place. (2) Numb. XXV. (f) V. Selden. de J.N. & G. &c. l. 4. c. 4.

(g) Add. C. L. 3. t. 27. Quando liceat unicuique, &c.

any Man that did kill him (a). And the *Panchæi* are said to have lookt upon it as unlawful for their *Priests* to pass the borders of their consecrated Country; and if any Man found them without those Limits, he was allow'd to kill them (b). Here therefore we may observe, That in these, and all other Laws of the like Nature, upon such evidence of the fact, as admits of no scruple and dispute, the general Edict has the force of a positive Sentence of Condemnation; and the Death of the Person that follows upon it, seems to be authorized by the command of the Magistrate (i); and if a private Man, upon the influence and instigation of such a Law, (supposing the Reasons of it to be just,) should kill the Party, he will not only be indemnified in the Civil Court, but may be fairly acquitted by his own Conscience, so he was not induc'd to that action by any private grudge or resentment, but barely by a belief, that by such an action he should do good to his Country; and especially, if the reason why the Law permitted, or commanded any Man to be the Executioner of the Penalty was, that the Common-wealth was in imminent Danger from such treasonable Attempts. But the Case is different, as to the Blood which is spilt upon an Indulgence, the Law sometimes alloweth to a just Concern and over-violent Passion; which only takes off the Civil Punishment, but doth not excuse the guilt of the act. Of this nature are the Laws which permit Husbands to kill Adulterers and their Wives, when they surprize them in the Act: for Human Laws pardon only the violence of a Discontent conceiv'd upon the most severe Injuries. Though possibly it might be a more convenient way, to leave such Injuries to be punisht by the Magistrate, so the Common-wealth might be in no danger by the delay of the revenge (c).

XIV. But notwithstanding, from the Ends of Punishment, and the State of Human Nature, 'tis manifest, there may be some Actions, in themselves evil, which yet it wou'd be needless, and to no purpose for Human Justice to punish. Such as are, first, Acts meerly internal, as sinful thoughts, evil inclinations and desires;

though it may afterwards happen, they may (as suppose by a subsequent Confession,) be discover'd (d). For since no Man is injur'd by such an internal motion, no man can be concern'd for the punishment of it (e). 'Tis true indeed, as Philo saith, That while we entertain, tho' it be only our Imagination, with bad thoughts, we are guilty of those thoughts: but this holds true with relation only to Divine Justice. Though Grotius in his Comment upon the 5th of St. Matthew, v. 28. shews from several Testimonies of Heathen Writers, that such thoughts, from bare reason only, may be proved to be real sins (f). But 'tis a quite different thing, when the internal acts are considered in conjunction with the external; for the influence these have upon the Quantity and Quality of our actions, is very considerable. And therefore many Crimes are punished, which have yet been stopt in the attempt, and fail'd of final success (g). But besides, it would be too rigorous to make every peccadillo subject to the severity of Human punishments, since in the present state of human Nature, the greatest caution and intention imaginable, is not sufficient to guard us from a multitude of slips and infirmities. And therefore Themistius (h) when he had divided Men's failings into three sorts, viz. Misfortunes, Mistakes, and Criminal Actions, very justly adds, that a Prince ought to pity the first, correct the second, and punish the third (i). 'Tis said of Alphonsus King of Arragon, 'That having carefully read over the whole Body of the Portuguese Laws, he highly commended the Wisdom, and the Order, and Administration that was observed in the Common-wealth; but was as much displeas'd to find so many Particular Laws calculated for the most Trivial and Minute Cases; and to expose the scrupulous exactness of them, he ask'd the Portuguese in way of raillery, How a Man was to be punish'd that set his foot to ground (k). Grotius in his 2d Book, C. 20. §. 19. speaking to this Subject, seems not to have said what is exactly proper or true: Our slips and failings, saith he, can hardly be call'd sins; because, if we consider them in the general, they are not committed with that liberty, which in

(a) Liv. l. 3. c. 55. (b) Diodorus Siculus, l. 1. c. 46. (i) Vide Grot. L. 2. c. 20. f. 17. (c) Vide Gratian Can. quicunque, &c. Cauf. 33. Qu. 8. Senec. Controv. l. 1. Controv. 4. l. 4. Controv. 24. Xenoph. de Educat. Cyri. l. 3. p. 41. Edit. H. Steph. Valer. Max. l. 6. c. 1. f. 13. Boetius ad Grot. l. 2. c. 1. f. 14. Ant. Matthæus de Criminib. ad L. 48. D. t. 5. Grot. in flor. sparf. ad Jus Justinian. ad L. 48. t. 5. D. l. 22. f. 4. ad L. Ful. de Adult. (d) Ad Grotius Imper. de Summar. Potest. circa sacra, c. 3. f. 1. (e) Cogitationis pœnam nemo patitur. Vide L. 48. t. 19. l. 18. de Pœnis. Philo Lib. quod det. pot. infid.

(f) Add. Bodinus de Repub. l. 4. c. 7. p. m. 734. Ammianus Marcellinus gives us a very strange Instance of Calumny, l. 15. c. 2. The Story he tells is of one Mercurius, whose Practice it was, when any Man happen'd to tell his Friend his Dreams, (and Dreams in Nature we know use to be odd and extravagant) to paint them in the worst Colours his Malice can give them, and then represent them to the suspicious Emperor: upon which the Dreamer was indicted, as guilty of as great and high a Misdemeanour, as if he had actually committed some unpardonable Fact. So that when this came to be publickly known, People were so far from telling their Dreams before strange Company, that they would hardly own that they had been Asleep. And some Learned Men were concern'd, that it was not their Fortune to be Born among the Atlantæi, where, they say, no Body dreams.

(g) Vide Grot. in Flor. sp. rf. ad Lib. 48. t. 8. l. 14. D. ad L. Cornel. de Sicariis. (h) Orat. IX. ad Valentin. Jun. Add. Sanderfon. de Juram. Oblig. Prælect. 3. f. 18. (i) Hier. Oforius, l. X.

(k) Julianus in Cæsariibus de Probo. 'Tis very difficult for a Man to govern an Horse, or any other Beast, and much more Men, without indulging them in some things they have an Inclination to; as Physicians usually allow their Patients in little Irregularities, that they may be the stricter in the Observation of the great and chief Prescriptions.

particular they seem to be: for I can't think it is a Consequence, that if it be *morally* impossible, but a Man must fall into some *sins*; therefore such *sins* of *daily infirmity*, or incur-sion, as they are call'd, cease to have the nature of *sin*. He adds in the *same Chapter*, that those *sins* do not deserve *punishment*, which neither *directly*, nor *indirectly*, bear any relation to Human Society, or other Persons; for that there can be no reason, why we should not leave such *Sins* to be *punish'd* by *GOD Almighty*, who has the highest Wisdom to *know* them, the greatest *Justice* to *examine* them, and the most absolute *power* to *punish* them: and that therefore 'tis without any prospect of *Advantage*, and consequently to no *purpose* for Men to institute such *punishments*. Tho' I think, it may be very well made a question, whether there be any such *sins* as those he speaks of, if we except *thoughts* before they are produced into *action*. Besides, the *Civil Laws* deny to some *Acts* the power of *producing an Action*, or *exempt* them from *human Penalties*; either for publick Peace and Quiet, or upon other reasonable accounts; sometimes it may be supposed that a certain *Action* would look better, if it could not seem to have been undertaken upon fear of *human Punishment*; sometimes the *matter* may be too frivolous to give the Judges the trouble of hearing it; or perhaps be too *perplex'd* and *intricate* to be determin'd; or when the *evil* is grown inveterate and so *rooted* in the Temper of the *People*, that it is not likely to be suppress'd without a *Convulsion*, which might prove Fatal to the Common-wealth (a); or else to prevent an unreasonable Increase of *Suits at Law* (b). In fine, It is *absolutely* Necessary, that all those *Disorders* of the Mind, which are the *Effects* of the common *Corruption* of Mankind, should be *exempted* from *Punishment*; since they are so *general*, that 'tis impossible but all *Civil Govern-ment* should be dissolv'd, if such *Sins* should fall under the *Severity* of *human Penalty*, before they discover themselves by an open *Enormity*; such as are *Avarice*, *Ambition*, *Inhumanity*, *Ingratitude*, *Hypocrisie*, *Envy*, *Detraction*, *Pride*, *Anger*, *Discord*, and the like: all which Vices, it was our Saviour's great Design, by the *Holi-ness* of his *Doctrine*, to extirpate and suppress. For 'tis certainly true, as *Seneca* says, 'That 'if every Man was to be punish'd that was of a 'wicked and depraved Disposition, none could 'be excus'd from Punishment (c).

XV. But neither is it always necessary that such *Misdemeanours*, as may properly be *punish'd* by the *Civil Court*, should therefore always be punished by it (1); but there may be sometimes room left for *pardon*. The *Stoicks* indeed, as *Stobæus* (d) represents them, were violent against this Opinion: For a *wise Man*, they said, ought never to *pardon* any Body; because the Person that *pardons* must suppose

that it was not the *Offender's Fault* that he *transgress'd*; though 'tis certain, that every Man's own *natural Depravity* is the *cause* of his *Transgression*: and therefore 'tis still true, that *Offenders* ought not to be *pardoned*. What they *meant* by this Argument seems to be *this*; either 'tis a Man's own *fault* that he *offends*, or it is not; if it be not his *fault*, there is no *Offence* committed, since every Man *transgresses* from his own *natural Depravity*, and therefore in this case there is no need of *pardon*; and if it be a Man's own *fault*, then he can't be admitted to *pardon*, because *Pardon* is not to be allow'd to any *wilful Transgressors*. Which Reason manifestly *begs* the *thing* in dispute. They add, That a *good Man* is not to be *compassionate* or *merciful*; for a *compassionate mer-ciful* Man deprecates and endeavours to alle-viate the *Punishment* a Criminal *deserves*, but every Man ought to have *Retribution* made him, according to his *deserts*. But now, the Nature of *desert* or *merit* is different with respect to *good*, and with respect to *evil*. The *good* which is due to a Man cannot in *Justice* be denied him; but the Nature of *evil* is such, (it not intending the *Benefit* of the Person that must suffer it) that it is no *Injury* to deny it him. They argue further, that a Man cannot be in-clinable to *mercy*, without thinking that the *Punishments* which the Law appoints for *De-linquents* are too *severe*; or that the *Legislator* has prescrib'd *penalties* without due regard to *fact*. But this is still but weak Reasoning. For 'tis no Contradiction, that the *Punishments* prescrib'd by the Law may be *just*, and yet may sometimes be *mitigated*; for the Law determines only in *general*, what *Punishments* are to be *inflicted* on such and such *Crimes*, without *consideration* of the *particular Circum-stances* which may sometimes happen, in *certain Persons*, in *certain States* and *Conditions* of the Common-wealth. But particular Men are *pardoned* for *certain* Reasons, which do not take place either in *all Offenders*, or at *all times*. *Seneca* (e), in his Book *de Clementia*, says, That *Pardon* is a *Remission* of the *Punish-ment* which is due, (*pœnæ debitæ*) but that a *wise Man* always doth what he *ought* to do. But here the *Mistake* lies in the word *due*. (*debitæ*.) For if it be meant, that *punishment* is *due* to *Offenders*; that is, that an *Offender* may be *punished* without *injury* or *just* occasion of *complaint*; in this *sense* it will not follow, that if a Man doth not *punish* an *Offender*, he doth what he ought not to do: for a Man may very *justly* and *lawfully* do many things, which he is not always necessarily *obliged* to do. Be-sides, as it is a mistake to say, that *punishment* is *due* to an *Offender*, meaning by it, that there is an *inherent Right* in the *Delinquent* which the *punishment* is to *satisfy*; (for I think no Man ever complain'd that his *punishment* was *remitted*; except it may be said, that a Man

(a) To this purpose is *Tiberius's Epistle* about *Luxury*. *Tacitus*, Ann. III. 53. (b) *Add. Seneca de Clementia*  
L. 1. c. 22. (c) *De Ira*, l. 2. c. 31. in fin. (1) *Vid. Grot. ubi supra*, l. 21. (d) *Stob. Serm. XLIV.*  
(e) *Senec. de Clementia*, l. 2. c. 7. in fin. *Vid. Ciceron. Orat. pro Muræna*, C. 29.

may wish that such *correction*, as might have reclaim'd him when he was *young*, was neglected, when he finds that his *childish Levities and Faults*, are grown up into *bold and manly Vices*.) So 'tis improper to say, that a *Delinquent ought to suffer Punishment*, (*pœnam dare*) meaning by it, that he is under an *Obligation* to suffer it: the reason of which I have explained before. But if by the word *due*, (*debita*;) it be understood, that a *wise Man* is oblig'd to *inflict the punishment*; I answer, *first*, That no Man can be under any such *Obligation*, unless the *executive power* of the Laws be either *publicly* or *privately* committed to his Care. And, *secondly*, That the *Obligation* which lies upon the *Governours*, doth not relate to the *Delinquent*, but to the *whole Common-wealth* or *Society*, whose *safety* they are bound to *provide* for, and especially this way, by *punishing* the *Insolence of Offenders*; which if they neglect to do, there is *no injury* done the *Criminals*, but they have *violated the Obligations* which they owe to the *Common-wealth*. But 'tis evident, that the *Peace and Safety* of the *Common-wealth* is so far from being subverted, that it is sometimes secured and establish'd by granting *pardon*, in *proper times and places*.

XVI. *Grotius*, l. 2. c. 20. sect. 21, 22. says, That there is room for *Pardon even antecedently to the penal Law*; but *this* ought to be *dexterously* explain'd; otherwise it will appear to be but a very *vulgar Thought*, that where there is no *law*, there is no *punishment*, no *transgression*, or *pardon of transgression*. And a *penal Law*, is not only a *law*, which *defines* the particular sort of *punishment*; but that *law* also is a *penal Law*, which leaves the *Determination* of the *Quality* and *Quantity* of the *Punishment*, to the *Discretion* of the *Judge*. Here therefore it must be observ'd, that in *Common-wealths* which have no *written Laws*, the *Laws of Nature* serve instead of *Civil Laws*, and *Justice* is *administred* according to them; and *Persons transgressing* them are punish'd at the *pleasure* of the *Judge*: but even, where the *civil Laws* are written, yet since it is impossible they should be so *express* and *particular*, as to *comprise* all that *Variety* and *Compass* of *Action*, in which *Men's impieties* may be discover'd; it is necessary that *Reason*, and the *Law of Nature* should supply the *Defects* of the *civil Law*: and where the *express penal Sanction* is not *sufficient*, it must be left to the *discretion* of the *Judge* to *determine the Penalty* (a). And thus we may understand how *Punishment* came to take place *antecedently* to the *penal Laws* (b). But although, in such *Common-wealths*, the *Magistracy* hath power to *inflict Punishment*

on *Malefactors*, yet this is no *Reason* why every *Malefactor* should be *punish'd*; but *that* must depend upon the *Connexion* there is between those *Ends* for which *Punishments* were at first instituted, and the *Punishment* it self. And therefore, if in a particular case, those *Ends*, upon a moral *Estimation*, do not appear to be *necessary*: As suppose, *first*, 'Tis thought most advisable, that such a particular *Crime* should not be *divulg'd*; or, *secondly*, If there be other *opposite Ends* of no less *Utility* and *Necessity*, as suppose, the *same*, or a *greater Good* might be obtain'd, by omitting the *Punishment*; or, *lastly*, If the *Ends* proposed by *punishing*, may be more conveniently obtain'd some other way; I can see no direct *Obligation* that lies upon the *civil Court* to *inflict punishment* (c). To instance in the *first case*, we must imagine some *Sin*, which is not yet grown into common *Acquaintance*, and in consequence, the *publick Impeachment* and *Prosecution* of which will appear neither *Necessary* nor *Safe*: for many *Men's Obedience* depends more upon their *Simplicity* and *Ignorance of Vice*, than any real *Love* they entertain for *Vertue*; and the *punishing* such a *Crime*, so new and strange, would not frighten so much, as sollicite and provoke their *perverse Curiosity*, to make an *Experiment* upon it too, and to love what is forbidden them. For this reason, 'tis said, *Solon* instituted no *law* against *Parricide*, that he might not seem by forbidding it, to have put *People* in mind of it (d). And *Busbequius* tells us, 'That the *Turks* seldom make *Inquiries* after *secret Criminals*, for fear they should only find *Occasion* for *Scandal*; but that every open *Breach of law* they severely punish (e). An Instance to the *second case*, may be conceiv'd in a *Criminal* who *pleads* his own, or his *Parent's*, or his *Ancestor's Merits* to balance his present *Transgression*; for it may sometimes be equally, or perhaps more beneficial to the *Common-wealth*, to reward a *brave Action* of a particular Nature, than to punish a *bad one*: and the *Expectation* of *future Benefits*, as well as the *Memory of past*, may be thought sufficient to expiate the *Crime*. For though what is once ill done can never be remedied, yet it may be atoned for by the *brave Actions* of the same *Persons* afterwards, and so be *honourably forgotten* (f). An Instance in the *third case*, may be taken from a *Man* who is won by good *Advice* to *reform*, makes a *verbal Satisfaction* to the *Person* injur'd; and giveth *Security* that there shall be no farther occasion of *Punishments* to these *Ends*, and that his *Fault* shall not be of any *mischievous Influence*. And then *Seneca* himself says (g), 'That a

(a) *Lycurgus contra Leocratem*. It was not through any Oversight in the Legislators, that the Punishments for such Crimes happen'd to be omitted; but because in the first times there were no such Actions ever heard of.

(b) And from hence that Passage in *Cicero* may be explain'd, l. 1. in *Verrem*. c. 42. No Law takes Cognizance of the Time past, except it be in a thing in its own Nature criminal and wicked, so that if there were no Law in force, it ought nevertheless to be absolutely avoided.

(c) *V. Gratian*. *Caus.* 23. *Quæst.* 3. c. 18, 24. 'Tis the same thing almost not to be, and not to be known.

(d) *Apuleius Metamorph.* l. 10. p. 319. *Edit. in usum Delph.* *Add. Senec. de Clement.* l. 1. c. 23. *Busbeq.* Ep. 3. gave *Augustus* concerning the Imposition of Punishments.

(g) *Seneca de Ira*, l. 1. c. 16. p. 29. *Edit. Gronov.*

'wife Man will be very ready to pardon a 'guilty Person, when his *Sorrow* for his *Fault* 'giveth him *promising* hopes of Amendment; 'and when he perceives he acted not by Prin- 'ciple, but only out of Rashness and Folly; 'nor will the *Impunity* so given, either be 'dangerous to the Person that *receives*, or to 'him that *gives* it. From all which, by the way, it appears how far a *Crime* may be re- leased by *Composition* and Agreement with the *Accuser* or *injured* Party; namely, that they may safely remit and forgive it, so far as their private Concerns are engaged in it; but that no particular *Composition* with them can super- sede or prejudice the *Right* of the Common- wealth. And therefore such Agreements be- tween private Men, may take away the *second* End of *Punishment*, but not the *third* (a). But to this *Case* we may reduce those Misbehavi- ours which we commonly call *Follies of Youth*, which any Man of candid Temper is willing to pardon; since, when the Warmth of that Age is over, Men usually admit of cooler and more sober Thoughts (b). And so also, when a Man has been injured (c), as he thinks the Injury much the less, if the injurious Party confesses that it was a rash and inconsiderate Action; so in all such Cases he will be more inclined to *pardon* than *punish* (1). For since all sorts of *Punishment*, and especially the more severe, seem to have something in them, which consider'd in its self, is, though not Repug- nant to *Justice*, yet contrary to that *Love* and *Affection*, which should be the Result of the common Affinity of Mankind; upon this account Reason will easily permit the *Punish- ment* should be sometimes superseded. And so we find *Plutarch* reasoning (d), 'Why, says 'he, were the *Rods* and *Ax* always carried 'Tied and Bound up before the *Roman* Ma- 'gistrates? unless either to signify to us, that 'their Anger ought not to be left loose and 'unconfind; or else that the slow unbinding 'the Instruments of Execution, might give 'them occasion to demur and delay Sentence; 'and, as it hath sometimes happen'd, to reverse

'the Punishment, after it hath been pro- 'nounced (e). For some Vices are Curable, 'others are past Remedy; the Rods are to cor- 'rect those that may be reform'd, and the Ax 'cut off what there is no hopes of amending. For sometimes a greater and juster Charity forces Justice to inflict the *Punishment*, that the pardoning one Man might not incommode many others: For 'tis but cruel Compassion to spare one *Malefactor* to the Wrong and Hazard of a number of *innocent* Persons (f). King *James* in his *Donum Regium*, l. 2. gives us this Catalogue of Crimes that ought never to be pardoned; Namely, *Sorcery*, *Robbery*, *Incest*, *Sodomy*, *Witchcraft*, *falsifying the Coin*, *Oppression* or *publick Violence*. In these Cases I have mentioned, therefore, the *Stoicks* say, A wise Man would *spare* and not *pardon* (g). But 'tis a ridiculous Nicety to refuse to call that a *pardonning* with the rest of the *World*, which they themselves will have to be *sparing*; and 'tis certainly beneath Men of Sense to dispute about Words, when the Sense of the thing is agreed upon.

XVII. But after the Establishment of the *penal Law*, the Difficulty seems to be greater, how the *Delinquent* can be excused from *Punish- ment* (2). For there seems to be more room left for *Pardon*, where the *Penalty* is arbitrary, than where 'tis expressly determin'd by a *Law*; and that, not so much, because 'tis expected that the *Legislator* should act conformably to his own *Laws*; as because the Authority of the *Laws* will be lost, if the due *Execution* of them is without good reason neglected; and because the *Magistrate* himself would seem to invite others to transgress, when the hopes of *Pardon* which he gives the *Criminal* is equal, or greater than the fear of *Punishment* (3) (h). Therefore, though the Force of *human Laws* depends upon the *Will* of Man, not only as to their Original, but also as to their Conti- nuance; yet they ought not, but upon very urgent and weighty Reasons, to be alter'd or repeal'd. For this would be a Breach of the Rules of Prudence, in the *Art of Government*.

(a) *Tacitus*, Ann. III. c. 70. There was Reason why he ought to be slow in pardoning the Indignities offer'd to himself, that he might be Cautious how he forgave those that injured the Publick.

(b) *Juvenal*, Sat. VIII. v. 166, &c.

*Quædam cum prima rescantur crimina barba.*

Some Faults of Course with Childhood end.

*Vid. Aristot. Rhet. l. 2. c. 3. init.* (c) *Vid. Arrian. de Exped. Alexand. magn. l. 7.* (1) *V. Grot. l. 2. c. 20. f. 22.*

(d) *Plut. Quæst. Rom. §2.* (e) *Juvenal*, Sat. VI. v. 220. *Nulla unquam de morte hominis cunctatio longa est.*

(f) *Julian. in fin. Misopog. p. 371. Ed. Spanhem.* 'Tis an Encouragement to the Growth of Wickedness, to show any Favour to Thieves and Villains. *Appianus Alexand. Mithrid. Bello, p. 250. Ed. H. Steph.* There is nothing more Ungrateful than a pardon'd Criminal. *And therefore none ought to be pardon'd but such as repent of their Wickedness.*

(g) *Gunth. Ligurinum, l. 1. v. 478, &c.*

Plus sæpe nocet sapientia Regis,  
Quam rigor: ille nocet paucis, hic incitat omnes  
Dum se ferre suos sperant impune reatus.

Excess of Mildness in indulgent Kings,  
More Danger, than the strictest Rigour brings.  
Some few perhaps may by Injustice die,  
But who can any pleasing Sin deny,  
Secure of Pardon and Impunity?

*Sæus Rosar. Pers. c. 8.* 'Tis brave and generous to forgive. But there is no Reason we should find a Cure for his Wounds who hath been a publick Enemy. A Man ought to think it an Injury to Mankind to let go a Serpent. To this relates what *Lepidus* said in *Tacitus*, Ann. 2. when he was against dealing severely with the foolish Poet; If he be pardon'd, the Common-wealth will be in no Danger by it; and if he be punish'd, his Example will have no Effect. (2) *Vid. Grot. ubi supra, f. 14.* (3) See above in B. I. c. 6. f. 17. (h) *Arnob. l. 7.* The Number of Criminals certainly encreaseth, according to the Hopes they have of buying off their Crimes; and Men are less scrupulous of offending, when they see the Favour of a Pardon is easily purchas'd.

But

But I don't know whether it be not a more dangerous Mistake, without very good Reason, to *suspend* the Execution of a Law still in force, for the sake of certain Persons; than utterly to *abrogate* it: since generally, none of the common Grievances of Men, seem more insupportable than this, That Persons of equal *Merit*, are not used with equal *Justice*. But notwithstanding, as the *Sovereign* may, when he sees good Reason for it, *repeal* an intire positive *Law*: so he has Power to *suspend* its Effect, with regard to certain Persons, and certain Crimes, the *Law* in other respects being still in force. The *Sovereign* I say, for subordinate Judges are not to make or alter *Laws*, but only to pass Sentence, according to those already made (a). *Grotius*, in the Chapter before mention'd, *Seet. 25, 26.* distinguishes the Reasons of *Pardon* given after the *penal Law*, into *Intrinsic* and *Extrinsic*. The *Intrinsic* Reason, according to him is, when the *Punishment* would not be unjust, as being *before* lawfully enacted and promulg'd, but however has the Appearance of too much Severity, when set in Comparison with the Fact; though I confess, I should think, that if the *Penalty* the *Law* enforces be in general too severe, it would be a wiser Method to correct the *Law* it self, than to pardon some few, and leave others expos'd to the Rigour of the *Punishment*. But undoubtedly Judges are obliged, upon all Rules of Equity, if not entirely to *remit*, at least to *mitigate* the *Punishment*, when they find in certain particular Facts, a Concurrence of Circumstances, that *alleviate* the Crime, as to the *Quantity* and *Quality* the *Law* supposes. In which *Cases*, the Fact it self hath the *Intrinsic* Grounds, though not of *Pardon*, yet of some Mitigation of the *Penalty* adherent to it. And therefore, I am of Opinion, 'twould be much more proper, to allow of no other but the *external* Causes of relaxing *Punishment*; such as the former *Deserts* of the *Criminal* himself, the *Merits* of his *Family*, or *Relations*, or some other *commendable Action* or *Thing*; or lastly, the Hopes that the *Delinquent* may make Amends for his *Fault*, by many good Actions afterward. 'And therefore, *Tully* saith (b), That a Man that petitions for *Pardon*, should first of all put the Judges in Remembrance, what good things he hath formerly done, and show how they overbalance the Guilt of his present Crime; and that in short, he has been the Cause of more Good, than Evil: And then, saith he, in the next place, he should recount the good Actions of his Family, whatever he thinks proper to be insisted on, and then he is to prove that he did not commit the Fact either out of Malice or Cruelty, but out of Rashness, or from some

' other Person's Inflation, or upon any other creditable or honourable Cause which engag'd him in it; and after all make what Promises, and give what Assurance he is able, that the Sense of his Crime, and the Lenity of the Judges in pardoning him, shall have such an Influence upon him for the future, as shall entirely restrain him from ever attempting the like again. And thus it hath been usual to *pardon* some *Criminals*, upon the *Desert* and *Merit* of their Ancestors, or at the Request of Men in *favour*. 'Tis related of the Emperor *Hadrian*, that he alleviated the *Punishment* of *Criminals*, according to the number of Children they had (c). And some have been *acquitted*, because they happen'd to be the last of *Noble* and *Illustrious* Families. *Phryne* an *Athenian* Courtisan, when she was tried for her Life, was brought off by the Art of *Lysias* the Orator (1), who took off her upper Garment, and expos'd her naked Breast to the Court. And *M. Antony* the Roman Orator, brought off *M. Aquilius*, when he was plainly convicted of *Bribery*, by the like Art. For bringing him in Publick View into the Court, at the Close of his Defence, he open'd his Bosom and shew'd the People the honourable Wounds he had received there (d). *Polydore Virgil* relates it, as a Custom which obtain'd formerly in *England*, that no *Criminals*, except such as were convicted of *Treason*, suffer'd Death, but were condemned only to *perpetual Imprisonment*, if they could but *Read* (e). And these Reasons will appear more Satisfactory, if upon Examination of the Fact, it seems to be particularly exempted from the Reason of the *Law*. The *General Reason* indeed, for the Observation of every *Law*, is the *Authority* and *Will* of the *Sovereign Legislator*; which, when there appears no other Reason, is Reason sufficient; but the *Particular*, is either some Benefit likely to accrue to the Common-wealth, or some Inconvenience which may be avoided, by the Observation of the *Law*: as for Example, let us imagine some place where *sumptuary Laws* are in force; the *general Reason* of these *Laws*, is the *Will* of the *Legislator*; the *particular*, that the Estates of the private Subjects may not be wasted or squandered away by extravagant and unnecessary Charges; and in this Instance, though the *general Reason* of the *Law* may be enough to support the Authority of it; yet when the *particular Reason* of it ceases, the *Punishment* may justly be remitted with greater Ease, and less Discredit to the Authority of the *Law*: As for Example, in *this Case*, if we suppose the *Offender* in such plentiful Circumstances, as to be out of Danger of being reduced to Poverty by the Vanity and Lavishness of his Expences. Rigid Governments in-

(a) *Lysias* II. Orat. 13. c. 3. in *Alcibiad.* *Themistius*, Orat. 9. de *Humanitate Theodosii*. There is a great difference between the Power and the Duty of a Prince, and a Judge; The latter is to be directed by the Laws, The former may amend and alter them, alleviate and soften their Rigour and Severity; as being himself a living Law. L. 40. t. 9. l. 12. f. 1. qui, & a quibus *Manumiss.* & L. 49. t. 8. l. 1. f. 2. D. *quæ sentent. sine Appellat. rescind.*

(b) *Cic. de Invent.* l. 2. c. 35. (c) *Vid. Xiphilin. Epit. Dion. Vid. Liv. L. 8. c. 35.* (1) The Author was *Hypocrites* and not *Lysias*, V. *Athen.* l. 13. (d) *Herodot. Thali*, p. 112, Ed. H. Steph. (e) *Polyd. Virg. Hist. Angl.* l. 26.

deed, will hardly bear Neglect in the Execution of their *Laws* or *Commands*, only because the *particular Reason* of them is ceas'd. As 'tis said, *Cambyses* was very well pleas'd that *Cræsus* was saved, but yet put the Persons to Death, that spared him, for their Remisness in Executing his Command. Again, it may be a reasonable Plea for Pardon, either when a Man is intangled in a *Crime* through *Ignorance*, though perhaps not such an *Ignorance* as wholly discharge the *Fault*, but such as might proceed from *Remisness* or *Negligence*; or if he were taken with any sudden *Weakness* or *Disorder* of *Mind*, which could not be easily prevented or overcome. Under the *first* of these, we may place the Misfortune of *Charondas*, in *Diod. Siculus*, who came through Inadvertency with a Sword on into a Publick Assembly, contrary to a *Law* he himself had made; and therefore I think he had no Reason, upon that Account, to lay violent hands upon himself (a). There is another Story in the same Author, of *Diocles the Syracusan* (b), who instituted a Law, by which it was made Death for any Man to be seen Arm'd in the *Forum*, without any Allowances to be made for *Inadvertency* or any other Circumstances; and yet he, upon the News that the *Enemy* had made an *Incurſion* into his *Territories*, Arm'd himself, and hearing that there was a *Sedition* rais'd in the *Forum*, went thither with his Sword on; but being told of it by a private Person, kill'd himself with it. But indeed there was no Pity due to him, because in his Law, he had cut off all Exceptions of *Inadvertency*, or any other Circumstances of the like Nature. Neither is what has been said of this Point, in the least refuted, by all that tedious *Dispute* of *Matthæus, de Criminibus ad L. 48. Tit. 19. §. 5. D.* To what has been already said it must be added, That as the *Measures* of *Punishment* in Human *Judicature* must be taken by the Advantages of the *Common-wealth*; so the same Rule may make it Necessary to admit *Criminals* to *pardon* upon Account of their *Numbers*. For though in general 'tis no Excuse to *plead*, that there were *others* guilty of the same *Crimes* (c) (1); yet every wise *Government* ought to take care that Justice, which is intended for the Preservation of Human Society, should not prove the Ruine and Destruction of it.

*Cautius ingentes morbos, & proxima Cordi  
Ulcera, Pæoniâ tractat solertia cura,  
Parcendoque secat; ferro ne longius acto,  
Irrevocandus eat sectis vitalibus error.*

The Skilful Surgeon all his Care applies,  
When nigh the Heart the burning Ulcer lies;  
With gentlest Touch he tries th' affected Part,  
And probes th' throbbing Wound with cautious Art,  
Nor wide th' Incision makes, but spares th' Unſound,  
For fear the Vitals suffer by the Wound (d) (e).

And therefore 'tis a very good *Character* of a Prince *Ovid* gives us, *L. 1. de Ponto* (2), that *He reforms more Vices by threatening Punishment, than by Punishment it self.* Besides, 'tis frequently necessary either to *soften* the *Rigour* of some *Laws*, or else suffer them to grow out of use. So *Tacitus* saith, *Ann. l. 3. (3)*, 'That it was propos'd to *reform* the Law called *Papia Poppæa*, because the Number of Persons 'obnoxious encreas'd, and every Family lay at *Mercy*, ready to be ruin'd upon the Suggestion of the Informers; and because, *as he saith afterwards*, the Informers had advanc'd themselves so far, that they had prevail'd not only in the *City*, but also over all *Italy*, and over every *Citizen* they could find any where else; so that many were already ruin'd, and almost every one was under the same Apprehensions. And thus *Tiberius*, in his Letter to the *Senate* (f) tells them, That he thought it a more proper Method to *pass by the Headstrong Over-grown Vices, than by attempting to correct them, to discover only what Crimes they had not Strength enough to master*; That it would be best to *reform them first in themselves*, and then to be content to *wait till Shame had corrected them in the Nobility, Necessity in the Poor, and Rich should grow weary of them.* For Men were not made for *Punishment*, but *Punishment* for Men. And therefore, if they who have the *right* to inflict *punishment* are under Apprehensions of imminent Danger upon the *infliction* of it, they can be no more oblig'd to punish, than a Man is to lay Violent Hands upon himself. In a Ship, if a *Pilot* should commit a *Crime*, when no Body but He understands the Management of the *Vessel*, 'tis plain that the Man that would do Justice upon him must unavoidably shipwreck himself, and all the rest of the Passengers. And so also the

(a) V. *Diodor. Sicul. l. 12. c. 19.* (b) *L. 13. 33.*

(c) *Vid. Hæocrat. laudat. Busrud. circa fin. p. 397.*

(1) *Quæ sit auctoritas ejus, qui se alterius factò, non suo defendat? Cicer. Orat. in Vatin. C. 6. p. 243. Ed. Græv.*

(d) *Claudianus de Bello Getico. v. 120, &c.* (e) *Lucanus Pharsal. l. 2. v. 141, &c.*

— Dumq; nimis jam putrida membra recidit,  
Excessit medicina modum, nimiumq; secuta est  
Qua morbi duxere, manus: periere nocentes,  
Sed cum jam soli possent superesse nocentes.

Tot simul infesto juvenes succumbere leto,  
Sæpe famæ, pelagiq; furor, subitaq; ruina,  
Aut cæli terræq; lues, aut bellica clades  
Nunquam Pæna fuit. — *Ib. v. 198.*

While he, the sound, freed from th' infected part,  
With Diligence severe and barbarous Art,  
The weaken'd Body sank beneath the Smart.  
The Guilty only were of Life depriv'd,  
But when the Guilty only had surviv'd.

In Plagues and Famines, and relentless Seas,  
By Earthquakes, and by common Enemies,  
Rome oft her noblest Lives in numbers spent;  
But ne'er before gave up to Punishment.

*Senec. de Ira, l. 2. c. 10.* There is a Necessity of Pardon when the whole Army deserts. (2) *Epist. 2. v. 127.*

*Nulla metu pæna, pæna qui pæna, coerces.*

(3) *C. 25. 28.*

(f) *Tacit. Ann. l. 3. c. 54.*

*Magistrate* may lawfully wink at some *Crimes*, the *Punishment* of which would be of dangerous Consequence to the Common-wealth: And especially, when the Persons guilty are *necessary* to the common Safety and Preservation. Tho' the *Magistrate* ought never to make any direct *Agreement*, for the permission of Vice, much lets make publick *Gain* by it (a). In *Italy*, *Pardons* are sometimes publickly promis'd to any of the *Banditti*, that shall bring with him the Head of another of the same *Gang*. (Tho' *Harry Stephens* (b) seems to have disapproved that Custom, and says, that the reason of it might appear agreeable enough in an *Aristotle* or a *Plato*, but could never become a *Christian*.) Upon such a Promise that the Villains might have a Jealousie of one another, and be hinder'd from uniting into Bodies, and from doing so much mischief as otherwise to the Common-wealth. (Sir *Thomas More* was of a contrary Opinion in his *Utop*. l. 2.)

XVIII. I shall in the next place enquire into the *Method* of rating *Penalties*, or what *Measure* of *Punishment* it is reasonable to allot to particular *Crimes*. And here besides what I have before (1) said concerning the *quantity* of *Actions*, 'tis obvious to observe, that in *Civil Courts* the *measures* of *Criminal Actions* are taken chiefly, *First*, from the *Object* they are concern'd in; and *Secondly*, as their *Malignity* doth more or less harm to the Common-wealth; And *Thirdly*, from the *Intention* and *Malice* of the *Delinquent*, which may be discovered by variety of *Circumstances*. The greater therefore and more noble the *Object* injured is, the greater and more *Criminal* is the *Fact* esteem'd. As therefore, as of all *Objects*, *God Almighty* is the Greatest and most Excellent, so any *Action* which tends to his Dishonour, is of all others the most wicked and detestable. And as the Obedience and Reverence due to him, which consists chiefly in the *Actions* of our Minds, ought to influence and govern our whole Lives; so (as he himself has discover'd his Pleasure), those *Actions* by which we express our *external Reverence* to *Him* may be superseded, when they come in Competition with those, which design any extraordinary benefit to Mankind, or to avert any great Evil from them, where there is danger in the delay. *Luk*. XIV. v. 5. the *Actions* next in remove from these, are such as affect the whole Body of Mankind; And then such as disturb the Publick order of the Common-wealth. *Afterwards* follow those *Criminal Actions*, that affect only particular Men; and under this *Rank*, the *Civil Court* sets those foremost, that strike at *Life*, the Foundation of all our temporal *Happiness*; and next such as concern the *Members*, not *Vital*, but without which *life* it self, would be an uneasy Burden; And which are to be valued according to the *dignity* of their use (2). The next *Class* of *Criminal Actions* are those, that dis-

order the *quiet* and *honour* of private Families; the Foundation of which is *Matrimony*; (though *Philo the Jew*, in his Book *de Decalogo & de Special. Leg.* places the *Command* against *Adultery*, before that against *Murder*) And in the next place, we may rank those that rob us of, or deny us those Blessings, which make up the *Necessaries* and *Conveniences* of *Life*; and that either *directly* or *indirectly*, by depriving us of them out of *wicked design*. And in the last place, we may reckon such as deprive us of our *Reputation*, or *civil Character* and *Esteem*. In the *particulars* of these *Crimes*, such are of the *first Rank*, which have reach'd to the greatest height of a consummate perpetration. The *Inferiour* are those that terminate in some *Acts*, and are not arrived at their full growth. And in these, the *Degrees* of *Malignity* differ according to the pitch they have arrived at. And here we may observe, that naturally, a *Design*, and *Inclination* to transgress, in any particular *Act*, must not be consider'd under the same *Degree* of *Enormity*, with the *Fact* it self, actually finished; because *Evil* presents it self to the Mind, under more odious and disagreeable Colours, when we come to close with the *Commission* of it; and consequently a Man must have greater *Obstinacy*, and *Resolution*, to overcome it, than when it lies, as it were at a Distance, and he hath but newly entertain'd the thoughts of the *Attempt*. When therefore we say the *Will* is the same with the *Deed*, we must understand, that this is meant only of such an *Act* of the *Will* which is united with the utmost *Endeavour*, so that no new *Operation* of the *Will* Intervene between *this* and the *Event* of the *Crime*, though the success of the *Action* fail; As suppose a Man takes aim at another to shoot him, tho' he should miss his Mark (3). And therefore Sir *Tho. More*, *Eutop*. l. 2. saith, 'That there is no less Danger in 'having attempted any ones Chastity, than in 'having actually violated it. For in every 'Criminal Action, a settled and determinate 'endeavour, is equal to the Deed. For 'tis 'not reasonable, that that Man should have 'any allowance made him for what was 'wanting to the completion of his Action; 'since 'twas far enough from his intent, that 'any such defect should happen. But the generality of such kind of *Evils* are rated higher or lower according to the *Disparity* of the *Subjects* they happen to light upon, as to their *State* and *Condition*, *Happiness* or *Infelicity*, *Age*, *Time*, or *Necessity*, or any particular *Passion*, or *Affection*, that might byas to some particular good, or give an *Aversion* to some *Species* of *Evil*. Neither must we only barely consider, what are the direct and immediate Consequences of any Action, but also what else may probably ensue; as in *Fire*, and *Inundations*, the Miseries and Deaths of a number of unfortunate People, are always to be consider'd

(a) See 2 *Pet*. II. 15. (b) *Apolog. pro Herodot.* c. 18, hereafter in Section 27. towards the End.

(1) B. 1. c. 8. (2) See *Grav. B.* 2. c. 20. f. 30. (3) See

(4): And

(a): And therefore the *Chinese* make it death, for any Man to be the occasion of the breaking out of Fire, tho' it were only by his neglect.

XIX. The *intenseness* or *remissness* of the *Will* and *Inclination*, are to be measured principally by the *Causes* and *Motives* which engage Men in *Sin* (1). There is hardly any Man wicked, without cause or design (2); for if a Man be in love with Vice, purely for its own sake, and sin only out of Vanity and Affectation, or has no other reason to give for his Vices, than that they are unaccountable and incredible (b), he must certainly be arriv'd at the highest pitch 'tis possible for Human Impiety and Impudence to reach. And therefore, we never find any Malefactor so confident, but he will either deny the Fact, or pretend some plausible reason for excuse, and extenuate it from some pretence of Nature (c). 'Tis certain, the greatest part of the World are perswaded into Sin by their Passions. Some of these press us with a sort of Violence, to escape present or imminent Evil. And 'tis reasonable these should be allowed to excuse or extenuate the Crime. And therefore such Crimes as are the Effects of the Fear of Death, Imprisonment, or any great Discontent, Pain or Passion, or of extreme Poverty, are always look'd upon to be excusable. The wise Hebrew pronounces, That the Thief whose mean Circumstances tempt him to Steal, is a more excusable Criminal than the Adulterer. So Theft in case of Hunger, is a less Crime, than the same, when it is the effect of unmeasurable Avarice; and Perjury upon fear of Death is more excusable than only upon the view of Gain, or to betray a Trust. And thus, as the Author ad Herennium speaks, B. 2. (3). 'Tis a greater Crime to debauch a Woman of Quality, than commit Sacrilege; because 'tis possible Extremity may force a Man upon the one, but the other can be the effect only of ungovernable Lust (d). And therefore Bawds that live by encouraging and supplying the Lusts of others, deserve more severe punishment, than any Man that pursues only his own Pleasure. It is the Opinion of the Emperor Antoninus (e), That those Crimes which Anger gives occasion to, are more excusable than those that arise from Lust. For, saith he, a Man that yields to the Passion of Anger, seems to break with the Laws of Reason, with some Regret and secret Reluctance of Mind; but one that sins in complaisance to his Lusts, gives himself up with Pleasure, and therefore is more intemperate, as well as more soft and effeminate in his compliance. And as another observes (f), Anger has a much stronger, and a more violent influence upon us than Love; for that gives us time to deliberate and consider with our selves;

but Anger raises such Storms in men's Breasts as hurry them besides themselves, and is never quiet till it is satisfied. The Bias of the other Passions inclines men either to some real or imaginary Good: The things that are really good, can have no natural tendency in them to tempt us into sin; such are all kind of Vertues and the Actions which flow from them. Other things may indeed be good in themselves, but may be also inducements to Sin, according to the disposition of the Man's mind, who is in possession of them. Of this Kind, some are pleasing and delightful; others instrumental only in the procurement of delights, which are such as we call useful. Now every Crime committed in pursuit of any of these things, is (ceteris paribus) look'd upon to be more excusable, the more that good which was in view, appears to be agreeable to Nature, or the more uneasy Men are without it. The imaginary good Things are such as Men owe the Credit and Value of, either to their Folly, their Vanity, or their Vices: Among these, we may rank Vain-Glory, or an Opinion of more than common Worth, neither bottom'd upon Vertue, nor with any mixture of real Profit joyn'd to it; as also Revenge, as it proposes to it self, nothing else but the harm of the injurious Person. And the less of Nature there is in these, and the easier it is for a Man to be without them, the more criminal are those Actions judg'd that flow from the pursuit of them (g). It is also certain, that all Crimes which are the result of clear and distinct Knowledge, are greater than those which arise from Error and Mistake: and that those Errors are more dangerous and criminal which a Man runs into, through an obstinate pursuit of his own Principles, and false Reason, than those which he imbibes from Publick Teachers. And it is also well observ'd by Hobbes, Leviath. c. 27. That the same Fact committed upon a presumption of Power, Friends, or Riches, by the assistance of which, the Offender hopes to resist the Publick Ministers of Justice, is a greater Crime than when it proceeds from hopes of not being discovered, or escaping by flight; for the one is an open contempt of the Law, the other not (h). And therefore Aristotle saith (i), such as deny and persist in their Crimes are punish'd with more severity; but such as think themselves justly dealt with, deserve to be us'd with gentleness and lenity: and the reason is plain, because 'tis impudence to deny what is plainly prov'd; and impudence is contempt and wilful opposition. And upon this View (says Seneca (k)) a wise Man will sometimes pardon a great Crime easier than a less, if he finds that that was the effect rather of weakness and infirmity, than rancour and malice; and that

(a) Vid. Grot. d. 1. (1) Vid. Grot. d. 1. f. 29. (2) V. Senec. de Benef. L. 4. c. 17. V. Auctor. ad Herennium, L. 2. c. 19. (b) Calpurn. Flaccus, Declam. 2. Princip. (c) Cicer. de L.L. l. 1. c. 14. (3) Chap. 30. towards the End. See hereafter, Sect. 21. towards the End. (d) Add. Val. Max. l. 8. c. 1. in fin. (e) L. 2. c. 10. (f) Libanius, Declam. 23. (g) Grot. d. 1. f. 29. (h) Add. Aristot. Rhet. l. 1. c. 12. & 14. (i) Rhet. l. 2. c. 3. (k) Senec. de Ira, l. 1. c. 16.

this is the product of a close, designing, inveterate Craft. Neither will he punish the same Crime after the same manner, in different Offenders, when what the one committed through indiscretion and negligence, the other did industriously and deliberately.

XX. Another Argument of the great force and violence of the Inclination and Intention, is, when besides the common Reasons that ought to be sufficient to restrain a Man from sin, there happen to be other particular Reasons, founded either in the Person of the Delinquent, or in the Person of him who was injured in the Fact, or in any other Circumstances. Thus as Juvenal saith (a),

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

—More publick Scandal Vice attends,  
As he is Great and Noble, who offends.

And thus the same sort of Sin, committed by a Church-man, is look'd upon to be a greater fault than by any one else, because 'tis expected he should be a Pattern of a pious and unblameable Life to others: For a Man that neglects himself, what he persuades others to do, confutes his own counsel by his practice; for the force of his example by which he dissuades, is much stronger than all the Arguments by which he would convince (b). Tully saith, 'The Guilt there is in the Vices of a Prince, is not so much to be consider'd (tho' that too may be great enough) as the consequences that attend them, that there will be always great numbers ready to imitate them; and therefore Princes of bad Morals deserve very ill of the Common-wealth; not only as they are vicious themselves, but as they spread and propagate Vice: not only as they are wicked themselves, but as they do more harm by their Example than by their Sin (c). Thus Tacitus (1) saith of Capito, 'That he was the more remarkably Scandalous, because being so great a Master in the Knowledge of Human and Divine Laws, he had forfeited his publick Character, and disgraced his own private Skill. And Tully saith in another place (d), As it would be unpardonable in a Man that profess himself a Grammarian, to speak improperly, or in one

that profess to have Skill in Singing, to show none in the Practice of it; because these are Faults in the Arts they pretend to: So a Philosopher that is guilty of Misbehaviour in the Conduct of Life, is the most inexcusable; because he is deficient in those Duties he affects to be thought a Master of; and commits Mistakes in the Art of Life which he professeth (e). In Peru, under the Empire of the Inca's, a Magistrate found guilty of any Crime, was punished with greater Severity than any private Offender; For This reason added, that He was expressly prefer'd to the Administration of Justice, and plac'd in an Office of Trust, upon the presumption that he was a Man of more than common Probity and Goodness (f). Upon this account the Injuries of a Friend, affect us more than those of an Enemy (g). And on the other side, a Benefit conferr'd by an Enemy, is more pleasing and more valued, than the Kindness of a Friend: Notwithstanding what Terence saith, 'That when a Man stands in need of a good turn, he is glad to receive it at any hand; but 'tis double pleasure to receive it from one he has reason to expect it from (h). For the same Reason, an Affront from a Man of mean Circumstances, is more insupportable than from an Equal or Superiour (i); or from a Man's own Children or Servants, than from another's. There are also some particular Crimes, which are branded with particular Infamy, as consisting in the violation of such Acts of Duty, which Men are obliged to pay to certain particular Persons, (2) and are therefore judg'd to be more highly wicked; such as Disobedience to Parents, (3) Inhumanity and Rudeness to Relations, Ingratitude to Benefactors; which are look'd upon to be more heinous, than if they terminated in any other Persons (k). In fine, 'tis a material aggravation, to consider the time, and place, when, and where the Fact was committed. And thus the same Crime committed in a publick place, before Witnesses, is greater, than when a Man endeavours to conceal it; both because, what is acted with the advantage of secrecy, at least gives less scandal; and because, 'tis a strong presumption, that, that Man is a bold and harden'd Offender, that has the impudence to out-face the World, and to sin, as it were, in defiance to all the good and sober part of Mankind (l). Thus it is a

(a) Sat. VIII. v. 140, 141. Dio Chrysostr. Orat. 1. de Regno, p. 9. C. Any Vice in a Prince is more heinous, and more in view. And to this sense we may apply that of Pliny, Nat. Hist. l. 5. c. 1. Men are never more credulous and easy of Belief, than when any Falsity is promoted under the Authority of a Great Man.

(b) Libanius, Declam. 29. (c) Cicer. de L.L. l. 3. c. 14. Senec. Hercul. Fur. v. 745, 746. The Crimes of Princes are of deeper Stains. (1) Annal. III. 70. (d) Tuscul. Quest. l. 2. c. 4. (e) Quintil. Declam. 3. p. 38. 'Tis the Misfortune of Superiors to be thought to command Others, what they do Themselves: and Evil is always most Pernicious, when the Author of it is Great and Powerful. (f) Garcilass. de la Vega Com. Reg. l. 2. c. 14.

(g) Petron. One that offers Violence to a Stranger is a Villain, but a Man that injures his Friend is little less than a Parricide. Among the Celts, according to Nic. Damascenus, de Moribus Gentium, a Man that Kill'd a Foreigner was Punish'd more severely than if he had Kill'd a Subject. The Punishment of the first, was Death, of the second, only Banishment. (h) Terent. Adelph. Act. 2. Sc. 3. v. 1, 2. (i) Vid. L. 47. t. 10. l. 17. f. 3. D. de Injur.

(2) D. ubi supra, l. 7. f. 8. (3) Vid. Grot. L. 2. c. 20. f. 30. & 2 Sam. c. XVI. v. 11. (k) To this purpose is that Passage in Lyfias, speaking to the Athenians, Orat. 4. contra Andocid. c. 6. Ye ought to shew your selves more severe to your own Subjects, when they Prophane the Rites of your Religion, than to Foreigners; Because the Crime, as these commit it, seems to come from Abroad; in your own People 'tis Native and Intestine.

(l) Vide Aristot. Probl. f. 29. q. 14. Vide D. De ubi supra, l. 7. f. 8.

greater sin, to be guilty of unchast Actions in a Church, than in a Tavern; to strike in the Court, than in a private House; and to be guilty of Intemperance on an ordinary day, *ceteris paribus*, is more excusable, than on days set aside for Devotion (a). Thus Cicero severely aggravates Antony's Crime, for coming into the Court so disorder'd with Wine, as to be forc'd to vomit while he sat on the Bench (b). Thus the Declaimer saith (c), 'That tho' Rudeness in any other place may perhaps be excusable, yet in the Temple, where we set a guard upon our words, where we compose our Souls, and confine even our thoughts, to offer an injury, or affront there, with the same boldness as in an unrequented, private place, is unsufferable (d). Lastly, The Methods and the Instruments used in the commission of the Fact, seem to be accessory to the aggravation or extenuation of the Crime; because 'tis usual to infer from them, the force or weakness of the intention. And therefore 'tis a greater Crime to rob a Man of his Goods, by forcing his House, by digging through his Walls, or artificially picking his Locks, than by going in boldly at an open Door.

XXI. Another Thing which aggravates or extenuates the Crime, is the power or ability the Person was Master of, to forbear the Fact (i). For some Men have clearer and more lively Apprehensions of the Reasons why they should decline ill Acts than others. And some have stronger Propensities than others to some particular sorts of sins, which may be accounted for, either by the particular mixture and constitution of the Body; or else by the Age, Sex, Education, or other Circumstances (e): For 'tis easie to observe, that young People, Women, and Men of grosser natural Parts, or that have had no advantages of Education, do not so accurately distinguish between Just and Unjust, Lawful and Unlawful; and know very little of the measures of them, or how to weigh and consider them (f). In Persons, where Cholera is the prevailing humour in the

Body, Anger is the governing Passion; others of more and warmer Blood, are easily inclined to Lust: Age turns our Desires one way, and Youth another (g). Again, The nigher any Evil seems to threaten, the stronger is the fear it causes, and the more difficult it is to resist it. A fresh Resentment strikes us with more Violence, than that which hath been cool'd by interval of time. And tho' Grief and Discontent will not always be silenc'd at first by Reason, yet they have not the same excuse when they have had time to be compos'd and quieted. In general, It is more Criminal to go sedately and calmly to commit sin, than in a disorder and disturbance of Passion (h). And therefore Aristotle says, 'That every Man must think him less excusable, who engages in a bad Action upon weak Temptations, than One, that is guilty of the same, upon the violent persuasions of strong Passions. And that when a Man strikes in cold Blood, he is more Criminal than if he were angry; for how far would such a one proceed, (saith he) if he were heated into a Passion? It was Pittacus's Law indeed (i), That such as abus'd others in their Wine, should pay double the sum they should do, if they had been sober: 'For since People in that condition, (saith Aristotle,) are generally inclined to be more abusive than others, the Law doth not so much regard the Pardon which ought rather to be allow'd to Men in the disorders of Drink, as the publick Good (k). But Crimes that arise from Passions, are look'd upon to be less odious when they are the effects of a Passion alarm'd and rous'd in us at the appearance of Evil; and such as arise from an appetite or eager pursuit after pleasures, especially the more needless ones, to be more criminal. For Pleasure doth not affect us so sensibly, and may be easier delay'd, or satisfied more innocently some other way without guilt. And (Aristotle saith) therefore, 'That 'tis a greater uneasiness to bear Pain of any sort, than to deny Pleasure: For, (saith he in another place) Pain distracts and weakens Nature in

(a) *Ibid.* l. 9. f. 1. D. de Injuriis, &c. (b) Cicero. Orat. Philip. 2. c. 25. (c) Quintil. Declam. 252. If any Injury be done to the Magistrate, it is an Act of Hostility against the State; if to an Ambassador, Satisfaction must be demanded by War, and the Laws of Nations. The same Sum of Money taken from a private Man, is Theft; from the Altar or Temple, Sacrilege. And so one that violates another's Chastity, shall pay to the Party demanding barely Satisfaction for Virginity, Ten Thousand Sesterces; but one that hath been publickly Guilty of the same Crime, and ravish'd a Candidate to the Priesthood, must not be allow'd the same Terms. Quintil. Decl. 264. Add. Instit. Orat. l. 6. c. 1.

(d) Demosthen. adv. Midiam. I was Abused by my Enemy, in cold Blood, in the Morning, out of Malice, not upon any heat of Wine, publickly, before Strangers, as well as Citizens, and that in the Temple, whether I was obliged to go by the Duty of my Office.

(e) Vid. Gros. l. 2. c. 20. f. 31. (f) Vid. L. 48. t. 13. l. 6. D. ad L. Juliam peculatus, &c. in Princip.

(g) Procop. Hist. Vandal. l. 2. c. 14. As it is very unusual, so it would be the more commendable, for the Son to lay aside that Falseness and Violence of Temper which run through the Family, and to take up a contrary Coolness and Probity.

(h) Gramond. Hist. Gall. l. 13. Young People seldom trouble themselves to be Wise, because they look upon it to be their Privilege to do what they please. Libanius, Decl. 21. p. 531. C. D. Ed. Paris. It borders very much upon Youth, to neglect the Obligations of Duty, and to be ignorant of what is Just and Honourable. *Ibid.* In all Nations the Age is made the Excuse for young People.

(i) Cic. Off. l. 1. c. 8. Those Faults which are the effects of any sudden Commotion, are more excusable than such as are premeditated and designed. Philo Jud. de Specialibus Legibus. p. 791. B. Edit. Paris. says, That it is an imperfect Crime which is not the effect of much Deliberation. Plato de L. L. l. 9. p. 931. C. Ed. Wech. They that Kill a Man upon premeditated Malice, are to be Punish'd more severely, than such as are guilty of Man-slaughter only, out of a sudden Rashness. (j) Aristot. Polit. l. 2. c. 12. (k) This Law is also mention'd by Plutarch in Conviv. 7. Sapient. p. 155. F.

' the Person that suffers it; but Pleasure hath ' a different effect, and offers it self fairer to ' our choice, and therefore ought to be thought ' more criminal and opprobrious (a). Lastly, Another *motive* to alleviate the *Penalty*, is when a Man's Friends and Relations perswade him to *transgress* the *Laws* (b).

XXII. 'Tis also usually consider'd, whether the *Malefactor* were himself the *First* of the *Kind*, or were *seduc'd* by the Examples of others; whether this be the *first* time he is found *guilty*, or whether he be an *old* Offender. For in every Common-wealth, the *first* Man that has the boldness to commit a *Crime*, which is like to be of ill *Example*, and which he does in a manner *inform* others in, is more *highly* Criminal, than another that has been encouraged by frequent *Precedents* in the like *Crime* before (c). Again, the same *Fact*, if it hath been constantly *punish'd* in other Men, is a greater *Crime*, than if there have been frequent Instances of *Impunity*: because the *first* is greater Contempt of the *Government* and *Laws*, than the *latter*. But the more or less frequent Repetition of the same *Action*, doth not make it in it self *better* or *worse*, any farther than as it discovers it to proceed from *inveterate* Custom or *Habit* (d). And since regard is *principally* had to the *frequency* of the *Repetition*, in the making an *estimate* of *Moral Actions*, (since from *thence* 'tis usual to measure the force of a Man's Resolution; and therefore it is commonly said, that *ill Habits* are worse than *ill Acts*;) it sufficiently appears why a *good Action* which a Man has frequently *repeated*, is look'd upon to be *better* than one he has but newly begun, or very seldom *practis'd*: and on the other hand, why a *bad Action*, often *reiterated*, is judg'd a greater *Crime*, than *one* the same Person has but once or twice been found guilty of (1). To this purpose was the *Emperour Julian's* Law against *Lyars* (e); *If any of my Servants be found guilty of a Lye, the first time, I pardon it; if he presume a second time, I bear with him: if it be prov'd upon him a third, he has not absolutely incurr'd my Displeasure; but if he venture the fourth time, I forbid him my Presence*. But the *Peruvians* under the *Government* of the *Inca's*, took particular care to *punish* the first *Essays* of their *Criminals*, because by this Method they thought they might prevent the return of the same *Crime* another time. For unless the *Weeds* are rooted up when they first appear, it must be expected that they will plentifully encrease. And where *Justice* moves

so slow as not to reach the *Offender*, 'till he has *repeated* his *Crime*, *private* Subjects are apt to grow impatient, and to take the liberty to *Redress* themselves, to the prejudice of the *publick* Peace (f). Neither is it any *Objection*, that a *good Habit* gives an easiness to good *Actions*; or that on the *contrary*, an *ill Habit* makes it difficult to forbear doing *ill*. For that labour it must cost a Man to attain the *good Habit* at first, is a sufficient reason why the value of it ought not to be less'n'd, tho' the exercise of it be *Easy* and *Pleasant*. And on the other side, the aversion to *Sin*, ought to be therefore the greater, because by a *frequency* in doing ill, a Man shall contract such a *Familiarity* with *Vice*, as he will hardly ever be able to renounce, and by repeated *Transgressions* will be abandon'd to *Impudence*, and forget the sense of *Shame*. For the common *Infirmities* of *Human Nature*, will excuse some *Errors* and *Slips* in the conduct of *Life*; but to be often guilty of the same *Miscarriages*, is a degree of *Madness* not to be born with (g). *The Faults a Man is guilty of at sixteen, will not appear the same, tho' all other Circumstances be supposed to continue, when he is forty; for by that time, besides that, his Habit appears inveterate and inexcusable, the maturity of his Judgment must cut off all pretences of excuse and plea for pardon*. And all these things are, with good reason, to be consider'd in *levying* *punishment*. For a *Crime* of no extraordinary *Malignity*, upon the first *Commission*, may be more easily *pardon'd*; or at least *punish'd* with less *Rigour*, than one which has been the common *Practice* of the *Delinquent* (2). Sometimes also, future *Reformation* is made the *Condition* of *Pardon* for past *Offences*: And in defect of that, the *Punishment* of the past, is join'd with that of the *repeated* *Crime*; and former *Misdemeanours* are again brought under the reach of *Justice* (h). From whence it appears, in what Sense that common Aphorism is allow'd to be True, *That the Estimation of a Crime is never encreas'd by any after Act* (3). And here it might also be enquired, how far that *Custom* of the *Persians*, which *Herodotus* speaks of, was agreeable to *Natural Equity*, when in *Criminal Cases*, the whole *Course* of the *Delinquent's* *Life* was examin'd, together with his particular *Offence*; and if upon the whole it appeared, that there was an overbalance of *good Actions*, the *Crime* was *pardon'd*. But upon a strict view, it must appear that all that signified nothing to the *intrinsic* *estima-*

(a) *Arist. Nicom.* l. 7. c. 8. The Intemperance of Anger is less Criminal than that of Lust. *Id. Magn. Moral.* l. 2. c. 6. A violent inclination for Pleasure is much more faulty than any excess of Anger. For Anger is a very restless uneasy Passion, and every one that is under the power of it, finds himself discomposed. But the Incontinence that ariseth from the concupiscible Appetites is attended with Pleasure, and therefore is less excusable, because it seems to be the effect of Wantonness and Effeminacy. There is a Passage like this, in *Marcus Antoninus*, l. 2. f. 10. Ad. *Aristot. Probl.* f. 29. q. 16. (b) *Vid. L.* 47. t. 16. l. 2. D. *de receptator.* Ad. *Grotius*, d. l. f. 29.

(c) *Velleius Paterc.* l. 2. c. 3. Precedents seldom stop where they begin, but if allow'd never so little Liberty, will soon make way for themselves to break out further. *Vid. Gell.* l. 10. c. 19. *Polyb. excerpt legat.* 93. c. 5. (d) *Vid. L.* 48. t. 19. l. 28. f. 3. D. *de penis.* Ant. *Matthæus de crimin. tit. de furtis.* f. 9. *seqq.* & *L.* 48. D. *tit.* 18. c. 4. f. 27, 28. (1) *Vid. Grot. L.* 2. c. 20. f. 30. (e) *Libanius Legat. ad Julian.* (f) *Garcilass de la Vega. Com. R. l.* 2. c. 14. (g) *Sir Tho. Browne's Relig. Medici*, f. 41. (2) *V. Grot. d. l.* (h) See i *Kings* l. 52. II. 23. (3) *Nunquam crescit ex post facto, præteriti delicti estimatio*, *L.* 50. t. 17. *De divers. reg. Juris*, l. 138. f. 1.

tion of the *Crime*: and therefore 'tis probable, this Method was not us'd in Crimes of an higher *Quality*, and where there were manifest Proofs of the *prepenſe* Malice of the *Criminal*; but as *Grotius d. l.* thinks, was, or at least ought to have been confin'd to such *Cases* only, where the *Delinquent* being not otherwise notoriously *vicious* was unwarily betray'd, by some Satisfaction or other, he conceiv'd, he should find in the Commission of the Fact, or else, where the *Proof* of the Fact lay *Intricate* and *Perplex*, a view of the *Criminal's* Life might be necessary to give the matter so much Light, as to discover whether it were probable, he was *guilty* or not: since a Man must make several Steps before he can come to the highest pitch of Guilt (1). Yet *Herodotus* (a), gives us an Example of *Sandoces* a *Persian* Judge, whom *Darius* commanded to be Crucified for taking *Bribes*; and giving *wrong* Judgment; but when he call'd to mind that the Services and good Offices he had done him, were more than his Crimes, order'd him to be taken down, and admitted him again to favour. And *Cicero*, in his *Defence* of *Sulla*, reasons the same way, 'In all Matters of Importance and Concern, (saith he) we are not to measure a Man's Intentions, Thoughts, or Actions, by the Fact it self; but by the Circumstances of his Life; and the reason (saith he) is, because according to the Opinion we receive of a Man's Morals, we generally Conjecture, how far he may be guilty, and how far not (b). And for this reason, it was usual in the Old *Roman* Judgments, for the Accuser to begin with a *Censure* upon the Life and Behaviour of the *Criminal*; and on the other side, the *Patroni* either made excuses for him themselves, or brought in the *Laudatores*, Persons that should give Testimony of his good Behaviour. And there was good reason for the Practice; for considering the general Depravation of Mankind; a *Judge* ought to be very cautious, how he takes away the Life of any *Subject*, who upon the whole, may rather be thought a good, than a bad Man. But it is to be observed, that an Inquiry into the *Criminal's* Morals, and past Life, where the *Fact* is intricate and obscure, may make the *Presumptions* great on both sides; and therefore, that if any Man has clearly acquitted himself of the *Crime* he was indicted of, he may lawfully plead, that he was not oblig'd to make a *Defence* for his *Morals*, or vindicate his former Behaviour, but only to acquit himself before the Court, of the Crimes his accusers directly charged him with (c). But yet when a Man that has always been a regular and dutiful *Subject*, changes his whole course of Life; there is good reason the *Laws* should deal se-

verely with him, upon a *double* Account; both because he hath been guilty of a *Crime*, and because he has made so ill a Choice, as to change a good Course of Life for a bad one (d).

XXIII. Now although from what has been said, it sufficiently appears, that one *Crime* is greater than another; and that *Human Justice* ought not to punish every *Crime* with equal severity; yet notwithstanding, it must be confess'd, that both the precise *Quantity* and *Quality* of *Human Punishments*, depend upon the Determination of the *Civil Sovereign*, which is principally to be directed, by the advantages and *publick* Good of every *Common-wealth*. Upon this view *Amasis* King of *Egypt*, punish'd no *Criminal* with *Death* in all his Reign; but according to the Degrees of every Man's Offence, condemn'd him, to bring a quantity of Earth, or Rubbish to the City he belong'd to. And by this method the Ground the Cities stood upon was rais'd higher, and the Cities secur'd against the Inconveniences of the Flood upon the rising of the *Nile* (e). But indeed there is no Necessity, that there should be always the same *Proportion* observ'd between the *Penalties*, as there is distance between the *Objects* injured by the *Offender*. Every particular *Crime* may be sentenced to a particular *Punishment*, as it happens to be most agreeable to the *Circumstances* of the State; without any Regard, whether another *Crime*, which in it self may seem greater or less than this, be punish'd with more or less Severity. *Plato* proposes a *Law* of this Nature (f), 'That if any Man robb'd the *Publick*, whether of more or less, his Punishment should be the same. For (saith he) a Man that takes away a thing of less value, though he doth it with less force than another that robs the State of something greater, yet he is guilty of the same ill Principles and Intentions: And a Man that takes away something of considerable worth, which he never deposited, can but be Unjust and Criminal. The Law therefore doth not inflict greater or less Penalties upon the Offenders, from the Comparison it makes between the Degrees of their Theft, but because it supposes, that one is more capable of being Reform'd, than the other. 'Tis certain, a *Judge* ought so far to observe *Equality* in the Distribution of *Punishments*, as to take care that such as are equally guilty should be equally punish'd; and that a Fault which was severely corrected in one Man, should not without very good reason be excus'd in another: since it must be expected that such Partiality would be a certain cause to raise Disturbances in the *Common-wealth*; and because a *Punishment* can have no effect when it is not inflicted upon any view of *publick*

(1) *Nemo repente fuit turpissimus* — *Juven. Sat. 2. v. 83.* (a) *Polyimnia, c. 13.* (b) *Orat pro Cluentio, c. 25.*  
 (c) *Author. ad Herennium. l. 2. c. 3.* (d) *Polyb. l. 7. in Excerpt. Petrescian.* But when he took a quite contrary way of Life, and grew every day worse and worse; 'twas fit every body should change their Opinions of him.  
 (e) *Herodot. Euterp. p. 90. Ed. H. Steph. Diodor. Sic. l. 1. c. 65.* Tho' *Amasis* King of *Egypt*, when he built *Rhinocolura*, took care that all those sort of People, the Scum and Filth of the Nation, should be carried into a Place by themselves, that they might not infect others, *Diodor. Sic. l. 1. c. 60.* (f) *Plato de LL. l. 12. init. p. 982. C. Ed. Weck.*

Good, but barely in Gratification to private Passion. But still an Equality of Punishment must be suppos'd only where the Criminals are guilty of the same Fact in Specie, and not of different. For 'tis common for Human Justice to punish small Faults with greater Rigour, or to take the contrary Method, as the Exigences of the State, or the Will of the Legislator determines. And the Criminal has no Reason to complain of the Partiality, since he knew before-hand what he was to expect (a). For instance, though Theft in it self be a much less Crime than Murder, yet the Thief has no just reason to complain, should he be condemn'd to suffer the same Punishment with the Murderer, tho' his Crime was not equal in Degree. The reason why Crimes of different Degrees are equally punish'd with Death is, because Death is the greatest and last Evil Men can inflict (b); unless it be that sometimes the way to it is short and easy, and at other times made terrible, and grievous, by delay and torture (c); or that sometimes dishonour is done to the dead Body, and infamy fix'd upon the Memory of the Person (d), which is sometimes inflicted a considerable time after the Delinquent's Death; and may again be recall'd, and taken off (e). Besides, the Will of the Legislator is often consider'd in determining the Penalty, though not in so absolute a Degree, as to exclude the Interest and Advantage of the Publick, yet to such a Degree, that the particular punishment seems in a manner entirely to depend upon it. There are also some Crimes of so black a Nature, as will justify the greatest Severity that

can be us'd upon Criminals who have contracted the slightest Acquaintance with them (f). So Philo says, 'That a Man who attempts only to kill another treacherously, is not the less guilty of Murder tho' he fails of Success: And the written Law in this Case commands, That if a Man come presumptuously upon his Neighbour to slay him with guile, thou shalt take him from mine Altar that he may die (g). The Athenian Judges indeed, were too severe, when they condemn'd a Boy for pricking out a Bird's Eyes, upon Suspicion, that it was a sign of a barbarous Temper, and that he might prove a very ill Member of the Common-wealth, if he were suffer'd to grow up to years of Maturity (h). But it is not the actual Commission of a wicked Act that makes the Criminal: 'Tis enough that a Man has arm'd himself, and discovers his Inclinations to Rob and Murder: For the Wickedness doth not always begin, but is exercis'd and improv'd only by the practice. For as Paternus reflects upon Caius Cato's being condemn'd for a small Offence (i); 'The Inclination and Intent of the Offender may sometimes be of greater force with the Judge than the Crime it self. For 'tis natural enough to argue from the Fact to the design of the Criminal; and to consider rather of what Nature the Offence is, than how great (k). In Cases of Treason and Conspiracy against the State, bare Consciousness, or Privity without any Assent, and Silence only, and the Concealment of it deserves Punishment (l). However in the Distribution of Punishment, there ought always to be as much Gentleness and Lenity

(a) Calpurnius Placcus, Declam. 5. When the Consequences are threaten'd before-hand, the Fault lies no where but in the Sufferer. (b) Lycurg. Orat. contra Leocrat. The greatest and the last of Punishments is Death. (c) Ovid. Her. Epist. l. 10.

Morsq; minus pœnæ, quam mora mortis habet.

Death hath less Pain it self, than the delay. Tho' some think a quick Dispatch an easier Punishment than a Miserable Life. Vid. Cæsaris Orat. in Sallust. Conjur. Catilin. and Tiberius's Answer in Suetonius, c. 61. To one that desir'd his Punishment might be short, was, I am not yet reconciled to you.

Senec. Hercules Fur. v. 512. Death to the Miserable is Ease.

Senec. Æg. Agamem. v. 989. He's yet unskill'd in the Arts of Tyranny, That punishes with Death.

El. Ibid. v. 996. Why is there any thing beyond the Grave?

Æg. Ibid. Yes Life when one desires to die.

Euripid. Hippol. Coron. τῆς δὲ ἀδύτης βίας ἐὐδελὲς δὲ συυχῆ. v. 147. Th' Unfortunate desire a speedy End.

Nay, Charron de la Sageffe, l. 1. c. 39. (VI.) §. 10. Ranks it among the ridiculous Notions of the Vulgar, to think to be reveng'd of an Enemy by killing him. For this, saith he, is only to take from him the sense of Misfortune, and to secure him from all further Harms; unless a Man thinks it necessary to his own Security, to leave no body alive that is like to be his Enemy, or to make him uneasy. In Philostratus l. 1. Apollonius condemn'd the Eunuch, that lay with the King's Concubine, to live, by way of Punishment. (d) Ælianus N. Hist. l. 4. c. 7.

(e) Vid. Socrat. Hist. Eccles. l. 7. c. 44. (f) Vide Ant. Matthæum de Crimin. Proleg. c. 1. §. 5, 6. & ad L. 48. D. tit. 5. c. 3. §. 10. & tit. 18. c. 4. Ziegler ad Grot. d. l. §. 39. Valerius Maximus l. 6. c. 1. §. 8. Vide L. 47. t. 11. l. 1. §. 2. D. de extraordin. Crimin. D. ad L. Cornel. de scariis. Vide L. 48. t. 8. l. 3. §. 1, 2, 3. Philo Judæus de confusione linguarum, p. 343. C.

(g) Vide Philon. de specialibus legibus, p. 791. Tacitus Hist. l. 2. c. 77. Qui deliberant disciverunt, to demur is to desert. And to this we may refer that of Plutarch, Cæsar. Penalties are not always inflicted for the Fact, but sometimes for the Intention and Design. Quintil. Declam. 362. The Law lays the Punishment upon the Will. Lyfias Orat. in Simonem. c. 12. It is certain that those we reciev'd our Laws from, did not intend that a Man who in a Quarrel had done harm to another, should therefore be banished: But that such as violently assaulted and injured a Man with a design to take away his Life, tho' they fail'd in the Attempt, should yet suffer that severe Punishment; because they suppos'd it just, that should suffer as really guilty of the Fact, that deliberately endeavour'd to put it in Execution; for tho' it happen'd that they were mistaken in the success of the Action, yet they pursued it as far as they had Power. Add. Ælian. Var. Hist. l. 14. c. 27.

(h) Quintil. Instit. Orat. l. 5. c. 9. Senec. de Benef. l. 5. c. 14.

(i) L. 2. c. 8.

(k) Ad L. 9. t. 8. l. 5. princ. C. ad L. Jul. Majest. Grotius in Flor. sparf. in Jus Justinian. (l) We have an Example of Thunus, in Benj. Priolus Hist. Gall. l. 1. c. 6. and of Dawid Berchinus, in Buchanan. Rerum Scotic. l. 8. Ad. Diodorus Siculus, l. 11. c. 54.

used, as is possible. And therefore the Severity of *Draco's* Laws, might justly appear insupportable, and deserve *Solon's* Corrections (a). Yet the *Course* of Justice in *Pera*, was altogether as *Rigorous*; for there almost every Crime was punish'd with *Death*: the *Judges* not so much considering the *simple* Nature of the *Offence*, as that it was a Breach of the Commands of the *Inca*, whom they look'd upon and revered as a *God* (b). But there is good Reason for *enhancing* the severity of the *Punishment*, when *just* Repentment, and Care for the *Common Good*, makes it necessary to secure the Publick Quiet by punishing *Malefactors*. For Instance, suppose the *Criminal* threaten Danger to the State, if he be not punish'd in time. *H. Stephens* gives us a *Story* (c), of a Man that having begg'd for a Pardon of the *King*, of *France* for the *seventh* Murder he was guilty of, and finding he could not obtain it, boldly told the *King*, that he would own only the *first* Murder to be his own *proper Action*; and that the *Imputation* of all the rest must lie upon the *King* himself; for that he should never have committed the other, if the *King* had not given him *Encouragement*, by pardoning the *first*. Sometimes also it is necessary to make *Examples* of some *Malefactors* to frighten others; especially where the *general* Perswasives and Inducements to *Wickedness* are strong (i); such as are *Easiness* and *Use*, which nothing but a *severe* Discipline can Reform. The *Jewish Law* lays a greater Penalty on the Person that steals out of the *Field*, than one that robs an *House*, because the *first* is done with greater ease; compare *Exod. XII. v. 1.* with the *7th* and *9th ver.* (d). And thus the *Scythians* thought no Crime so *Heinous* as *Theft*, because having neither *Houses* nor *Folds* to keep their Cattle in, no *Man's Property* could be secure, if *Robbery* had any *Indulgence*. And in some Nations, *Theft* is look'd upon to be a greater Crime in a *Domestick*, than in a *Stranger* (e). It was *Death* at *Athens*, for a Man to steal from the *Baths*, from the *Schools* of Exercise, or the *Market*, or any such *publick* Place; but one that robb'd a *private* House, was only to pay *double* the worth of what he stole (f). *Q. Curtius* says, 'There was a Custom among the *Persians*, that oblig'd them to be strict in concealing any *Secret* that concern'd their *Kings*; and adds, that neither *Hope*, nor *Fear*, could extort any Expression from them that might give *Light* to discover it; the *Ancient* Constitutions of that *Empire*, obliging them to such *silence*, upon pain of *Death*; and that therefore no *Intemperance* was punish'd so severely among them, as that of the

'Tongue, it being thought that no Man could be capable of any great Attainments, who could think it a pain to be silent, when it was plain there is nothing in Nature easier. Further also, *Custom*, or when a *Vice* is grown popular, or in Fashion, (for as to that *habitual* Custom or Familiarity, particular Men contract by *repeated* Sins, I have spoken already) though it be some *Extenuation* of a Crime, yet doth certainly deserve very *severe* Punishment (g).

—————*Veteri post obruta morbo*  
*Corpora, Pœnias nequicquam admoveris herbas*  
*Non levioꝛe manu, ferro sanantur & igni, (h).*  
*Ne noceat frustra mox eruptura Cicatrix, &c.*

A crazy Body long inur'd to Pain,  
 From healing Medicines seeks Relief in vain:  
 When at the Bone the fretting Ulcer smarts,  
 It fears the Lance, but mocks the gentler Arts.  
 With *Cauticks* and *Incisions*, force your way,  
 The Treacherous Wound will else your Skill betray.  
 Skinn'd o'er without, it seems to heal inclin'd,  
 But still the Sore lurks festering deep behind.  
 But searching *Fires*, the secret *Faults* disclose,  
 Pursue the watry Humour as it flows;  
 From sickly Veins prevent the fresh Supplies,  
 And stop the Springs whence first Corruption rise:  
 If obstinate the Sore, and still unsound,  
 And dangerous *Gangreens* gnaw within the Wound; }  
 A Limb cut off must for the whole compound.

And therefore *Grotius* judiciously observes (i), that in publick *Trials*, it is some *Excuse* for an *Offender* to plead that his *Fault* is common; because in all *Trials* the Point in Dispute is, what Share of *Guilt* that particular Person has contracted; and this without doubt must appear the less, when the Man was carried away with the Violence of the *Stream*, rather than the Force of his own *Inclinations*; But when *Laws* are to be made, a prevailing *Custom* is an undeniable Argument, that there is greater need of severe *Sanctions* to suppress it; because *Laws* must be supposed to regard the Advantages that may accrue by the *Punishment* in general. However, when a *Vice* has rais'd it self to such an Head, and *Offenders* are grown so numerous, that if all of them were to fall under the reach of Justice, the Commonwealth must be much *dispeopled*, if not entirely *ruin'd* by rigorous *Executions* of Law, the Law must yield to the Necessities of the State, and rather be neglected, or laid aside, than occasion the Desolation of the *Common-wealth* (k). *For Laws* are to be applied only where things are capable of being effected, and so may very well punish *Offenders* when they are few, and may easily be reclaim'd by *Punishment*, but to attempt upon Multitudes is to no purpose (2).

(a) Vid. *Plutarch. Solon.* (b) *Garcilass. de la Vega, Com. Reg. L. 2. c. 12, 13.* (c) *Apolog. pro Herod. c. 17.*  
 (1) *V. Grot. d. l. f. 34, 35.* (d) *L. 47. t. 17. l. 2. D. de EffraCTOR. Justinus, L. 2. c. 2. de Scythis.*  
 (e) Tho' the *Roman Law* seems to have the contrary Method, *L. 48. t. 19. l. 11. f. 1. D. de panis. Vide Ant. Matthæum de Crim. tit. de Furtis, c. 3. f. 2, 3. Ad. Arist. Probl. f. 29. Quæst. 14.* (f) *Vide L. 47. t. 17. l. 1. D. de Furibus Balnear. Ant. Matthæum de Crimin. ad h. t. & t. 14. de Abigeis.* Add what *Philo Jud.* urges, to aggravate the Crime of Sorcery, *de Special. legibus, p. 791, 792. Ed. Paris.* *Q. Curtius, l. 4. c. 6. f. 5, 6.*  
 (g) *Leg. 16. f. ult. D. de Pœnis, ubi supra.* (h) *Claudianus in Eutropium, l. 12. v. 11. &c.*  
 (i) In the above-mention'd place, f. 35. (k) See *Tiberius's* Epistle concerning *Luxury, Tacitus Ann. 3. c. 54. in the Beginning.* (2) *Plutarch. in Solon. p. 90. Ed. Wech.*

Lastly, where the *Necessities* of the *State* are pressing for the purpose, if upon an *Invasion* and *War*, there should be no other Person fit for the Command and Charge of a *General*, there can be no Reason why a *Criminal* of experienc'd Courage and Conduct might not be releas'd even from *Capital Punishment*, when it appears that the *State* cannot be safe without his Assistance; and therefore there was Reason in what *Fabricius* said, when he gave his Vote for *Cornelius Rufinus* a good *General*, but a very covetous Man, to be *Consul*; that he had rather be robb'd than sold (1). And so *Junius* the *Dictator* after the Defeat at *Cannæ*, publish'd an *Edict*, That if any Man, whether he was a Prisoner for a *Capital Crime*, or for *Debt*, would list himself for the publick Service, under his Command, he would grant him a *Pardon*, and discharge his *Debts* (2).

XXIV. From all which I think it is evident, that there is no *vindictive Justice* in the *Civil Court* which determines what *Degrees* of Punishment ought to be inflicted on particular *Crimes*, by any *Decision of Nature*. But the true *Measure* of all *human Punishment* must be taken from the *Utility* of the *Common-wealth*; and according as the *Ends* of Punishment, seem most easy to be attain'd, the *Punishment* may either be *enhanced* or *alleviated*, according to the *Discretion* of the *Government*. Yet still so as that the *Method* of *Punishment* may admit of great *Latitude*. And therefore, as it would be too severe to inflict a *Penalty*, when the *Ends* of *punishing* may be attain'd by gentler *Methods* (3); so the *Punishment* is much too easy, when it has not *Sharpness* enough to produce the *Ends* design'd by it, and consequently to restrain the *Insolence* of the Subject, or settle the *internal Security* of the *Commonwealth*; or in short, when it is a *Punishment* the *Delinquents* themselves despise (4). If the *Legislator* go too far on the one hand, he is liable to the *Infamy* of being *Cruel* (5); and if he inclines to the other side, he makes all *Punishment insignificant*; and gives absolute *Liberty* to *Vice*. For since the *Natural End* of all *Punishment* is to *dispose Men* to obey the *Law*, and in *Consequence*, to restrain them from *Actions* contrary to it; and since *Men*, whenever they allow themselves to consider, always weigh the *Conveniencies* and *Inconveniencies* which arise from the same thing; it is evident, that if the *Harm*, or *Pain* inflicted, be less than the *Benefit* or *Satisfaction* that naturally follows from the *Crime* committed, the *Punishment* will be but a very slender In-

ducement to persuade any Man to resist the *Temptation* of *Disobedience* (6).

XXV. I am to add further, that since the same *Punishment* doth not affect all Persons alike (3), and consequently will not raise the same *Dispositions* in all, to *Obedience*, it is easy to discover, that both the *general penal Sanction*, and the *Application* of it to *particular Parties*, ought to be made with a suitable *Regard* to the *Person* of the *Delinquent*, and in that, to all those *Qualities* of *Age*, *Sex*, *Dignity*, *Fortune*, *Strength*, and the like; which may either *increase*, or *mitigate* the sense of *Punishment* (7). For the same *Mulct*, for Instance, will press hard upon a *poor Man*, which will be no *Burden* at all to a *rich*; An *ignominious Punishment* will fit easy upon a *Wretch mean* and *despicable*, when to a *Person* of *Honour* and *Quality*, nothing will be more insupportable and afflicting; And *Men*, and *full grown People* have more *Strength* to bear *Punishment* than *Women* and *Children* (8). And the *Moors* therefore punish *Women* guilty of *Unchastity*, with greater *Severity* than *Men*; because they suppose that generally the *Arts* and *Enticements* of the *Women*, first give them *Encouragement*. But yet it doth not from hence follow, that *Punishment* ought to be inflicted in a *Geometrical*, (or as *Bodinus* (9) affectedly calls it, an *Harmonious*) *Proportion*; all that is really intended here is no more than to make a *simple Equation* between the *Crime* and the *Penalty*, which the *Circumstances* of the *Person* are necessary to find out. But if on the account of such *Qualities*, which neither aggravate the *Crime*, nor augment the *sense* of the *Punishment*, *Crimes equal* in *Demerit* are *unequally* punish'd; 'tis a shameful *Partiality* and *respect of Persons*; of which *Grotius* doth not always acquit the *Roman Laws*. And some produce this for an Instance (4), a *Man* that kills his *Wife*, when he has taken her in *Adultery*, if he be a *Person* of *inferior Rank*, is sentenc'd to perpetual *Banishment*; but if he be in any *Dignity* or *Office*, he is only to suffer the *Relegatio* for some *short time*; For a *mean Person* may be as much concern'd and afflicted at the *Disgrace* he suffers by the *Falseness* of his *Wife*, as a *Man* of *Honour*, and may leave his *Country* with *equal Grief* and *Regret* (5). And Lastly, it may also be observ'd, that in some *Nations*, certain *Sorts* of *Punishment* are attended with particular *Infamy*, thus *Euripides*,

High on the Gallows ignominious Pains,  
The very Slaves regret and think dishonourable,  
But by the Sword to fall looks generous and brave:

(1) V. A. Gellium, l. 4. c. 8. (a) Livy, l. 23. c. 14. Add Grot. upon 1 Kings II. 6. (2) See Montaign's Essays, B. 1. c. 11. p. 309. Ed. Paris. (b) V. Gellium, l. 20. c. 1. de Veratii Petulantia. (c) V. Hobbes de Cive, c. 3. f. 11.

(d) Vid. Hobbes de Cive, c. 13. f. 16. Leviathan. c. 27. Author. de princip. just. & decori p. m. 200. Cumberland. de Legibus Nat. c. 5. f. 39. (3) Vid. Grot. ubi supra, f. 33. (e) Vid. l. 47. t. 19. l. 4. f. 1. & l. 12. f. 1. D. de Incendio, ruina, &c. & t. 10. l. ult. D. de Injuriis, &c. & t. 11. l. 6. D. de extraord. Crim. & t. 12. l. ult. D. de Sepulchro violato, & t. 14. l. 1. f. 3. D. de Abigeis. t. 21. D. de termino moto. L. 48. t. 8. l. 3. f. 5. ad L. Cornel. de Sicariis.

(f) Vid. L. 48. t. 5. l. 38. f. 24. l. 39. f. 4. D. ad L. Jul. de Adult. L. 48. t. 13. l. 6. D. ad L. Jul. Pecul. & t. 13. l. 5. f. 3. D. ad L. Jul. Pecul. L. 4. t. 4. l. 37. f. 1. D. de minor. L. 50. t. 17. l. 108. D. de divers. reg. jur. Add. Olearius Itin. Perf. L. 3. c. 6. of the Pecuniary Mulct, paid among the Russians for any Abuse offer'd, call'd by them Biszestia.

(g) De Repub. l. 6. c. ult. (4) V. D. L. 48. t. 8. l. 1. f. 5. (h) Vid. Edictum Theodorici Reg. c. 91. Add. Zieg. ad Grot. L. 2. c. 20. f. 33.

(a) And *Telemachus* in *Homer* (b) would not dispatch his *Maids*, *καταφῶν δαμάτω*, that is, would not kill them by the Sword, but hangs them. The Punishment of *strangling* on the other hand, is look'd upon to be *Honourable* by the *Ottoman Family*, who think it infamous that noble Blood should be spilt upon the Ground. And the *Jews* thought it a more *ignominious* Death to be *beheaded*, than to be *strangled* or *ston'd* (c). On the contrary, some *Punishments* have had the Fortune to be accounted *Honourable*. And upon such a *Notion* as this, we are told that the *Athenians* were angry, that so mean and contemptible a *Wretch* as *Hyperbolus*, should be banish'd by *Ostracism* (d); *Because it was usually thought an Honour to suffer that Punishment; and they could readily yield Ten Tears Banishment to have been really a Punishment, when Thucydides and Aristides, and such great Men suffer'd it; but they thought it was too great a Credit to Hyperbolus, and would only encourage him to boast, that he had suffer'd the same Punishment which was inflicted upon the most gallant Men of Athens* (e).

XXVI. Neither can I see any Necessity that every Common-wealth should take its *Measure* and *Standard* for the *Punishment* of Crimes, from the *penal Sanctions* of the *Jewish Law*. Because that *part* of the *Law* was the *Positive* and *Civil Law* of the *Jews*, and was accommodated to the *Genius* of that *People* and *Commonwealth*. From which, since the *Constitutions* and *Tempers* of other *Nations* and *Commonwealths* are very different, there is good Reason why the *Penalties* too shou'd be different. Whether this indeed will hold true with Respect to the *Capital Punishment* of *Murder*, as well as to *other Crimes*, may bear some Dispute. Because, the *Law* which determines that *Punishment* seems to have been *promulg'd* to all Mankind, as well as to the *Israelites*. And the Reason of the *Punishment* is evident. Because, a Man who is *barbarous* to that Degree, as to take away any Man's Life *maliciously*, can never give sufficient *Caution* to others, without losing his own (f). However, I think it should not be thought a Breach of that Command *God* gives, *Gen. IX. 6.*

(1), if a *Murderer* should be released from *capital Punishment*, upon some extraordinary *Exigence* of the *Common-wealth*. For since the *Determination* of all Punishment is of *positive* Institution, and all *positive* Laws may be accommodated to the *Necessities* of the State; that *Law* may also reasonably be suppos'd to admit of the same *Exception*. Some indeed are of Opinion, that that *Passage* is rather a *Divine Commination* than a *Law*, and that *God* only declares by it, that he will *execute* Vengeance upon *Murderers*, either by Men, or by some other *severe* Method, if they happen to escape the *Inquisition*, and *Rigour* of *human* Justice. See *Acts XXVIII. 4.* Neither doth *Grotius's* Interpretation of it, *L. I. c. 2. s. 5.* exclude the *Exception* which is grounded upon the *State* of the *Common-wealth* (g). But *Selden*, *L. 4. c. 1.* expressly affirms, that the *Jewish Rabbins* did not understand that place to be a *Law* of such Force, as that it should always *oblige* the *Magistrate* necessarily to punish *Murder* with *Death*; but that it was an express *Indication* of *God's Hatred* to that Crime, from the *Severity* of the *Penalty* he annexed to it; which it might be lawful for Man, according to the Posture of Affairs, and Variety of Circumstances in the *publick Government* of the *State*, either to *limit* or *inflict*. And for this Reason, the *Jews* (as their *Law* directs in other *Cases*) did not inflict *Death* upon any of their own *Nation* that kill'd a *Profelyte of the Gates*, or any other *Gentile*. Nay, if any Number of *Jews*, or other *Circumcised* Persons, had by Blows or Kicks, or any other way Kill'd one of their own *Nation*, so that no *One* of them *separately* did any thing which might be the *immediate* Occasion of his *Death*, all of them were *acquitted* from suffering that *Penalty* which was otherwise due by *Course* of *Law*; because neither of them *singly* was guilty of the *Murder* (h). However this be, I would not be thought to persuade the World to an unwarrantable *Easiness* in dispensing with the *Punishment* of this *Crime*. Neither would I undertake to defend that Expression in one of the *Constitutions* of the *Kings* of *Poland*, rela-

(a) *Helena*, v. 306, &c. *Plin. Nat. Hist.* l. 2. c. 63. Strangling is an odd sort of Death, by stopping the Breath which endeavours to find a Passage. *Add. L. 48. t. 19. l. 28. f. 2. D. de Paris.* To this also we may apply that of *Dio Crisostom.* *Orat. ad Alexandrinos.* The one is the Death of a Malefactor, the other of an unfortunate Slave.

(b) *Odys.* l. 22. v. 465, &c. (c) *Seld. de J. N. & G.* l. 7. c. 6. Thus *Philo Jud.* in *Flaccum*, is very angry that the *Jewish* Magistrates and Senators at *Alexandrina* should be scourg'd in the same manner, and with the same Instrument, as the meanest *Egyptian* Slaves were. To this we may refer that of *Seneca*, *de Constantia Sapient.* c. 4. There are some Slaves that had rather be scourg'd than beat. And it was I presume a very ignominious Punishment which is mention'd. *Additament. I. Leg. Burgund. Tit. 10.* (d) *Vid. Plutarch. Alcibiades*, pag. 197. B. Where there are these Verses quoted out of *Plato* the Comick Poet.

Worthy to suffer what he did, and more,  
But not in such an honourable way;  
The Abject Wretch the Sentence did disgrace.

*Vid. Plut. Nicias*, p. 530. E. Where he speaks of the same Matter.

(e) Thus it was some sort of Comfort. *Aeneæ magni dextra cadis.* ———

*Virg. Aeneid.* l. 10. v. 830. & de la Cerda in loc.

(f) To this Purpose is that of *Antiphon.* *Orat.* 15. All Courts of Justice that sit upon Murder, are always in the open Air, that the Judges may not be forced to come into the same place with the Malefactors; and that the Prosecutor may not be under the same Roof with the Murderer. *Add. Libanius, Progyrn. loc. com. contra Homicidam.*

(1) See *Grot.* on that place, and on *Matt. V. 40.* (g) *Add. Grot. in Flor. spars. ad Jus Justin. ad L. Corn. de Sicar.*

(h) See more in the same place.

ting to the Punishment of *Murder* in the *Nobility*, *Nos divini Juris rigorem moderantes*, We mitigating the Rigour of the Divine Law (a). And here I should take some Notice of the *Dispute*, which some scrupulous Persons have rais'd against the *lawfulness* of punishing *Theft* with *Death*. But upon this I refer you to the Opinion of *Grotius*, L. 2. c. 1. f. 14. (1). Yet *Selden* says, *De J. N. & G.* L. 7. c. 6. That among the *Jews* the Punishment of a *Gentile*, found guilty of *Theft*, was *Death*; but that the *natural Jews* were used with more Gentleness (b). And *Herod's* Laws are condemn'd as too severe by *Josephus*, That such Persons as were guilty of *Burglary*, or of *breaking up*, or *digging into Houses*, and such as *robbed in the Night*, should be *sold out of the Land to Strangers*. By a Law of *Solon's* at *Athens* it was decreed, That the *Penalty* for *simple Theft*, if what was *stolen* was recover'd, should be to pay *double*; or if it was not recover'd, *ten times* the Value of it. But it was added, *That if any Person had surreptitiously taken away out of the Licæum or Academy, or the publick Schools, either Cloths, or Cups, or any thing of the least Value, or any Vessel out of the Schools of Exercise, the publick Walks, or Portico's, worth more than ten Drachms, he should be punish'd with Death* (c). What *Punishment* the *Roman Law* inflicted is very well known. *Justinian* does not allow that a Man who was guilty of no more than *simple Theft*, should suffer even so much as *Mutilation* of Members (d); Though otherwise it cannot be thought absurd that every *Criminal* should be punish'd in the *Part* which offended, so *Alexander Severus* punish'd a *Notary* who exhibited a false *Libel* of a *Cause* before the Council, by passing Sentence upon him, that the *Nerves* of his *Fingers* should be *cut*, so that he might never use them to write more (e). So *Seleucus* pass'd a Decree, That an *Adulterer* should be condemn'd to lose his *Eye*, because the *Eye* makes the first Breach upon the *Chastity*, and so much forbidden *Passion* may be express'd in *Looks* as may easily kindle the most unlawful *Lusts*. And so also the *Law of God* commands, *That the Woman's Hands should be cut off, who in any Strife, between her Husband and another Man, drawing near to deliver her Husband out of the Hand of him that smiteth him, putteth forth her Hand and taketh him by the Secrets*, Deut. XXV. 11. (f). How-

ever *Anton. Mattheus*, *De Criminibus*, Tit. de *Furtis*, C. 2. puts a handsome *Interpretation* upon *Justinian's* Institution (2) by urging for it, That since 'tis generally either *Idleness*, or *Poverty* that forces People to steal, the *Emperour* was not willing Thieves should be punish'd by losing the *use* of their *Limbs*, that they might not be depriv'd of the *Instruments* necessary for them to reform their bad *Course* of Life; and when they ought rather to be forced upon some laborious *Employment*. In *Germany*, the *Law*, that all Thieves should be hang'd, was made by *Frederick* the Second (g). And it was afterwards confirm'd by *Charles V.* but it look'd more severe in him than in *Frederick*, because he took no Care of the *Value* of the *Coin* which was then sinking. Upon the whole, though I am of Opinion, that 'tis possible for Judges to be too free in inflicting *capital Punishments*, and that sometimes it might turn more to the *Advantage* of the State, if such *Criminals* as are here spoken of, were rather condemn'd to some useful Labour and Service (h); And so we are told *Sabaco* King of *Egypt*, forced all Malefactors that were condemn'd in *capital Punishments*, to *publick Labours*; and that the Country was soon sensible of the Benefit it receiv'd from such an *Application* of them (i). Yet I make no doubt but that *Theft* may lawfully be punish'd with *Death*. And from what has been said, it will be easy to answer all the *Objections* urg'd to the contrary, especially those from *Ant. Mattheus*.

XXVII. Neither lastly, is it necessary that a Man should suffer in the same manner in which he offended, or that a *Criminal* should always be punished by (3) *Retaliation*. This Opinion is commonly ascrib'd to the *Pythagoreans*, who defined Punishment by [*Ἀντιποινῆς* or] a suffering the like. And the Judgment of *Rhadamanthus* is brought to confirm this *Method*. *Justice is duly then administr'd* (k); when the *Offender* suffers as he sins. But *Aristotle*, *Nicom.* l. 5. c. 8. proves the Absurdity of the *Ἀντιποινῆς*, or *Retaliation* by this Instance: If a *Magistrate* (says he) strikes another Person, he is not to be stricken again, but if another Person strikes a *Magistrate*, he is not only to be stricken again, but to be further severely punish'd. As to that *Command* in *Ex.* XXI. 23. and *Levit.* XXIV. 20. the *Jewish Doctors* are generally of Opinion, that it does

(a) *Add. Philo Judæus de legibus special.*

(1) See Mr. *Barbeyrac's* Second Note upon this Section.

(b) *Josephus Archæol. Jud.* l. 16. c. 1. (c) *Add. Aristot Problem.* f. 29. c. 14. (d) *Justinian. Novell.* 134. c. ult.

(e) *Lampridius, Alexander.* c. 28. (f) Thus *Vulcatius Gallicanus* in *Avidius Cassius*, c. 4. relates, That he had cut the Nerves of the Deserter's Legs. *Add Cujacius's Observ.* L. 7. c. 13. (2) *Institut.* l. 4. c. 1. *De obligat. que ex delicto nascuntur*, f. 5. (g) *Feudor.* l. 2. t. 27. f. 8. *de Pace tenenda.* (h) *Vid. Herodot. Euterpe*, p. 90. *Ed. H. Steph. Diodor. Siculum*, l. 1. c. 65. (i) *Sir Thomas More, Utop.* l. 1. (3) See Mr. *Barbeyrac's* First Note upon this Section, and *Grot. B.* 2. c. 20. f. 32. (k) *Ovid. de Arte Amandi*, l. 1. v. 655, 656.

— *Neque enim lex æquior ulla est,  
Quam necis artifices arte perire sua.*

— Th' Inventers, as 'tis just,  
Should feel those Pains themselves discover'd first.

*Quintil. Decl.* 11. p. 154. The Justice of Revenge is shortest when the Crime is the measure of the Punishment. And if the Nature of Revenge be consider'd, a Man is best reveng'd, when his Injuries are punish'd in the same way they were committed. *Senec.* l. 5. *Contr. Prefat.* p. 276. What a Man designs for a Punishment to another, is often by a very just Method of Punishing chang'd into his own. *Polyb.* l. 12. in *Excerpt. Peiresc.* Since he hath carried himself with so much Bitterness and Moroseness to others, 'tis just others should use him with the same Unkindness.

not oblige to a rigid *Retaliation*, but that such *Crimes* may be redeem'd by a pecuniary *Mulct*. *Bodinus de Repub.* L. 6. C. ult. denies that this *Law* was ever in force. For Example, that it was never understood that when one Man broke another's Leg, his should be broken too; and he adds, that that *Form*, *An Eye for an Eye, and a Tooth for a Tooth*, is no Argument to the contrary; because *That* was only a proverbial Expression, and implied no more, than that the *Penalty* ought to be proportion'd to the offence; that what deserv'd only a Reproof ought not to be punish'd with *Death*; and that such Offences as deserved *Death*, ought not to be corrected with a Reprimand; and that *This* may easily be inferr'd from hence, that those *Divine Laws* do not punish *Theft* with *Theft*, *Adultery* with *Adultery*, nor *Wound* with *Wound*. But *Theft* with double or four times the value of the thing stol'n; *Adultery* with *Death*; and a *Wound* with a pecuniary *Mulct*. The same *Divine Law* hath also respect of *Persons*; For Instance, if a Man curses a private Person, the *Law* prescribes no severe *Punishment* to be inflicted on him: but if a private Man curses the *Ruler*, or a *Son* his *Father*, the *Punishment* is *Capital*. On the other Hand, *Constantinus L' Empeur Babakama.* c. 8. §. 1. contends for the *Literal* sense of *Those* Words. I shall not undertake to determine the dispute between 'em; But after all, 'tis confess'd however, that it was left to the Power of the *Judge* to transmute the *Corporal* Punishment of *Retaliation* into a *pecuniary*, according to the nature of the *Circumstances*, from that Passage of the *Law*, *Ex.* 21. 29, 30. where a *greater punishment* is admitted to be chang'd for a *less*. 'And *Josephus* says in his *Antiquities*, L. 4. C. 8. that he that puts out another Man's Eyes, was to suffer the like and lose the same himself, which he deprived the other of; unless the Person that lost his Eye, was content to take a Summ of Money in lieu of that *Penalty*; the *Law* allowing the Sufferer to set the Rate upon his own Misfortune. But on the other hand, they that endeavour to prove *Retaliation*, urge that passage in *Deuteronom.* XIX. 19. (a). But it may be answer'd, that the *Laws* there mention'd, cannot with any appearance of reason be thought to belong to this *Subject*; since the *Punishment* for *Evil-speaking*, and *Cursing*, exceeds all the *Measures* of *Retaliation*; the bare Endeavour having the full *Evil* set in

view. However, in other respects the *Penalty* of that is not unjust. For there is no difference between an *Evil-speaker*, and one that does ill, but only in the *Opportunity* (b). Thus by the *Law of God*, a Man that brought an *evil Report* upon a *Virgin*, was lookt upon to be equally guilty, with one that forced her *Honour*. *Deuteron.* XXII. 19. 29. (c). For there can be nothing more *Injurious* and *Malicious* than *Detraction*; it maketh us think well of *Falshood*, and forces *Innocence* itself to look guilty (d). And the *State of Human Affairs* must be reduced to a very desperate Condition indeed, if every *Man's malice* has power to make us *Criminal*: For *Innocence* can never be happy enough, to escape the pernicious *Diligence* of a *Slandrous Tongue* (e). In one of the *Laws* of the *Twelve Tables* it is Instituted, that the *Man* that breaks another's *Limbs*, unless he can make his *Peace*, and *Compound* with him, shall suffer the like. Upon which *Law* I refer you to the Dispute between *Favorinus* and *Sex. Cæcilius* in *Gellius*, (1) L. 20. c. 1. But it is plain, that *Retaliation* was grown out of use at *Rome*, from the 7th Section of the *Institute*, *De Injuriis* (f). *Diodorus Siculus*, L. 12. c. 17. gives us an Account of a *Law* made by *Charondas* to this effect: If any *Man* puts out another's *Eye*, let his *Eye* also be put out. 'It happen'd, That 2 Person blind in one *Eye* was set upon, and lost his other, and consequently was entirely deprived of *Sight*: Now in this *Case*, tho' the *Criminal* was to be deprived of one *Eye*, yet his *Punishment* was justly thought less than he deserv'd; because, tho' He might seem to be sufficiently punish'd by the *Letter* of the *Law*, yet his *Loss* was not considerably so great as the others. And therefore it would look more like *Justice*, where the *Penalty* was to be laid equal to the *Injury*, that the *Person*, who entirely deprived the *Man* of *Sight* that had lost one *Eye* before, should lose both his. The blind *Man* grown therefore impatient at his *Misfortune*, and the *Partiality* of the *Case*, took the *Courage* to represent his *Case* to the *People*, bewail'd the *unhappy Condition* of his *Life*, and beg'd them to alter the *Law*; at last putting the *Rope* about his *Neck*, (as the *Custom* was there upon such occasions) his *Entreaties* had the desir'd *Effect*, the *Law* was abrogated; a new one better consider'd was preferr'd, and He escap'd the *Death* he was ready to have suffer'd (g). But however this be, 'tis cer-

(a) *Conf. L.* 9. t. 2. l. ult. C. de *Accusat. & Inscip.* L. 9. t. 46. l. ult. C. de *Calumn.* L. 9. t. 12. l. 7. C. ad *L. Jul. de Vi Publica.* *Josephus Archæol. Jud.* l. 4. c. 8. No *Israelite* shall have by him any mortal *Poison*: And if any such be found in his *Possession*, he shall die, and suffer what he was to have done whom the *Poison* was prepar'd for. *Diod. Siculus*, l. 1. c. 77. repeats an *Egyptian Law* of the same Nature.

(b) *Quintil. Decl.* 331. 'Tis a sort of *Murder* to attempt any *Man's Life*, that ought not to be kill'd. And *Plin.* in his *Panegy.* c. 35. n. 3. speaking to the *Delators* tells them, That they were to expect *Punishments* equal to the *Rewards* they had had before, that their *Hopes* should be no greater than their *Fears*, and that they should be as much afraid *Themselves*, as they were fear'd before by others.

(c) *Isocrates de Permutatione*, p. 540, 541. *Detraction* makes *Judges Perjure* themselves; extinguishes the *Light* of *Truth*, involves All that hearken to it in a *Mist* of *Lies*, and then easily finds a way to deprive *Men* of their *Lives*.

(d) *Quintil. Declam.* 11. *Defamation* can have no effect, but by the *Injustice* of the *Judge*. (e) *Constitut. Sicul.* L. 2. c. 14. (1) *Noët. Attic.* (f) *Institut.* L. 4. t. 4. l. 7. (g) *Demosthenes* mentions the same *Law*, adv. *Timocratem.* *Aristot. Rhet.* l. 1. c. 7. The *Punishment* is not the same when a *Man* puts out his *Eye* that has but one, and one of his that hath two. *Add. Pet. Gregor. Tholofanus Syntagm.* l. 31. c. 10.

tain, That so rude a Notion of Retaliation can never be a just Measure of Punishment. For in the first place, there are a great many Crimes, which it cannot possibly be apply'd to. As I believe, Retaliation was never thought a proper Punishment for Adultery, Ravishment, Bestiality, Treason against the State, Reviling, Detraction, Sorcery, Forgery of Wills or Deeds, Counterfeiting the Coin, Imposing of false Births or Adulterous Children, Procuring Abortion, Kidnapping, Crimen Ambitus, Incest, Sacrilege, Removing the Landmark, Defacing Sepulchres, Cozenage and Collusion, Prevarication, and the like. And by the way, It should be mention'd as an Instance of the Wisdom and Piety of the Emperour Theodosius, that he took off the shameful Punishment of Women taken in Adultery then usual at Rome, by which they were to be condemn'd to the publick Stews, and were there to be prostituted to All that came, a Bell ringing all the time they suffer'd that Infamous Punishment. For though an Ignominy of this Nature, might possibly produce the same Effects as the most severe Punishment; yet since this Punishment could not be put in Execution without Sin, it seem'd rather to encrease than take away the Guilt of the Fact it punish'd (a). But admitting that those Laws which seem to establish Retaliation, apply it only to Injuries and Hurts that affect the Body; and admitting that One may imagine a Case where the Crime committed may be well enough turn'd into the Punishment of it; and that neither the Persons, the Place, the Time, Quality, or Cause, enhance or aggravate the Crime: Yet even upon such Suppositions, simple Retaliation will not be a proper Punishment. For Instance, a common Man strikes another a Box of the Ear, in some private Place; now if the Person that suffer'd the Stroke is to return the other the Like, 'tis to be fear'd, he will hardly be exact enough to observe a just Proportion (b). And if the Execution be referr'd to a third Person, how shall he know with what force the first Blow was given? Besides, in many Crimes Retaliation might be too severe, if there should be no Distinction made, whether the Fact were committed maliciously, or not; Or if no difference of Persons be observ'd. For Example (1), a Man designing to strike another a Slight Blow in the Face with his Diamond perhaps, or some Stone he wears on his Finger, unhappily, against his Intention, strikes out his Eye. It would be very severe, if such a Person should, upon that Misfortune, be condemn'd to lose his Eye too. So if a Gentleman kick a common Porter or Labourer, it would be too severe to sentence that the Kick should be return'd again upon him, because, 'tis a Dishonour to a Person of Quality to receive a Kick, and none to one of mean

Condition. Again, on the other hand, in many Crimes, the Punishment of Retaliation seems too easy. And this may happen particularly from a Disparity between the Persons who did, and who suffer'd the Injury; or else from a Disparity of Place, Time, and other Circumstances. But in the general, the Arguments which Grotius produces in the Chapter before cited §. 32. entirely confute that wild extravagant Notion of Retaliation; Where He also with very good Reason denies, that when a Man hath deliberately, and without much alleviating Circumstances, done hurt to another Person, He ought to suffer just as much Harm as he has done, and no more. For 'tis a Contradiction to Equity, that the Fears and Dangers of the Innocent and the Criminal should be equal. And there would be but slender Provision made for common Security, if Malefactors should be under no greater Fears from publick Justice and the Laws, than good Men are from their Insolence and Wickedness; especially since the Hopes of Concealment, of escaping by flight, or by some way or other evading Justice, are in a manner additional Advantages to every Villain. And besides, the most Sacred Laws themselves do sometimes ordain the same Punishments for imperfect and finish'd Crimes, Deut. XIX. 19. Exod. XXII. 9. (c) It was a remarkable Law which Strabo mentions, L. 15. among the Indians, He that deprives men of the use of a Limb shall not only suffer the like, but shall have his hand cut off also. But if any Person deprives an Artificer or Mechanick of the Use of an Hand, or an Eye, He shall be put to Death. And by Solon's Law, the Person that put out one of another Man's Eyes, was to lose both his own (d). And so also a Man that went arm'd with a Design to kill any Person fell under the reach of the Law de Sicariis, L. 48. t. 8. l. 1. D. ad L. Corneliam. Now though the Consequence of this be, that the Punishment of a mature finish'd Crime, should be proportionable to the degrees of its consummation, yet since human Justice can inflict no Punishment greater than Death, and it is impossible that should be repeated, there must necessarily be a stop made there; though according to the degrees of the Crime, the Punishment of Death may be made more painful by Torture, or appear more grievous from the Circumstances of Ignominy and Disgrace, which either attend or follow after it.

XXVIII. I proceed in the next place, to consider those Punishments which are inflicted by human Justice, for other Men's Crimes. And here, without dispute, (2) They that do really partake of the Guilt of the Offence, ought to share also in the Punishment in proportion to the Influence they may be supposed to have in the Fact; Since they suffer not for another Man's Fault but their own. But now

(a) Socrates Hist. Eccl. l. 5. c. 18. (b) Add. Lex Wisigothorum, l. 6. t. 4. c. 3. (1) V. Aristot. Ethic. ad Nicom. l. 5. c. 8. (c) V. Editum Regis Theodorici, C. 13. & 50. (d) Diogenes Laert. Solon.  
(2) V. Grot. L. 2. c. 21. §. 1.

how, and by what Method of acting a Man may be said to *partake* of another's *Crime*, I have shewed before (1) (a). But it must be observ'd, that there is This difference between *Satisfaction* for *Damage*, and *Punishment*; that 'tis more usual for human Justice to *condemn* an *Offender* to make *Restitution*, than beyond, and besides that, to suffer *Punishment* also: Because Imprudence or Levity of Offence may be sufficient Motives to supersede *Punishment*, though perhaps not to excuse *Reparation* for *Damages*. It was a remarkable *Law* which was made by *Thomas Randolph*, *Regent* of *Scotland*, (b) 'to Suppress the *Robberies* which were then frequent; 'And That was, *That all Husbandmen should leave their Plows, and other Instruments of Tillage, in the open Fields: And that at Night they should not so much as lock or secure their Houses or Barns; and That the Losses They suffer'd. should be paid to them by the Justiciaries of the Kingdom, who were to be reimburs'd by the King, and the King was to satisfy himself by the Goods and Chattels of the Robbers that were apprehended.* But now as to *Crimes* contracted by *Corporations* or *publick Bodies*, It must be observ'd, that though the *Decrees*, to which the *Major Part* consents, are generally look'd upon to be *Decrees* of the *Whole Body*; so that the lesser Number *dissenting*, shall be oblig'd notwithstanding to see them *executed*: (c) (2) Yet if there be any Enquiry made about the *Guilt* of such an *Act*, Those Persons only are to be supposed *liable* who *actually* gave their *Consent*. And Those are *innocent*, who denied their *Agreement* to it, from the *Beginning*, and constantly persisted to dissent from it (d). *Alexander* the Great took *Thebes*, He commanded that all the *Thebans* should be sold for *Slaves* excepting only such of them, as were against passing the *Decree* to break *Alliance* with the *Macedonians* (e). Nay, it is not uncommon to excuse Those at least, (as to the highest degrees of *Guilt*) who dissented at first, but afterwards fell in with the *Prevailing Number*, and then pursu'd the *Execution* of the *Criminal Decree* as far as they had *Power*. So the *Greeks* were said to have spared *Antenor* and *Aeneas*, (3) who had perswaded the *Trojans* to restore *Helen*, though the *Latter* of them perform'd many brave *Actions* in *Defence* of his *Country*. It is also to be further observ'd, that the *Punishment* of a *Corporation* or *Body Politick*, as such, is different from the *Punishment* of *particular Persons* and *Subjects*. The *Punishment* of a *particular Subject*, is sometimes *Death*. And that which answers it in the

*Body Politick* is *Dissolution* (f): And when a *Corporation* or *Community* is thus dissolv'd, all *usufructuary Advantages* are said to be at an end with it; in the same manner as in *Cases* of *Death* (g). Sometimes *particular Persons*, are by way of *Punishment*, made *Slaves*. And the *Body Politick* suffers the like, in case It were once immediately *subject* to the *Civil Sovereign* only, but is afterwards *subjected* to some other *subordinate Body*, or perhaps to a *Particular Subject*. And lastly, as *Particular Persons* may be punish'd by way of *Mulct* levied upon their *Estates*: So the *Body Politick* when It commits any *Publick Crime*, is punish'd by *Deprivation* of the *Publick Goods* belonging to It, such as *Forts, Naval Stores, Ships of War, Arms, Treasure, publick Lands, Privileges, and the like*. So when The People of *Antioch*, upon the *Imposition* of a *new Tax*, pull'd down the *Emperour Theodosius's Statues* in all the *Publick Places*, He punish'd them by forbidding them the *Use* of the *Theatre* and the *Baths*, and by taking from them the *Title* of *Metropolis*, which their *City* enjoy'd before (h). And so *Marcus* the *Emperour* took away from the same People all the *Publick Shows*, and other *Ornaments* of their *City*; (though he afterwards restor'd them again) (i). So *Severus* demolish'd the greatest part of *Byzantium*, ruin'd the *Theatres* and *Baths*, and all the *Ornaments* of the *City*, reduc'd it almost to a *Village*, and made it *subject* to the *Perinthians* (k). And thus the *Emperour Constantias* by way of *Punishment* to the same *City*, Because They had kill'd his *General, Hermogenes*, took away from them the *Dole* of *Corn* which he had usually before distributed among them (l). But however in *Crimes* where there are *Numbers* of *Complices* 'tis reasonable, the *Chief Promoters* and *Abettors*, should be punish'd with greatest *Severity* (m). And in short, In *Estimating* the *Crimes* and *Penalties* of *Corporations* and *Bodies Politick*, It should be consider'd as *Quintilian* very well observes (4), 'That generally whatever a *Community* undertakes, must be ascribed to the power of the *Counsellors* that direct It; And that all *Popular Disturbances* and *Insurrections* are of greater or less *Violence* according as the *People* are exasperated. Just as all *Motion* in our *Bodies* derives it self from our *Minds*, and our several *Parts* are as it were dead and useless till put in *Action* by the *Soul*. 'Tis the easiest thing in *Nature* to raise any *Kind* of *Passion* in a *Multitude*. For there was never any *Assembly*, where every *Man* could perfectly govern himself by his own *Thought, Sense* and *Reason*. Nor

(1) See above in B. 1. c. 5. f. 14. and in B. 3. c. 1. f. 4, 5. L. 9. t. 8. ad L. *Juliam Majest.* l. 5. c. 9, & 10.

(b) Buchanan *Rer. Scotic.* L. 9. (c) *Vid.* Polyb. l. 5. c. 49. in *fin.* Plin. l. 6. Ep. 13. Particular Men at the first Proposition of any Matter may lawfully dissent; but when the Decree is pass'd, that which the Majority agreed to, must oblige all. (2) Upon this, See above in B. 7. c. 2. f. 15. (d) See Luke XXIII. 51.

(e) *Plut. Alexander.* p. 670. D. (3) V. T. Liv. l. 1. c. 1. (f) *Ad. Constitut. Sicul.* l. 1. tit. 47.

(g) *Modestinus* in L. 7. t. 6. l. 21. D. *quibus mod. Usufruct. amit.* (h) *Libanius Orat.* 13.

(i) *Vulcatius Gallicanus* in *Avid. Cassius.* c. 9. (k) *Herodianus.* l. 3. c. 19. (l) *Socrates Eccles. Hist.* l. 2. c. 13.

(m) *Vid.* Liv. l. 28. c. 26. *ab. init.* (4) *Quintil. Declam.* 11. p. 156. Ed. *Lug. Bat.*

' was there ever a *Multitude* that had the Fore-sight and Prudence particular Men have. Whether it be that all Men are less affected with publick Concerns; Or that every Man is less sollicitous, where he doth not think himself in particular answerable for the Success. For the Presumption and Dependence Men have upon others, make them negligent and remiss themselves. And so *Cicero* says, that among the *Romans*, if any Number of *Soldiers* had offended against the *Laws Military*, some few of them were punish'd as their *Lot* happened, *That so the Terror might reach all, though but few fell under the Punishment* (a). And this is implied in the Answer of *Germanicus's* Army to him in *Tacitus*, That he should punish the Guilty, but pardon such as had been Misguided (b).

XXIX. And here it may be question'd, Whether a Crime committed by a *Community* or *Corporation* will always leave it under Execution of the *Punishment*, for Instance, If a *Community* has been publickly Guilty of some criminal Act, perhaps two or three hundred Years past (1)? It may perhaps have some Show of Reason for the Affirmative to say, That as long as the *Community* lasts, it continues the same (2), though the particular Members in it change, and succeed one another. But when the Question is of *Human Punishment*, It ought in Truth to be denied. For it is more necessary, even in particular Men, to punish fresh, and therefore more scandalous Crimes, than old forgotten Faults. And therefore, there was very good reason for that *Prescription of Crimes* which the *Roman Laws* allow'd (c). Besides, it is to be observed, that some things may be immediately and naturally predicated of a *Community* as such; For Example, The having a *common Stock*, *common Constitutions*, *Rights* and *Privileges*, which the particular *Members* cannot call their own. And again, that there are other things which agree to the *Body*, only as derived from the particular *Members*, or which first of all inhere in the *Members*, and afterwards influence and denominate the whole *Body*. Thus it is usual to call a *Society Learned*, *Noble*, *Wise*, *Honourable*, or *Contemptible*, as the *Majority* of its *Members* is *Learned*, *Noble*, *Wise*, *Honourable*, or *Contemptible*, tho' perhaps some of the *Members* may be *Unlearned*, *Base*, or *Imprudent*. And in this latter Sense it is, that such *Bodies* may be said to have incur'd *Punishment*. For the *Demerit* adheres to the particular *Members*, as they are suppos'd to be Persons who have the use of their Understanding, and are capable of acting with Reason and Choice. But a

*Community*, as such, and as it is conceiv'd to be distinct from the particular *Members*, has no *Faculties* by which it is capable of exercising such *Actions* as primarily and immediately contract *Demerit*; and which may therefore be suppos'd to be distinct from those of the particular *Members*. And therefore it follows, that if the *Members*, by whom the *Body* contracted the *Demerit*, are dead and gone from the *Society*, and the *Guilt* has not been continued by any *Act* of their *Successors*, that the *Demerit* it self expires with them; and consequently that which made the *Body* liable to *Punishment*; since the one cannot be justly inflicted without the other. *Plutarch* (d) indeed, in this case, appeals to the *Methods of Divine Justice*, which sometimes, as we read, *Visits the Sins of the Fathers, upon the Children*. But as the Proceedings of *divine Justice* are not always to be made a Pattern to *human*; so neither doth it follow that if it be *Equity*, to allow *Posterity* the Possession of those *Rewards* and *Honours* which were acquired by the *Deserts of Ancestors*; it is therefore *Equity*, that they should also suffer the *Punishments* due to their *Ancestors* Offences. For it is the Nature of a *Benefit*, that it may freely be bestow'd, at the Pleasure of the *Donor*, even upon a Person wholly *undeserving*; but the Nature of *Punishment* is quite different. The *Romans* (as *Justin* tells us) made use of the Pretence of an old forgotten Kindness, to undertake the Defence of the *Arcarnians* against the *Etolians* (e), declaring that the Reason why they assisted them was, because the *Arcarnians* did not join with the other Cities of *Greece*, to send Forces against *Troy*, from which City the *Romans* would be thought to have derived themselves: Though it was clear this was nothing else but *Pretence*, and was only a Colour to excuse themselves for interposing in things it did not belong to them to be concern'd in (f).

XXX. But however it is still true, That *human Justice* ought not to force a Man to bear part of the *Punishment* of another's *Crime*, when he was not Accessory to the *Commission* of it. The Reason is, because all *Merit* and *Demerit* are entirely *personal*, and founded in the *Will* of each Man; which certainly is, or nothing is, at his Command, and which can't contract any *Guilt*, but by some *internal Motion* of its own (3). But because it often happens, that some Men's *Offences* are the *Occasions* of *Evil* to others; that we may not be apt from hence to make a wrong Inference; It is necessary to observe, in the first place, that not every thing that brings Uneasiness, Inconvenience, or Loss upon a Man, is properly

(a) Cic. pro Cluentio, c. 46. Tacitus, Ann. L. 1. c. 44. init. (b) Add Polyb. 1. 11. c. 27. in fin. & excerpt. Legat. 1. 28. c. 4. Bodinus de Rep. 1. 3. c. 7. p. m. 527. & Sequ. Ant. Matthæus de Crimin. ad L. 48. D. t. 18. c. 4. f. 30. Const. Sicul. L. 1. tit. ult. (1) V. Grot. 1. 2. c. 21. f. 8. (2) Plutarch de sera numinis vindicta, p. 559. A. (c) Vid. Ant. Matthæum de Crim. ad L. 48. t. 19. c. 4. t. 20. c. 4. f. 14. (d) Plut. de sera Nam. Vind. d. 1. (e) Justinus, L. 28. c. 1. in fin. (f) But the Expressions Mahomet the II. used to Pope Pius the II. were more ridiculous than this; That he was surprized to find Italy joined in a Confederacy against him, since the Trojans were his Ancestors as well as theirs, and since it ought to be their common Concern to revenge H. For's Death upon the Greeks, whom the Italians had now made an Alliance with against him, Mich. Montaigne's Essays, 1. 2. c. 36. p. 556. (3) This Reason is taken from the Beginning of the XXXIII. Section.

**Punishment** (1). A Man when his Estate is *confiscated* upon some *criminal Account*, and he is reduced to Want and Poverty, may properly be said to have *suffer'd Punishment*. But how many Men are there, that come into the World without any other *Fortune* or *Estate* than their own Persons? How many are there that by *Fire*, *Shipwrack*, *Incurfions* and *Depredations* of Enemies, are *stripp'd* of All, and whose Poverty cannot be call'd *human Punishment*, but *fatal Misfortune*? And I may say, that therefore the *Evils*, for Example, which *Subjects* sometimes *feel* from the *Miscarriages* and bad *Government* of their *Princes*, should be thought also to be of the same Nature with those other Inconveniencies and Afflictions, which attend *human Life*; such as ill Constitution of Body, Infirmities of Age, unwholesome Air, Barrenness, and the like.

XXXI. And *Secondly*, it must be *further observed*, that there is great difference between the Damage which a Man suffers *directly* by another's hand, and that which falls upon him only by *Consequence*. A Man suffers the *first*, when he is *depriv'd* of that which he has already all proper Right to. The other happens when that *Condition* is *intercepted*, without which he could not enjoy such a *Right* (a). Thus when the *Estate* the *Parents* were possess'd of is *forfeited*, the *Children* also feel the *Loss* of it. But however, That is not a *Punishment* properly, with respect to the *Children*, because they cannot come to the *Inheritance* of their *Father's Estate*, unless their *Fathers* preserve it for them till they die. And therefore the *Confiscation* or *Forfeiture* only *intercepts* the *Condition*, without which the *Children* can have no Right to their *Father's Estate* (b). But however, it was truly an *unjust* and *barbarous* Law, (as *Buchanan* calls it,) which was made by *Mogaldus* King of *Scotland*, *That all the Goods and Chattels of condemn'd Criminals, were to be forfeited to the Crown, excluding their Wives and Children from any Part of them* (c).

XXXII. Again, *Lastly*, It ought to be observed, that sometimes the *Evil* a Man may suffer, or the *Loss* of any *Good* he may sustain, may be *occasion'd* by another Man's *Offence*, or because another Man has not perform'd his *Obligation*; but still that this Man's *Offence*, or *Deficiency* in Performance of the *Obligation*, is not the *proper* and *immediate* Cause why the other suffers *Evil*; Nor can any *third* Person pretend any direct *Right* from such an *Offence* to inflict *Evil* upon him (2). Thus it is common for *Fidejussors*, *Bondsmen*, to suffer *Loss*, when the *Debtor* they engage for, breaks his *Promise*. But the immediate *Obligation* that binds the *Fidejussor* or *Bondsmen* to discharge the other's *Debt*, is his own *Promise*. For as a Man that *engages* himself to be bound for a *Buyer*, is not properly *obliged* from the thing

*bought*, but from the *Promise* he made: So a Man Bound for a *Criminal*, is not properly *obliged* by the other's *Crime*, but by his own *Engagement*. From whence it follows, that when the *Fidejussor* or *Bondsmen* is to suffer *Evil*, it must not be *measur'd* by the other's *Crime*, but by the *Power* he had to *promise*. And therefore when the *Delinquent* escapes, and it is necessary his *Surety* should make *Satisfaction* to *Justice*, 'tis not to be consider'd what *Evil* might have justly been inflicted on the *Delinquent*, but what Degrees of *Evil* the other could *oblige* himself by his own sole *Consent* to suffer for him. And hence it may also be *inferr'd*, how far *Bondsmen* or *Fidejussors* may be admitted in *capital Cases*: And that may be only thus far; either that the *Bondsmen* may promise the *Magistrate*, (whose Duty it is to prosecute the Offender) that he will *satisfy* for the Damage he has done; or else that he will take care to bring him to *Trial*, upon Condition that the *Criminal* may be admitted to *Bail*, if he be already apprehended, may be *free* from the Inconveniencies of a *Prison*, and may not be oblig'd to appear at his *Trial* in *Irons*; or if not apprehended, that nothing be issued out against him in his *Absence*, and before he has had a *judicial Hearing*. But no Man can oblige himself to suffer Death for a *Criminal* (3); since no Man hath so much Power over his own Life. Neither can the nature of *Human Justice* allow such *Punishments* to be inflicted. For the *end* of *Punishment* is to *restrain Men from Transgressions, and dispose them to Obedience*. But in This Case, neither has the *Fidejussor* himself offended, neither by his act of *Engagement* doth he derive the guilt of the other's *Crime* upon himself. For it can be no *Crime* in Him to desire that the *Criminal* should have a *Fair Hearing* in a Convenient Place, and be without trouble and disquiet, before *Judgment* passes upon him: Nor is it any to promise He will pay the *Pecuniary Mult* imposed on the *Criminal*, in what manner the *Magistrate* shall think fit to set it, when the *Criminal* is fled from *Justice*. Besides the *End* of *Human Punishment* cannot be obtain'd by punishing the *Surety*; for if He be punish'd, he must be punish'd, not because He himself is guilty of any *Criminal Action*; but because He is so imprudent as to expose himself to Danger, upon the presumption of another Man's *Honesty*. And then all the *Effect* of such a *Punishment* will be This, that Other Men will be more cautious for the future how they *engage* themselves; Not that They will be more careful to avoid the *Crime* the *Offender* was guilty of. And therefore such a *Punishment* would seem to have no Regard to the *Fact* of the *Principal Criminal*, but only to the unwary *Credulity* of the *Surety*. And therefore the *Magistrate* that punishes a *Bondsmen*, or *Fidejussor*, understands neither the Nature

(1) V. Grot. L. 2. c. 21. f. 10. (a) We have an Instance of this in L. 39. t. 2. l. 24. f. ult. l. 26. D. de Damn. inj. &c. & L. 35. t. 2. l. 63. D. ad L. Falciariam. (b) Vid. L. 48. t. 22. l. 3. D. de Interdict. & Relegat. &c. (c) Buchanan. Rerum Scotic. l. 4. (2) Vid. Grot. d. l. f. 11. (3) See above in B. 5. c. 10. f. 12.

of *Punishment*, nor his own *Duty* in inflicting it; except it appear that He design'd only to abuse him, and *elude* the force of *publick Justice*. And again, since no Man has such *Right* over his own *Members* as to take *Liberty* to deprive himself at pleasure of any of them; it is evident that no Man can oblige himself to suffer the *Punishment* of *Mutilation* for another Person. But 'tis a different Case, when *Jaylors*, the *Keepers* of *Malefactors*, are punish'd with *Death*, who either by Neglect or Collusion, gave them opportunity to make their *Escape*; for they suffer for their own *criminal Default*, not for their Prisoners (a). Nay further, Though it must be allow'd that the *free Heads*, and *Masters of Families*, had the Liberty of setting up what sort of *Government* or *Law* they pleas'd; yet it does not seem to be a proper Method to *banish* the *Fidejussors*; as well because *Banishment* can hardly be called a *Punishment*; as because it is not the Interest of the Commonwealth to drive away such *Subjects* (b). There are several other Cases, where a Man may suffer *Inconvenience* by another's *Offence*. For Instance, If a Friend be so kind to me as to let me live in his House *Rent-free*, and it happens that my *Friend*, the *Proprietor*, be found guilty of some *Crime* for which his House is *forfeited*: 'Tis plain that I must be sensible of *Inconvenience* in such a Case, because I must be forced to provide my self of a new Habitation, when perhaps he would have allowed me to have lived there longer upon the same Terms. But the *Punishment* doth not properly *affect* me. For the *Publick*, that is *seiz'd* in the *Propriety* of the House, may when it pleases, by its own *Right*, deny me the Use of it, at that *Rate* I had it before. So also *Children* of *Traytors* and *Rebels*, are often denied *Civil Honours* in the *State*. And this indeed aggravates the *Punishment* in the Parents, since their *Children*, (whom they are supposed to have the greatest Affection and Regard for) must for their *Fault* live without any *publick Character*, or Mark of *Honour* and *Esteem* in the Commonwealth. But this is in Reality no *Punishment* to the *Children*; because the *Government* may bestow *Honours* where it pleases, and therefore may by its own *Right* and *Authority*, exclude such Persons as have not in the least offended, from all *Titles* and *Dignities* it has *power* to confer, as often as it is thought agreeable to the *Rules* of *Government*, and the *publick Good*.

XXXIII. From these *Distinctions* it appears,

that no Man can be *justly* punish'd by any *civil Court* for another Man's *Offence*, when he is free from *Guilt* of it. And the Reason is, because that *Aptitude* which disposes a Man for *Punishment* proceeds from *Demerit*, and *Demerit* in the last *Resort* is founded in the *Will*, which is certainly, or nothing is, at a Man's own Command, and which cannot contract any *Guilt*, but by some *internal Motion* of its own. 'Tis a Mistake in *Grotius*, in the Chapter before cited, *Seet. 12.* to think that there may be an Instance given to the contrary, *Extrinsic* to the *Person* of the *Delinquent*, in the *Person* of one he hath a violent Affection for. And I think it is nothing to the Purpose to say as *Plutarch* does (c); 'That the Master by 'correcting some of his Scholars, puts all the 'rest in mind of their Duty, and a General 'by making a Decimation, punishes the whole 'Army. For both the *Youth* that is *corrected*, and every *tenth* Souldier that *suffers*, is really *Criminal* himself. And hence therefore it follows also, that *innocent Children* are not to be *punish'd* for the Crimes their *Parents* were *guilty* of (d) (1). And therefore some *Interpreters* explain *Joshua*, C. 7. v. 24. thus, That *Achan's Children* were brought out only, that they might hear the *Instructions* *Joshua* gave them, and the rest of the People; and be advised to take warning how they were found *guilty* of the like Crimes themselves; not that they were to be *ston'd* with their Father. But if this Comment upon the Text will not be allow'd, See what *Grotius* saith, *de J. B. & P.* l. 2. c. 21. § 14. *in princip.* (e).

— Ne perge queri, casusque priorum  
Annumerare tibi. Nec culpa nepotibus obstat.  
Tu modo dissimilis, rebus mereare secundis  
Excusare tuos.

Lament no more, nor to your self misplace,  
The Crimes or Fortunes of a former Race.  
Our Parent's Guilt but to themselves extends,  
Taints not the Blood, nor to the Sons descends,  
By your own worth, you blot out the Disgrace,  
And raise the faded Lustre of your Race (f).

And therefore that Law of the *Persians*, by which, when any *single Person* was found *guilty* of *Misdemeanour* against his *Prince*, his whole Family and all his Relations were to suffer with him, was justly censured by *Am. Marcellinus*, as Insupportable, and Barbarously Rigorous, beyond Example (g). 'Tis certain

(a) See 1 Kings XX. 39. seqq. Acts XII. 19. (b) Garcilasso de la Vega Comm. Reg. l. 6. c. 3. relates, That the Provinces which bordered on the Imperial City Cozco, were oblig'd, by way of Tribute, to furnish the Court of the Ynca with Officers and Servants. And that upon any Crime or Neglect they were guilty of, the Provinces that presented them were to be responsible. (c) De sera Numinis Vindicta. p. 561. A. Ed. Wech.

(d) Vid. L. 9. t. 47. l. 22. C. de Penis. L. 48. t. 19. l. 26. D. de Penis. (1) Vid. Grot. ubi supra, f. 13, &c.

(e) Ovid. Metam. L. 4. v. 669, 670.

Illic immeritam, maternae pendere lingua,  
Andromedam Penas, injustus jusserat Ammon;

There partial Jove did for her Mother's Crime  
The fair Andromeda in Chains confine.

(f) Statius Thebaid. L. 1. towards the End. (g) Vid. Herodot. L. 3. p. 235. Edit. H. Steph. de Intapherne. Justin. l. 10. c. 2. The Macedonians had a Law much of the Nature. Vid. Curtium, L. 6. c. 11. l. 8. c. 6.

indeed, that by Punishments of such Cruelty, Princes intended above all things to provide for their own Safety (a). For though a Man may have Bravery enough to despise his own Life (as *Hellanicus* in *Justin*, is said to have done when he was Old and Childless, and was therefore the more animated in his Conspiracy against the Tyrant *Aristotimus*, because he had nothing to fear, neither his Age, nor Family;) yet he will not be perhaps without Fear, when he knows that his Friends and Relations may be ruin'd with him, and upon his account. And again, it might seem to be a further Security to cut off the Sons, to prevent them from revenging their Father's Death. For says *Aristotle*, *It is but Folly to kill the Father when the Sons are spared* (b). Besides, it is not easy to be believ'd, that a Man will have the Boldness to undertake an Enterprize of so much Danger, without communicating his Design to his Relations. For which Reason *Arrian* says (1), *Alexander* put *Parmenio* to Death. And perhaps it may be true as *Cassius* in *Tacitus* said (c), 'That tho' there is a Mixture of Injustice in every exemplary Punishment, yet the Evil particular Men suffer by it, is sufficiently recompens'd by the Benefit it brings to the Publick. Thus in the Ninth Book of the Codes, t. 8. ad *L. Julian* Majest. the Sons of Traytors were to suffer the same Punishment as their Fathers, when it was to be fear'd they might be influenced by their Father's Example (d). Thus the Children of the *Maratocupeni*, (Robbers in Syria, who had that Name given them from the place they inhabited,) were all cut off with their Parents, for Fear they should grow to imitate them. *Hobbes* in his *Leviath*. c. 28. gives this Reason for the Justice of this sort of Punishment, 'Because such as are Guilty of Treason against the State, are profess'd Enemies to it, and therefore it is lawful by the original Right of Nature to make War upon them; but in War the Sword judgeth not, nor doth the Victor make Distinction between nocent and innocent, nor has other Respect of Mercy, than as it conduceth to the Good of his own People. And besides, in publick Judgments and Trials in case of Treason, there is this thing particular, That the Sovereign may sit Judge in his own Cause; and sometimes, laying aside the Formalities and Intricacies of Process, begin with the Execution (e). But yet conscientious Princes ought to consider what *Tiberius* said in the Case of *Cn. Piso* *Tacit.* Ann. 3. c. 12. And indeed, neither in War

ought the Sword to be so Merciless, as not to spare such as Age and Innocence plead for. And since such as are born in the Commonwealth are Subjects, there is no Reason why they should be treated as Enemies, unless their own Acts make them such. And therefore, there can be no other way of punishing an Innocent Son for the Treasons and Rebellions of his Father, than by intercepting those Goods from him, which would otherwise have descended from his Father to him. In Peru under the Government of the *Tuca's*, if a *Curaca* were put to Death for any Misdemeanour, his Son was not therefore denied to succeed in his Father's Place and Office, but was shew'd his Father's Crime and Punishment, that he might take Warning from thence how he offended (f). But to be denied those Honours which a Man can lay no Claim to, is not properly Punishment. But neither do the other Reasons that are given, excuse the Injustice of this sort of Punishment: As for Instance, when the Greeks (as *Dionys. Halicarnassæus* tells us) cut off any Tyrant; they always either kill'd or banish'd his Children, upon an Opinion, that it was a Contradiction to Nature, to suppose good Children could be born of bad Parents, or bad Children of good (g). Neither can this sort of Punishment be justified by any Arguments from Divine Threatnings, since the Dispute relates only to human Justice (h). And therefore it was a wise and good Constitution of the Egyptians, that no Woman with Child should suffer Death, till she was deliver'd, which is also now observed in other Nations (i). And here it may be observ'd, That it is an Abuse of the Legislative Power, when the Legislator takes Advantage of the Crimes of particular Offenders, to enact Rigorous Laws against a whole Sex or Order; though perhaps afterwards, in Tract of time, the Punishment it self may grow into Credit, and the Death inflicted by it be thought Honourable. As it happen'd by that Law among the Indians; by which the Wife was to be burnt with her deceas'd Husband. The Occasion of which Law was, That the Women when they were tired, or out of Love with their Husbands, made no Scruple to poison them to make way for the Embraces of others (k). And hence also it appears, that the Heir is not affected by any Punishment inflicted upon the Body, or Reputation of the Delinquent (l). But a pecuniary Mult will reach him, tho' in Equity it ought not to exceed the Value of the Inheritance which descends to him (m).

(a) *Justin*. l. 26. c. 1. l. 21. c. 4. towards the End. *A. Cælius* in *Val. Maximus*, l. 6. c. 2. speaks to the same sense. (b) *Rhet.* l. 2. c. 21. (1) *B.* 3. (c) *Ann.* XIV. c. 44. (d) *Vid.* *Ant. Matth. de Crim.* l. 48. t. 2. f. 10. *Am. Marcell.* l. 28. (e) *Add Grot.* Comment. upon *Joshua* I. 18. (f) *Garcilass. de la Vega Comm. Reg.* l. 2. c. 13. (g) And it was very well said by *Marcus* in *Vulcat. Gallicanus* in *Avidius Cassius*, c. 12. And therefore ye ought to pardon *Cassius's* Children, his Son-in-law and Wife. But did I say pardon? since they are Guilty of no Crime. (h) *Add. Grot.* l. 2. c. 21. f. 14. (i) *Diod. Sicul.* l. 1. c. 77. *Ælian.* V. Hist. l. 5. c. 18. *cum Schefferi Notis.* l. 48. t. 19 l. 3. *D. de Paris.* l. 1. t. 5. l. 5. f. 2. l. 18. *D. de statu hom.* *Plut. de sera Numin. Vindict.* p. 552. *D. Add. Quintil. Declam.* 277. What Severity of Punishment on the other hand is used in Japan, we are inform'd by *Bern. Varenius* *Descr. Japoniæ*, c. 18. *Ferdin. Pinto Itin.* c. 55. *Varenius de Relig. Japon.* c. 11. p. 129. (k) *Vid. Cic. Tusc. Quæst.* l. 5. c. 27. *Strabo*, l. 15. *Abr. Rogerius de Braminib.* p. 1. c. 19, & 20. (l) *L.* 48. t. 19. l. 20. *D. de Paris.* (m) *Vid. L.* 47. t. 1. l. 1. *D. de privatis Delictis.*

## C H A P. IV.

## Of the Power of the Sovereign, in determining the Value of Subjects.

**T**HOUGH there may be discover'd certain *Foundations* for the Preference of one Man to another, even in a *Liberty of Nature*, out of *Civil Government*; yet since those *Foundations* cannot give any Man a *Right*, unless enforced by *Compact*, or the *Definitions* of the *Civil Power*, I think this a proper place to explain the Nature of those *Distinctions*, which are made between Men, according to the *Esteem* they are differently rated by. Now *Esteem* is the *Value* which is set upon Persons in Common Life, according to which they may be *equall'd*, or *compar'd* with others, and be rated either *higher* or *lower* than those they are *compared* with. For there is a near Affinity between the two most noble *Branches* of *moral-Quantity*, *Esteem* and *Price*. The *first* is consider'd in *Persons*, the *second* in *things*; because as the *one* is the *Rate* of *Persons* in Common Life, so the *other* is of *Things*. And as the chief Reason why a *Price* was set upon *things* was, That when they were to be exchanged or removed from one Person to another, they might be the better *compared* with one another: so the End intended by *Esteem* is, That we may be able to form a *Comparison* between Men, by setting as it were a *Value* upon them; and in consequence establish a becoming *Order* and *Distance* between them, whenever they should happen to be *united*; it evidently appearing that nothing was more absolutely inconsistent with the *Convenience* of Life, than an *universal* Equality. Now *Esteem* may be divided into *simple* and *intensive*. I shall consider both *parts* of the Division, with the different *Relations* they may bear to such Persons as live in a *Liberty of Nature* (1), and such as are *Members* of the same *Commonwealth*.

II. *Simple Esteem*, with regard to such as live in a *Liberty of Nature*, seems chiefly to consist in this; When a Man's Behaviour and Character prove him to be One that acts upon *Principles* of *Conscience*, One ready to comply with the *Laws* of *Human Society*, and prepared, as far as he has Power, to observe the *Law of Nature* towards other Men (2). For as we say of a *thing* which is of *Use* in Common Life, that it is of *Value*; and, on the contrary, say of a *thing* there is no *Use* of, that it is *worth nothing*; so it may be said, that That Person is a Man of some *Value*, that will suffer himself to be treated like a *sociable* Creature. But when a Man plainly shows himself *unfit*

for *Society*, by disregarding and confounding the *Law of Nature*, and the *good Offices* he owes to other Men upon the Force of it; he may deservedly be look'd upon to be a Man of no *Worth* or *Value*.

III. Now this sort of *Esteem* may be consider'd three ways. *First*, as *Intire*. *Secondly*, as *Impaired*. *Thirdly*, as *utterly Lost*. It continues *intire*, till a Man by some *Act* of deliberate wilful Malice, out of wicked Design, violates the *Law of Nature* to the Prejudice of another Person. For the Frailties of human Nature excuse Sins of Infirmary, and a Man does not by them forfeit the Reputation of being an *honest Man*, as long as he continues to have a firm *Sincerity* of Mind, and endeavours to do nothing but what is *just* and *vertuous*. And every Man is supposed to deserve this *Esteem* till his own Evil Actions deprive him of it. And therefore it may be said, That all Men *naturally* have an equal Share of this *Species* of *Esteem*, and before they have been Guilty of any *criminal Action*, must be supposed to be *equally Good* and *Vertuous* (a). And this is the Ground for that common Saying, *Every Man should be supposed a good Man, till the contrary is proved*. And this will hold True, notwithstanding those ill Dispositions *Hobbes* chargeth upon human Nature (b). If he be in the Right, indeed every Man must be supposed an ill Man, till the contrary be proved, or rather till he is depriv'd of all Power to do Hurt. But it must be said, that the Principle he at first lays down, *That all Men have Power and Will to hurt or destroy one another*, is far from being universally True, as I have prov'd already (3). But yet because Men may *wish* and *endeavour* one another's Hurt and Ruin, therefore it may be said that every Man may *naturally* be look'd upon to be a good Man; but that it is not impossible he may happen to be otherwise, and that Men may be kind and friendly to one another, but that it is not safe absolutely to rely upon, or trust them.

IV. The same *Species* of *Esteem* is *lessen'd* or *impair'd* by *criminal malicious Actions*, especially by those of more than ordinary *Guilt*, and which were intended contrary to the *Law of Nature*, unjustly to disquiet other Men; The Effect of which *Actions* is, that it will not be thought Safe to give Credit for the future to such a *Deceiver*, or to engage in *Business* or important Affairs with him; without

(1) Such are Sovereigns, and Citizens of different States, with respect to one another. (2) See Mr. *Babeyrac's* Note upon this Section. (a) *Plin. L. 5. Ep. 3.* The Inequality of the Orders among Men, should make no Difference in the Exactness of their Behaviour. *Sanctitas morum non distat ordinibus.* (b) *De Civ. c. 1.*

(3) *B. 2. c. 2. l. 7, 8.*

*Solid Caution.* But though a Man's *Esteem* may be *impaired*, and his *Reputation* sink upon such ill *Actions*, yet it is not *absolutely Lost*. For though I may justly suspect, that a Man will use me in the same manner he hath used others; yet I cannot be always so absolutely certain of this, but that sometimes it may fall out contrary to my *Expectations*. For perhaps there might have been some *Particular Reasons* which moved him to injure other Men, which he may not have against me; and a Man may sometimes be under the Power of violent *Passions*, which at other times he is free from. However, the Blot which a bad *Action* leaves upon a Man's *Reputation*, may be taken off by a voluntary *Tender of Reparation* for Damages, or of some *Equivalent*; and by giving *Evidences of Sorrow and Repentance*. For all these voluntary, unforced *Motions*, may be *Conviction* enough, that his *Intentions* are really alter'd, and that he *sincerely* repents.

V. But a *State and Way of Life* which directly tends to the *Harm of other Men* without *Distinction*, and to make *Advantages* by manifest *Injustice*, utterly *destroys* all this *Esteem*. Now there are in most *Commonwealths* *People* that, by a particular *way and manner of Life*, own and profess the *Exercise of certain Vices*; such as are, All *Whores, Barwds, Strolers, and sturdy Beggars*; all those *Plato* banisheth his *Common-wealth* (a). And they are (as *Isocrates* (1) saith) a *Disgrace to That* they live in (b).

But now, How little *Share of Esteem* all these are to have, must be determin'd by the *Government* that *tolerates* them (c); when the *Publick* thinks fit to give them *Indulgence* (d); they cannot certainly at least be denied the common *Rights of Men*. So the *Pimp* expostulates in *Terence*, *Though I am a Pimp, the common Bane of Youth, a perjurd Wretch, and publick Nuisance, yet I never did you any Wrong* (e). 'Tis certain indeed, That a *Way of Life* maintain'd by the *Profession of any sort of Vice*, must very much tend to ruin all *Natural Esteem*: But unless the particular *Vice* be also attended with *Injury to other Men*, I do not see why the *Persons* that profess the

*Practice of it*, should be treated as *publick Enemies* to all the *World*. But where the *Profession of a Vice* is accompanied with *Harm and Injury to other Men*; and where the *Persons* professing it, treat no Man who is not of their own *Society* with better *Usage* than they would *Beasts*, declaring *Hostility*, not against any certain *Enemies*, but against *Mankind* in general, 'tis manifest they utterly *forfeit* all that *Esteem* Men usually measure one another by. And such are, All *Pirates* (2), *Highway-Men, Robbers, Ruffians, Pick-pockets*, and the like. And the *Difference* will not be material, nor will their *Characters* be much better'd, Whether such *Persons* act always up to the *Height of Wickedness and Villany* or not? Whether a *Robber* will satisfy himself barely with committing *Spoil and Robbery*, and forbear *Bloodshed*, and be contented only to have taken away my *Money or my Goods*. For as 'tis no *Justice*, so it can deserve no *Commendation*, not to be an accomplish'd finish'd *Villain*. And without dispute, whole *Bodies and Clans of Pirates and Robbers* ought to be rank'd under this *Denomination*, as long as they continue their *Course of Life*, notwithstanding they may seem to have some *Resemblance of Justice* among them (f). Neither will whole *States and Common-wealths* deserve better *Rank*, when they are not content to acquiesce in the *Enjoyment of their own Rights at home*, but invade and ravage the rest of the *World*, without *Regard to Faith or Compacts* to the contrary. But where *States or Common-wealths* are so *Partial*, as to be just in the *Observation of Compacts* with some particular *Allies*, but to *all other* their *Neighbours*, or at least to certain *Nations*, show little *Regard* in the *Observation of the Law of Nature*, and scruple not, without just *Provocation*, to break it; Their *Credit*, it is evident, must very much sink, but it would be too severe to deny them every *Degree of Esteem*. Now, the *Effects* that attend Men under such a *Loss of Esteem*, are generally such as these; That unless they leave off their *unjust and bloody way of Life*, it will be necessary for other Men to show them no more *Mercy*, than they do to *Beasts of*

(a) Plato de L. L. l. 11. (1) In *Areopagitico*. (b) *Atticus* Bishop of *Constantinople*, in *Socrates's Ecclesiast. History*, tells *Calliopi*, That he should distribute his *Charity*, not among those that made a *Trade of begging*, only for their *Bellies*, and spent their whole *Life-time* in nothing else; but among such whose *Modesty* would not suffer them to ask it. *Socrat.* l. 7. c. 25.

Thus neither were *Beggars* tolerated in *Peru*, under the *Government of the Ynca*.  
(c) But they that were disabled, so that they could not maintain themselves, were kept by the *Publick*. Vid. *Garcilass. de la Veg. Com. Roy.* l. 5. c. 9. & l. 5. c. 11. (d) But formerly in *Egypt*, there were *professed Thieves* allow'd, of whom *Diodorus Siculus*, l. 1. c. 80. gives this Account. 'Such as would be employ'd in the *Trade of Thieving*, enter'd their *Names* with the *Grand Master of the Order*, and were obliged by *Article*, to bring all the things they stole to him; and they that lost any thing were to apply themselves by *Letter* to him, in which they were to signify the *Particulars* they lost, together with the *time and place*, when and where, they were lost, and so every thing being easily discovered, the *Person robb'd* was to pay a fourth part of the *Value of the things*, and take them again. For since it would have been impossible to prevent all manner of *Thieving*, the *Legislator* found out this *Expedient*, that what was lost might be recovered, by paying only a small *Price for the Redemption*. But no *Question*, it would have been a better *Method*, and less inconvenient for the *Subjects*, to have made *severe* Laws against such sort of *People*, and to have taken care they should be strictly put in *Execution*.

(e) *Ter. Adelph. Act.* 2. Sc. 1. v. 34, 35. Vid. *Constitut. Sicul. L.* 1. t. 20. (2) See above in B. 2. c. 2. f. 10.  
(f) Thus in *Heliodorus's Ethiopicks*, L. 5. c. 15. There is mention'd a *Law* that was among the *Pirates*, by which he that first boarded the *Enemy's Ship*, and expos'd himself to the greatest *Danger* in the *Fight*, was to have his *Choice of the Booty*. And in the same place we are told, That the *Robbers* observe some sort of *Conscience* among one another, and shew *Kindness and Humanity* to those they are acquainted with.

Prey. That when they are apprehended, they will be used with more *Severity* than any other sort of *Enemies*, though others might have threaten'd equal Danger: That They will not be look'd upon to deserve the *common Offices of Humanity*; And that all merciful Usage will be denied them, least it may seem to encourage them in their Villanies. Moreover, as there can be no Strefs laid upon their *Faith*, should they offer it, since the *Habit* of Outrage they live in, must have cancell'd all *Good Opinion* of them; so I doubt not it may very well be maintain'd, That Neither are They capable of receiving *Obligations of Faith* from Other Men, as long as they continue in their *Ill Course of Life*, (which must always be presuppos'd): For I either make a *Voluntary Agreement* with such a *Person*, or he *Compels* me by *Unjust Force*. I cannot do the *First*, without deriving upon my self some Share of his *Guilt*, by treating such a Man as a *Friend* that professes himself a *common Enemy* to all the World, except his own Accomplices. Not to say further, That it may be often an Injury to other Men to keep *Faith* with Robbers, For Instance, in the Case of leaving some *Depositum* in trust with Them (a). But if a *Robber* should have done Me some *Good Office*, which it was no *Discredit* to Me to receive from such Hands, it can be but reasonable that I should give him the Reward I promis'd (1): But then He is not the Person He was suppos'd to be, a *common Enemy* to all Mankind besides his own Companions. On the other Hand, if he *Compels* Me by *Unjust Force* to engage my *Faith* to Him, it appears from what has been said before (2), that *Compacts* extorted by Fear are Invalid. But after All, *Such Persons* may recover their *Lost Esteem*, by giving over Their infamous *Course of Life*, and by taking upon them some other *Creditable Profession*. And So may Whole *Bodies of Thieves and Robbers* by such a *Change*, as well as particular Men. And from That Time They are to be dealt with as Men of *Repute and Honesty*. But They ought first of all, either to make *Reparation*, or obtain their *Pardons* for the Injuries They have done.

VI. *Simple Esteem, with regard to such as live under Civil Government, is, That Sort of Esteem* by which a Man is look'd upon to be at the *lowest*, A *Common*, but A *Sound, Member* of the *State*. Or when a Man hath not been declar'd A *Corrupt Member*, according to the *Laws and Customs* of the *State*, but is suppos'd to be A *Good Subject*, and is Look'd upon and *Valued* for such. And this *Esteem* may be lost under *Civil Government*, either *First*, When it is denied to *Certain States or Conditions*; or, *Secondly*, When taken away upon a *Criminal Account*. The *First* may happen *Two* ways; Either *1st*, when the *State* hath *Naturally in it self* nothing *bad or wicked* belonging to it. Or *2dly*, when it *really* deserves, or at *least* is *thought* to deserve, such an *Imputation*. Thus a *State of Slavery*, tho' it implies in its own Nature nothing *Bad or Criminal* to belong to it, Yet in many *Common-wealths* deprives Men of all *simple Esteem*; and *Slaves* are neither look'd upon to be *Civil Persons* Rated or Number'd in *Civil Assessments*, or *Considered*, or *Valued* as *Subjects*. It is well known how *despicable* their Condition was among the *Romans* (b); And the *Esteem* the *Jews* allow'd their *Gentile Slaves* was not greater (c). So also in *some Common-wealths*, 'Tis a *Dishonour* to be *base Born*, tho' the *Blemish* of the *Birth* is certainly only the *Parents Fault* (d). And Thus in *India*, there is a certain *Race* of Men call'd *Peneas*, which are look'd upon to be *infamous* (e). A *State* under the *Latter Consideration* takes away or lessens *Civil Esteem*, Either because the *Persons* that live under it, are employ'd in Things which cannot be perform'd without the *Guilt* of some *Vice or Sin*; Or else are oblig'd by It to undertake such *Mean Offices and Duties*, which None but *Persons of base and abject Spirits* would stoop to be employ'd in. What *Value* is to be set upon Those of the *First Sort* must be known from the *Laws, or Customs and Manners* of every *Common-wealth* (f). Those of the *Second Sort* are *common Hangmen and Executioners, Bailiffs, Goldfinders*, and the like; *Persons* that in most *Common-wealths* are denied the *Society* of all *People of Fashion or Reputa-*

(a) Vid. L. 16. t. 3. l. 31. f. 1. D. *Depositum*, &c.

(1) See above in B. 3. c. 6. f. 11. towards the End.

(2) See the same Book and Chapt. f. 10. &c.

(b) Vid. L. 18. t. 5. l. 6. D. ad L. *Juliam* de *Adulter*.

(c) *Joseph*. Archæol. Jud. l. 4. c. 8. Neither are *Slaves* permitted to be *Witnesses*, because of the *Baseness* of their *Minds*; since it may justly be believed, that their *Testimonies* are corrupted, either by the hopes of *Gain*, or else out of *Fear*. Add. *Selden*. de *J. N. & G. Sec. Heb.* l. 5. c. 3. *Lex Wisigoth.* l. 2. tit. 4. c. 9.

(d) Vid. L. 6. t. 57. l. 5. C. ad S. *Actum Orficiatum & Stobæum*, Serm. 75. Unless perhaps we allow there is something in that which is said in *Procopius Hist. Arcan.* That the *Infamy* of a *Woman's Vices* not only spreads it self to her *Husband*, but descends in a greater degree to the *Children*, and they are condemn'd to bear a perpetual *Mark* of *Disgrace*, as if *Nature* had stain'd them with the *Dishonours* of their *Mother*.

(e) Vid. *Abbr. Rogerium de Bramin*, Part 1. c. 2.

(f) To this Purpose is that which is related by *Valerius Maximus*, l. 7. c. 7. of *Q. Metellus* the *Prætor Urbanus*, who would not allow *Vecilius* the *Bawd*, the Possession of *Inventius's Goods*, tho' they were left to him by *Will*; because he would neither seem to approve *Inventius's Action*, in throwing away his *Fortune* into such a *Sink* of *Lewdness*, nor allow *Vecilius* the *Rights* of a true *Citizen*, since he had renounced every honourable way of *Life*. And thus in the same Author, when *Genucius*, a *Priest of Cybele*, had obtain'd a *Decree* of *Cn. Orestes*, the *Prætor*, that *Navianus's Goods* should be restor'd to him, the *Consul*, *Emilius Lepidus*, revers'd the *Prætor's Decree*, that the *Court of Justice* might not, under the *Pretext* of his *Suing* for his *Rights*, be polluted by the obscene *Presence* and contaminated *Voice* of *Genucius*. And to this belongs also that, in L. 11. t. 5. l. 1. D. de *Aleator*. Where the *Prætor* saith, He would give no *Judgment*, if any *Person* should *Beat* or do any *Damage* to him, at whose *House* he should hear they play'd at *Dice*, or if any one *Stole* or *Cheated* him of any thing, at that time.

tion. And in some States the Laws themselves have expressly so determined. In *Rome*, Cicero says (a), 'The Executioner was forbid by the Laws of the *Censors*, not only to be seen in the *Forum*, but to see the Light, or breath the Air of that Place, or to have any Habitation in the *City*; As if his Presence would strike Infection and Pollution upon the publick Assemblies. In Other States, It is thought Scandalous to mix in Company with such Persons, only upon the Force of Custom and common Opinion. It seeming natural to suppose, that Persons employ'd in Cruel and Slavish Offices, Would have generally Humours and Dispositions suitable to their Employments; And that None but Men of Mean and Servile Tempers could voluntarily submit to them. Among the *Romans*, the Souldiers indeed were often made use of in publick Executions in the *City* as well as in the *Camp*, without Infamy, or Diminution of their Esteem (b). For there is much difference between doing an Execution at the Particular Command of a Superiour, and between doing it by Profession. So also among the *Jews*, Criminals were Stoned by all the People. And *Montaigne* tells us (c), that *Witoldus*, Duke of *Lithuania*, introduced a Custom in that Country, that Condemn'd Criminals should put themselves to Death with their own Hands, It appearing unreasonable to Him, that Innocent Persons should be employ'd to commit Murther; Tho' this was but a filly Reason, For the Executioner cannot be said to commit Murther by inflicting the Punishment the Law awards. But Others give this better Reason for the Law, that None might be forced upon the Office of an Executioner, to cause and to see the Agonies of the Criminals, to which the innate Tenderness and Compassion of human Nature must give every man an Aversion.

The *Roman Laws* set a Mark of Infamy upon All Persons that acted upon the Stage for Hire (d), or suffer'd themselves to be Hired to fight with Beasts (e). But the Reason why Infamy was annexed to such Actions, was not that any Immorality was supposed in them. (For such Actions may, 'tis possible, be Innocent enough;) But The Gain made by them was That which made them look dishonourable and base to the Natural Gravity of the *Romans*. (For 'tis often the Hire only which makes the Service Mean and Base.) By the Same Laws, it was look'd upon to be Infamous, for a Man to Permit His Daughter to Marry

while She was a Widow, within the time of Mourning; Or to Marry Any Person in such Circumstances Himself; Or to suffer Any Person under his Charge to Marry or to be Married Within that Time; Because it might seem to betray much Levity and Unsettledness of Mind, to argue weak Inconstancy of Faith, and wild desultory Lust. Among the Ancient Inhabitants of the *Canary Islands* it was thought very great Ignominy and Disgrace to be a Butcher (f); And Sir *Thomas More* makes his *Utopians* of the same Opinion (g). *Selden* tells us, that the *Jews* refused to admit Four Sorts of Men either to be Witnesses, or to have any Hand in Judicial Matters; because of the Ill Repute they bore among them; And Those were Gamesters, Usurers Persons that made Gain by the Produce of the Seventh Year, or Year of Remission; and Such as taught Pidgeons to fly. And He adds, They gave this Reason for it; Because None of these Sorts of People apply'd themselves to any Way, of Life which tended to promote Publick Good, or bring any Advantage or Convenience to Human Life (h).

VII. Thus the Loss of Simple Civil Esteem may be owing purely to a State of Life. But a Man may also entirely be depriv'd of it upon a Criminal Account; When for some Particular Sort of Crime He hath committed, (for every Offence will not deprive a Man of Civil Esteem) (i) the Laws of the Commonwealth fix a Mark of Infamy upon him: Which is usually done, Either by Taking away his Natural Life at the same time, and by condemning his Memory, or by ejecting him out of the Commonwealth with Shame and Disgrace; or perhaps by Allowing him to Continue in the Commonwealth, but not as a Sound, but Disorder'd, Infected Member; Or, in other words, by permitting Him to inhabit in the Dominions of the State, and to enjoy the Common Protection of the Laws, but by Excluding him out of all Publick Offices and Employments, and all Honourable Societies, by making him Uncapable to make any Will, and by disabling Him to do any Legal Act which supposes untainted Reputation. But now what are the Crimes which contract all this Infamy must be known from the Laws of every particular Commonwealth (k). And Here it may be observ'd, That according to the *Civilians*, the Infamy which is contracted by any bad Action may be either the Effect of an Immediate (1) Imposition of the Law it self; or of some antece-

(a) Pro Rabirio, c. 5. (b) Vid. Petr. Fabr. Semestr. l. 2. c. 6. (c) Essays, l. 3. c. 1.

(d) Vid. L. 3. t. 2. l. 1. i. D. de his qui Infam. not. (e) Vid. L. 3. t. 1. l. 1. f. 6. D. de Postulando.

(f) Aloisius Cadamustus Navigat. c. 8. (g) Utop. l. 2. (h) Selden de J. N. & G. Sec. Heb. l. 4. c. 5.

(i) Vid. L. 1. t. 54 l. 1. C. de modo Multarum. (k) Vid. L. 50. t. 13. l. 5. f. 1, 2, 3. D. de extraordin. Cognit. Tho' in this place I observe, that in some of the Examples, there is hardly any Distinction made between the simple and intensive Esteem. And here we may observe a Law of the Egyptians, by which Souldiers that deserted, or did not obey the Orders of their Commanders, were not punish'd with Death, but only Infamy and Shame. And if they could by their Courage afterwards wipe off the Ignominy, they were restor'd to their former Dignity. And thus the Legislator, by making Ignominy a greater punishment than Death, taught them to think Infamy the greatest Evil, and at the same time seems to have considered, that such as were punished with Death, must for ever be made incapable of doing any further Good in common Life, but that such as were only deprived of their Honour, would be always endeavouring to do something that might recover it, Diodor. Siculus, l. 1. c. 78. (1) Vid. D. d. l.

dent *Examination* and *Sentence* of Some *Judge* (1); or else of the *Censure* of Men of *Character* and *Esteem*, Which is commonly call'd *Infamy of the Fact* (a). (b) But I am rather inclin'd to think, This *Infamy of the Fact* is not so much the Immediate Effect of the Opinions, of Men of *Character*, As a Punishment which the *Law* also inflicts upon that View, that *Good Men* always condemn Such *Actions*, and look upon them to be *Base* and *Wicked*. For Tho' it may be thought a Discredit, to fall under *Censure of Persons of Approv'd Lives*, and *Reputation*, yet unless the *Law* joins with, and confirms that *Censure*, No Man can suffer so far in his *Civil Esteem* by the Judgment only of Private Men, as to be Excluded from any *Rights* and *Advantages* which the *Civil Laws* allow to an *Unblemish'd Reputation*. And therefore it is evident, That a Man doth not Immediately forfeit *Esteem*, When He is Accused of, and Charged with, any Crime of *Infamous Nature* and Quality. For as *Julian* rightly answer'd *Delphidius* the *Orator*, (2) When he cry'd out, *Who would be guilty, If it were sufficient to deny the Fact?* 'Who could be Innocent, If it were enough only to Accuse (c)? But it is Then a Crime produceth *Infamy* when the Person is condemn'd for it, or confesseth it. And That he is also supposed to do, when he agrees with the *Prosecutor* to let his *Action* drop: Because all such *Agreement* naturally supposes *Confession* (d); Except perhaps it may be made appear, that He chooseth to come to *Composition* with the *Prosecutor*, not out of any *Consciousness* of *Guilt*, but for other just Reasons, as to escape the *Vexation* and *Trouble* of *Trial*, the *Severity* or *Partiality* of the *Judge*, or upon some particular *Dislike* he bears to his Person (e). But tho' a Man's *Reputation* is suppos'd to be Clear'd, when He is *Acquitted* from the Crime which was charg'd upon Him; Yet to make his Innocence appear the more *Unquestionable*, and to punish *Calumny* and *False Accusation*, 'Tis usual in many States and *Common-wealths* to force the *Accusers* to beg pardon, confess themselves guilty of *Falseness*, make their *Submissions*, and pay *Respect* and *Honour* to the *Party* Accused, and the like (f).

VIII. From What has been said It may also be infer'd, That it is no *Real Infamy* or *Dishonour*, When a Man hath suffer'd an Abuse either by Words or *Actions*, not to *Revenge* it with his own *Sword*; As the Custom is in some Countries, especially among *Persons of Rank*, and Men of *Military Profession*; but to punish it by the *Magistrate*, or pass it by in Silence, supposing such *Patience* doth not imply *Confession* of any Bad or *Base Action*. It seems to argue indeed much *Cowardice* and *Littleness of Spirit*, tamely to submit to Every Man's *Insults* and *Injuries*, without endeavouring *Bravely* to vindicate and assert his *Rights* and *Liberty*; And it seems natural in such Cases, For every Man to be of the Opinion of *Neoptolemus* in the *Poet* (g),

Τὸ θναίνω μᾶλλον ἢ ἀπὸ βλεμῶ καλεοίμην.

I'd sooner Die than be a Coward thought.

There are Certain *Injuries* which If a Man chooseth generously rather to *Despise* than to *Revenge*, He will not bring his *Courage* in Question. Nor can I see any thing in such Conduct that can rob Him of his *Natural* or *Civil Esteem*. And therefore, *Hobbes* says, 'If a Man receive Words of *Disgrace*, or some little *Injuries* from another, for which there is no Punishment assigned by *Law*, and is afraid he shall fall into *Contempt*, and be obnoxious to the like *Injuries* from others, and to avoid this, protects himself by the Terror of his private *Revenge*; this is a Crime, and such a *Fear* will not excuse it; because the *Common-wealth* would have the publick Words, that is, the *Laws*, be of more force with the *Subjects*, than the Words of any private Man, which they that made the *Laws* therefore assign'd no Punishment for, because they thought it not worthy a Man that had the Use of *Reason* to take any notice of them (h). And much less is it any *Dishonour* for a Man, in a *Common-wealth*, where the *Laws* expressly forbid *Private Revenge*, to prefer *Obedience* to the *Laws* rather than expose himself at once to the *Danger* of the *Fight*, and the *Severity* of *Civil Justice*, upon a vain pretence of *Honour* (i). Neither is it always I presume a sign of *Cowardice*, for a

(1) Vid. L. 3. t. 1. l. 1. f. 8. De postulando. (a) Infamia Facti.

(b) Vid. L. 2. t. 12. l. 13. C. ex quibus Caus. infam. irrog. Add. L. 37. t. 15. l. 2. D. de obseq. Parent. prestand. l. 20. & D. L. 3. t. 2. l. 20. de his qui notant. infam. Vid. L. 9. t. 9. l. 25. C. ad L. Jul. de Adult. And to this you may refer that which *Rochefort* Descrip. Antillar. Part 2. c. 8. relates of the *Apalachite*. They have no other Punishment, saith he, for Thieves, besides the Reflections that are made upon them in all Company upon that account; and this is generally taken so hard by them, that to avoid it, they will fly away into the most uninhabited *Desarts*.

(2) V. *Ammian*, *Marcellin*. L. 18. (c) And to this we may apply that of *Plautus* in *Trinum*, Act. 1. Sc. 2. v. 44. 45. Not to commit a Crime is in a Man's own Breast, the Suspicion whether he does or not, is in anothers.

(d) Vid. L. 3. t. 2. l. 5. D. de his qui infam. notant. Quoniam intelligitur confiteri crimen, qui paciscitur.

(e) Thus in *Isocrates* adv. *Callimach*. in the Beginning. Some persuaded the Defendant to Compound the Matter with the Plaintiff, because in *Trials* there are several things which fall out otherwise than are expected; and in passing the Vote, there is more of Chance than Equity. And therefore it is a much better and safer way to be at some small Expence, to get clear of a Crime, than to refuse to pay any Money, and run so great a Hazard.

(f) It is evident from *Josephus* de *Bello Judaico*, l. 4. c. 39. That the *Ignominy* of having been in Chains, was supposed to be taken away, if the Chains were not Unlock'd, but Fil'd afunder; and this, he saith, was the way, when any one had been put in Chains innocently, among the *Romans*.

(g) Q. *Calaber*. l. 9. (h) *Leviath*. c. 27. Vid. *Leg. Salicam*. tit. 32.

(i) — Injustum rigido jus dicitur ense. *Ovid*. *Trist*. L. 5. El. 7.

'Tis cruel Justice which the *Sword* inflicts.

Man to refuse to put his Life and Fortunes to the Venture upon every little insignificant Quarrel, when there may be often less dangerous, and more innocent and lawful Occasions offer'd to show his *Courage* (a). Thus When *Pyrrhus* in *Plutarch* call'd *Antigonus Villain*, and challeng'd Him to meet him upon the Plain, and fight him for the *Kingdom*, *Antigonus* answered, ἢ μὲν αὐτῷ στρατηγίαν ἐν ὄπλοις μάχων ἢ καυρῶν εἶ, that His Way of making War consisted as much in knowing proper Times and Opportunities, as in Strength; and that if *Pyrrhus* were weary of his Life, he might easily find ways enough to go out of it; And So *Augustus* Answer'd *Antony's* Challenge, in the same Author, That he might easily find a way to die (b). And in such Cases, no Prudent, Considerate Man, hath any reason to be disturb'd at the Opinions or Censures of the *Vulgar*; since the *Esteem* of every Subject is to stand and fall by the Judgment of His *Sovereign*, and the *Laws* of the State; Since 'tis sufficient Proof of *Bravery* and *Resolution* to obey the *Laws*, in Defiance to all the little Cavil and Calumny of the Vain and Idle Part of Mankind. And hence it will be no Difficulty to answer what *Hobbes* says in his *Leviathan*, c. 10. 'That it is 'hardly possible, but private Duels should be 'thought Honourable, because they are the 'Effects of Courage, which is Power. For Why should it not be rather look'd upon to be a Sign of *Greatness* and *Bravery* of Spirit, to know how to govern the *Heats* and *Passions* of our Minds, and to give them no other Liberty but what the *Laws* allow? Tho' I think the same Author says very well afterwards, c. 30. 'That all *Laws* that forbid *Duels*, 'should ordain Honour for them that refuse, 'and Ignominy for them that make the *Challenge*; and thus those that refus'd to fight would have an Honourable Excuse. The Remedy the *Sicilian Constitutions* propos'd against this Custom was, by inflicting severe Penalties upon them that offer'd any *Affront* (c).

An Account, by the way, of the *Antiquity* of *Duels*, and whence they at First began, We may see in *Diodorus Siculus* (d). 'The *Gauls* '(saith he) in the Height of their Entertainments upon the least Quarrel that arose, 'would break off their Mirth, take their 'Swords, and without expressing any value 'for their Lives, go out and fight. And this 'they did upon a Belief, That They should enjoy another Life, in a new Body; and therefore easily despised the Care of This; As '*Lucan* expresseth it:

— Inde ruendi

In ferrum mens prona viris, animæque capaces  
Mortis, & ignavum est reditura parcere vitæ (e).

— Hence they so bravely dare  
Defie the Sword, and all the dread of War,  
Scarce satisfied with death; and think it mean,  
To spare a Life that must return again (f).

IX. But Further, it is also evident, that the *Government* cannot deprive any Man of his *Natural Simple Esteem* arbitrarily, at pleasure, but only upon Some *Antecedent Crime* He hath been guilty of, Which is attended with *Infamy*, either by its own *Intrinsic Turpitude*, or by *Express Sanction* of *Law*. For Since such a *Power* can no way be supposed to promote *Civil Society*, or the *Interest* of the *Commonwealth*, it is not to be supposed it was ever Conferr'd upon the *Sovereign* Governours in it. But as the *Civil Sovereign* may Unjustly *Eject* a Subject out of the *Commonwealth*; so He may Unjustly also take away his *Civil Esteem*, so far at least, as to deprive him of all those *Rights* and *Advantages* which attend an *Untainted Esteem* in the *Commonwealth*. But his *Intrinsic Natural Esteem* can no more be taken away from a Man, than his *Vertue* and *Integrity*. Besides, 'tis next to a Contradiction, that a Man should be declared *Infamous* at the *Pleasure* only of the *Government*; that is, That a Man should be charg'd with a Suspicion of being guilty of some *Dishonourable*, or *Criminal* Action, not because he is really Guilty, but because 'tis the *Pleasure* of the *Government* by such means to use an Innocent Person as if he were *Criminal*. And I think it is also beyond dispute, that there lies no *Obligation* upon any Subject, to sacrifice his own *Simple Esteem* and *Character*, to the *Civil Government*, or to contract any *Real Infamy*, for the *Advantage* of the *Publick*. For neither hath the *Government* Power to command any *Base*, or *Ill* Action, which will be the cause of *real Infamy*; neither ought a Subject to obey, if It should.

X. Whether indeed, it may not be required of a Subject of *Good Character*, to take upon himself the *Infamy* of his *Prince*, or his *Country*; or as it were, make himself *Criminal* for their *Faults*, is not so clear. But Here (tho' I think it hardly possible for a Man to counterfeit himself a *Criminal*, without being in some measure, really so) I conceive, There ought to be a *Distinction* made between a *Prince's* *Domestick* or *Private* Faults, and Those that are *Publick*, or which have an *Influence* upon the whole *Commonwealth*. Now that a Man should take the *First* Sort upon himself, and make himself *Criminal* for his *Prince*, can neither be *Lawfully*, and *Justly* desired by the One, nor Safely be complied with by the Other: Whether with design to put some plausible *Colour* upon the Action of the *Prince*,

(a) Vid. *Cæs. Com. de Bell. Gallic.* l. 5. c. 44. Vid. *Busbeq. Epist.* 3. de *Velibego*.

(b) *Plut.* in *Pyrrh.* p. 404. A. & in *Anton.* p. 950. E. *Alexander de Rhodes Itiner.* l. 2. c. 6. relates of the Soldiers in the Kingdom of *Tonquin*, That tho' they are very Valiant against an Enemy, and set but little Value upon their Lives; yet among one another they never draw their Swords, but are as loving as Brothers: And that when they once saw a *Frenchman* and a *Portuguese* fight a *Duel*, they were amazed at it, and said they never saw such Barbarity before. (c) *Const. Sicul.* l. 3. tit. 33. f. 4. (d) *L.* 5. c. 28. (e) *Lucan.* l. 1. v. 460, &c.

(f) Vid. *Appian. Celtic.* Where he gives the same Reason for the Boldness and Bravery of the *German*.

or whether to take the *Blemish* that would otherwise be fix'd upon *His Natural Esteem*, upon Himself. For no body can take away the *Civil Esteem* of the *Sovereign*, because he is placed above the reach of any *Civil Judicature*. Thus it cannot be thought that any Good Man can approve the *Action* of *Anicetus*, when He declared, He had been guilty of Adultery with *Octavia* only that *Nero* might have a Pretence to dissolve his Marriage with Her (a). But Yet 'tis not Uncommon, that when *publick Ministers* by Secret Order from their *Masters*, Enter into *Treaties* with *Foreign States*, or oppose and form Designs against *Them*, Which if known to be the Result of *Publick Counsel* or *Instructions*, would bring Danger or Inconvenience upon the State, to avoid the Ill Consequences which might follow, by laying the fault upon the *Ministers*, as if they had Acted only by their own *private Judgment*. And in such a Case, I think no good *Subject* would refuse to divert the *Evil* from the Commonwealth, by favouring the *Excuse*, and yielding that what He did, was beyond his *Instructions* and without *Command*; Provided his Punishment be no greater than some small pretended *Disgrace* (b). For to suffer *Death* upon That Account, or to be *given* into the Hands of the *Injured Party*, would be a Severity not to be born or excused. But the Pretended *Punishment*, Whatever it be, may be easily either remitted or *Compensated* otherwise. For 'tis unquestionable, that He that hath Power to inflict *Civil Infamy*, hath also Power to remove it (c). But notwithstanding, if *Infamy* be inflicted for any *Impious* or *Flagitious* Action, *Restitution* of a Man's *Fame* will only produce the *External Civil Effects* of an *Unblemish'd Reputation*; but will not in the least wipe out the Blot which lies upon his *Natural Esteem*.

XI. *Intensive Esteem*, is that Species of Reputation by which Persons otherwise Equal in the *Simple Repute*, are prefer'd to One Another, According as One possesses a larger share than *Another of Those Things*, whatever they be, which are apt to raise in other Men *Reverence* and *Respect*. Now *Honour*, which answers the *Intenseness* of *Esteem*, is the *Signification of our Opinion of Another Man's Excellencies*. And therefore the *Honour* is not really in Him that *receives*, but in him that *gives it* (d). For tho' a Man may set what *Value* he pleases upon himself as the *Seller*

does upon his *Commodities*: Yet as in These, it is the *Buyer* at last that determines the *Price*; so the *Value* of Men is no higher or greater than as others are pleas'd to set it (e). For as *Hobbes* says, *let a Man (as most Men do) rate himself at the highest he can; yet the true Value of him is no more than he is esteem'd at by others* (f). But yet every Man is affected more or less with the *Honour* others pay him, as It answers to that *Value* which he puts upon himself (g). But the *Esteem it self*, or That which gives Men the *Title of Desert* to *Honour*, is often *Figuratively* expressed by that *Word*. And so Certain *Publick Stations*, and *Places of Dignity* attended with Honour, are peculiarly call'd *Honours*. 'Tis rightly observ'd by the *Author* before-mention'd (g), 'That it is impossible any *Society* should be either great, or of any long continuance, that at first united only upon such a *Bottom* as a *Common desire of Glory*, or upon mutual Obligations to assist one another in their pursuits after *Honour*; because *Glory* and the *Honour* that is built upon it, consist in *Comparison* and *Preference*, and so what belongs to every body, belongs to no body; and because the *Rate* that is commonly set upon a Man, is taken from what he is able to do without the Assistance of others (h). On the other hand, the further *Ignominy* spreads, the lighter it seems, and the easier it is supported. Now this *Intensive Esteem* also may be consider'd, Either with regard to Such Persons as live in a *Liberty of Nature*; or Such as are *Members of the Same Commonwealth*. But I shall now proceed only to examine the *Foundations* of this *Intenseness* or *Eminence*, as They fall under these Two Considerations. First, As they produce barely an *Aptitude* or *Disposition* in Men to receive *Honours* from Others; and Secondly, as They give them a *Proper Right* to demand *Honour* as their *Due*.

XII. The *Foundations* of *Intensive Esteem* in *General* are all those Things which discover, or are supposed to imply extraordinary Excellence or Perfection of any Kind (i). The Effects of which are consonant to the *Laws of Nature* and the Ends of *Civil Government*. For 'tis unusual to see *Persons* of dissolute Morals and *Eminent* for Nothing but their Vices, *celebrated* and *admired* by the Multitude. So in particular, are Men of unusual Strength and Abilities at Eating and Drinking (k); of ex-

(a) Vid. Tacit. Ann. XIV. 62. Euripides, Helena, v. 106, 107. Nor for my Brother can I bear that Stain. Add the Story of Anton. Perez in Thuanus, l. 104. (b) Add. Marselaer. Legat. l. 1. c. 33. p. m. 200.

(c) See Cornel. Nepos. Alcibiad. c. 6. f. 5. Libanius, Orat. 7. To dissolve, and undo things that are already done, is what we reckon among things impossible; but to take off Ignominy from them that are in Disgrace, is not so difficult a Task; and you are the only Physician that can cure this Disease: Speaking to Julian the Emperor. See Justin, B. 5. c. 4. (d) Aristot. Nicom. l. 1. c. 3. We ought to think the Honour is rather in those that Honour, than them that are Honour'd. (e) Vid. John VIII. v. 54. (f) Leviath. c. 10.

(g) See above in B. 7. c. 1. f. 2. towards the End. (h) Hobbes de Cive, c. 1. f. 2. (i) Cic. de Nat. Deor. l. 1. c. 17. Every thing that excels, may justly command a Veneration.

(k) Such as Juvenal describes, Sat. IV. v. 139, 140.

Nulli major fuit usus edendi  
Tempestate mea.

In Arts of Eating, none more early Train'd;  
None, in my Time, had equal Skill attain'd. Mr. Dryden.

Aristoph. Acharnens. Act. 1. Sc. 2. v. 35, 36. The barbarous People value Men only, as they can Eat and Drink most.

travagant, insatiable Lust; of mad, rash, ungovernable Humours; dextrous, ingenious; crafty, artful Villains; and in short, All Mifcreants whatever, that are arriv'd at some signal Proficiency, and seem to be Leaders in their several Vices. But who, the more They are accomplish'd in their different vile Practices, will appear only the more insupportably Wicked to all the good and sober part of Mankind (a). It may possibly require much *strength of Body*, and readiness of *Parts* to be compleatly Vicious; But 'tis also certain, that Vice will govern with greater Power and Violence, where there is more *Vigour* and *stronger Appetites* to entertain and support it. From All Which it is easie to infer, that *Commendation* and *Glory* must be *rated* only by the *Valuation* of the Persons We receive it from. And therefore, that the greatest *Commendation* is that which comes from Persons that deserve it themselves; And consequently, that a *Wise Man* will set no value upon their Praise, (as M. Antoninus saith,) who cannot so much as appear pleasing to themselves (b). But in particular, the *Foundations* of This *Esteem* are such as These; *Perspicacity* of Mind, *Parts* and *Abilities* capable of much Improvement and Variety of Knowledge, especially when great Capacities are answered by great Attainments. A Judgment turn'd for Business, easily discerning the true State of things, and difficultly imposed upon (c). *Steadiness* of Resolution, unshaken and unmov'd at External Accidents, above fear, and beyond the force of *Temptation*. *Eloquence*, or the Power of expressing the Thoughts with much fluency of Words, and gracefulness of Utterance. And next to These, *Strength*, *Beauty*, *Comeliness*, and Good *Proportion* of Body; as these may be suppos'd to be either Instruments, or Promises and Signs of certain Graces and Perfections in the Mind (d). Hence it has been vulgarly thought, that extraordinary *Tallness* of Body, implies a Mind and Person *Great* and *Noble*. And the *Gods* and *Heroes* were therefore represented upon the *Stage* in the *Buskin*, that the *Actors* might appear of an unusual Size. And 'tis observable, that there are many Men that wish to be *Taller* than they are; but that there are very few that would be content to lose an Inch of their *Stature*. But how ridiculous soever this Opinion seems to be, it prevail'd so far, that upon the force of it, the *Ethiopians*, (as *Herodotus* saith (e)) chose their *Kings* by a certain *Measure*. A Method

of Election, which would no doubt have been much approved by the *Indian*, mention'd in *Montaign*, who happening to be at *Roan* while the *Court* was there, in the Reign of *Charles IX.* said, that he thought it very strange so many Tall Men with long Beards, and so bravely arm'd, as They were that stood about the King's Person, (meaning the *Swiss-Guards*) should be content to obey a Beardless Boy, and that he wonder'd they did not choose One of them King (f). But it is often seen (as the *Poet* says) That,

— *Natura breves animis ingentibus artus,  
Finxerit.* —

Nature large Souls in little Room confines (g).

And that (h),

— *Ἄνερον τε  
Ἄπειρον τε πλείονα, μέγαν δ' εἰς ἑδὴν ἀέξει  
Ἄνερον, οἱ μὲν οἱ πικρὴν ἔστι μῆτις ἔπι.]*

'Tis fond to hope Success from Strength or Might;  
Except with Force, Prudence and Art unite.

But besides These Foundations of *Intensive Esteem*, there are also others to be mention'd, such as the *Goods of Fortune* (as they are call'd) which seem either to suppose Industry, Wit, and Prudence necessary to obtain them, or to promise Power, or to supply Matter to do Great Things. But That which advances Reputation most, and is the *Foundation* of the Highest and most *Intense Esteem*, is *Good Success*, and *Fortune* in Great and *Important Actions*. This first of all seeming to suppose *Intrinsic Worth* and *Excellence*, and then to demonstrate the Advantages that arise from it, and the Lawful Ends it may and has been applied to (i). And as the *Fame* of such *Achievements* gains Belief in the World, it is properly call'd *Renown*. A *Reputation* of particular *Prudence* and *Conduct* in Difficulties relating to Common Life and Practice, or to *Speculative Abstracted Truths*, is what is usually call'd *Authority*: which others more fully call an *Opinion of greater Knowledge*, join'd with *Probity* and *Sincerity*. And hence those *Degrees of Esteem* which *Age* is thought to confer, are *founded* upon nothing more than the common Perswasion, that *Experience* and long Observation upon Business and Things, gene-

(a) Philo Judæus de Migrat. Abrahami. p. 413. A. Ed. Paris. To Excel many Things that are Bad, is only a more famous Infamy. Arrian Epietet. l. 3. c. 14. If you tell me you can Kick with a great deal of Strength; I answer, You value your self upon that which belongs to an Ass. (b) M. Ant. l. 3. c. 4.

(c) Vid. Ecclesiast. IX. 15. 1 Kings III. 28.

(d) Vid. Virg. Æneid. l. 5. v. 344. Isocrat. in Encom. Helenæ. Tho' he is there a little too much an Orator. Lord Bacon's Essays, c. 41. 42.

(e) Thalia. Vid. Themest. Orat. 14.

(f) Montaign's Essays, l. 1. c. 30. Add 1 Sam. X. 23, 24. and here also we may apply to this sense, that of Oppian, Cyneg. l. 3. c. 68.

Μείον ἄνδρ' μείζων τελέθει, μέγαλοισ' ἢ μέγαν.

The Great excels the Less, the Less the Great.

(g) Claudian, de Bello Getico, v. 584. (h) Q. Calaber, l. 5. (i) Aristot. Rhet. l. 1. c. 3. 'Tis just to Honour those that do Good, but not such as barely have it in their Power. Pind. Olym. Od. 6. v. 123, 124. τεκμαίρου γρημ' ἔργων, The Work discovers what the Author is.

rally produce *Caution* and *Prudence* (a); tho' it is not to be denied, that there are Instances where *Grey Hairs* are not *signs* of *Wisdom* (b). But now on the Other hand, Women generally desire rather the Complements of *Youth* and *Beauty*, than the Respect and Honours paid to *Age*. And therefore *Lais*, when she grew Old, dedicated her *Looking-Glass* to *Venus*, Adding as it is in the *Epigram* (c):

— ἐπι τῆν ἡρὸν ὀφθαλμοῖς

οὐκ ἐδέλω' οἷν δ' ὡς παρ' ὅ, ἐ δ' ὡς αἰμα.

The Face I once could boast no Glass can show,  
And that I now have left I would not know.

The *Roman Law* seems to allow more *Worth* and greater *Dignity* to *Men* than *Women* (d). Tho' in general, there are some *Foundations* of *Esteem* common to both Sexes. And there are others which are particular to the *Women*, such as the several *Accomplishments* of *Vertues* and *Duties* peculiar to their *Sex*. And there are Others again, which are *borrowed* and *derived* to them, when they are said to *shine with the Rays of their Husbands* (e); or when they Value themselves upon the *Number* or *Worth* of their *Children* (f).

XIII. From all which it readily appears what Judgment may be made upon what *Hobbes* says in the X. Chap. of his *Leviathan*, where he reduces all the *Foundations* of *Honour* or *Intensive Esteem* to *Power*, which he calls a *Possession of present Means*, to obtain some *apparent future Good*. And this he divides into *Natural* and *Instrumental*. *Natural Power* (he says) consists in the *Eminence* of the *Faculties* of *Body* or *Mind*, as extraordinary *Strength*, *Beauty*, *Prudence*, *Arts*, *Eloquence*,

*Liberality*, *Nobility*, and the like. *Instrumental Powers* are those, which being acquired by these or by *Fortune*, are the *Means* and *Instruments* of acquiring more, as *Riches*, *Reputation*, *Friends*, and good *Luck*; and in short, any *Quality* whatever, or the *Reputation* of any such *Quality*, as makes a Man be *lov'd*, or *fear'd* of many. And then he defines *Worth*, or *Dignity*; That it is the value or price of a Man, or as much as would be given for the use of his *Power*. And the manifestation of that Value we set on one another is that, he saith, which is call'd *Honouring* and *Dishonouring*. Thus to value at an *high Rate*, is to *Honour* a Man; at a *low Rate*, is to *Dishonour* him. *Afterwards* he recounts the natural *Tokens*, or ways of *Honour*, as to pray to another for *Aid*, to *Obey*, to give great *Gifts* (g), to be sedulous in promoting another's *Good*, to give way or place to another in any *Commodity*; to shew any sign of *love* or *fear*, to *praise*, *magnify*, or call *happy*, to speak to another with *Confidenciation*, to appear before him with *Decency* and *Humility*, to *believe*, to *trust*, to *relied* on another, to *hearken*, to *counsel* or *discourse* of what kind soever, to *agree* with in *Opinion*, to *imitate*, to *honour* those another *Honours*, to employ in *Counsels* or *Actions* of *Difficulty*. And farther, *Civil Dignity according to him*, is that Value which is set on a Man by the *Common-wealth*, which is understood by *Offices* of *Command*, *Judicature*, *publick Employment*, or by *Names* or *Titles*, introduced for *distinction* of such value. And he rightly observes, that the *Common-wealth* may make whatsoever it pleases to stand for *Signs of Honour*, tho' it be otherwise in its own nature *indifferent*; as for instance, it

(a) Vid. D. L. 50. t. 6. l. 5. init. de Jure Immunitatis. Q. Calaber, l. 5.

Αἰεὶ δ' ἐν βελήσι γέρον πολυῖδρις ἀμείνων  
Ὀπλοτέρη πέλξ ἀνδρῶν, ἐπεὶ μάλα μὲλα οἶδε.

Diod. Sicul. l. 19. c. 34. It seems more natural, to pay greater Reverence and Respect to Aged, than to young People. Oppian. Halieut. l. 1. v. 683. γῆρας γ' ἐναίσιμον ἀνδρῶν ἰθυσίον, Age makes Men venerably Great.

(b) Such as we apply that of Ovid Metam. l. 9. v. 436, 437.

— Qui propter amara senectæ.

Pondera despicitur, nec quo prius, ordine regnat.

And as Lucan, l. 1. v. 135. expresseth it:

— Stat magni nominis umbra:

And therefore Horace saith very well, Ep. l. 1. Ep. 1. v. 8, 9.

Solve senescentem mature sanus equum, ne  
Peccat ad extremum ridendus, & ilia ducat.

Antiphanes. Life is like Wine, when it runs low, it will turn fowre. Add Charron de la Sagesse, l. 1. c. 35. f. 5. Strabo, l. 15. p. 488. The *Indians* allow no Pre-eminence to the Aged, unless their *Prudence* deserve it. Philo de Abrahamo, p. 387. A Man ought not to be call'd Old from the time he hath liv'd, but from the way he hath spent his Life in. For many that have continued a long course of Years in ill Practices, can only be call'd long liv'd Boys. And it is sometimes true, as Varro saith, de re Rustica, l. 2. c. 2. That is a better Age which is attended with Hopes, than that which is follow'd by Death. Quint. Inst. Orat. l. 2. c. 1. p. 104. We ought not to value any one according to his Age, but according to the Improvements he hath made. Isocrat. in Archidam. init. It is not our Years, but our Parts and Industry that makes us wiser than others. Philostrat. in Vit. Apollon. Thyæn. l. 6. c. 3. p. 287. D. Youth doth not hinder a Man from seeing things clearer than even old Age it self.

(c) Antholog. l. 6. Quintil. Declam. 306. p. 462. There is nothing to be loved in an old Woman, but the Memory of what she was. Add Ld. Bacon's Essays, c. 40.

(d) L. 1. t. 9 l. 1. D. de Senatoribus. Add. Jac. Godofred. de præcedentia, part. 1. c. 5. f. 35.

(e) Vide l. 8. D. de Senatoribus, ubi supra. (f) Vide Ovid. Metam. l. 6. fab. 4. v. 127. & seqq. Valer. Max. l. 4. c. 4. f. 1. Plut. in C. Gracch. Vide Buchanan. Rerum Scotic. l. 12. init. Orat. Kennedi.

(g) And upon this Foundation I suppose, (tho' the Respect intended, was oddly express'd) the Prince of Zamaga in Africa, as Leo Africanus, l. 1. relates it, kill'd a great Number of Camels and Ostriches, to entertain his Guests; which sort of Provision they desired him to spare, he told them, that he should not deal civilly by them, if he treated Guests he thought so Noble, and that he had never seen before, with only the lesser sort of Animals.

‘ was a sign of Honour among the *Persians*, to be conducted through the Streets in the King’s Garments, upon one of the King’s Horſes (a), (as it is alſo to wear certain Marks or Badges). Thus the *Chinese* ſalute with the Head and Hand; the *Japoneſe* by putting off their Slippers. The *Chinese* always riſe to any Perſon they deſign to Honour. They of *Japan* pay their Honours ſitting on the Pavement, and think it Rudeneſs, and Ill Breeding to ſtand when they perform their Ceremonies (b). However all this be, that Notion of his, that Honours conſiſt ſolely in the Opinion of Power, is by no means to be admitted; neither what he infers from thence, ‘ That it doth not alter the Caſe of Honours, whether an Action (ſo it be great and difficult, and conſequently a ſign of much Power) be juſt or unjuſt. And that therefore the ancient *Heathens* did not think they diſhonoured, but greatly honoured their Gods, when they introduced them in their Poems, committing Rapes, Adulteries, Thefts, and other great, but unjuſt or unclean Acts. For tho’ it might be granted, that the Foundations of Honours may ſo far, be properly enough reduced to Power, namely, as they are naturally apt to produce ſome Effect or other in Human Life; ſince what is of that dull, unactive Nature, as will produce no Effect either Good or Bad, ſeems to be capable of having no Value one way or other ſet upon it: Yet that Power alone, without Relation to, or Conjunction with Goodneſs, ſhould be the Proper and Natural Foundation of real Honour, is what is contrary to Reason, and *Hobbes* himſelf: For in his Book *De Cive*, c. 15. §. 9. he gives this Definition of Honour; that *It is an Opinion of the Power of Another in Conjunction with Goodneſs*. And thence he infers, that *There are Three Affections neceſſarily conſequent upon Honour; Love, that bears relation to Goodneſs and Hope, and Fear, that have Regard to Power;*

and thus That only is *True Honour*, which is attended with all theſe *Three Affections* together. Fear alone, excited by a *Power* determined to *Evil*, can never be look’d upon to be a *Sign of Honour*. For *Fear* hath always a mixture of *Hatred* in it; and where a Man bates, he naturally wiſheth *Harm*, and *Ruine*, and not *Honour* (c). Thus by the *Chriſtian Religion* we are affured of the great *Power* of the *Devil*, but that it is utterly averſe to all *Goodneſs*, and always bent upon all *Evil*; but certainly no Man in his Senſes can ſuppoſe that he deſerves *Honour* upon that Account. And therefore, *he himſelf*, when he tempted our *Saviour*, did not ſhow him his *Force* and *Power*, but his *Gifts*, the *Glories* and *Kingdoms* of the World, *Matt. IV. 8, 9*. Nor can any Man of Senſe think it a good reaſon, which the People of ſome Barbarous Countries in the *Indies* give for their Worſhipping the *Devil*, that he ſhould do them no *Harm*. And therefore alſo methinks I have no Patience to ſee *Hobbes* mentioning *Flattery* among the reſt of his *Natural Signs of Honour*. For *Flattery* in every Kind of it implies and ſuppoſes ſome *Deficiency*, or *Blemiſh*, both in the Perſon that gives, and in him that receives it; and is an *Act* and *Species of Scorn* and *Deriſion*, without the leaſt mixture of *Love* or *Sincerity* in it (d). But as to the *Fables* of the *Poets*, there are ſome Men indeed that think, that they imply no more than that the *Gods* are above all the Confinement of *Laws*. And Others rather ſuppoſe (e), that *All was Mystery in them, and that many ſecret Truths were conceal’d under the Diſguiſe of thoſe Vices and Abſurdities*. But whatever they make of them, it will never by me be conceivable, that *Rapes* and *Adulteries* could be an *Honour* to the *Gods*, any more than they would be to any ordinary *Mortal* here on Earth (f).

XIV. But after all, theſe Foundations of In-

(a) *Eſther*, VI. 8. (b) *Bern. Varen. Japon. Deſcript.* p. 21. Add *Neuhof.* in *Gen. Deſcript. China*, c. 4. Vid. *Rochefort. Deſcript. Antill.* part 2. c. 19. where alſo he tells us of ſome unuſual ſigns of Honour.

(c) *Silius Italicus*, lib. 1. v. 149.

— Et metui demens credebatur honorem.

— And vainly thought it Honour to be Fear’d.

(d) And therefore *Lucan*, l. 5. v. 385, 386. calls it, — Voces per quas jam tempore tanto Mentimur dominis.

The Words with which we have long time abus’d Our Princes. —

Vid. *Plutarch. de adulator. & amici discrimine.* *Pſcennius Niger* in *Spartianus*, c. 11. when one was preparing to addreſs him with a *Panegyrick* upon his being made *Emperour*, ſtop’d him by ſaying, That he ought to write an *Oration* in Praise of *Marius*, or *Hannibal*, or any one of the famous ancient *Generals*, and recommend their *Brave Actions* to the Imitation of the preſent Age. For to commend Perſons that are living, added he, is only to deride and expoſe them, and eſpecially *Emperours*, ſince ’tis evident, what you may hope, or what fear from them, ſince they have the *Power of the Laws*, can do as they pleaſe, and take away your *Lives*, or ſend you into *Baniſhment*.

(e) *Salluſtius Philoſoph.* de diis & mundo, c. 3.

(f) *Pindar ſays very well*, *Olymp. Od. 1. 55* ἀνδρῶν φάμεν ἑοικὸς ἀμφοὶ δαμόνων καλὰ. Men ought to ſpeak with Reverence of the *Gods*. *Iſocrates* in *laudat Buſrid.* p. 395. calls theſe *Fables* *Blasphemies*, by which (ſaith he) they boldly fix ſuch things upon the *Gods*, as no Body would dare ſpeak of his *Enemy*. For they do not only charge them with *Thefts*, *Adulteries*, and *Slavery* to Men; but accuſe them further, of devouring their *Children*, depriving *Fathers* of their *Genitals*, *Copulation* with *Mothers*, and a *Thouſand* other wicked *Actions*. The *Authors* of which *Stories* were not indeed puniſh’d as they deſerv’d, but yet neither did they altogether eſcape; for ſome of them were *Stroalers*, *Vagabonds*, and *Beggars*, others were ſtricken *Blind*, and others were driven out of their own *Country*, and forced to make *War* continually upon their *Relations* and *Friends*; and *Orpheus* the chief *Inventor* of theſe *Fables*, was torn to pieces. *Seneca* de *brevitat. Vitæ*, c. 16. To make the *Gods* *Authors* of *Vice*, what is it but to encourage and inflame our own *Luſts*, and to bring the *Example* of the *Deities* for our *Liberty* and *Excufe*. *Fulgentius Mytholog.* l. 1. p. 55, &c. If the *Gods* were guilty of *Theft*, *Justice* would have nothing to do with *Criminals* or *Crimes*, ſince they would be countenanc’d by *Heaven*.

*sensitive Esteem*, produce only an *Imperfect Right* to demand *Honour* and *Respect* from others, so that if a Man *deny* it where it is really *deserv'd*, he cannot be said to have done an *Injury*, but only to have been guilty of some *Discourtesy* or *Incivility*: For among Persons that live in a *Liberty of Nature*, where All are *Equal*, it doth not appear how any Man can pretend *Right* to demand *Honour* from another; since from that *Love* every Man naturally bears to himself, it is very easy for him to *imagine* that there are *Qualities* or *Endowments* in himself, *equal* or perhaps *superiour* to those which others *value* themselves upon. For instance, One Man thinks his *Age* deserves *Reverence* and *Esteem*; Another, that *Youth* and *Vigour* have a much better *Title* to it (a). The Hopes and Expectations of Some, raise them to as great a Pitch of *Vanity*, as the real Success of Others. Some *value* themselves upon *Strength of Body*; Others think *Wit* and *Prudence*, the Endowments of the Mind, much *Nobler Qualities* (b). This Man measures his *Worth* by the *Largeness* of his *Fortune*, Another by an *Easiness* and *Freedom* of Mind, which he thinks equal to all the *Wealth* and *Opulence* in the World. Some presume upon their *Learning*; Others will suppose that there is nothing *True and Real* in *Human Knowledge*, more than *Resolution*, *Fidelity*, and *Sincerity*; the τὸ βέλαιον ἢ πῖσόν ἢ ἴπνεις, as *Plato* states it (c). Some insist upon the *Honours* they have attain'd, Others satisfy themselves that *Honour* is not always paid where it is *deserv'd*, or *deserv'd* where it is paid (d). And others set little *Value* upon *Greatness of Birth*, and despise it when it is not attended with an answerable *Greatness* of *Fortune* (e). And certainly the *Wiser part* of Mankind will always think it as false a *Method*, to value (1) Men by their *Riches*, *Dignities* or *Honours*, or by Things *External* to them, as it would be to take the *Worth* of *Horses* from the fine *Furniture* which may belong to them. But besides, since *Honour* is then properly paid, when a Man acknowledges *superiour* Excellencies in Another, and pays some *voluntary* Submissions to him upon that score; and since no Man can be *forced* to pay This by outward *Violence*, that *Method* being more likely to confirm him rather in an obstinate *Refusal* of them; it is evident, that it is a *Mistake* to allow these *Foundations* the *Force* of any such *perfect Right* which might be asserted by *Violence* and *Arms*. For the *Respect* a Man pays to Another upon

*Compulsion* and *Command*, is no *Sign* of any *Internal Reverence* he has for him, but only that he is afraid of *Punishment*. And further, since *External Signs* of *Honour*, unless they proceed from *Submission* of Mind, are to be call'd *Show* and *Mockery* rather than *Honour*, it would be *Folly* to threaten *Violence* when they are denied; especially if the Person from whom they are expected declares, that it is not out of *Contempt* that he omits to pay the *Formalities* of his *Respect*, but only because he would enjoy his *Liberty*, and not be *forced* to do that which ought to be left to his own *Pleasure* and *Courtesie*. And therefore the *Scythian Ambassadors* told *Alexander the Great*, 'that They hoped it was excusable in them 'that lived in *Desarts*, not to know who He 'was, and whence He came. And *Ariovistus* in *Cæsar's Commentaries*, tells *Cæsar*, 'That if 'He had been to desire any thing for himself, 'He would have attended him in Person, and 'that He could not but expect that *Cæsar* 'should show him the same *Respect* (f). From all which, it seems to be evident, that tho' it be agreeable to *Natural Reason*, that *Honours* should be paid to Persons of *Superiour Excellencies*; or further, that tho' it might be also allow'd, that it is no less a *Command* of the *Law of Nature* to honour Persons of *Worth*; yet still that *this Duty* must be One of those, which a Man hath no *Right* to demand from Others, but which must be left entirely to their *Good Nature* and *Civility*. But when a Man pretends *Right* to demand *Honour*, or any *Sign* of it from Another, 'tis necessary he should either have *Power* and *Authority* over him, or Produce some *Compact* for his *Right*, or Prove it by some *Law* made or approved by their *Common Lord* and *Master*. *Mandeflo* in his *Travels* (g) relates, That in a *Treaty of Peace*, after a long War between the *Portuguese* and the King of *Cochin*, it was a long time before the *Disputes* on each side could be brought to a *Conclusion*, because the *Indian Nobles* insisted, that the *Portuguese* should give them the *Way*, as the *Common People* of their own Country were obliged to do. But that the *Portuguese* refusing such dishonourable *Terms*, it was agreed at length, that the *Debate* should be decided by *single Combat*, in which the *Victory* happening to the *Portuguese*, the *Indian Nobility* were obliged to give the *Way* to the *Portuguese*, and to stand still till they were pass'd by.

XV. But however, between *Private Men*, certainly the *Noblest Contest* for *Honour* and

(a) *Pind.* Olymp. Od. 4. towards the End.

And Youth sometimes with hoary Hairs  
Before the Noon of Life is crown'd.

(b) *Sophocl.* Ajax. Flagell. p. 69. Ed. H. Steph.

The strongest have not still the best Success,  
But Prudence never is unfortunate.

(c) *Plato.* Ep. X.

(d) *Cic.* Ep. ad Fam. l. 3. Epist. 13.

(e) *Euripid.* Phœniss. v. 445. & *Electra.* v. 37, 38.

Ααυτοῖσις γένος γε. Χρημάτων δὲ πτωχότες.  
Noble in Birth, but miserably Poor.

(1) See Mr. *Barbeyrac's* Fourth Note upon this Section.

(f) *Cæs.* de B. G. l. 1. c. 34. And *Vologeses*, King of the *Parthians*, answer'd *Nero*, when he sent for him almost in the same manner, It is easier for you to pass so great a Sea, than me; when your are in *Asia*, we shall easily agree when to meet. *Xiphilinus* Epit. *Dionis.*

(g) *Mandeflo* Itin. part. 2.

*Eminence*, would be to dispute who should express the greatest readiness to pay Honour to Others, or most Modesty in declining it themselves (1). And it is ridiculous enough for Men to grow warm and angry in a Contention about outward Honour; especially when there is little or no Profit or Advantage to be made by it, and when it may end perhaps like the *Dispute* mentioned in the *Epigram* (a), *Who only shall go thorough the Dirt first*. It was a Good Determination enough which a certain Prince made, when Two of the meanest of his Servants had quarrel'd which should take Place at Church, That the Greatest Fool should Sit first. For as to what *Quintilian* says, that a *poor Man's Honour is his best Estate* (b), it must be understood only of *simple Esteem*. But between *Princes* and *Nations*, the Disputes about *Eminence* of *Worth* and *Dignity*, and the *Precedence* which depends upon it, have generally and in all Ages been managed with greater show of Reason, and stronger Pretences. The Arguments usually urged in these Controversies will perhaps deserve closer Consideration. Thus much therefore is beyond dispute, that where a *Prince* depends upon *Another* of *Superiour Power*, the Greater is the most *Honourable*, and has a *perfect Right* to *Precedence*; tho' perhaps the same *Title* may be Common to Both of them. Thus there are Instances of *Greater Kings* that have Others call'd *Kings* under them, tho' in Reality they are no more than *Magistrates* and *Governours* of *Provinces*. Some Princes do *Homage* to Others for their *Kingdoms*, as *Feudal*, and there are Others that hold theirs by other *Titles*. So in *Tacitus's* Life of *Agri-cola*, 'tis said to be an *old receiv'd Art* of Rome, to make and maintain *Kings* to be their *Instruments of Slavery*. And thus *Adherbal*, in *Sal-lust*, says, that when his Father *Micipsa* died, he commanded him to think nothing in the *Kingdom* of *Numidia* his own, but the *Administration* of it, and that the *Right* of it belong'd to the *Roman Senate* (c). And so also a *Prince*, that has made an *Unequal League* with *Another*, doth by that very *Act* acknowledge a *Superiority* of *Worth* and *Dignity* in the *Other*; since he obliges himself to pay more *Respect* than will be given. And it is, I think, also further clear, that where a *Prince* hath obtain'd against *Another* a *Right* of *Superiority* of *Dignity* or *Precedence*, either for his own *Person*, or as *Head* of such a *State* or *Common-wealth*, whether by *Compact* or *Custom*, and such a sort of *Sufferance*, as no other probable Account can be given of, than that he was allowed to be the

*Greater Prince*; that *Right* may be infilted on and maintained, as long as that *Prince* lives, who is as it were, the *Character* or *Mark* of the *Dignity*, and under whom that *Right* was at first obtain'd (d).

XVI. But where no such *Right* has been already fix'd, there variety of Arguments are used to prove *Superiority* of *Eminence* and *Dignity*. The *Antiquity* of *Kingdoms*, *Families* and *Governments*, the *Extent*, *Riches*, and *Power* of *Dominions*, the *Quality* of that *Power* which the *Prince* holds over his *Subjects*, and the *Magnificence* of his *Title* are the Common and General *Topicks*. That *Antiquity* adds a sort of *Reverence* and *Veneration* to *States* and *Families*, is an Opinion commonly receiv'd. And they that endeavour to support themselves upon the Strength of it, usually urge, that they enjoy'd their *Dignity* in full Lustre long ago, when other *Kingdoms* were subject to the basest *Slavery*; or, it may be, when the *Family* which now wears the *Crown*, and *Triumphs* so Insolently in its new *Honour*, lay undistinguish'd among the Common Herd of the People. That 'tis unpardonable *Arrogance* to dispute *Precedence* with *Princes* whose *Predecessors* might, if they had pleas'd, have made the *Ancestors* of Others their *Slaves*. That it is a sort of a *Natural* and *Universal Law*, that *Things* of *Later* should be *Inferiour* to *Things* of *Earlier* Original. And from hence they usually pass to a pompous Representation of the several Great Actions in *War* and *Peace*, which have been Atchiev'd in that *Kingdom*, by the *Princes* of the *Blood Royal*. Few of which sort those *Upstart Nations* and *Families* can presume to challenge. Moreover, *Power* adds *Terror* to *Reverence*, and makes it not only *Impudence* (2), but *Rashness* and *Folly* to contend for *Honour* with those in whose *Power* it is to do us *Good* or *Harm* as they please. And without dispute, 'tis a certain Way to demand and to obtain *Honour*, to tell the World with *Sword* in *Hand*, that if *They will not*, *THAT shall give it*. Further, 'tis look'd upon to be an *Higher Degree* of *Eminence* to be *Free* from all other *Restraints of Subjection*, but those which are due to *G O D*, the *Supreme Governour* of the World, than to be confin'd by *Human Laws*, and to live under *Ties* of *Compact*. And lastly, since the *Title* is Commonly used to express the *Thing*, the *Magnificence* and *Greatness* of it; That may be supposed also to imply an Argument against *Inferiority* of *Dignity* (e).

XVII. These with Arguments of a like Na-

(1) See Mr. *Montaign's* *Essays*, B. 1. c. 13.

(a) *Mart. Ep.* 10. v. 8. *Per medium pugnas & prior ire lutum*. *Senec. de Ira.* l. 3. c. 37. Because you were placed in a little less honourable Seat, you presently break into a Passion, and are angry with the Master of the Feast; him that invited you, and him that was put above you, How ridiculous is it? What difference is there, what part of the Table you sit at? Can a Seat make a Man more or less Honourable? (b) *Declam.* 252.

(c) *Sallust. Jugurth. Bello.* (d) *Vid. Jac. Godofred. de Præcedentia*, par. 1. c. 1. Add the Dispute between the *French* and *Spanish* *Ambassadors* in *Andr. Maurocenus Hist. Venet.* l. 8. p. 301, &c. & *Memoirs touchant les Ambassadeurs*, by Mr. *Wicquefort*. (2) The greatest part of this Chapter is Word for Word, taken out of our Author's *Dissertation de Existimatione*, which is amongst his *Academical Dissertations*.

(e) *Vid. Andr. Maurocen. Hist. Venet.* l. 12. p. 484. Where he talks of the *Emulation* that happened between the *Princes* of *Italy*, upon *Pius Quintus's* presenting *Cosmus* with the *Title* of *Great Duke* of *Tuscany*. *Vid. Paul. Hist. Concil. Trident.* l. 5. p. m. 402.

ture may perhaps be speciously urged: But after all, it must be confes'd, they can produce no more than an *Imperfect Right*, unless confirm'd by *Compact Express* or *Tacit*, according to receiv'd Custom. And it will be no Difficulty to destroy the Force of these and all such Arguments, by answering, That *Antiquity* alone can have no *Real Honour* in it, since it only implies *Tract of Continuance*, which may be urged for the most *Inconsiderable* Things as well as the most *Valuable*. That all *Kingdoms* are by their own Nature *Free* and *Independent*. And that it is not material to enquire how long they have been so. That it may indeed be allow'd, that when a *Kingdom* hath long continued in a flourishing Condition, the Strength of its *Constitution* and the *Wisdom* of its *Government* ought not to be question'd; and that it need not be denied, that the *Favour* of *Heaven* and the *Bravery* of *Subjects*, was sufficient to Defend them against Foreign Arms. But then, that *Common-wealths* of *Later Growth* may possibly be settled as *Wisely* and *Govern'd* as *Happily*, as those that have stood much Longer; nay, perhaps be Establish'd with greater Wisdom, and enjoy greater Happiness, since the Wise and Good *Institutions* of *Ancient States* and *Common-wealths* generally cost them dear, and they of *Later Date* have the Advantage of seeing and using what Others discovered before them. That the Favours of *Heaven* are not in Human *Disposal*, or certain to be long *Enjoy'd*. But yet that it is not impossible to provide so far, that the *State* may not fall to ruine of it self for want of *Good* and *Wholesome Laws*. In fine, that all things ought to be valued according to their *present State*; what is pass'd we have no more to do with, and what is to come doth not yet concern us. That *distinct States* and *Common-wealths* never unite into *Systems*, or form *General Assemblies*, where it may be necessary to oblige them of *Latest standing* to be content to be placed lowest. All are allow'd to enjoy distinctly their separate Freedom. That the *Government* of any *State* should continue in one particular *Family* for a long Course of *Time*, may be allow'd to be sometimes an Argument that the *Posterity* succeeded and imitated the Vertues of their *Ancestors*; but it must also be allow'd, that great Wealth and Riches only are sufficient Guards, and not easily to be over-power'd. Much also in the long Possession of a *Throne* must be ascribed to

the Disposition and Temper of the *People*, averse to *Change*: And much in the *Succession* of *Good Princes* to the Blessing of *Heaven* alone. But still *Princes* and *States* of later *Origine*, ambitious to be thought *Great*, may easily answer, that they cannot look upon any thing as their Own, which was not got by their own Industry or Power (1). That it is a very easy thing to take Possession of large Estates or Dominions, purchas'd by the Success of Ancestors; but to raise a great Fortune, or an Empire, requires Bravery and Vertue. That Others owe their *Greatness* to the Chance of being Well Born, *They* to their own *Worth* and *Excellencies*. That Others can produce nothing for themselves, but old forgotten *Monuments* of their *Fathers Great Actions*; theirs is no *Borrow'd Lustre*, but the *fresh Acquisitions* of their own Vertue and Valour. Lastly, that no Degree of *Honour* is beyond that of being a *Sovereign Prince*, and that this sets the *Latest Families* upon the Level with those of the most *Ancient Date* (a).

XVIII. As for *Power* indeed, that may often force the Weaker to pay the *Signs of Honour* to the Greater, because it is Madness not to yield to them that have Power to do us Harm when they please. As *Favorinus* in *Spartianus* (b) pleasantly told his Friends (who were angry with him for giving up a *Word* to the Emperor *Hadrian*, that was used in *Good Authors*) *Certainly he ought to be allow'd more Learned than every Man that has Thirty Legions at his Command* (c): But if a *Prince* hath Strength enough to Defend his own Dominions, he cannot be obliged to yield *Precedence* to any others, however superiour in Riches, since he has no reason to be afraid of them, or to ask Relief or Protection from them. For where *Liberty* is equal, a Disproportion in Wealth can make no Difference. And therefore if One *Prince's Territories* be six Hundred Miles in Extent, and Another's but One Hundred, yet the Difference in the *Kingdoms* makes none between the *Sovereigns*; for their *Power* is of the same Nature in the Greater and in the Less; and the *One* may answer the Ends of *Government* as well as the *Other*. Not to say further, that *Power* alone, as it implies Ability to do Harm, doth not include any *Excellence* in it, which is naturally proper to command *sincere Respect*: For all *Respect* hath a mixture of *Love* in it, but *Power* to do Harm can certainly produce nothing but *Hatred* (d).

(1) Nam genus, & proavos, & que non fecimus ipsi,  
Vix ea nostra voco. ———

Ovid. *Metam.* L. 13. v. 140, 141.

(a) Ovid, *De Fast.* L. 5. v. 26.

Quoque die partu est edita, magna fuit.

The Day that gave her Birth first made her Great.

And to this we may apply that of *Arnobius*, l. 2. Is this a new thing which we are engaged in? In time it will be old; is that old in which you are concern'd? In the times when it first began, that also was new.

(b) Hadrianus in *Spartian.* c. 15.

(c) *Juvenal.* Sat. 5. v. 130, 131.

Plurima sunt, que  
Non audent homines perijsa dicera lana.

— No Freedom will from him be born,  
Whose Cloaths are thread-bare, and whose Cloaks are torn.

Mr. Bowles.

(d) Add. *Jacob. Godofred.* d. tit. de precedent. part 1. c. 3.

XIX. Further, *Absolute, Unlimited Power* may perhaps force from *Subjects* greater Degrees of *Respect*, not without a mixture of *Fear*: But with *Sovereign Princes* it can have no such Effect, since they must look upon Another *Prince's Absolute Power*, as it relates to them, to be no more than *Liberty of Nature*, which in it self gives no Man *Pre-eminence* to Another, not *Subject* to him. And since every *Prince* is to be valued, not by his own *Rights* only, but by the State and Condition also of the *Common-wealth* he *Governs*; it will not be difficult to imagine, that a *Limited Monarch* may from *that* enjoy Advantages which will make him *Greater* and more *Considerable*, than a *Prince* entirely *Absolute*. Lastly, *Titles* and *Words* of all sorts, take their *Value* as *Money* doth from *Use* (1). And since the Highest *Dignity* of *Princes* is the *Sovereign Power*, it is sufficient if that be express'd in its *natural simple* Sense, or according to *common Use*. For the *Pomp* or *Modesty* of *Words*, neither can add to, nor lessen the *Thing* (a). So the *Turkish Monarch* is usually called *Emperour*, the *Persian* no more than *King*; yet this Distinction in it self gives no *Preference* one to the other. For an *Affected Multiplicity* of *Titles* added to the *Proper Stile*, seems to have a sort of *Barbarism* in it; and may perhaps strike some *Awe* upon *Inferiour* and *Ignorant Subjects*, but can make no impression upon *Foreign States* and *Princes*. For how was the *Roman Emperour*, for Example, concern'd, Whether *Sapores King of Persia* call'd himself, *Brother of the Sun and Moon*, (as *Ammian. Marcellinus* relates) or of *Saturn* and *Venus* (b)?

XX. From all which it is sufficiently clear, that there is no *perfect Obligation*, which presupposes *Proper Right* in Another, by which a *Prince* really possessed of *Sovereign Power*, is bound to yield *Precedence* to any other *King* or *Prince* as more *Honourable*, however *Superiour* in the *Particulars* before-mention'd, neither is one *Free State* or *Common-wealth*, obliged to yield more, tho' perhaps another is more *Ancient* or more *Powerful*. Nor indeed is a *State Govern'd* by the *Populace*, inferiour in *Dignity* to a *State Govern'd* by a *Prince*, tho' in a *Democracy*, there is no *particular Person* to be compar'd with a *King*. And hence an *Ambassador* from a *free Common-wealth*, is not necessarily obliged to give *Precedence* to an *Ambassador* from a *Crown'd Head*. But because *Vicarious* and *Deriv'd Honour* cannot be supposed to appear with the same *Advantage* as *Original*; and a *Minister* cannot be invest'd with the

same *Dignity* as a *Prince*; and since *free Common-wealths* can never meet in the same *Place* with *Sovereign Princes*, but by their *Ambassadors* and *Deputies*; 'tis evident, that the *Ambassadors* of *free States* ought to yield *Precedence* to all *Crown'd Heads*, and *Sovereign Princes*.

XXI. And this *Equality* between the Persons invest'd with *Sovereign Power*, needs not be any *Objection* against *Interviews*, or *Conferences* to be made either in their own *Persons*, or by their *Ministers*, or against their *Uniting* into an *Establish'd Council*. For if a *Prince* make a *Visit* to Another in a *Foreign Country*, the *Laws of Civility* give the *Stranger* the *Precedence*, except he comes in the *Quality* of a *temporary Subject*. For tho' every *Prince* be *Supreme* in his own *Dominions*, yet *Princes* in the same manner as *Ambassadors*, by a sort of *Fiction*, seem still to continue as *Persons free*, and not within any *Prince's Territories*, to whom and by whose *Consent* they make a *Visit*, without laying aside or disguising their *Quality*. For 'tis certainly *Unadvisable* and *Dangerous*, for a *Prince* to venture *Incognito* into a *Foreign Country*, without having first procur'd *Leave*. 'Tis certain *Gramondus* (c) confidently pronounces, that *it is no violation of any publick Law, to seize and detain disguised Princes*. But I confess I do not see for what reason; unless it be, that to come in *Disguise* without giving *Notice*, may seem to imply some *Suspensions* of, and *Disrespect* to the *Prince* of the *Country*. If *two* or *more Princes* are to meet in a *third Place*, it would not be difficult to dispose *Things* so, that no *Preference* be given to either of them. For the *Roomis* they are to meet in, might be so contriv'd, as to leave it absolutely uncertain, which is the *first* and most *honourable* Place in it. And upon this *View*, *round Tables* have been sometimes used upon such occasions (d). The *Princes* may also declare before-hand, that the *Congress* shall be made without regard to *Precedence*, and that they intend to sit *Promiscuously*, or as they please or happen to place themselves. So *Philostratus* relates of the *Brachmans* of *India* (e), That they appointed no particular *Place* for their *Prince*, (as the *Greeks* and *Romans* would think it necessary to do) but every One sits where he pleases. But this will still be much easier to be done, if *Princes* will please to meet *Incognito*, and without their usual *Pomp* and *Retinue*. Nor could they by any other *Method* more fully declare, that they would not raise *Difficulties* or *Disputes* about the

(1) See *Grot. B. 1. c. 3. f. 10.* (a) *Add. Geor. Bates Elench. motuum nuperorum in Anglia, part 2. p. m. 246, &c. & Author. Cardinalismi, part 1. l. 3. p. m. 375.* (b) *Ammian. Marcellin. l. 17. c. 5. Add. Ibid. l. 23. c. 6.* (c) *Hist. Gall. l. 13.* (d) *Ausonius in ludo septem Sapientum, v. 78, 79, 80.*

*Reſte olim ineptum Delphicus luſit Deus,  
Quærentem, quiſnam primus Sapientum foret:  
Ut in orbe tereti nomina eorum inſcriberet,  
Ne primus eſſet, ne velimus quiſpiam.*

One to *Apollo* once this *Question* brought,  
Which he the first of all the *Sages* thought?  
Write in a *Ring* their *Names*, the *God* reply'd  
And equal *Dignity* to each, divide.

(e) *De Vita Apollon. Thyan. l. 3. c. 8. p. 134. C. D. Lucian. Epist. Sat. ad divit. p. 628.* 'tis easiest and most agreeable in *Entertainments*, that all should be *Equal*. *Add Athenæus Dipsoph. l. 1. c. 4.*

*Points of Dignity.* Or if this *Method* be not thought the best, it may be determin'd by *Lot*; and that two ways, either with *Condition* that every *Prince* shall for the future remain contented with what *place Chance* determines for him; or else that every *Prince* in *turn*, shall succeed in a certain *Order* settled by *Lot*. But *Disputes* may be much more easily ended, if the *Congress* be form'd only by *Ambassadors*; especially since there is one *Way* more of preventing *Difficulties* among *them*, namely, if the several *Princes* their *Masters* send them with *Characters* of different *Value*. For since different *Degrees* of *Dignity* arise purely by *Arbitrary* Imposition, they may easily be varied several *Ways* (a). But here it is to be observ'd, that the *Value* of such *Characters* must be determined by the *Common Consent* of *Sovereign Princes* (b). For if One *single Prince* should by his own *Authority* alone, create a *New Character*, to bestow upon his *Ministers*, whenever the *Ambassador* makes his *Demand* for any such particular *Honour* from Others, They may justly except against his *Master's* Power to *oblige* them to pay it. But after all, it must be confes'd, that such an *Evenness* of Temper as *Agefilaus* express'd, when he was placed in an *obscure Place* in the *Theatre*, is often much the happiest, in preventing *Disputes*: For as he said, *It should not be thought that the Place adds Honour to the Man, but the Man to the Place* (c). It was a good *Method* which *Abbas*, *King of Persia*, took to prevent differences at a *publick Entertainment*; them that were inclin'd to the *Persian Perswasion* he placed on his *Right Hand*; those of the *Turkish* he seated on his *Left*, because the *Persians* thought the *Right Hand* the most *Honourable*, and the *Turks* the *Left* (d). And it was an *Artful Stratagem* enough, which *Alphonsus XI.* used to silence an old *Dispute* for *Precedence*, between the *two Towns* of *Burgos* and *Toledo*; when he came to ask their *Opinions* in *Council*, before any mention of their *Dispute* began; they of *Toledo* I know, *saieth he*, are ready to comply with my *Commands*; let them of *Burgos* speak; which immediately silenced Both; Both equally thinking themselves *Preferred* to each other; those of *Toledo*, because the *King* spoke in their *Name* First; and they of *Burgos*, because they were *Commanded* to speak for themselves First (e).

XXII. But if a *Lasting Society* is to be erected between a *Number* of *Equals*; and every *Particular Member* be desirous that the *Equality* should continue, but unwilling to admit the *Determination* of the *Lot*, or that a *Constant*

*Succession* in *Turn* should prescribe their *Places*; There is another *Method* left resembling the *Chance* of *Lots*, and Which can be no way prejudicial to the *Dignity* of any *Member*; and that is, that Every *Member* should take *Place* in the *Common Assembly*, in the same *Course* and *Order* in which he was *Admitted* into It. And this *Method* is to be *Particularly* observ'd with regard to all *Members* that are admitted into the *Society*, after It is *Established*. For They that at *First* *Constitute* the *Society* had better perhaps take *Place* by *Lot*, or by *common Consent* and *Agreement*. And because it is generally received in *Colleges*, and other *Societies*, that every *Member* is to be *Placed* according to the *Order* of *Admission*, *Grotius* gives it for an *Universal Rule*, that the *Natural Order* between *Fellows* of *Such Societies* is to be *Placed* according as *They were Received* into *them* (f). But it must be observ'd, that in such *Societies* *Priority* or *Posteriority* of *Place* doth not in the least imply *greater* or *less* *Degrees* of *Dignity*, but is only the *Order* of *Equals* in *Honour*. And therefore there is no difference between the *First* and *Last* in that *Respect*. For it is a different *Case*, when the *Preference* is given for *Superiour Eminence* of *Worth* in the *Person* *prefer'd*; as *Ausonius* tells the *Emperour Gratian*, 'Tis no *Dishonour* 'to be *Second*, but of *Two Honourable* Persons 'He that hath the *Precedence* is the most *Honourable* (g). But it is also observ'd by *Grotius* in the *Place* before mention'd, that in *Assemblies* of *Christian Kings* and *People*, met to represent the *Body* of the *Universal Church*, it was the *Custom*, that They that embraced *Christianity* should in all *Religious Assemblies* have the *Precedence* to Others. And upon this bottom Some have taken the *Liberty* to challenge *Precedence*, and claim *Superiority* of *Dignity* as their *Right*, in all Other *Assemblies* of what *Nature* soever. But whatever *Good* *Reasons*, there might be to introduce *Observation* of such an *Order* in those *Sacred Conventions*; yet that the same should be observ'd in All Other *Assemblies*, and that the *Antiquity* of the *Christian Profession* alone should produce such *Pre-eminence* of *Dignity*, is what I can see no *Reason* for. Especially since it is one of the *Commands* of the *Religion*, *In Honour* to prefer *One Another* (h). Besides, in *Councils* The *Clergy* generally were the *Parties Principally* concern'd; the *Lay Persons* appear'd only as *Assistants*, and were to submit to the *Decrees* made by Them. But however this be, it cannot be *Reason*, that because a *Person* in a *Certain Assembly*, for a *Certain*

(a) See Mr. Wicquefort, des Memoirs touchant les Ambassadeurs. Add. Jac. Godofred. de precedentia, part 3. P. Paul. Hist. Con. Trid. The Dispute between the French and Spanish Ambassadors at Trent and Rome, about Precedence, l. 8.

(b) See Mr Wicquefort's Mem. touchant les Ambaf.

(c) Plut. Apoph. Lacon. p. 208. D. Damonides in a like Case said, 'tis very well you have found out a way to make even this place honourable. Ibid. Apoph. Add Plut. Symposiac. l. 1. c. 2, 3. (d) Pet. de Valle, Itin. part. 2. Ep. 5.

(e) Hieron. Osorius de Rebus gestis Eman. l. 1. Add. Gramond. Hist. Gall. l. 3. init. (f) Grot. l. 2. c. 5. §. 21. Add. Boecler. in locum, add. L. 50. t. 3. l. 1. D. de Albo scribendo. L. 12. t. 3. l. 1. C. de Consul. &c. tit. 44. d. l. C. de Tiron. l. 3. C. t. 5. d. l. de Præpos. sacri Cubiculi. l. 1. C. t. 4. d. l. de Præf. Prator. l. 2. C. L. 10. t. 52. l. 10. de Prof. J. Jac. Godofred. part 2. c. 3. §. 17, 18. de precedentia.

(g) Auson. Panegy. ad Grat. c. 24. in fin.

(h) Rom. XII. 10. Phil. II. 3.

*Respect*, which hath no influence upon his *Honour* in general, yields the *Precedence* to another; he is therefore obliged to yield it every where, and when there is no regard had to those *Respects*. And thus there are few *States* or *Common-wealths*, in which there are not particular Persons that are *Members* of several different *Societies*, and who therefore may in *One* be obliged to give *Place* to a *Certain* Person; when out of *That*, or in another, They are known to be his *Superiours*.

XXIII. But however it is evident, that there is that *Force* in *Sovereign Power*, which will always give the Person invested with it, *Absolute right* to the *Preference* to all Persons Subject to it. For without dispute, *Authority* is *Superiour* to *Obedience*; and it must be allowed to be greater, to controul and command the *Wills* of others, than to submit and comply one's self. Nor can a Man have Power to deny *Reverence* and *Regard* to that Person to whom he owes his *Protection*, and Who has power by *Punishments* to compel me to obey him. So that *Government* doth of it self naturally introduce *Inequality* among Men. Tho' it is not unnatural to think, that besides that *Veneration* which is due to the *Place* and *Office* of the *Sovereign*, Good Subjects often suppose themselves obliged to pay other Particular *Marks of Esteem*, to the Particular *Vertues* and *Excellencies* eminent in their *Prince* (a). But it is also further manifest, that the *Greater* and more *Absolute* the *Prince's Power* is, the *Greater* will the *Honour* be, his Subjects pay him. Nay, long Possession of *Sovereign Power*, tho' in it self it can give him no real strength, doth yet wonderfully raise the *Dignity* of the *Prince*. But notwithstanding, *Subjects* may sometimes excel their *Princes* in those *Foundations of Esteem* which produce only an *Imperfect right*. And therefore it was a most extravagant *Vanity* in *Hadrian the Emperour*, to make himself profess'd *Rival* to All the *Best Masters* in the *Arts* they were famous for. And it was ridiculous in *Alexander the Great*, when reading that *Place* in *Homer*, where the *Greeks* wish'd the *Lot* might happen to *Ajax*, or *Diomedes*, or *Agamemnon*, he broke into a *Passion* and said, *He would have kill'd the Person that should have named him last*. For it is no discredit to a *General*, to have *Souldiers* under him of more *Prowess* and *Bravery* than himself (tho' 'tis true, as *Domitian* said, *the Honour of being a Good Commander,*

*is as great as that of being a Good Prince* (b). But among *Subjects* of the *same Common-wealth*, it is left entirely to the *Sovereign* to prescribe the *Measures* and *Limitations* of *Intensive Esteem*; and to grant to *Some Persons* *Perfect Right of Precedence* to Others. And whatever *Station* He thinks fit to assign to any Man, That He may lawfully maintain against any of his *Fellow Subjects*, and That He ought to be satisfied with (c). For as the *Old Centurion* in *Liuy* said (d), *Subjects should think every Post honourable in Service*. And tho' perhaps sometimes undeserving Persons may be prefer'd to Men of *Worth* and *Merit*; yet if a Man should upon that account be uneasy and dissatisfied with his own *State*, or give *them* disturbance in *Theirs*, He Will deserve to be punish'd for contempt of the *Sovereign Authority*. For, as *Terentius* said in *Tacitus* (e), 'It 'is not the *Subjects* business to enquire who 'their *Prince* prefers, or for what reasons, 'Heaven hath placed the supream disposal of 'things in his Hands, and it is their honour to obey (f). But it might seem a good way to silence the complaints of *Ambitious Subjects*, if *Princes*, when They prefer Persons to *Places of Honour*, would always have regard to those *Foundations of Esteem* which were before mentioned; and more especially to the particular *Services* they have done the *Publick*; which to reward with *Eminent Degrees of Esteem*, rather than with *Money* or *Reward* of like Nature, is generally the *Politick Art* of *Princes* (g). But so much the *Rather*, because, except the *Dignity* and *Pre-eminence* of *Great Men* among *Subjects* be measured by the *Benefits* and *Assistance* they give, or at least are capable to give among their *Inferiours*, it will be but *Insignificant*, and without *Reality*. But because, if *Princes* were obliged always to *Place* their *Subjects* according to their *Intrinsic Worth* and *Merit*, The *Trouble* would be infinite to make *Reviews* of them so often as it would be necessary; and besides, that no such *Review* could be made without displeasing the greatest Part of *Them*, since 'tis certain, that the *Generality* of *Men* never consider how many *They* have left below *Them*, but how *Many* *They* still see above *Them*; It might seem perhaps to be the most proper and easiest *Method* to bestow *Honours* upon the *Subjects*, at least upon them of the *Best Rank*, according to the *Offices* They bear in the *Common-wealth* (h). And Then again, it will be easy to pre-

(a) Nestor in Homer Iliad. l. 1. v. 277, &c.

Μήτε σὺ Πηλεΐδ' ἦδ' αὖτ' ἐπιζέμεναι βασιλῆϊ  
'Αχιλλεΐω· ἐπεὶ ἕσσοθ' ὁμοίως ἐμμορε τιμῆς  
Συμπλήρω βασιλῆος ὅτε Ζεὺς κῦδος ἔδωκεν.

Tho' Achilles rather submitted to the Conduct, than the Power or Command of Agamemnon.

(b) Tacitus Agricola, c. 39. (c) Vid. L. 1. t. 14. l. 3. De Offic. Prætoris. (d) l. 42. c. 34.

(e) Ann. VI. c. 8. (f) To this we may apply that of Lucian, Judic. Vocal. 'Tis fit and proper that every Letter should continue in that order in which it was at first placed; and to go out of that, is to break all that is just and equitable. And he that first made these Laws for you, settled this order, by which every Letter was for ever to continue in its own place and dignity. Plin. l. 9. Epist. 5. If the Distinctions between Degrees and Dignities, were mix'd, disorder'd, and confounded with one another, nothing would be more unequal, than Equality it self.

(g) Vid. Xenoph. Cyropæd. l. 8. p. 130. Ed. H. Steph. where he speaks of the order in which Cyrus placed his Friends at an Entertainment. (h) Add Ld. Bacon's Essays, c. 53.

vent Complaints, if none but Men of *Merit*, and Persons well *Qualified* are put into Those *Offices* (a); and if the *Offices* themselves are disposed in a Natural and Proper *Order*. And in *General*; the most just and perfect *Order* of *Offices* seems to be when the *Honours* annex'd to *Offices* are Greater or Less proportionably according to the Nature, Weight, and Publick Importance of the Affairs and Business which belong to the Management of Them; and according as it requires the greatest *Parts* and *Accomplishments* to discharge Them (b). In *Homer*, *Dignity of Office* is prefer'd to that of *Blood*, even of *Natural Bravery and Courage*, For thus *Nestor* tells *Achilles*:

ἴδ' ὅσ' κάρτερός ἐσσι, θεῶν δέ τε γέναίολο μῆτις,  
Ἄλλ' ὄγε φέρτερός ἐστιν, ἐπεὶ μέγ' ἔουσιν ἀνδράσιν (c).

We own you Brave, your Race divine adore,  
Him greater think, because his Power is more.

But It sometimes also happens, that Some *Offices* in the *Common-wealths* have larger shares of *Honour* annexed to them, than of *Authority* and *Power*; and sometimes the quite contrary; Perhaps, for fear, least *Honour* attended with much *Wealth*, and *Power*, might tempt the *Magistrate* to take Arms against the *Common-wealth* (d). But in every *Rank* of *Offices*, Men should be thought More or Less *Honourable*, according to the *Dignity* of the *Employment* They have in It. Now tho' it is unavoidable, that One *Office* will be look'd upon as more *Honourable* than Another; Yet this will be no Reason that All and Every Particular Person, entrusted in the more *Honourable Office*, should therefore challenge *Precedence* from All, and Every Person in the less *Honourable*; but only that the *Highest* Person in the *Inferiour Office*, ought to give *Place* to the *First* in the *Superiour*, but may still have *Preference* to All that are *Subordinate* to the *First*. It is but rarely seen, that the Person gives *Lustre* and *Honour* to the *Office*. So it happen'd once at *Thebes*, to the Office of *Tax-Gatherer*, after *Epaminondas* had born it (e). But as to the *Intrinsic Value* of all marks of *Honour* and *Dignity*, That depends upon the *Vertues* and *Qualifications* of the Persons that wear them (f). And This was what *Antisthenes* meant, when He desired the *Athenians* to make a *Decree*, that *Asses* should be *Horses*. 'For tho', *As They told Him*, Nothing could 'be more contrary to common sense and rea-

son, yet, *As He answer'd*, to Prefer Persons 'to *Places of Trust*, and *Command* in the *Common-wealth*, that are no way qualified for Them, but only by that Publick *Act* and *Declaration*, which puts them into them, is almost as absurd (g). But if the *Subjects* come to an Agreement among themselves, about their *Order of Place*, or if *Custom* hath introduced any particular *Order*, Either Method may be supposed to have the force of *Law*, unless the *Government* except against, or forbid it (h).

XXIV. But if *Comparison* is to be made between *Eminent Men* of different *Common-wealths*, it is clear, that the *Foundations* of *Intensive Esteem*, even where such Persons are concern'd, can produce nothing more than an *Aptitude* to receive *Honour* from others, who have less *Pretensions* to those *Foundations* than themselves. And that Whether the Person of *Greater Eminence* come into a *Foreign Common-wealth*, as a *Traveller* or *Stranger*, or meet Others in a *third Place*: It must be excepted only, if the *Prince* oblige his *Subjects* to give *place* to the *Stranger*; or if the *Dispute* be determined by some *Third Prince* where they meet, or if it be decided by *Agreement* or *Custom*. And therefore the *Dignity* of an *Office*, which a Man bears in his own *Common-wealth*, gives him no *Right* to Prefer himself to the *Subjects* of a *Foreign State* that may perhaps bear *Offices*, which He in his own Country demands *Precedence* upon. For a *Right* which is of force against *Fellow Subjects*, is not therefore of force against all other Persons; for the same reason that the *Laws* of *Foreign Nations* oblige none but their own *Subjects* (i). Nor is it any material *Objection*, that perhaps the *Foreigner* in his *Own Country* may have a greater *Title* than the Person he disputes against. For every *State* and *Common-wealth* may set what *Value* they please (within themselves) upon *Titles* and other *Marks* of *Honour*, whether given by Themselves or Others. Besides, the *Value* of *Offices*, by the *Greatness* of which the *Measures* of *Honour* are generally taken, is different in different *Nations*. And even the most *Beneficial* and *Useful Arts* are not every where equally esteem'd; as it is well known, that in Some *Countries* the *Arts of Peace* are most *Valued*, in Others Those of *War*. Besides, it is particularly observable, that the *Words* by which the different Degrees of *Honour* are express'd, do not only denote different

(a) Otherwise it will fall out, as *Claudian* saith in *Eutropium*, l. 2. v. 322.

Quis non consule tali  
Vilis honos?

(b) *Ovid*. *Metam*. l. 13. v. 366, 367.

Rate[m] qui temperat anteit,  
Remigis officium.

(d) *Vid*. *Bodin*. de repub. l. 3. c. 6. p. m. 501.

(f) *Sallust*. *Jugurth*.

(g) *Diog*. *Laertius*, l. 6.

(h) *Vid*. *L*. 12. t. 8. l. 2. C. ut dignitatum Ordo servetur. And it is a remarkable place in *Suetonius Vespas*. c. 9. That it might be known, that the two Orders were not distinguish'd so much by the Liberties, they might use one another with, as by their *Dignity*; upon a Quarrel that happen'd between a Roman Senator and a Knight, he thus pronounced, That ill Language ought not to be given first to a Senator, but that it was lawful enough to return it, when he began it himself.

(i) Add *Memoires de Wicquesfort touchant les Ambassadeurs*, p. 519.

Honour it self grows mean  
When such a Consul rules.

'Tis more to rule the Helm

Than ply the Oar.

(c) *Hom*. l. 1. *Iliad*. v. 280, 281.

(e) *Vid*. *Plut*. in præcept. gerend. reip. p. 811.

*Dignities* in distinct Common-wealths, but have also sometimes *Greater value* set upon them and sometimes *Less*, even in the same Common-wealths, according to the Alterations of time, which *Raises* or *Lessens*, we know, the *Price* of every thing else. For the *External Signs* of *Esteem* have their determinate *Value* set by the *Imposition* of every Particular Common-wealth; But the *Foundations* of *Intensive Esteem*, taken as they are in their own nature, and in the Estimation of Wise Men, can never lose their *Value*. And therefore the World is every where so just to *Vertue*, to all Celebrated *Arts*, *Functions* and *Employments*, as to pay them *Honour* and *Respect*. But by the Possession of these only, a Man hath no *Right* to demand any Particular *Marks* of *Honour* in *Foreign States*; except He can obtain such a Right by some of those *Ways* before-mentioned. But, because *Marks* of *Honour* are always presumed to be given as *Rewards* of eminent *Vertues*; therefore the *Civiliz'd Part* of the World *Abroad*, generally pay almost the same *degrees* of *Respect* to the *Honours* of *foreign Nations*, that are allowed them at *home* (1). But still they would be thought to do so, more out of *Civility* and *Complaisance*, than from any *perfect Obligation*. But there are also some States that allow but little *Value* to *foreign Honours*. *Cicero* speaking (a) of some Particular *Foreigners*, who were of *noble Families*, does not call them *absolutely Noble*, but says they were (*Domini*) at *home*, or (*apud suos, nobiles*) among their own People, *Noble*; the Meaning of which is, that *foreign Nobility* was not allow'd the same *Value* at *Rome* that it had in its own Common-wealth. What *Cicero* says in another *Place* seems more insolent (b). *If* (says he) *We make a Comparison between the Men, the meanest Citizen of Rome, is Equal to the Greatest Man in Gallia*. The *Honours* that were given Them that Won the *Prize* at the *Olympick Games* in *Ancient Greece*, are well known. But it would have been *Ridiculous* for them to have expected the same in other *Places*, where *Strength* and *Activity* of Body were not in so much *Esteem*.

XXV. *Lastly*, Since almost in every Nation some Degree of *Dignity* is suppos'd to adhere to *Birth*; It will not be improper in this place to Enquire particularly what is implied in *Nobility of Blood*, and what *Value* ought to be set upon it when consider'd in *it self* (c).

And here it will undoubtedly be allow'd, That *Nobility of Birth* doth not of it self bestow better *Constitution* of Body, (though perhaps *Goodness* and *Elegance* of *Diet* may sometimes seem to contribute to it;) Neither does it produce more excellent *Dispositions* of Mind, or a *brighter Wit*, or more *vigorous Understanding*; But all these Endowments may as well attend the *meanest* as the most *noble Extraction*. *Nature* does not take any other Method in giving *Birth* to *noble*, than She does to *common Men*. And *Conjugal Honour* is, or may be kept as *Sacred* among *common People*, as Persons of highest *Quality*. Nor would it be an easy Task to prove, that *noble Families* are less corrupted, or expos'd to *Adulteries*, than the *poor* or *mean* (d). So that if even the *Vertues* of *Parents* could be always suppos'd to be *transfused* into the *Children*, yet it would be extreme Difficult for many *noble Persons* to prove, that their *Blood* descended to them *pure* from the first *Rise* of their *Family*, without *spurious* or *foreign Mixtures* (e). And it is so far from being always true, that

*Fortes creantur fortibus & bonis* (2),

The brave do from the brave and good descend.

And that on the contrary, we see nothing more Common than *Instances* of the *Degeneracy* of the *Children* of the *greatest Men*. 'Our Parents (as *Marius* (f) saith in *Sallust*) may leave us 'all that it is possible for them to leave, Their 'Estates and *Pictures*, and an happy Memory 'of themselves; but their *Vertue* they never 'did nor can leave; for that alone is what can 'neither be given nor received. But further, 'Tis possible that *common Persons* may be as well Educated as the *noble*; and 'tis not unusual to see the Advantages the *Great* and *Rich* have of cultivating and improving their *minds*,

(1) V. *Cicero*. *Orat. in Verr.* 1. 3. c. 23. p. 44. Ed. *Græv.* (a) *Pro M. Fonteio*, c. 8. in *fin.* (b) *Pro L. Flacco*, c. 13. in *fin.* (c) And this *Value*, I believe, is scarce any where higher, than among the *Indians*, according to the Account we have of it in *Orosius*, *De rebus gestis Emanuel.* 1. 2. Who tells us, that if any of the *Inferiour People* chance to touch a *Noble-Man*, they think it a *Stain* upon their *Nobility*, and a *Disgrace* to their *Family*, and revenge it as an *Injury* of the highest Nature, by the *Death* of those unfortunate Persons, that happen'd upon them.

And therefore, he says, All below the Rank of *Nobility*, when they take a *Journey* any whither, are forced to call out and make a *Noise*; and by that, the *Nobles*, having Notice of their coming, command them to break the way, and so the *Meaner People* escape *Death*, and those of *Quality*, the Danger of a perpetual *Blemish* to themselves and *Family*. And as the greatest Crimes do not deprive the one of their *Nobility*, so neither can the greatest *Vertues* excuse *Obscurity of Birth* in the others, but every Man must of Necessity submit to the Condition and State his Father left him in. And these *Nobles*, we are further told, were allow'd the *Privilege* to lie with other Men's *Wives* when and where they pleas'd; and if any of them happen'd to be with another Man's *Wife* (a Sign of which was a *Target* hung up at the Door) the poor *Husband* dared not go into his own *House*.

(d) *Phil. Baldeus* descript. *Oræ Malabar & Coromandel.* c. 26. & *de Idolat. Iudor.* Part II. c. 16. *Mandeslo Itiner.* L. 2. c. 10. *Add. Abrah. Rogerius de Bræminibus*, c. 1, 2. *Diodor. Siculus*, 1. 1. c. 74.

In *Euripides* *Hippolyt. Coron.* v. 409, 410. 'tis said of *Adulteries*,

This Evil first from noble Families,  
With wide Infection tainted the whole Sex.

(e) *Vid. Dio. Chrysofom. Orat.* 15. *init.* p. m. 236. *Grotium*, 1. 2. c. 7. f. 8. (2) *Horat. L.* 4. *Od.* 4. v. 29.

(f) *B. Jugurth.*

scandalously mis-spent in Sloth and Luxury, to supply and support the most extravagant Vices. It may well be presum'd, as *Plato* says (a), *That Nobility of Birth, if attended with good Education, may produce eminent Vertues.* But it is also evident *in fact*, what *Degeneracy Noble Families* sometimes sink into, and how much the *Glory of Ancestors* is obscured by the *Blemishes of Posterity* (b). And 'tis certain, that many that have been *obscurely* born, have rais'd themselves to the *highest Honours*, purely upon the *Stock of their own Vertues.* *Isocrates* (c) took it for a *Topick* to commend *Nobility*, That it did not, like other *Gifts of Fortune*, soon decay, or remove into other hands, but continued always with the *Person* it once belonged to; and therefore was the best *Inheritance* Men could leave to their *Children.* But certainly, except a *Man* can support his *Nobility* by his own *Merits*, or except he enjoys by it some particular *Privileges* in the *Commonwealth*, it can be but a very *worthless* *inconsiderable* Thing. And therefore, there is no *Necessity* in the *Nature* of the Thing, that the *Son* should succeed either to the *Places*, or *Degrees of Esteem* his *Father* enjoy'd only by his *Birth.* Especially, since in the *last Resort*, *Mankind* are deriv'd from the same *Original.* For as *Marius* in *Sallust* says (d), 'Every Man partakes of the same *common* *Nature*, and the 'Brave only have the best *Title* to *Nobility.* And therefore a *Man's* own *Vertues*, not those of his *Ancestors*, ought to recommend him; According to the *Character* *Tibullus* gives of *Mesala* (e):

(laudes,

*Nam Quamquam antiquæ Gentis superant tibi  
Non tua Majorum contenta est gloria fama,  
Nec quæris quid quaque Index sub imagine dicat,  
Sed generis præcos contendis vincere honores,  
Quam tibi Majores, majus decus ipse futuris.*

For You, tho' grac'd by long descending Fame,  
Despise the dull hereditary Name.  
Nor from the Dead will borrow sleeping Praise,  
Or rob their Monuments your Own to raise,  
Greater than all the Heroes of your Line,  
To your own single Merits, you confine  
Your Praise; and to Posterity will leave  
A greater Name than all your Race could give.

XXVI. But however, it hath obtain'd in many States and *Common-wealths*, that *Persons* of *Merit*, who have been placed by the *Government*

in *Stations* to which particular *Privileges*, and peculiar *Degrees of Esteem* are allowed, might have the *Advantage* of deriving the same down to their *Children* by *Birth*; and in the *Nature* of an *Inheritance* (f). For 'tis certain, that *Nature* has made no *Real Distinction* between the *Birth* of the *Noble* and the *Plebeian.* The *Difference* between them is grounded entirely on the *Imposition* and *Indulgence* of the *Commonwealth*, which allows, that such a particular *State*, to which certain *Rights* and *Degrees of Esteem* are annexed, shall descend to the *Posterity* of the *Person* it was first confer'd upon (g), barely by *Birth*, without any new *Grant.* And if this *Imposition* be taken away, all the *Distinction of Birth* ceases. And therefore when a *Prince* removes a *Commoner* into the *Nobility*, he cannot be supposed to make any *Alteration* in his *Nature* or *Extraction*, or to infuse new *Vigour* into his *Mind*, but only to place him in a *State* opposite to the *Commonalty*, and to give him *Liberty* to intail that, and the *Rights* consequent upon it, upon his *Children.* Which was properly enough signified by *Amasis* King of *Egypt*, when to show that the *Obscurity* of his *Birth*, was no *Reason* why he should be denied his due *Honour* as he was King, He melted a *Bafon* of *Gold* into an *Image*, and set it up to be *Worshipped* (h). On the other hand, if a *Man* be degraded from his *Nobility*, either by way of *Punishment* for some *Fault*, or because he refuse to conform to the *Laws* of the *Nobility*: It is not to be supposed, that his *Nature* or *Temper* of *Mind* is therefore *altered*, or that the *Blood* he derived from his *Ancestors* is *changed*; Neither can it be denied, that he continues to be of *noble Extraction*; but he is only deprived of a certain *State*, and of the *Privileges* that belong'd to it in the *Commonwealth.* And then he is in all respects no better than a *Commoner.* And in the same manner it must be said, that neither *Legitimation* nor *Restitution* (i) in *Blood* make any real *Change* in *Nature*, but only introduce certain *moral* *Effects* (i). *Machiavel* in his *History* of *Florence* tells us (k), That after the *Tyranny* of the *Duke of Athens* was expired, the *Sovereign* *Power* being lodg'd in the *People of Florence*, and the *Nobility* excluded by *Law* from any *Share* of the *Government*, a certain *Gentleman* call'd *Benchi*, of the *noble Family* of the *Boundelmonti*, for his *Gallantry* and good *Services* in the *Wars* against the *Pisans*, was pre-

(a) *Alcibiad.* I. p. 440, 441. Ed. *Wech.* (b) *Aristot. Rhetor.* I. 2. c. 15. *Nobility* consists in *Greatness* of *Extraction*; *Generosity* in not departing from *Nature*, which all that are *Noble* cannot pretend to; for many of them are *Persons* of no *Worth* or *Value.* *Add. Stobæus Serm.* 84, 85. (c) *Encom. Helenæ.* (d) *B. Jugurth.*

(e) *Tibull. L.* 4. *El.* 1. v. 28, &c. (f) *Lesbonactes Orat. bartat.* The *Children* of such as have behav'd themselves with *Bravery*, in *Dangers* that threaten'd the *Common-wealth*, are look'd upon to be *Noble.*

(g) *Add. Huartus scrut. Ing.* c. 16. p. m. 488, &c.

(h) *Herodot. Euterp.* p. 99. Ed. *H. Steph.*

(i) *V. C.* I. 6. t. 8 *De jure aureorum annulorum, & de natalibus restituendis.* (i) And in this Sense we may understand that of *Euripides. Phænis.* v. 821, &c.

ἔ γάρ ὃ μὴ καλὸν, ἐπὶ ἔφου καλὸν, &c.

For what is once dishonourable and foul,  
Is never otherwise, the base born Son,

Still on his Mother black Reproach reflects,  
And on his Father Obloquy and Shame.

(k) *Lib.* 3.

ferr'd to be one of the *People*; that is, was made a *Plebeian*. And the same Historian, in another place, says (\*), That the *same Privilege* was granted to several others of the *Nobility*. And, among the *Romans*, *Clodius* left the *Senatorian Order*, and was adopted into the *Plebeian*, that he might be capable to be made *Tribune* of the *Commons* (1).

XXVII. But however it must be allowed, That generally all Governments, when they bestow any such *publick Honour* as that of *Nobility* on their Subjects, have regard to Persons known by some distinguishing *Excellencies*, or extraordinary *Merits*. And as such Persons justly deserve a larger Share of *Esteem* than others, so 'tis to be supposed that their *Vertues* are thought more *Valuable*, when the *Rewards* of them are allowed to be derived to those, for whom Nature gives all Men the strongest Affection. Especially since 'tis Natural to believe, such Favours may provoke the *Emulation* of other Subjects, and make them ambitious to gain the like *Rewards*. Besides, it is but natural to expect, that the *Children* influenced by the Example of their *Parents*, may be proud to rival the *Vertues* of their *Families*, and maintain their *Title* by their *Honours*, by the same *Methods* which at first gain'd them. Nor is it less easy to suppose, that *Parents* may think their *Honour* engaged to take Care, that the State should not have Reason to complain, that their *Children* were grown degenerate. Now, when it was allowed therefore, That *Nobility* should be annexed to the *Birth*, and run in the *Blood*, it was to be expected that Persons would not submit to mix with *Families* of *mean* Extraction; least by marrying beneath themselves, they might seem to debase their *Quality*, and cut off those *Rights* which they would derive to their *Children*. It might seem also Prudential, rather to admit the *Daughters* of Equals than Inferiors to share in their *Dignity*; and it might be thought of Moment, that the *rich Tradesman's* Daughter might not be Capable of being prefer'd before the *poorer* of the *Nobility*. And that *Posterity* might not dispute their *Descent*, it would seem necessary to keep an exact account of their *Families* and *Pedigrees*. When, on the other hand, it would be needless for Persons of *meaner* Rank to take the same Care to register their *Ancestors*, since they enjoy no special *Privileges* upon the Score of *Birth*, but are obliged to support themselves by their own *Industry* and *Vertue*.

XXVIII. Further to illustrate what has been

said, it may not be improper to enquire, what particular *Institutions* relating to *Nobility*, were observ'd amongst the *Romans*. Now *Romulus* therefore, that he might digest his *rude disorder'd* Multitude, into the proper Form of a *Civil Body* or *People*, made Choice of an hundred Persons out of the *Mafs* (2) to be his *Council*; and these he call'd *Patres*, either to express the Nature of their *Station*, or their *Age*; The rest of the *People* were still no more than *Commons*. The Descendents of the first were call'd *Patricians*, by an easy and plain Denomination, implying, That they were of the *Family* of the *Patres*; or as others suppose, *That they only could show their Fathers*, the rest being only a Company of *Fugitives* that could not tell who their Fathers were, nor prove that they were *free* Parents, and therefore were no better than *Filii Terræ* (a). And this Supposition they attempt to prove, Because whenever the *Patricians* were to be assembled by their Kings, the *Præcones* or *Criers*, call'd every Man by his *own*, and by his *Father's Name*; But that the *Plebeians* were summon'd to the Assembly by a Trumpet of *Ox-horn*, the *publick Servants* going through the City and calling them by that Sound only. *Dionysius Halicarnassæus* indeed, according to his usual Turn, gives a softer Interpretation to this *Custom* (b), telling us that the *Præcones*, call'd the *Patricians* by *Name*, by way of *Honour*; and that the *Commons* were summon'd by the *Horns* only for Expedition. But 'tis clear that *Decius* in *Livy* seems to contradict him (c). 'For was it never heard, says he, 'in what manner these *Patricians* were at first 'constituted, that they did not drop down out 'of the Clouds, but were only such Persons 'as could (*Patrem ciere*) name their Fathers, 'that is, were no more than *Free-born*? I my 'self can now call a *Consul* my Father, and my *Son*, his *Grandfather* (d). From all which it appears, That it was *Title* enough to the *primitive Nobility* of *Rome*, to be born in *lawful Wedlock* and of *free Parents*; 'For indeed 'in all new erected Common-wealths, *Nobility* 'must necessarily be late, and rais'd by *Vertue* (e). And hence the *Patricians* urged, That they were the only Persons that were of any *Family*, or that were related by *Gentility* to one another. And therefore *Cicero* in his *Topics* gives this Definition of the *Gentiles* or Persons of Extraction and *Quality*. 'They 'are Persons that have all the *same Name*, 'are descended from *free Parents*, none of their 'Ancestors were ever *Slaves*, nor were they

(\*) L. 5. (1) *Vid. Livii Epitom.* l. 103. (2) *V. T. Liv.* l. 1. c. 8. (a) *V. Plutarch. Romulus*, p. 24. D. Et *Quæst. Rom.* p. 278. C. D. (b) *Rom. Antiq.* l. 2. (c) *Liv.* l. 10. c. 8. *in fin.*  
(d) *Juvenal. Sat.* 8. v. 272, &c.

*Et tamen ut longe repetas, longæque revolvas  
Nomen, ab infami gentem deducis Asyllo.  
Majorum primus quisquis fuit ille tuorum,  
Aut Pastor fuit, aut aliud quod dicere nolo.*

(e) *Liv.* l. 1. c. 34.

Boast then your Blood, and your long Lineage stretch  
As high as Rome, and its great Founders reach;  
You'll find in these Hereditary Tails,  
Your Ancestors the Scum of broken Jails;  
And Romulus, your Honour's ancient Source,  
Was a poor Shepherd's Boy, or something worse.

Mr. Stepney.  
'them.

‘ themselves ever depriv’d of *Liberty* (a). Though in Course of Time, ’tis certain the *Plebeians* also form’d and asserted their *Gentes* or *Families* (b). And hence the *modern Languages*, derived from the *Latin*, call *Noblemen* and *Persons of Quality* (*Gentlemen*) *Gentiles Homines*: But afterwards when the *Plebeians* were allowed to make *Inter-marriages* with the *Nobility*, and so all the *Disbonour* and *Baseness* of their *Original*, if there were ever any such, might seem to have been worn out; Then the *Patricians* found out another *Difference* to distinguish themselves from the *Commons*, by instituting certain *Religious Rites Particular* to each *Family*, and assuming a *peculiar* sort of *Sanctimony* to themselves. And upon this Account they insisted, that all the *Offices* in the *Common-wealth* ought to be given entirely to them, because they only had the proper *Auspicia*, or *Omens of Success*. But this ridiculous Pretence was soon, as it deserv’d, expos’d and neglected by the *Plebeians*. Though some of them too, to show that the *Patricians* had no just Grounds to assume such a *Prerogative*, set up their *private Sacra* and *family Rites* (c). Which afterwards growing *Burthensome* upon their *Heirs*, were taken off by *Coemption*, as *Cicero* informs us (d).

XXIX But afterwards, when the *Senatorian Dignity*, and *Great Offices* of the *Common-wealth*, which had been engross’d all by the *Patricians*, were left open and free from the *Plebeians* especially; the *Nobility* of *Rome* was not measur’d so much by *Date of Families*, or *Patrician Descent*, as by *Number of Images*. And from that time the *noble Families* of *Rome* were distinguish’d into *Patrician* and *Plebeian* (e). The *Equestrian Order* was not properly *Noble* by *Institution* of the *Common-wealth*. *Tacitus* says, indeed, in his *Life of Agricola*, That *Agricola’s Grandfathers on both sides* had been *Procuratores* or *Solicitors* to the *Emperor*, Which is the *Equestrian Nobility*: But the right Sense of that Place is, that as they were of *Senatorian Families*, measured their *Nobility* by the *Great Offices* they had born, usually call’d *Magistratus Curules*; so the *Procuratorship* to *Cæsar* was look’d upon by the *Knights* to have been a sort of *Nobility*, especially because, besides that of *Prefect* of the *Prætorian Cohorts*, or the *Emperor’s Life-Guards*, there was no higher *Office* which belong’d to that *Order*, as such. So that in the latter Ages,

the *Nobility* of *Rome* did not constitute any particular *Order*, separated from the rest of the *People* by peculiar *Rights*, but every *Man* was allowed to be *Noble* upon his own, or his *Ancestors* Merits, either as he was able to produce their *Statues* or *Images*, or to raise himself to *places of Honour* by his own *Vertue* (f) (1). But though many of the *Roman Offices* were no less *Necessary* and *Serviceable* in times of *War* than *Peace*, as that of *Dictator*, *Master of the Horse*, *Consul*, *Prætor*; yet since *Peace* is as it were the *ordinary State* of a *Common-wealth*, *War* the *extraordinary*; and since those *Offices* also seem, as well by their *Nature* as *Appellation*, to bear a nearer Relation to *Peace* than *War*; it must be allowed that *Roman Nobility* had rather a *Civil Original* than a *Military*. And indeed, it would have been a *Method* altogether *Impolitick*, to have confined *Nobility* to *simple Martial Courage*, as separated and distinguish’d from the *Office* and *Conduct* of a *Leader*; (so as hereby to have constituted a *particular Order* enjoying large *Rights* and *Immunities*;) in such a *Common-wealth*, where *War* was the common *Profession*, as I may call it, of every *Subject*. The *Roman Nobility* therefore, did not constitute any *peculiar Rank* of *Persons* in the *Common-wealth*; Nor did it afford any other *Advantage* more considerable than this, that the *Images* of *famous Ancestors* usually made the way to *Honour* more open and easie.

XXX. From all which it is evident, That the *Nature* and *Genius* of *modern Nobility* in most of the *Kingdoms* of *Europe* is much different. For with us the *Nobility* constitutes a *particular Order*, distinguish’d from the rest of the *Subjects* in *Dignity*, and by extraordinary *Rights* and *Privileges*. Besides that, the *Prince* frequently confers the *Honour* of *Nobility* without giving any publick *Employment* with it, and that too, not so often in Consideration of *Civil*, as of *Military Accomplishments* and *Vertues*. One Argument of which, among others, is, That *Noble Families* distinguish themselves from one another, as well as from *Commoners*, by *Devices* impress’d upon *Shields* with an *Helmet* placed above; and which are therefore call’d *Arms*. Of the *Antiquity* of which, *Diodorus Siculus* may be thought to give an account (g), when he tells us, ‘That the *Arms* of the *Gauls*, were *Shields* about the *Height* of a *Man*, flourish’d and emboss’d

(a) *Boetius* in *Topicis*. The *Gentiles* are such as bear all the *same Name*, as the *Brutus’s*, the *Scipio’s*; but if they are *Slaves* they are not *Gentiles*. And though perhaps the *Children* and *Descendants* of *Freed Men* may have the *same Name*, yet they are not therefore in the *Number* of the *Gentiles*, because *Gentility* must be derived down from a long *Race* of such as were *Free-born*. (b) *Add. Franc. Connanus Com. Jur. Civil. l. 2. c. 11.*

(c) *V. Liv. l. 4. c. 2. l. 6. c. 40, 41. l. 10. c. 7.* (d) *Cic. pro Murana, c. 12. Add. Godof. in Cic. Epist. Fam. l. 7. Ep. 29.*

(e) *Liv. l. 10. c. 7.* The *Plebeians* can number their *Triumphs*; and it doth not now repent them of their *Nobility*, *l. 6. c. 37. towards the End.* From that Time the *Commons* will enjoy every thing the *Patricians* value themselves upon, *Authority* and *Honour*, *Glory* of *War*, *Descent*, *Nobility*. (f) To this Purpose is that of *Claudian*, *De Cons. Prob. & Olyb. Paneg. v. 13, &c.*

Quemcunque requires  
Hac de stirpe virum, certum est de Consule nasci.  
Per fasces numerantur avi, semperq; renata  
Nobilitate vigent.

Through all the Line, each Worthy you can name,  
His noble Birth doth from a Consul Claim,  
Th’ Imperial Fasces each Descendent Grace.  
And add repeated Honours to the Race.

(1) *V. Juvenal. Sat. 8. v. 8, 19.*

(g) *L. 5. c. 30.*

‘with every ones proper Device, as he pleas’d  
 ‘to have it. Some (*he adds*) held before them  
 ‘Images of Beasts in Brasses, Artfully contriv’d  
 ‘to serve both for Defence and Ornament.  
 ‘On their Heads they wore Helmets of Brasses,  
 ‘beautified as they thought with some Mark  
 ‘upon the Crest of them, which might be seen  
 ‘at a Distance. Their usual Ornament was  
 ‘the Horns, or the Head of some Bird or Beast  
 ‘form’d upon them, or fix’d to them (†). For  
 what Reasons this Part of the World seems to  
 pay so much *Honour* only to the Vertues *Military*,  
 when the *Chinese*, on the other hand,  
 prefer the *Men of Learning* to those of the  
*Sword*, will not be difficult to resolve. For  
 it may be consider’d, that tho’ the Advantages  
 which the *Common-wealth* receives from Men  
 of *Civil Life* and *Profession*, are no way infe-  
 rior to those it gains by Persons *Military*:  
 (For certainly, To form good *Laws*; To ad-  
 minister *Justice* impartially; To increase the  
 Riches of the *State* by Improvement of Trade  
 and Commerce; To be able, by the Force of  
 Eloquence, to compose popular Discontents, and  
 to incline the Minds of the People what way  
 soever the Posture of Affairs requires; To dis-  
 cover the Counsels and Designs of *Foreign*  
*Enemies*, and to prevent, or frustrate them;  
 are *Excellencies* of the *Highest Nature*, and  
 that deserve the greatest *Honours*;) yet *Civil*  
 Persons have not always that *Esteem* and *Value*  
 paid them which is their due, and especially  
 among People of scanty *Knowledge* and *Observa-*  
*tion*, both because the natural and acquired Per-  
 fections which are necessary to the Attainment  
 of *Civil Accomplishments*, lie generally out of  
 common View, and are not well understood by  
 vulgar Apprehensions; and because they seem  
 to discover themselves in a sedate silent way,  
 without Noise, or Violence, or Danger. But  
 now the Vertues and Qualities *Military* are  
 perfectly of another Nature. And therefore,  
 though *Courage* and *Resolution* are no less ne-  
 cessary in *Civil Administration* and *Conduct* than  
*Military*; Yet People of *Martial Temper* and  
*Spirit*, that had rather purchase a Subsistence  
 with their *Blood*, than by their *Sweat* and *In-*  
*dustry*, think nothing more *Glorious* and *Noble*,  
 than to be prepar’d against all the Terrors of  
*War*, than to face and defie *Death* and *Danger*,  
 and to Hazard, what is of all Things most  
 Valuable, Life it self; that other Men may  
 live in greater *Ease* and *Security* (a). For these  
 Reasons in many Kingdoms of *Europe*, the *No-*  
*bility* hold their *Estates* by a *feudal Right*, and  
 have *Immunities* from several *Duties* settled  
 upon them which are exacted from those of *in-*  
*ferior Rank*, purely because they were obliged to

attend the *Wars*, and assist the State in *Military*  
*Service*. The *Original* of which *feudal Right*  
 seems to be hinted in *Lampridius’s* Life of  
*Alexander Severus*, c. 58. Where he tells us,  
 ‘That the Lands which the *Emperor* took from  
 ‘the *Enemy* were given to the Officers and  
 ‘Soldiers that liv’d upon the *Borders*, to en-  
 ‘joy them for ever, provided they would  
 ‘oblige their Heirs to enter into *Military Ser-*  
 ‘vice, and never to live a private Life; the  
 ‘*Emperor* supposing, that they would be the  
 ‘better Souldiers when they were also to defend  
 ‘their own *Estates*. And hence it is unusual  
 for the *Nobility* to turn to *Trade* or *Mer-*  
*chandize*, not because such *Professions* are really  
*Mean* or *Dishonourable* (b); but because they  
 would divert them from their *Military* way  
 of Life, and force them upon the *Dishonour*  
 of enjoying *Fiefs* and *Privileges gratis*, with-  
 out any Returns of Service. And therefore  
 where-ever the *Nobility* are allowed, without  
 Disparagement to their *Honour*, to apply them-  
 selves to *Trade* and *Merchandize*, it may safely  
 be infer’d, that they had no *Military Original*.  
 The *Egyptians*, *Scythians*, *Persians*, *Lydians*,  
 and almost all the *old barbarous Nations*, accord-  
 ing to *Herodotus’s* Account of them (c), look’d  
 upon all Persons, that apply’d themselves to  
*Trades* and *Handicraft Employment*, to be the  
*meanest* and *lowest* sort of *Subjects*; And their  
*Children* they always thought *mean* and *base*.  
 They only were allow’d to be of *Quality*, that  
 were above all *Mechanical* Employments; and  
 especially, that made *War* their *Business* and  
*Profession* (d). And at *Rome* there was a *Law*  
 prefer’d by *Q. Claudius* Tribune of the *Com-*  
*mons*; ‘That no *Senator*, or *Senator’s* Father,  
 ‘should have any *Ship* of greater Burthen than  
 ‘would contain the Quantity of three hundred  
 ‘*Ampboræ*. Such a *Ship* being suppos’d to be  
 large enough to carry their Corn out of the  
 Field; and all *Trade* look’d upon to be beneath  
 Persons of that *Dignity* (e).

XXXI. But notwithstanding, There are and  
 have been some *States* and *Common-wealths*,  
 where the *Honours* allowed to *Birth*, have  
 been and are very *inconsiderable*; every Man  
 being left to raise and support his *Nobility* by  
 his *Merits* to the *State*. ‘So the *Egyptians*,  
 ‘we are told in their *Funeral Orations*, never  
 ‘used to make Mention, as the *Greeks* did, of  
 ‘the *Family* of the Party *Deceased*; because  
 ‘they thought every Man equally *Noble*: But  
 ‘his Education they were always sure to speak  
 ‘of, and Manner of Life, his *Piety* and *Devo-*  
 ‘tion, his *Justice*, *Continence*, and what other  
 ‘Vertues he was known to have practis’d (f).  
 So the *Turks* never set a higher Value upon

(†) *Add. Hobbes Leviathan*, c. 10. in fin. (a) *Vid. Arist. Probl.* l. 27. q. 5. (b) *Conf. Bodinus de Repub.* l. 3. c. 8. p. m. 546. Some indeed fetch the Reason of this from *Ecclesiasticus* XXXVIII 25, &c. and because as *Cicero* saith, *Offic.* l. 1. c. 42. They make no Profit unless they resolve not to spare for Lies. (c) *L.* 2. p. 98. *Ed. H. Steph.*

(d) *Add. L.* 4. t. 63. l. 3. *de Commercio & Mercator.* & *L.* 12. t. 1. l. 6. *G. de dignitatibus.* *Aristot. Polit.* l. 3. c. 3. *Cic. Offic.* l. 1. d. 1. The Gains that all Mercenaries make, who sell their *Labour* and not their *Art*, are base and fordid; and the Wages they receive is the same thing as an *Earnest* of their Slavery. (e) *Liv.* l. 21. c. 63. and *Juvenal* calls the Merchant, *Vilis sacci mercator olentis*, *Sat.* 14. v. 269. a sordid Wretch that trades for nasty Wares.

(f) *Diod. Sicul.* l. 1. c. 92. *Tullus Hostilius* in *Dionys. Halicarn.* l. 3. p. 148. *Ed. Lips.* says, I cannot think that human Nobility can consist in any thing but Vertue.

themselves, than what may seem Due to their own *Merits*: To the *Ottoman* Family only they allow *Nobility of Blood* (a). Neither do the *Chinese* express any *Honour* for *Antiquity of Descent*, the *poorest* and *meanest* Person in the *Empire* is capable by his *Learning* only of preferring himself to the highest Places of *Honour* (b): And in their *Marriages*, neither the *Emperor* himself, nor any of his *Children*, make Choice of their *Wives* with regard to *Extraction*, but only to the Beauty and Agreeableness of the *Woman* (c). Such Customs perhaps, may be contrary to those which are receiv'd in this part of the World; but notwithstanding the *Wiser* part of Mankind ever have, and always must allow it to be true, That *Nobility* ought not to depend only upon the *Blood*, but should much rather be rais'd and establish'd upon *Vertue* (d). It was a severe, but a very proper Answer which *Antigonus* gave to the Son of a brave *old Officer*, Ambitious of *Honours* he had not deserved, 'Tis your own *Vertue*, and not the *Blood* you derive from your *Father*, that must recommend you to me (e). For as *Plato* saith (f), 'Every Man has had a numerous Race of *Ancestors* before him, some of which were perhaps *rich* Men, and some *poor*, some may have been *Princes* and some *Slaves*, some *barbarous* and some *civiliz'd* (g). And it is not unlikely, as

another suspects (h), that the *Poets* deriv'd their *Heroes* from the *Gods*, only to cover some Misfortunes or Defects in *Birth* or *Quality*, which might perhaps have been found out, upon a strict Enquiry into their *Descent*. For 'tis certain, if we were to unravel any Man's *Nobility*, we should at last come to something *Mean and Little* (i): And therefore *Lycurgus* prov'd by the famed *Example* of the *two Dogs*, that it is not *Nature* but *Education* that forms Men to *Vertue* (k). And 'tis easy for a Man of the *latest* Quality to give them of *Ancient* but corrupt and degenerate *Nobility*, the same Answer that *Iphicrates* did to *Hermodius*, one of the *old* Race of the *Harmodii*, when he objected to him the *Meanness* of his *Birth*, I am the *first* of my *Family*, and you are the *last* of *Yours* (l). Nor are there wanting those that argue, That it is unjust to exempt any Man, or to grant him *Immunity* from any particular *Duty* and *Burthen* in the *Common-wealth*, to the *Prejudice* of other *Subjects*; or to give him easier *Admission* to *Preferments* and *Offices* barely upon the Score of *Birth*, which, 'tis certain, can of it self confer no extraordinary *Vertues*, and which it is in no Man's Power to procure for himself (m); since others may be as well, perhaps *better*, acquainted with the *Arts* necessary in the *Administration* and *Management* of those *Offices* than he is, and particularly if

(a) *Auger. Busbequius*, Ep. 1. Add what he saith of the *Fanizaries* in the same place. (b) *Martin. Pref. Hist. Sin.*  
(c) *Neuhof. in legat.* pag. 280. (d) *Senec. Hercol. Fur.* vers. 339, 340. *Qui genus jactat suum, aliena laudat.*  
*Boetius de Consolat. Philosoph.* L. 3. *Metr.* 6.

*Quid genus & promos strepitis?  
Si primordia vestra,  
Autoremque Deum spectes,  
Nullus degener extat;  
Ni vitiiis pejora fovens,  
Proprium deserat ortum.*

*Horace, Sat.* 6. l. 1. v. 7, 8. to *Mæcenas*.  
*Referre neqes quali sit quisque parente  
Natus dum ingenuus.*

*Claudian, l.* 2. v. 123. *de Laudib. Stilicon.*  
*Letos ex omnibus oris  
Evehis; & meritum, nunquam cunabula queris  
Et qualis, non unde satius.*

*Add. Seneca de Beneficiis*, l. 3. c. 28. & *Epist.* 44. and thus *Canulejus* in *Livy*, l. 4. c. 3. The Growth of the *Roman* Empire was owing to this. That no Family was thought mean or contemptible which was eminent for its *Vertues*. *Herodian*, l. 5. c. 1. The Gifts of Fortune are frequently bestow'd upon such as do not deserve them; but the *Vertues* of the *Mind* are every Man's own proper *Glory*. And *Greatness* of *Birth*, *Riches*, and the like, though we think them happy that enjoy them, yet can add no real *Praise* to a Man, because they are derived from others.

(e) *Plutarch. de vitios. Pudore*, p. 534. & in *Apophth.* p. 187. B. (f) In *Theateto*, p. 128. C. Ed. *Wech.*

(g) There is a Passage like this in *Dio. Chrystome*, *Orat.* 15. *de Servitute* p. 238. B. It is impossible, that from the Beginning of the World, there should have been any Race of Men, in which there have not been almost innumerable Instances of some of the Progeny that have been *Slaves*, of others of them that have been *Tyrants* and *Princes*, *Captives* and *Criminals*, *Tradesmen* and *Mechanicks*; and in short, some of all *States*, *Professions*, and *Conditions*, that have been in the World, and that have, in their Turns, gone through all the *Business* and *Employments*, all the *Fortunes* and *Calamities* of human Life. (h) *Dio. Chrystos.* ibid. (i) *M. Seneca*, L. 1. *Controv.* 6.

(k) *Plut. Apophth. Lacon.* p. 225. (l) *Plut. Apophth. Add. Philo. Judæus de Nobilitate.* *Stobæus, Serm.* 84, 85, 86, 87. *Tho. Browne de Religione Med.* Part II. c. 1. When I speak of the *Vulgar*, I do not understand the *Common* People only, and the lowest *Dregs* of the *Rabble*. For even among those of the higher *Ranks*, there is a sort of *vulgar* inferior *Multitude*, you may safely say, made entirely of the same *Materials* with the meanest of the *Populace*. For my part, I make no *Scruple* of ranking them with the *Mechanicks*, however their *Fortunes* may conceal the *Defects* of their *Understanding*, and their *Riches* seem to excuse their want of *Sense*.

(m) *Euripides Electra*, v. 551. Πολλοὶ γὰρ ὄντες ἀψήκτους εἰσὶ κακοί.

The Noble often are Degenerate.

Fondly our high Descent we boast,  
If whence at first our Breath we drew,  
The common Springs of Life we View;  
The airy Notion soon is lost.  
Th' Almighty made us equal all.  
But he that slavishly complies  
To do the Drudgery of Vice,  
Disowns his high Original.

You own 'tis nothing whence a Man began  
When every Action proves the Gentleman.

From every Land the Bravest you select,  
And with their Vertues pleas'd, their Blood neglect.  
Nor for Descent enquire, our Noble Lines;  
Careless of Birth, where Worth superiour shines.

he be a Person given to the Enjoyments of Ease and Pleasure (a). In short, that it may seem to be a very great Misfortune in a *Common-wealth*, when the *Civil Sovereign* is tied up and confin'd to a particular *Order of Men*, in disposing Places of *publick Trust*, that he cannot have the *Assistance* of his other *Subjects*, though in *Business* they are very well qualified for; and especially, if he has not Power to *elect* any Person of *Worth* into such an *Order*. For when it becomes necessary for Princes to support and favour the *Nobility* only, that by their *Assistance* they may more easily *Restrain* and keep in *Awe* the rest of their *Subjects*, 'tis certain that their *Power* grows feeble, and that the *Reins* of Government are ready to drop out of their hands; since they are forced to enter into a kind of *Faction* with Part of their *Subjects*, to distrust the Force of *open Authority*, and take Refuge in the *Artful Designs* of *Secret Policy*. I shall add only what my *L<sup>d</sup> Bacon* says in his *Advancement of Learning* (b), 'That a *Kingdom* that would be *Great*, 'must not encrease its *Nobility* to too great a 'Number.

XXXII. It may be proper now, in the last place to enquire, Whether *Civil Dignity* and *Marks of Honour* depend upon the *Sovereign Power* as to their *Durations* also and *Continuance*, as well as in their *Original*? And Here it must be enquired, Whether the *Marks of Honour*, and the *Privileges* and *Rights* annex'd to it, are confin'd to any Particular *Office* and *Employment* in the *Common-wealth* which the *Sovereign* has the Disposal of; Or, Whether they are settled upon the *Subject* in the *Nature of Property*? Upon the First Supposition, it is evident, the *Sovereign* must have the same *Power* that he has to appoint or remove his *Officers* and *Magistrates*. *Fabius* the *Cunctator* very well expres'd, not only the Greatness of his Spirit, but the Submission also he thought himself obliged to pay to the *Power* of the *Common-wealths*, by that Calmness of Temper which he show'd when the *Master of the Horse*

was made Equal with him while he continued *Dictator* (c). *Solon* us'd to say, 'That *Courtiers* and the *Favourites* of *Princes* were like 'Counters used in casting up *Summs*; for as 'Counters sometimes signifie a greater Number, and sometimes a less: So these *Creatures* 'are absolutely at the Mercy of their *Princes*, 'Whose Pleasure makes them *Great* and *Noble*, 'or *Mean* and *Despicable* (d). But upon the Second Supposition, when the *Subject* enjoys his *Dignity* and the *Marks* and *Badges* of *Honour* in the *Nature* of *Property*, the *Government* cannot in Justice take them from Him, Unless by way of *Punishment*. And in this Case, as *Aristotle* in *Ælian* said (e), *There is a wide difference between not obtaining Honour, and between being turn'd out of it after a Man has obtain'd it: For it is no great Pain to a Man not to gain what He Pursues; but to be dispossessed of what he has gain'd must be a sensible Affliction.* But notwithstanding, the *Immunities* and *Privileges* annex'd to *Honour* may Either be laid under *Suspension*, or be Entirely taken away upon some pressing *Emergency* in the *Common-wealth*; *Allowance* being made for them, as it best may in some other Method. For since the *Extremities* and *Necessities* of the *State* must always be supposed to be *Exceptions* to all Such *Privileges*; It would be the most Extravagant Absurdity imaginable, to make them *Sacred* and *Inviolable* beyond the *Necessary Defence* and *Preservation* of the *Common-wealth*. From what hath been said It may also be discover'd, how far any *Common-wealth* may with Justice Enact, That *Children of Traytors* shall be *Excluded* from all *Honours* in the *Common-wealth*? So it was decreed by the *State of Athens* in the Case of *Antipho*, as appears in his *Life* (1): And at *Rome*, *Sylla* made a *Law*, That the *Children* of all Persons *Proscribed* should not appear *Candidates* for any *Honour*. And the answer to it in short is, that the *State* may justly enough deny them all *Publick Dignities* and *Employments*, but can not rightly deprive Them of *simple Esteem*.

(a) Such as those *Aristophanes* mentions, *Ran. Act. 3. Sc. 1. v. 2.* That were good for nothing but to Eat and Drink, or those *Juvenal* speaks of, *Sat. XI. v. 11.*

Mr. Congreve,

*Quibus in solo vivendi causa palato est.*

Such whose sole Bliss is Eating, who can give But that one brutal Reason why they live.

(b) *L. 8. c. 3. n. 3. Vid. Essays, c. 14. by the same Author.*

(c) *Vid. Liv. 1. 22. c. 15. 26.*

(d) *Vid. Polyb. 1. 5. c. 26.*

(e) *Var. Hist. 1. 14. c. 1.*

(1) *Vid. Plutarch in Ejus Vit. in Orat. 10. c. 1.*

CHAP. V.

Of the Power of the Sovereign, both over the Publick Patrimony, and the Estates of Private Subjects.

TO understand distinctly what Power the *Sovereign* has over the *Estate* and Fortunes of the *Subject*, it will be necessary to

observe, that this Power is derived either from the *Nature* of *Sovereignty* in it self; or else from the particular manner of the *Acquisition*

quisition of it. For it is manifest, that there is a great difference between a *Prince* (1), that has rais'd his own Kingdom, collected, as it were, his own Subjects, and who was at first the Universal, Absolute *Proprietor* of every thing in the Common-wealth; and Another freely call'd to Government and invested with *Sovereign Power*, by Persons already in Possession of their distinct *Proprieties*. The First, it is clear, hath not only all that Power over the *Bona Reipub.* the *Good* contain'd in the Common-wealth which flows from the Nature of *Sovereign Power* it self; But also the same Which every *Master of a Family* has to his *Estate*, except He is pleas'd voluntarily to remit any Part of his *Right*. If such a *Prince* therefore keeps his *Propriety* entire, the Subjects can have no better Right to What they possess, than the *Roman Slaves* had to What they got by their own labour; that is, a *Pre-carious* Possession revocable at Pleasure, whenever the *Prince* thinks fit. But however, as long as the Subjects are in Possession of such *Goods* or *Estates*, they may justly supply themselves with Sustainance and other Necessaries from them by way of Wages for the trouble of improving and preserving them. And therefore what *Hobbes* falsely applies to all manner of Subjects (a) holds true only with regard to These, viz. 'That the *Propriety*, which a Subject hath to his *Goods* consists in a *Right* to 'exclude all other Subjects the Use of them, 'but not to exclude the *Sovereign*; As in a 'Family, the Father grants some of his Sons 'a *Propriety* to certain *Goods*, distinct from the 'Proprieties of other Sons of the same Family, 'but not from that of the Father himself; So 'that every Son in the Family enjoys a *Propriety* barely to so much, and for so long as the 'Father pleaseth. But if the *Prince* I am speaking of recedes from any part of his *Right*, the Subjects will have just as much *Right* to their *Goods*, as the *Concessions* of their *Prince* make over to them. And this, by different *Princes* hath been done different ways. *Pharaoh* was to have the Fifth part of the *Increase* of all the Land of *Egypt* to himself; the other Four were to continue to Husbandmen, only the Lands that belong'd to the *Priests* were not sold, and they had a third part of the Land by the Donation of *Isis* (b). *Strabo* says, that in *India* the Land was the *Prince's*, and Husbandmen were hired to cultivate it for the Fourth Part of the Produce (c). And this is the Custom now in the Dominions of the *Great Mogul*; Where the Emperour is also Heir to all his Ministers and Servants, and to all Merchants. In the Kingdom of *Congo* (2)

no Subject has any Property which he can transmit to his Heirs, but all falls to the *Prince*; And he administers and disposes the Goods to what Uses he thinks fit. In such *Countries* therefore, all the *Right* Private Subjects have to their *Goods* and *Estates*, depends Originally upon the Favour of the *Prince*, who hath an absolute Power to dispose of all they have, so far as the *Compacts* and *Irrevocable Grants* He hath made will permit. But after all, it is usually observ'd by *Travellers* of those *Countries*, and particularly of the *Empire* of the *Great Mogul* (d), that That *Absolute Propriety* of the *Prince* has been the Reason why that and other Kingdoms of the *East*, otherwise very happy in the Advantages Nature has given them, should lie Wild, Desolate, and Barbarous, and either be always Poor and Decaying, or at least never arrive at the Splendor and Greatness of the *European* Nations, where the *Princes* are generally more tender of invading the *Properties* of their Subjects, and where Subjects have the Liberty to defend their Own, even against their *Princes* (e).

II. But there are, on the Other Hand, Common-wealths, where the *Original Right* the Subjects have to their *Properties* does no way depend upon the Favour or Indulgence of the *Civil Government*. And this seems to have happen'd these two Ways; Either first, when a People under the *Conduct* of a *Prince* they set over themselves remove in Search of new *Seats*: Or Secondly, when a Number of *Masters of Families* already possess'd of their several *Properties* freely erect themselves into a *Common-wealth*, or voluntarily join themselves to some *Common-wealth* already established, and submit themselves and their Fortunes to *Civil Government*. In the former Case, the Method usually observ'd is this, the Whole Body of the People under the *Conduct* of their *Leader* possess themselves of some New *Country*, Which perhaps in its large Extent is bounded by *Limits* which Nature her self, or the Arbitrary Constitutions of the World have given it; But which is afterwards *canton'd* into Parts and distributed to Particular Persons either by *Lot* or at the *Discretion* of the *Commander*, or possibly (tho' very seldom), by every Man's own *Choice* (f). Now in this Case, tho' Every Particular Man's *Property* seems rather to be grounded upon the *Leader's* Appointment than his own *Seisure*; Yet it does not follow, that therefore All He has is owing purely to the Favour of his *Commander*. For every Man that voluntarily went in the *Expedition* has certainly an absolute *Right* to share in the *Acquisitions* of it, and to be consider'd in the *Divi-*

(1) See above, in B. 7. c. 6. s. 16. (a) *De Civitate*, c. 6. s. 15. &c. 12. s. 7. (b) *Gen.* XLVII. v. 23, 24, 26. *Vid. Diad. Sicul.* l. 1. c. 21. 72. Et *Grot. Com.* in *Gen.* XLVII. 26. (c) *Strabo*, l. 15. p. 484. Ed. *Genev. Casaub.* *Diod. Sicul.* l. 2. c. 40. *Vid. Garcilass de la Vega, Com. Roy.* l. 5. c. 5. (2) *Vid. Edward. Lopez.*

(d) *Bernier de Nuperis Motibus in Imp. Magn. Mog.* (e) *Garcilass de la Vega, Com. Roy.* l. 5. c. 2. relates, That it was the Command of the *Tuca's*, That none of their Subjects should be obliged to Plow the *Emperour's* Lands, before they had taken care of their Own; because it was not likely any Man would be so Diligent as he ought, in his *Prince's* Business, that had not before well settled his Own. The Poor, the same *Historian* says, were always look'd upon to be an useless Multitude among them, both in War and Peace. (f) See *Cornel. Nepos* in *Miltiades*, c. 2.

tion of the Land (a). But much less do the Properties of the Private Subject own any Original Dependency upon the Favour and Indulgence of the Civil Sovereign, Where (as was supposed in the Second Case) a Number of Masters of Families possessed of their Liberties and distinct Proprieties, freely submit to Civil Government. For I take it to be clear, notwithstanding all that Hobbes has said to the contrary (1), that Persons that live without Civil Government in a Liberty of Nature may nevertheless enjoy their several Properties (2). For admitting, that Nature gave every Man a Right to Every thing, yet This is no Argument why every Man might not by Intervention of Compact have his Separate Property divided to him. And tho' a Compact of Two or more about Things left in a Community of Nature, does not in the least prejudice Other Men, but leaves them to their full Primitive Right; Yet if All Men consent by common Compact, either Express or Tacit, to make a Division of Things, without Dispute This must introduce a true and real Propriety. And therefore Hobbes's (3) Assertion is false, that every Father of a Family that is under no Subjection either to another Father, or to any common Master, has a common Right to every thing (b). Tho' it must indeed be allowed, that They that live under Civil Government have their Properties better secured and defended than They that live in a Liberty of Nature; for These must support Themselves by their own single Force alone, while the Others can call the whole Strength of the Common-wealth to assist them, either against the Encroachments of Foreigners or the Injuries of their Fellow Subjects (c).

III. In Common-wealths therefore where the Properties of the Subjects do not originally depend upon the Government, the Civil Sovereign hath no further power over them than what immediately flows from the nature of the Supreme Power in it self, unless the Subjects freely consent to enlarge it. Every thing says Seneca (d), by a Civil right may be said to belong to the Prince, while yet the particular parts of that wide Possession are divided among different Proprietors, and Every Thing belongs to a distinct Owner.

And therefore when we present our Prince with our Houses, our Slaves or our Money, we do not think we give him back his own. The Prince hath indeed a power over all We have, but the Propriety is in the private Subject. 'Tis common to say, that such and such Territories belong to the Athenians or Campanians; But the People of those Countries distinguish and divide them further between one another by Private Boundaries; The whole Extent of a Country may be under Such or Such a Common-wealth, but there are distinct Proprietors, who have their separate Portions of it. And therefore We may give away our Estates to the Publick, tho' in some sense They may be said to have belonged to it before; because the Title We have to them is of a very different Nature, from that which the Publick can be said to have. For the Prince possesses All by his Sovereign Command and Authority, the Private Subjects by their Propriety (e). And Therefore the Emperour Adrian, when the People petition'd him to give a Slave liberty that had pleas'd them in the Chariot-race, reprimanded Them for it, and told them, that it neither became him to free another Man's Servant, nor Them to offer such an injury to his Master (f). And the Emperour Claudius made an Edict, to suppress a common practice of begging other Men's Estates of the Emperour; It being an Opinion current at that time, that it was in His power to give them away; And He restor'd an Estate he had obtain'd that Way Himself, when He was a private Subject (g). But now this Power we are here speaking of may, I think, be properly enough reduc'd to Three Heads; First, to the Right of making Laws to direct such a Porportion in the Use and Consumption of certain Goods and Commodities, as the State of the Common-wealth requires. Secondly, to the Right of levying Taxes. Thirdly, to the Exercise of the Transcendental Propriety (h). To the first Head we may reduce all Sumptuary Laws (4), or such as prescribe bounds to Extravagant unnecessary Expences, which would in course of time be the ruin of private Families, and in consequence weaken the Common-wealth it self, by carrying the Publick Money abroad into

(a) Vid. Genes. XIV. 14, 21, 22, 23, 24. Vid. Supr. 1. 4. c. 6. f. 3, 4. (1) Ubi Supra.

(2) See above, in B. 3. c. 4. f. 2, 3. (3) De Civie, c. 6. f. 15. (b) Vid. Genes. IV. 4. XIII. 5, &c.

(c) Vid. Genes. XXXIV. 30. Vid. Xenoph. Memorab. l. 2. p. 433. Ed. H. Steph. where Socrates saith, a Man is happier that lives secure in Society with a moderate Fortune, than that leads a lonely melancholy Life, full of Fears and Dangers, in the Enjoyment of the Riches of a whole Common-wealth. And in this Sense we may admit of what Cicero saith, Orat. pro Caccina, c. 25. that if we take away Civil Right and Government, there will be no Distinction left between one Man's Property and another's; and in his 2d Book of Offices, c. 21. more clearly, Their chief Reason why Common-wealths were instituted, was that every Man might enjoy what was his own. For tho' Men were by Nature directed to Society, yet they found it necessary to erect Cities for the Security of their Properties.

(d) Senec. de Beneficiis, l. 7. c. 4, 5.

(e) Vid. Grot. Com. in 1 Reg. XVI. 24.

(f) Zonaras, Tom. 2.

(g) And therefore it was a Mistake in the Emperour Frederick to think that

Quicquid habet locuples, quicquid custodit avarus,  
Jure quidem nostrum, populo concedimus usum.  
Rege figuratam Regis patet esse monetam;  
Cæsaris & domino sub Cæsare fulget imago.

All that the Rich and Covetous receive,  
Is mine by Right, to them the Use I give;  
The Royal Stamp, who claims the Coin, declares,  
And Cæsar's Money, Cæsar's Image bears.

Gunth. Ligurinus, l. 3. v. 480, &c.

(h) Dominium Eminens. (4) See Mr. Barbeyrac's First Note upon this Section.

Foreign Countries; whither the Humour or Vanity of Luxury and Waste generally runs (a). Besides another Inconvenience to be prevented by such Laws is this, That they that squander away their Fortunes Extravagantly, make themselves incapable of serving the Publick. For a Man, for Instance, that spends but Two Parts in Five of what he hath Yearly coming in, and pays Two more in Taxes to the State, feels no Inconvenience by it, and lays up to encrease his Stock one Fifth Part more; whereas One that spends every Year all He receives, if He pays never so little to the Publick, must either lessen his Estate, or retrench his Expences. Of this Sort were those *Sump- tuary Laws* in the Roman Common-wealth which P. Manutius recounts out of Macrobius (b). And that Law of Plato's (c), 'By which 'he would not have a Marriage Invitation 'bring together, more than ten Persons, and 'those Relations; Nor that Persons of the best 'Quality should spend above a Mina or ten 'Crowns on such occasions (d). To this Head also may be reduced Laws against Gameing (e), and Prodigality. Of which nature was Periander's Law at Corinth, by which no Man was allowed to spend more than he had coming in (f). A Law which deserves to be particularly enforced upon Persons concern'd in the publick Affairs and Places: Since it is very well observ'd (g). That 'tis Impossible any Man should govern well in the Common-wealth, that is negligent in his own Concerns, or forbear mis- spending the publick Treasure, that hath used to live above his private Fortune; for a Man that hath managed his Own ill, must be suspected when he undertakes for Others (h). And further, under this Head we may rank all Laws that determine the Rates and Quality of Possessions and Estates; Such was the Licinian at Rome, That no Man should have a Possession of more than five Hundred Akers of Land, nor above One Hundred Head of large Cattel, or five Hundred of the Less (i). As also the Law, which Aristotle says was generally observ'd in popular Governments, That no Man should sell his first Inheritance. And Oxyllus's Law, that Money should not be lent upon Mortgage of Land (k). As also that Decree of the Roman Senate (l). That all Candidates for Offices in the Common-wealth, should be obliged to turn a third part of their Estates into Lands in Italy. And We may further reduce under this Head all Laws that determine the Quantity and Mea-

sures of Grants and Legacies; That lay Re- straints upon the Power of making Wills, or that put a stop to Excess in dedicating things to pious uses (m). As also Laws That forbid Cer- tain Subjects to possess Certain kinds of Goods; As in India no private Subject is allowed to keep an Horse and an Elephant, the Prince only enjoying that Privilege (n). Moreover Laws against Idle and Lazie People; such as was that among the Nabathæi, by which every Man was Publickly punish'd that wasted his Estate (o). And those against Persons that suf- fered their Estates to run to ruin purely by Care- lessness and Neglect (p). And That made by Amasis King of Egypt, by which every Sub- ject in his Kingdom was obliged every Year to make it appear to the Governour of the Province he liv'd in, what Trade or Profession he was of, making it Death for any Man to refuse to obey (q). To this Head also belong Those Laws, by which Subjects are forbid the Acquisition of Certain Goods, and to encrease their Estates Certain Particular ways; So Pliny says, there was a Decree of the Roman Senate, to forbid the digging after any kind of Ore or Metal in Italy, tho' it was very well known, that no Country had greater abundance or variety (r). To this Head belongs also the famous Venetian Law, by which no Subject of that State can either by Will or Sale, or any other Way, upon any account leave, sell, or alienate the Perpetuity of any immoveable Goods to the Church, or Persons Ecclesiastical, without leave from the Senate (s). And lastly, the Laws That forbid the Exportation of Money, and com- mand, that all Trade with Foreigners shall be managed by Barter only, and Exchange of Commodities.

IV. But Secondly, a further Right which belongs to the Sovereign is, that he can take away part of the Goods of the Subject by way of Tax. For Taxes moderately imposed, and faithfully laid out in the service of the Publick, are only the Wages which every Man pays the Common-wealth for the defence and se- curity of Himself and Fortunes: and to main- tain the Expences unavoidably necessary to that End. And therefore when Nero propos'd to give orders to lay aside all Sorts of Taxes, supposing that That would certainly be the noble- est Grant he could ever possibly make to the World; the Senate put a stop to his heat, by show- ing Him that the Empire must be dissolv'd and ruin'd, if he cut off the Revenues from it that

(a) V. Plin. Nat. Hist. l. 6. c. 23. The Arabians are certainly the richest People in the World, for They are the Merchants that exhaust the Wealth of the Roman and Parthian Empires; They are continually importing among us the Produce of their Seas or Woods, and never buy any thing of us in return. N. H. l. 6. c. 28. Every year constantly the Indies drain us of little less than 500000 Sesterces, besides that, the Commodities We have from thence sell here for an hundred times double the advantage they do there. Vid. l. 12. c. 18. N. H.

(b) Manut. de L. L. Roman. Macrobi. Saturnal. l. 3. (c) Plato de L. L. l. 6. p. 870. D. E. Ed. Francof.

(d) Vid. Ælian, Var. Hist. l. 3. c. 34. Garcilass de la Vega, Com. Roy. l. 5. c. 11.

(e) Vid. L. 11. t. 5. D. & C. L. 3. t. 33. de Aleatoribus. Gratian. c. 7, 8, 9. Distinct. 80.

(f) Heraclides de Politicis. (g) Polyb. l. 10. Excerpt. Peiresc. (h) Lucian in Antholog. T. 2. p. 834. Ed. Amst.

(i) Vid. P. Manutium de LL. Rom. Numb. XXXVI. 7. 9. Aristot. Polit. l. 2. c. 5. 7. l. 6. c. 4, 5.

(k) Vid. LL. Burgund. tit. 84. f. 1. (l) Plin. l. 6. Epist. 19. (m) Exod. XXXVI. 6. (n) Strabo, l. 15. p. 484.

(o) Strabo, l. 16. p. 539. (p) Vid. Gellium, l. 4. c. 12. (q) Heroder. Euterpe. (r) Plin. Nat. Hist. l. 3. c. 20.

(s) Maurocenus, Hist. Ven. l. 17.

supported it (a). Which if a Man will be at the trouble fairly to consider, he will be forced to confess, that the Complaints of the People, (who are apt to think the Burthen of the Taxes the great occasion and cause of all their Miseries), are generally very *unjust* as well as very *impudent* (b). But their Complaints are most groundless and intolerable, *That wear whole Estates upon their Backs* (as *Plautus* says, (1) *and yet when they are to be Tax'd, pretend They are not able to pay, tho' at the same time They find enough to allow their Vanity, Which lays a much more unreasonable Tax upon them, than the State.* *Archidamus in the Peloponnesian War, when his Allies desired him to settle some stated Proportion for their Contributions, told them, that War could not be carried on by fix'd allowances, for that there is no determining before-hand, what supplies of Money will be necessary* (c). *It being impossible for them that engage in a War to know what will be the certain Event of it* (d): For it very seldom happens, that as *Cato* said, *a War will maintain it self.* And indeed in general, The *publick Expences* cannot be confin'd within any particular Bounds, because of that Variety of *Casualties* and *Accidents* which happen, and which do not depend upon *our selves* but our *Neighbours*, which will always demand *supplies of Money* to be defeated or avoided (e).

V. However, a *Wise Prince* will so far comply with the *querulous Humour* of his People, as to take care that his *Taxes* be collected with as little disturbance and as much gentleness as possible. Now the generality of People

think it harder to be obliged to part with what They look upon to be their *Property*, than to be denied the *Appropriation* of some few particular things (f). 'Tis generally true, *that Men have hardly any sense of publick Calamities,* (as *Hannibal* told the *Carthaginians*) *but when they affect them in their private Fortunes; and there is no Loss They feel so much, as that which touches any part of their Estates.* And therefore Some have thought it the best way to provide for that inconvenience once for all; and set aside a *Portion* of their *Estate*, purely for the use and service of the *publick* (g). Some again are of Opinion, that the *Generality* of the People are burthen'd less by *Taxes* rais'd by *Custom* or *Excise*, than when levy'd in a way of *Subsidy* and *Tribute*. In laying *Impositions* or *Customs* upon *Foreign Commodities* imported, it should be consider'd, whether the *Commodities* are for *necessary use*, or only for *Luxury*. If they are of the latter kind, the *Custom* may very justly be laid heavier, to prevent and suppress *Extravagance* and *Riot*; and because the *Rich*, or *they that enjoy large Privileges otherwise*, and contribute little to the *Publick*, are generally the only *Buyers*. It should be also considered farther, whether the same *Commodities* might not be produced at *home*, or wrought to the same perfection, by the *industry* and application of our own *People*. And if it appears they may, the *Imposts* ought to be rais'd higher upon them, *especially upon Commodities* that serve only to supply *Luxury* and *Vanity*, and make us pay *Tribute* to other Nations, *not for our Lands indeed, or Possessions, but what is much worse,*

(a) Tacit. Ann. 13. c. 56. Vid. Hist. 4. Tac. c. 74. where *Cerealis* tells the *Treviri*, All the Harm we have done you by our right of Conquest, hath been only to defend and secure your Peace; for it is impossible to support Peace in the World without War, to maintain a War without Money, or to have Money without a supply from Taxes. *Iseus*, Orat. 6. He thought that he ought to be very thrifty in his own Expences, and reserve all that was left for the use of the Publick, that there might be enough to defray the Charges of the State. *Themistius*, Orat. 14. The Laws forbid every Man that is return'd into the Exchequer, to take any place of publick Trust, before he hath discharged that Debt.

(b) Vid. *Hobbes de Cive*, c. 12. s. 9. *Plaut. Cistell. Act. 2. Sc. 2.* (1) In *Epidicus*, Act. 2. Scen. 2. v. 42, &c.

(c) *Plut. Apophth.* p. 219. & in *Crassus*. (d) *Procop. de Bello Persic.* L. 2. c. 26.

(e) It will not be impertinent to the Discourse, or difficult to Apply to any Preparations for War, what is mention'd by *Nicetas Choniates*, l. 1. 'The Emperour *Manuel Comnenus* was over-perwaded by his Treasurer *Johannes Puzenus* to apply the Money that was usually raised to maintain a Navy to his own use, and bring it into the Exchequer. The Reasons he gave to induce him to it were, that the State had not always occasion for a Fleet, and that the Charges to keep it were constant, and ran generally very high; and that therefore it would be a better way to call the Money into the Exchequer, and whenever the posture of Affairs made a Fleet necessary, the Emperour's Coffers would be full enough to defray the Expences of it. The Proposition took, and *Puzenus* was applauded for an extraordinary Man, and look'd to have more than common Sagacity and Skill in the management of Publick Affairs. But in Reality, the greatest Enemy to the Common-wealth could not have given more pernicious Advice. For he deceiv'd the Emperour Two ways, On one hand by misrepresenting the Greatness of the Expence, And on the other by falsely Stating the easiness of the charge it might be reduced to. And upon this Counsel rashly given and obstinately adhered to, the Provinces that lay upon the Sea were continually afterwards infested with *Pyracies*. And therefore the Historian infers, that the Calamities that followed might as justly be charg'd upon the Author of that Advice, as a Fire is as much upon the Person that does not put it out when he can, as him that at first Kindled it. Vid. *Nicoph. Gregoras*, l. 6. who gives an account of some Instances, in the publick Affairs like this, in the Time of *Andronicus Paleologus*.

(f) Vid. *Liv.* l. 5. c. 23. l. 30. c. 44. *Plut. Camillus*. Where the People took it very ill, that they were forced to give back a Tenth part of the Booty that had been shared among them.

*Homer. Iliad.* l. v. 125, 126.

Ἀλλὰ τὰ μὲν πολίων ἔξεσθ' ἄποδωκεν, τὰ δὲ δάσαι,  
 Λαοὶ δ' ἐκ ἐπίπτοις παλίνδοξα ταύτ' ἐπαίρειν.

*Claudian de Laudib. Stilicon*, L. 1. v. 379, 380.

— Graviolem amissa dolorem

Quam necdum quaerita, movent.

Vid. *L.* 24. l. 1. s. 5. *D. de Donat. inter Virum & Uxor.*

(g) Vid. *Diador. Sicul.* l. 1. c. 72. *Paulum Warnefridum de Gest. Longobardorum*, l. 3. c. 16.

We've shar'd the Spoils of the victorious Field,  
 And none will to a new Division yield.

The loss of our Enjoyments grieves us more  
 Than not to have enjoy'd.

for our Folly (a). As to the *Exportation* of *Commodities* of our own growth, it should be consider'd whether it be the interest of the *Common-wealth*, that they should not be *exported*; or whether it be necessary to send them to a *Foreign Market*, that the *Subjects* have a way to continue *Trade* or encrease their *Wealth*. The *First* naturally *raises* the *Customs* upon the *Commodities*, the *Second* *lowers* them. But besides it may be further consider'd, whether our *Commodities* are absolutely necessary in *other Countries*, and whether they are to be had from any other *place*. For all know the *Industry* and *Diligence* of the *Merchant*, and what difficulties and dangers He will venture himself in, upon the hopes of *advantage*; and that if the *Impositions* upon their *Commodities* be too high in one place, the *Market* will soon be carried to another; or else that they that buy, will content themselves to be without the *Commodities*: as *Gallianus* once said, *what can't we live without this Egyptian Linnen, and can't the Common-wealth be safe without these Robes of Honour?* And in my opinion, *Hesiod's* Rule may be very well apply'd to *Customs*, *ἡ μὲν ἡμισυ πλεονεκτησιμῶν* (i), *The Half is more than the Whole*. For a good *Harbour* is worth but very little when it hath lost its *Trade*. And such a *Constitution* too as *Nero* made, might possibly deserve Consideration, *That Vessels of Trade should not be taken into the valuation of Estates*, and that the *Merchants* should not be obliged to pay *Taxes* for them (b). The Government should also provide against the *Frauds*, which *Collectors* of *Customs* usually have, to promote their own private *Gains*, and take care to hinder their *importunity* and *impertinence*, and the trouble they give *Subjects* and *Traders*, which are born with more impaciencie and regret, than the *Customs* themselves. Thus *Dio Cassius* B. 42. saith, *that Cæsar deliver'd Asia from the Exactions and Oppressions of the Publicans, and reduced all their Customs into a form of Tribute* (c). So *Tacitus* (d) commends an *Edict* of *Nero's*, by which he *Commanded*, that the *Laws* relating to the *Taxes*, that had been out of use till then, should be entirely laid aside; and that no suit for any *Tax* that had been drop'd, should be reviv'd after the *Year* was expir'd; and that the *Magistrate* should have a *Power* extraordinarily to pass *Judgment* against the *Publicans*. Neither indeed should the *Exchequer* it self be always allow'd too much Favour, because that *seldom loseth a Cause*, but under a good *Prince*, and because there are never wanting those that have *impudence* enough to assist all its pretensions (e).

VI. But in *levying Taxes*, and indeed any sort of *Imposition* upon the *Subjects*, particular Care should be taken not to give any just Occasion of Complaint, which will be unavoidable where the *Taxes* are laid unequally. For as *Hobbes* very well observes, *A Burthen which*

*the whole Body of Subjects may possibly think easie and gentle will, if any considerable Number release or excuse themselves, lie heavy and insupportable upon the rest* (f). For generally, it is not the *Tax* it self, so much as the *Disproportion* and *Inequality* of it, that sits uneasy upon the *People*, either from the *Discontent* that followeth upon the *Injury*, or from *Envy* that others should be excused. And indeed, since All the *Subjects* pay, the *Common-wealth*, in *Reality*, is nothing else but the *Price of Peace*; 'tis but reasonable, that such as have an equal Share in the *Peace*, should pay equally for it, by assisting the *Common-wealth*, either with their *Money* or their *Persons*; so that all *Immunities* and *Privileges* granted in *Common-wealths* to particular *Men*, or *Orders of Men*, are no further Reasonable, than as they who enjoy them *ballance* them, by the extraordinary *Merit* of the Service they do (g). But to discover in what this *Equality* consists, it must carefully be observ'd, that the *Enquiry* is not after *Equality* in *Money*, but in *Charge* and *Burthen*; or in other words, it is not necessary to this *Equality* I speak of, that every *Man* should pay an equal *Sum of Money*, but that the Share every *Man* is to pay, should not lie heavier upon one than another, which may easily enough be effected by making the *Proportions* equal, between the *Burthen* of the *Tax* and the *Benefit of Peace*. For though all equally enjoy *Peace*, yet they do not all make the same *Advantages* by it. Some get much more than others; and again some spend much more than others. And from hence *Hobbes* makes an Enquiry; 'Whether the *Subjects* ought to contribute to the publick, in *Proportion* to what they get, or what they spend, or whether a *Man* should be *taxed* according to what he hath coming in, or according to what he consumes? Where first I think I may say, that since every *Man* is secured in his *Property*, by the Care the *Common-wealth* takes of him, he may justly be *taxed* in *Proportion* to his *Income*, as *Servius Tullius* said, in Defence of the *Institution* of the *Census* (h). *It is very Just I think, and very much for the Publick Good, that such as have large Fortunes should pay largely, and such as have less in a due Proportion*. And thus all *Subsidies* levied upon extraordinary Exigencies in the *Common-wealth*, ought to be laid according to the *Value of Estates*. And then, Secondly, Since every *Man's* Life is defended by the *Sword* of the *Common-wealth*, and Life is equally dear to *Poor* and *Rich*, they are both equally obliged to attend the Service of the Wars, and to pay an equal moderate *Tax* upon that account, such as a *Poll-tax*, in which the *Rich* pays no more than the *Poor*. But because it is owing in like manner to the publick Care of the *Common-wealth*, that the *Subjects* have the *Advantages*

(a) Dio Chrysostr. Orat. 79. p. 664. D. (i) V. Hesiod. Oper. & Dier. v. 40. ubi vid. Cleric. (b) Tacit. Ann. 13. c. 51. (c) Vid. L. 39. t. 4. l. 12. Princip. D. de Publicanis. (d) Tacit. Ann. 13. d. l. (e) Plin. Panegy. c. 36. (f) Hobbes de Cive, c. 13. f. 9. (g) Vid. Diod. Sicul. l. 4. c. 73. de Machaon. & Podalir. Isocr. in laudat. Busirid. de Priv. Sacerd. Egyptior. p. 389, 390. (h) Dionys. Halicarn. l. 4. p. 215. Edit. L'epf.

and Opportunities of raising Estates by their own Industry; the great Difficulty in this case is, How the *Tax* upon this account ought to be laid? And perhaps the most Convenient way may be, to *Tax* Men according to what they *consume*, rather than what they *get*; especially, since Men generally *spend* in Proportion to what they have *coming in*. For if the *Tax* be laid according to what People have *coming in*; and it should happen that Some who have equal *Incomes*, should yet have very unequal *Possessions*, (which is as common as it is for one Man to be Frugal, and lay up what he can, and for another to spend what he gets in Waste and Luxury) The Consequence will be, that they that equally enjoy the *Benefit* of the *common Peace*, must yet bear an *unequal Share* of the *Burdens* of the Common-wealth. For Instance, Here are Two Persons which get equally an *hundred Pounds* a Year, and one of them spends constantly *forty* of it, and the other perhaps *four score*: Since both of them equally enjoy the *Benefit* of Peace, it seems Reasonable that both should pay equally for it. But then in this there will be these Two *Inconveniencies*. First, That it will be very difficult for the Government to discover what each Subject *gets* every Year by his Industry; besides that, there cannot be a *Review* made so often, of what every Man is Worth. And Secondly, That if the *Tax* be levied at the Years end, when both have made up their *Accounts* of what they have *received*, and how much *expended*, and the *Tax* be laid upon each of them in Proportion, to what they have remaining of the last Years *Income*; 'tis manifest, that one must pay double as much as the other, though both equally enjoy'd the *common Peace*. And what is worse, the one suffers for his *Parimony*, and the other is eas'd by his *Extravagance*. And therefore it must be the best Method to lay the *Tax* upon the *things* which are to be *consumed*, and then every Subject will insensibly pay his Share to the *Publick*, in Proportion to his *private Consumption*, not indeed for what he now actually is, but for what, by the Protection of the Common-wealth, he was formerly possess'd of; and so that which is paid to the *Publick*, will be look'd upon to be part of the *Price* of the *things* that are *consumed*. But what hath been said before, in other respects, of the *Customs*, may also be applied to *Taxes* and all other *publick Impositions* (a). What ways of *raising Money* Necessity may sometimes force a Government to

take, may be seen at large in *Aristotle's Oeconomicks*, l. 2. c. 1. I cannot by the way forbear mentioning a very odd sort of a *Tribute*, which the *Tuca's* of *Peru* laid upon the *poorest* of their Subjects, which was to bring every Year to the Governours of their Provinces, a certain number of *Gnat's Horns*; the Design of which might possibly be, either that no Body should think himself exempt from paying *Taxes*, or else perhaps to free themselves from those Insects (b).

VII. (c) *Sovereign* or *Transcendental Propriety* (which is the Third head) is what some pretend to be afraid of, more upon Account of the *Name*, than *Thing* (1). The *Sovereign* Power, they say, was erected for the common *Security*, and that alone will give a *Prince* a sufficient *Right* and *Title*, to make use of the *Goods* and *Fortunes* of his Subjects, whenever *Necessity* requires; because he must be supposed to have a *Right* to every thing, without which the *publick Good* cannot be obtain'd. But the *Transcendental Propriety* is too *Arrogant* and *Ambitious* a name; and which ill Princes may sometimes abuse to the Damage and Ruin of their Subjects. But as it is *trifling* to dispute about words, so I think there can be no Absurdity or Danger in giving a particular Name, to a particular Branch of the *Sovereign Power*, as it exerts it self in a certain way, upon certain things. What the Force of this *Propriety* is, I shall now endeavour to explain (2). It will be confess'd agreeable to natural Equity, That when *Contributions* are to be made for the Preservation of some particular thing, by Persons that enjoy it in common, every Man should pay his *Quota*, and one should not be forc'd to bear more of the *Burthen* than another. And the same holds to be Equity also in *Common-wealths*; But because the State of a Common-wealth may often be such, that either some pressing Necessity will not give leave, that every particular Subject's *Quota* should be collected; or else, that the *Publick* may be forced to want the Use of something in the Possession of some private Subject; it must be allow'd that the *Sovereign* Power may seize upon it, to answer the Necessities of the State. But then, all above the Proportion that was due from the *Proprietors*, is to be refunded to them by the rest of the Subjects. For Example, When a *Town* is to be *fortified*, the *Fields* and *Gardens* of private Subjects must be laid open, and perhaps their *Houses* be pull'd down, to give room for the *Works* and *Ditches*. In *Sieges*, *Houses*

(a) Vid. *Tacit. in Agricola*, c. 19. Where he says, that if *Agricola* rais'd the *Tribute* upon the *Britans*, or obliged them to pay a greater Quantity of Corn, he made them Amends, by allowing them proportionable Favours, and by taking away all those Exactions and Oppressions which were more insupportable than the *Tribute* it self; for they had been forced before to wait ridiculously at the Granaries, though they were shut against them, and to buy their own Corn, and sell it again at a set Price; and it had been common to set them new Roads and Places at a great Distance, that the People might carry their Corn from the Incampments that were nearest to them, to those that were farthest off, and in the worst ways, that so what lay open for all, might turn to the Advantage of a few. Vid. *Cic. in Ver. Sic.* 3. And it was too severe an Answer, *Pescennius Niger* gave the *Jews*, when they begg'd him to lessen the *Taxes* upon their Estates; You would have me take off the *Tax* upon your Lands, but I assure you, if I could, I would lay one more upon the Air you breath, *Spartianus*, c. 7. (b) *Garcilass. de la Vega*. l. 5. c. 6. & l. 8. c. 5, 6. (c) *Dominium Eminens*. (1) See above in B. 4. c. 6. f. 3, &c. See Mr. *Budde's* History of the Law of Nature, in his *Selecta Jur. Nat.* l. 53. (2) See *Grut. B. 1. c. 1. f. 6.* and c. 3. f. 6. and B. 2. c. 14. f. 7, 8. and B. 3. c. 19. f. 7. and c. 20. f. 7, &c.

and Trees that belong to private Persons are taken down, that the Enemy may not be sheltered by them, or the *Besieg'd* incommoded. *Materials*, private Men lay by for their own Use, may be taken and made use of in publick *Fortifications*. In general *Scarcity*, the Store-Houles and Granaries of private Subjects are set open. In the *Extremities* of State, *Monies* entrusted with the Government are seized. And private Men's *Coffers* are rifled when they are not kind or publick spirited enough, to offer their *Money* voluntary by way of *Loan*. As *Xenophon* says *Cyrus* did (a). Perhaps what *Cæsar* did of this kind, when he came to *Rome* after the Defeat of *Pompey*, is not to be justified, though he be suppos'd a Lawful Prince. For as *Dio* relates it; 'He pretended to borrow the publick Money, when he found there 'was no other way of getting it, but continued 'to threaten Force, and to demand it as his 'due; and yet was resolv'd never to pay it 'back (b). So again, if there be no other way to oblige a common Enemy to retreat, our own Country is to be laid waste, and all Things which might be Serviceable, to be carried away, or left unfit for Use (c). From all which it appears, that *Transcendental Propriety* never takes place, but in the *Extremities* and *Necessities* of the Common-wealth. Tho' *Bæcler* in his Comment upon *Grotius*, l. i. c. i. f. 6. observes, 'That the *Necessity* here meant hath 'its different Degrees, and that it is not only 'at the last Extremity, this Power may be made 'use of. But neither, on the other hand, is this Power to be extended too far; but should be reduced to Equity, as nigh as it is possible. And a famous Example of this we have in *Livy*, l. 31. c. 13. From hence it may also be further infer'd, that the Prince himself cannot release a Subject from the Force of this *transcendental Propriety*. Because the *publick Extremities* of the Common-wealth must always be suppos'd to be unanswerable Exceptions to all sorts of *Privileges*. For it is a Contradiction to pretend to be a Subject, and yet to insist upon a *Right*, utterly inconsistent with common *Safety*. But however, without Dispute, They that have lost or sacrificed their Fortunes to the *publick Safety* in such *Extremities*, ought to have a *Restitution* or *Satisfaction* made them, as far as it is possible by the whole Common-wealth (1). Some indeed will make this *Exception*, when tho' the Damage sustain'd be unavoidable, it might yet have been easily foreseen and prevented. For the purpose, when Houses built in the *Suburbs*, are pull'd down in time of *War*. For the *Proprietors* of these can demand no *Compensation* for their Losses; because they

knew before that they could not build in those Places upon other Terms. And consequently, by building there notwithstanding, did in a manner tacitely consent to them. But much less can any *Compensation* be allowed, where the *Necessity* was universal; and every Subject suffer'd equal Loss. For the Publick is concern'd no further than to take Care that the Subjects be not injured by any ill Conduct in Government, but never oblig'd it self to bear all the Damages they might at any time sustain (d).

VIII. As to the publick *Goods* which belong to the Common-wealth it self, as such, it is to be observ'd, that in some Kingdoms they are divided into two Parts, one of which is intended for the Maintenance of the Prince, and the other to defray publick *Expences* for the Preservation of the *State* (2). (So *Dionysius Halicarnassens* makes a Distinction between the Δημοσία κτήσις, or the *publick Possessions*, and the Τῶν αὐτῶ βασιλέων κτήσις, and the *Patrimony of the Prince* (e). And in *China*, One part in Nine of the Land belongs to the *Emperor* (f). By that Part intended to maintain the Prince, I mean, That the Prince in some States hath certain Goods assign'd him out of the *Publick*, the *Income* of which is to maintain the *Expences* of his Palace. And of all these the Prince hath the full *Profits*, and may dispose of what he hath coming in from them, as he pleases; and what he lays up out of his *Income*, where the Laws of the Kingdom do not provide otherwise, makes an *Accession* to his own *private Patrimony* (g). The *Emperor Pertinax* (h), upon this View refused to have his Name put upon any of the *Imperial Possessions*, because, as he said, *They were not the Emperor's Propriety, but the common publick Estate of every Roman*. In *Peru*, under the Empire of the *Yuca's*, the Lands were divided into Three Parts; One part belong'd to the *Emperor*, Another to their *God* the Sun, the Third to the *Common-wealth*; and therefore the Subjects paid no *Taxes* out of theirs (i). But Secondly, The *Goods* which are to defray the *Expences* for the *Conservation* of the *State*, are only barely entrusted to the Care and good Husbandry of the Prince, who should always have especial Regard for the *publick Good* (3), and express the same Caution and Conscience as a *Guardian* ought to have for the *Estate* of his *Pupil*. From whence it may be easily infer'd, on which side the *Right* lies, to what a Prince gets or lays up in the time of his *Reign*, on *His* or on the *Common-wealth's*. For if a Prince grows Rich out of that Branch of the *Publick Revenues* which belongs to the

(a) *Xenoph. Cyropæd.* l. 8. (b) *Dio Cassius*, l. 42. (c) *Critolaus*, when the *Romans* were making *War* upon him, agreed with the *Achaian* Magistrates, that all Suits for Debts should be put off, and no Man should be oblig'd to make any Payment till the *War* was at an end. *Vid. Polyb. Excerpt. Leg.* 144. c. 3. *V. l.* 18. t. 3. l. 8. *D. de leg. Commisoria.* *Curtius*, l. 3. c. 4. See *Sueton.* Ch. 42. of *Jul. Cæs.* the Law made by *Cæsar* about the Payment of Debts.  
 (1) See *Grot.* B. 3. c. 20. f. 7. (d) *Jo. Christoph. Becmannus*, *Medir. Polit.* Diff. 21. f. 8.  
 (2) See *Grot.* B. 2. c. 6. f. 11. (e) *Dion. Halicarn.* l. 3. *Antiq. Roman.* (f) *Martin.* *Hist. Sin.* l. 4. c. 24.  
 (g) *Senec. de Benef.* l. 7. c. 6. Every thing belongs to *Cæsar*, but to his Exchequer nothing but his own private Fortune; every thing is at his Command, but his *Patrimony* only is his own by *Propriety*. (h) *Herodian.* l. 2. c. 15.  
 (i) *Vid. Garcilass. de la Vega Comm. Roy.* l. 5. c. 14. (3) See the last Section of this Chapter.

Common-wealth; or by imposing *Taxes* upon his Subjects; or by the Expence of their *Blood*; or by employing them in any of those *Services* which by common Obligations they owe the Common-wealth; it is clear, that his Wealth must accrue to the *Publick*, and not to his own *private Estate*. But suppose, as it may also happen, that a Prince may make all necessary *Preparation* for a War, and carry it on afterwards, without any Assistance of the *publick Treasure*, upon the Strength of his own *private Riches and Estate*, without engaging the Common-wealth, either in the *Expence* or *Hazard* of it, or it may be perhaps, barely from the *Profits and Revenue* of his *Crown-lands*. In such a War 'tis also clear, that whatever *Acquisitions* a Prince makes will be absolutely his own Right, and that he may if he please exclude the Common-wealth. For I have an undeniable Right to the *Profits* of what I have the *Use and Produce* of, and therefore may dispose of them as I think fit (a).

IX. I shall in the next place enquire, what lawful Power any Prince may have to *alienate* the *whole* or *any part* of his Kingdom. By which I do not mean a *Patrimonial Kingdom*, but a *Kingdom* receiv'd by *free Consent* of the People. *Grotius* is very large upon this Question (b). The Issue of the Matter in Dispute in short is this; That a Prince hath no manner of Power to *transfer* or *give away* his Kingdom by his own *single Authority*; And that his Subjects are not at all *obliged* by such an *Act* if made; and that the *Consent* of the *People* is entirely as necessary as that of a *Prince*. For as the *People* cannot justly take the *Crown* from their *Prince*, so neither can He, without their *Consent*, set it upon whose Head he pleaseth. But in the *Alienation* of a *Part of a Kingdom*, besides the *Prince's Consent*, there is required not only the *Consent* of the *People*, that are to continue under their old *Prince* and Government, but the *Consent* of that *Part* too especially which is to be *alienated*. The Reason is, Because they that at first erected the Common-wealth, and they that came voluntary into it afterwards, bound themselves by mutual *Compact*, to be govern'd by one and the same Government, as long as they thought good to continue in the *Dominions* of the same Common-wealth. And therefore, as every particular Subject acquired a Right by Vertue of that *Compact*, not to be violently *ejected* out of the Common-wealth, nor to be given up to any *Foreign Power*, except by way of Punishment; So the whole Body of the Subjects from the same *Compact*, acquires a Right to it self over the particular Subjects, by which no Subject can put himself under a *Foreign Government* or *Power*, or disclaim and renounce the *Authority* of his own, as long as he is allowed to live in any of the *Dominions* belonging to it. And therefore, since all *Common-wealths* (as all *Moral Bodies*) are form'd and grow by a

*Consent* of the Parts, we must look back upon the *Original Design*, and Intentions of the *Primitive Founders* of them, when we enquire what Power the *whole Body* hath over the *Parts* in such a Case as this. And it cannot be presumed, that their Intentions were, that the *Body* should have a Right to cut off its own *Members* when it pleas'd, and deliver them up to *another's* Power and Command. And for this Reason the People of *Guienne* justly refused to be separated from the Kingdom of *England*, notwithstanding the Grant and Donation of *Richard the II.* (c). But indeed there is one *Exception* against what was said before, That a *Part* ought not to disown or separate from the *Body*, while it continues within the same *Dominions*, and that is this; Except it be in the last *Extremities*, and that it be impossible for it to preserve it self otherwise, than by submitting to the *Enemies* Power and Authority. For in all *Agreements* of this *Nature*, the utmost *Necessity* seems of Course to be excepted; which, it is always allowed, gives a Man full Liberty to secure himself all the ways he can possibly. And therefore 'tis no more than what must be expected, and is far enough from being Criminal, That a *Town* after it hath made the best *Resistance* it could against an *Enemy*, should at last chuse rather to surrender, than suffer it self to be carried by *Storm*, and be put to the Sword. For since every Man that submits himself voluntary to *Civil Government*, had before from *Nature*, a *Right* to defend himself all the ways he could, and therefore enters into the *Common-wealth* for the better Attainment and Security of that *Right*: When the Common-wealth can no longer afford Protection or Defence to the Subjects, they must be supposed to be releas'd from the Ties they were under before, and to be at Liberty to consult their own Safety as they think best. And without Dispute, the Common-wealth it self can have no other *Right* over the *Members* of it, than what was granted and left by them that at first erected it. And therefore as the Common-wealth engageth to protect and defend every one of its *Members*; unless hindred or prevented by unavoidable Necessity; So whenever it struggles under such a Necessity, it is supposed, that no Man is forbid to provide for his own Security as well as he can. In the *Natural Body* indeed, it is Lawful to cut off any particular *Member* to preserve the whole, because every *Member* lives entirely by the Life of the *Body* and cannot live otherwise; but in a *Moral* or *Politick Body*, 'tis possible the *Members* may exist and live in a separate divided State; and therefore the *Body Moral* hath not the same Right over his *Members* as the *Natural*. But if a Prince should be Necessitated by *Extremity* of his Affairs, to compound for a Peace with an over-powerful Enemy, by giving him a certain *Country* in his *Dominions*, and that *Country* should disown and deny the *Grant*; in this

(a) V. Grot. l. 1. c. 3. f. 12.  
Annotations) & l. 3. c. 20. f. 5, &c.

(b) L. 1. c. 4. f. 10. & l. 2. c. 6. f. 3. (Upon both which Places see Bacler's  
(c) Froissard. l. 4. Polyd. Virgil. Hist. Angl. l. 20.

Case, it is my Opinion, that the Prince may draw his *Forces* out of their *Towns* and *Garrisons*, and leave them *naked*, not hindering the *Conqueror* from taking *Possession* of them. But then that he hath no Power to oblige or force them to surrender themselves, or to submit to the *Conqueror's* Authority. Neither can I think, that the *Country* is under any *Obligations*, if they have Strength enough in it, not to make *Resistance* against such a *Conqueror*, or afterwards if they can, not to erect themselves into a *distinct Common-wealth*. For thus when the Emperor *Jovian* was obliged by *Treaty* to give up the City *Nisibis* to the *Persians*, the Citizens desired they might have leave to defend Themselves (a). By such *Agreements* therefore, the *Prince* indeed and *People* lose their Right to such a *Country*; but the *Conqueror*, if they consent to receive him and swear *Allegiance* to him, acquires a lawful *Authority* and *Power* over them. As to that Opinion some are fond of, either with regard to *all* Kingdoms, or perhaps only to some *particulars*, That whatever *Goods* are appropriated to, or as they say, *incorporated in the Crown*, can never be any way *alienated*, and that neither the longest Course of Years, or another's quiet and peaceable Possession can secure them from an *Act* of *Resumption*, at any time after, it is without Dispute, False and Groundless. And much more Absurd and Ridiculous is it to assert, that any Kingdom may have Privilege to waste and ruine others, and yet that what it hath once seized, can never afterwards be recover'd from it.

X. From what hath been said it is further evident, That a *Prince* cannot without his *People's* Consent (1), make his Kingdom *Fendatory* to another, or hold it upon Condition of (b) Forfeiture whenever the *Feudal Oath* is violated, or that when his *Family* is extinct it shall devolve to the *Prince* it is held from. For if the *Conditions* be such as these, the making the Kingdom *Fendatory* is indeed a *Conditional Alienation*. And again on the other hand, the *People* may recal any *Act* of *Homage* which the *Prince* hath remitted without their Consent. And it further follows, that a *Prince* cannot *mortgage* any part of his Dominions, so that the Government of it, and *Natural Possession*, shall be for so long resign'd to the *Creditor*, without the Consent of his *People*, and the *Part* engag'd by the *Mortgage*; and much less if there be any Conditions of (c) *Forfeiture* annex'd. The Reason of which is, Not only because a final *Alienation* is generally the Consequence of *Mortgaging*; but besides, because the *People* when they made Choice of their *Prince*, chose to be govern'd by *him*, and not by any *other*. And because it may justly be presumed, that they that are grown and are strictly united into one *People*,

can never be willing to be broken and canton'd into *Parts* and *Divisions*.

XI. And it is also further evident, That the *Prince* hath no Power, without Consent of his *People*, to alienate those *Goods*, the *Revenues* of which are design'd, either to support the *publick Expences*, or to maintain the necessary *Greatness* and *Dignity* of his *Court*. For in those *Goods* the *Prince* is allow'd only the *Use* and *Produce* of them, which can never amount to a *Right* of *Alienation* (2). And tho' perhaps he may think himself well enough provided for, for his own Life, yet it should be considered that there are to be other *Princes* to succeed *him*, who are all to be maintain'd agreeably to the Dignity of *Crown'd Heads*. But however, we are to distinguish carefully between the *Goods* themselves or the *publick Patrimony*, and the *Profits* or *Produce* of them. The first the *Prince* hath no Power to alienate, the other he hath free Liberty to dispose of, as he pleaseth. Thus where the *Right* \* of what the *Sea* or *Rivers* cast up and join to the *Land*, is the *Publick Patrimony*, or belongs to the *Crown*, the *Prince* cannot make away, or transfer that Right, to any one else; but I can see nothing that can oblige him, not to dispose of what is thrown up by the *Tide* or the *Stream*, as he thinks fit; because this is the *Produce* of that Right. So the Right of *Confiscation* may be a *Publick Patrimonial Settlement*, and the *Confiscated Goods* be the *Produce* of that *Settlement*. The First is appropriated to the *Common-wealth*, the Second belongs to the *Prince*. But after all, a *Prince* that hath Power when *Reasons* of *State* require it, to levy new *Subsidies* upon the Subject as he pleaseth, may when the Necessities of the *Common-wealth* command, *Mortgage* any part of the *Publick Patrimony*. For as the *People* are obliged to pay the *Subsidies*, such a *Prince* lays upon them, upon such *Reasons of State*: So are they obliged to redeem what was *Mortgaged* upon such *Reasons*. Since the thing is the same, whether They pay the Money beforehand, to prevent the necessity of the *Mortgage* or whether it be levied upon them afterwards to redeem it. And here it is manifest, that every Particular Subject is not the *Debtor* of that Money, tho' every one be obliged to contribute his Share to discharge it (d) (3). So also, Where the *Prince* lays out Money for the Use of the *Publick* out of his own *Private Estate*, the *Common-wealth* must be supposed to *Mortgage* to him the *Publick Patrimony* upon that Account, till such time as the *Debts* contracted upon it are clear'd by the *People*. But all this will hold only upon Supposition, that there be no *Fundamental Law*, or *Capitulation*, which provideth otherwise, and either enlargeth or confineth the Rights of the *Prince* or *People*.

(a) *Ammian. Marcellinus*, l. 25. c. 12. *Zosimus*, l. 3. (1) See *Grot. B. 2. c. 6. f. 9.* (b) *Sub onere Commissi ex Felonia.*  
 (c) *Lex Comm. soria.* (2) *Vid. Grot. ubi supra*, l. 11, 12, 13. \* *Alluvionum Jus.* (d) *Vid. Senec. de Beneficiis*,  
 L. 6. c. 20. (3) See *Grotius*, B. 3. c. 2. f. 1.

## C H A P. VI.

## Of the Right of War.

SINCE every particular Man in a *Liberty of Nature* hath the same *Natural Right*, States and Commonwealths have, to defend himself against unjust Violence, and to defend and assert his Rights by Force, when Others injure him in, or endeavour to deprive him of them: it will, I think, be a proper Method to enquire, First, What may be supposed Common to the *Wars* of particular Men, and Commonwealths. And then Secondly, What hath either by Custom of Nations, or by Nature, been appropriated to the Latter.

II. First therefore, 'tis certain that nothing is more Consonant to the *Law of Nature*, than that no Man should offer Unjust Violence or Injury to Another; and on the other Hand, than that all Men should show Kindness and Humanity to one another, and be particularly exact in the Observation of Agreements and Compacts. And when Men duely attend to, and obey these Laws, they may be said to enjoy *Peace*; which is a State most agreeable to Human Nature, which tends most to promote its Happiness and Security, and indeed which the *Law of Nature* was given to Men principally to Establish and Preserve (a). Nay further, *Peace* is a State proper to Human Nature, as such; since it ariseth from a Principle peculiar to Mankind above the Brutes; whereas *War* flows from Principles common to Both. Brutes indeed by Instinct of Nature will endeavour to Defend and Preserve themselves as well as they can (1). But Man alone understands the Nature and Constitution of *Peace*. For it is he only, that can voluntarily undertake or forbear the Performance of any Action which may bring Good or Harm upon another Person, upon a Consideration of certain Obligations on one side, and certain Rights on another. All which depends entirely upon the Use and Exercise of *Reason*. Beasts indeed,

perform the Service their Masters are pleas'd to use them in. But the Reason of that Obedience goes no higher than the Fear of Blows, or the Temptation of Good Keeping; for the Sense of any Obligation, without doubt, lies much out of their Reach. We find too, that Beasts are seldom inclin'd to hurt Men, or one another; but this must be supposed either the Effect of Fear and Weakness, or because they find nothing to Provoke their Appetite. Again, there are others of them that seem to be Fond of, and to Care for and Assist one another. But it is not to be supposed, that they do so, because they are sensible they are obliged to it (b). But notwithstanding, it is very lawful, and may sometimes be necessary for Man himself to make *War*; for Example, when he finds that another Person hath maliciously design'd to do him Harm, or denies him his *Right*. For in such Cases, the Care he is supposed to have of his own Safety, giveth him Power to Defend himself, and Assert his Right, what ways he thinks best, tho' it be with the hurt of the injurious Person; or to recover his *Right* by force, when he cannot obtain it by easier means (c). For Nature hath not only given Man a quick Sense of Injuries, that he might not suffer himself to be Oppress'd and Insulted; but she hath also armed him with Strength and Agility of Body, that he should not be forced tamely to submit. But then, when Nature permits *War*, *Peace* is the end she intends should be secured by it. For *Peace* is the Price and Reward of *War*. And when Men are forced to fight, it is not because they are to make *War* perpetually, but that they may enjoy a lasting *Peace* and Security for the Future (d). But besides, tho' the Person that doth Harm, doth immediately, as far as he is concern'd, give a Man Power to make *War* upon him, yet it ought to be consider'd, what Good

(a) Vid. *Polyb.* l. 12. c. 14.

(1) Vid. *Laetan.* Institut. Divin. L. 5. c. 17.

(b) To this purpose is that Passage of Quintilian, *Declam.* 9. p. 128, 129. Ed. *Lugd. Bat.* Nature seems to have infused into Man, more than into other Creatures, a certain Sociableness of Temper and Constitution, which hath taught us to think our selves Happy in one another's Company and Conversation, to unite into Nations, and erect Cities and Commonwealths; And among all the Impressions she hath made upon our Souls, there is none that can be of greater Use to us, than that of Kindness and Good-Will. For what can we imagine Happier than Mankind, if all the World could be perswaded to be Friends? We should have no Wars, Seditions, Robberies, Quarrels and Disputes, or any of those Evils which we our selves add to those of Fortune. It hath pleas'd Heaven indeed, that it should be otherwise, but however the World hath always been agreed, that Sincerity, Integrity, and Gratitude, ought to be the great Principles in the Composition of every Brave and Noble Spirit.

(c) *Distys Cretensis*, l. 2. c. 21. p. 41. Ed. *Amst.* *Max. Tyrius*, *Dissert.* 14. p. 138. Ed. *Lugd. Bat.* A good Man never begins a War but when he is forced to it, but a bad Man makes it his Choice. V. *Becker* in *Grot.* l. 1. c. 3. f. 1.

(d) *Aristot.* ad *Nicom.* l. 10. c. 7. We make War that we may live in Peace. There is no Body that desires, or makes Preparations for War, purely for the sake of the War it self. For a Man must be of an Inhuman Temper, that will make Enemies of his Friends, barely for the Satisfaction of the Quarrel. *Tacit.* *Hist.* l. 4. c. 76. There is no Body so forward in taking Arms, that had not rather obtain that peaceably, which he trusts to the Decision of a War. And therefore it is a very ill Character of some, which *Silius Italicus* describes, l. 3. v. 330, 331.

*Nec vitam sine Marte pati: quippe omnis in Armis,  
Lucis causæ sita est, & Annatum vivere pati,*

They think Life pleasant when in Arms employ'd,  
But dull and worthless if in Peace enjoy'd.

or Evil may probably be brought upon himself or others that did him no Injury by it. For Injuries, which do not entirely rob a Man of Quiet and Safety, ought not to provoke him to revenge them with War; when either the Inconveniencies he may bring upon himself, and those that belong to him by it, are like to be greater than the Advantages he can propose; or when others he at present is at Peace with, must by his War suffer such Evils as by the Laws of Humanity, on a quiet Submission to the Injuries offer'd, he ought to Defend them from. And therefore, That Man is justly to be commended, that will not Revenge an Injury, when he sees that a War will, in all Probability, produce greater Evils than Good.

III. The Causes of Just War may be reduced to these Three Heads. First, to Defend our Selves and Properties against Others that design to do us Harm, either by Assaulting our Persons, or Taking away or Ruining our Estates. Secondly, to Assert our Rights, when others who are Justly Obliged, refuse to Pay them to us. And Lastly, to Recover Satisfaction for Damages we have Injuriously Sustained, and to Force the Person that did the Injury, to give Caution for his Good Behaviour for the Future (1). And hence ariseth the Division of Just Wars into Offensive and Defensive. The Latter of which, I take to be those sorts of Wars, in which Men endeavour to defend and keep what is their own. The Former are, when Men Extort their Rights that are denied by Force, Attempt to Recover what hath been Unjustly Taken from them, and Require Caution for the Future. Sometimes indeed, the Party that first began the War, may have the Credit of being on the Defensive. For Instance, suppose he be often Alarm'd and Harass'd with sudden Incurfions upon him, the Enemy retiring always when he appears to oppose him; or suppose a Man be assured that his Enemy hath form'd Designs against him, and so disables him for the Attempt, while he is making his Preparation (a).

IV. But in General, the Causes (2) of every War, and especially of the Offensive, ought to be Evident, and without mixture of Doubt and Uncertainty (3). For it is very usual in Cases of this Nature, for Doubts to arise; either perhaps out of Ignorance of Matter of Fact, when it is not absolutely certain, whether it was done or not, or with what Inten-

tion it was done; or else out of a negligent, slight Comparison between Strict Justice and the Laws of Love and Charity; or, it may be, from a mistaken Computation of the proportion of the Utilities, which it is probable, will be Effects of undertaking or forbearing the War. In these Cases therefore, as no uncertain Pretensions (4) ought to be made use of; so neither should Men immediately seek Redress by Arms, but sincerely endeavour, and that these Three ways especially, to Compose the Differences, before they break out into a War. First, by Conference between the Parties, or their Agents (5). Secondly, by Appeal to Arbiters (6). Or in the Last Place by Lot (7) (b). But how evident soever the Causes of War may be, a Wise Man before he draws his Sword, ought to consider what Grotius says, l. 2. c. 24. And to think further, that it is great Folly in particular Men, as well as Common-wealths, not to accept of Accommodation, or hear of Reconcilement, while things stand whole on both Sides; But when they have sufficiently Punished and Mortified one another, then quietly to give over, without giving any Body the Trouble of parting them (c).

V. The Unjust Causes of War are recounted by Grotius, l. 2. c. 22. f. 5, &c. Some of them are manifestly Unlawful. Others of them have some Colour to be thought Lawful, tho' it be but weak and faint. Under the first Rank is to be placed Avarice and all extravagant Desire of encreasing Wealth, as also Ambition, and the Hopes of enlarging Rule and Dominion, of growing Great, and purchasing a false Fame and Glory, by the Oppression of Others. Avarice is a Cause of War usually conceal'd and dissembled with great Care, because it supposes a base and fordid Spirit. But Ambition is generally favour'd in the World, under the Name of Gallantry and Fortitude. And it is commonly thought Greatness and Bravery of Mind, to grasp after, and fight for what belongs to other Men. But yet Princes as Phisiscus told Alexander (8), Tho' they are never so Ambitious of Glory, should not think it any, to be remember'd, as Famines and Pestilences are, as the Plagues of Mankind; but as the greatest Blessings, as Peace and Happiness. For tho' the Great GOD often makes use of War to Purge and Punish the World (d); yet when Princes make War without any other Design than that, it is the greatest Impiety. And yet the Jews thought that They were allow'd, when their Sanhedrim

(1) See Mr. Barbeyrac's 1st, 2d, and 3d, Notes upon this Section. (a) Vid Justin. l. 2. c. 3. n. 12.

(2) See Grot. B. 2. c. 1. f. 1. and c. 22. f. 2. and Mr. Barbeyrac's First Note upon this Section.

(3) See above, in B. 1. c. 3. f. 7, 8. and Grot. B. 2. c. 23. f. 1, 2, 3, 4, 5, 6, and 16. (4) See Grot. B. 2. c. 24.

(5) See above, in B. 5. c. 13. f. 3. (6) See the same Book and Chapter, f. 4, &c. (7) See the same Book, c. 9. f. 2, 3. (b) Valerius Flaccus, l. 5. v. 663, &c.

An nullas præferre preces nec fœdera Regis  
Ulla sequi? cæca sed cuncta impellere Pugna  
Debuimus? sic Thraces agunt.

Never to peaceful Overture to yield,  
Or Sacred League, but in the bloody Field  
Always in Arms to breath relentless War,  
None but the wildest Savages will dare.

(c) Isocrates Orat. ad Philip. p. 154. Ed. Min. Paris.

(d) As in Euripides, Hællena, v. 38, &c. Jupiter is said to have engaged the Greeks and Phrygians in a Quarrel.

To ease the Earth of her too numerous Sons.

declared *War*, tho' without any other Reason, than barely for the Greatness and Glory of their Nation, to invade their Neighbours, and if they could, make an absolute Conquest of them (a). Under the *Latter* Class may be Rank'd *Fears*, which arise from the Strength and Power of Neighbours; and when Men think, as the Poet says, *They don't want Will to do what they have Power* (b). But this single Suspicion is not sufficient to make a *Cause* of War *Just*, unless Men have very good Moral Certainty, that They have form'd Designs against Them. For an uncertain Jealousie of Danger, may be reason enough to persuade a Man to be Circumspect, and Fortify himself as well as he can, but can never give him a Right to strike the first Blow, tho' it be only with Intent that the other should give him *Real Caution*, as they call it, that he will attempt nothing against him (c). For as long as my Neighbour doth me no Injury, and I do not apparently take him in any Preparation for such a Design, (for sometimes an intended Injury, and but begun, may as justly be punish'd with *War*, as an Injury that is finished) I ought to presume, he will always continue in the same Mind. But especially, if I have his Word and Faith to assure me of his Sincerity. And it would be extremely Unjust in me to force him to give me *Real Caution*. Because thus he must be in a more suspected Condition than my self, being forced himself to rely upon my Faith alone. Supposing indeed, that there be *Just Cause* of *War*, the Growth and Power of Neighbours may very well deserve immediate Consideration and Regard, in Debates about it. For Experience hath often proved it true, that Men's Desires of being Great, encrease in Proportion to their Strength and Power (d). 'And 'it is Natural for Men to be suspicious, and 'afraid of being oppress'd, whenever they apprehend that there is an Over-Balance of Power in their Neighbours; for it is easie to imagine, that such as have too great a share of Strength, will find Reasons when they please to make Use of it, upon them that are Weaker, tho' they do nothing to deserve it. But now as for *Utility*, to make that a *Cause* of *War*, or to pretend the same Right from thence to what belongeth to Others, as Necessity may give, is Unpardonably Impudent. Tho' it is no more than what the *Athenians*, in *Thucy-*

*dides* (1), said for themselves, That 'no Body 'is so much a Friend to Justice, as to neglect 'an Opportunity of possessing himself of what 'he can get by Force, barely because it is Un-just. Especially, since nothing can be more opposite to the Publick Interest of Mankind, than to admit the Introduction of such a Right, which will give a Man leave to take away any Thing by Force from another Person, which he thinks will be an Advantage to himself. For it must be expected that other Persons will use him with the same Liberty, he takes with them. And as to other *Pretences* for War, which *Grotius* mentions in the same Place, they may be answer'd the same way. My Lord *Bacon* in his *Advancement of Learning*, gives this for a *Sufficient Reason* for making War upon the *Americans* (e), which I must confess, I cannot agree with him in: 'That they were 'to be look'd upon as People proscribed by 'the Law of Nature, inasmuch as they had a 'Barbarous Custom of Sacrificing Men, and 'feeding upon Man's Flesh. For it ought to be distinctly considered, Whether Christian Princes have sufficient Licence given them to Invade those *Indians*, as People proscribed by Nature, only because they made Man's Flesh their common Food? Or because, they eat the Bodies of Persons of their own Religion; or because, they devoured Strangers and Foreigners? And then again it must be asked, Whether those Strangers they are said to Kill and Eat, come as Enemies and Robbers; Or as Innocent Guests and Travellers; Or as forc'd by Strefs of Weather? For this last Case only, not any of the Others, can give any Prince a *Right of War* against them; and this to Those Princes only, whose Subjects have been used with that Inhumanity by them (2).

VI. Tho' it be also Common to all *Sorts of War*, that the particular *Nature*, and, as I may call it, *Genius* of them is *Violence* and *Terror*; yet it is also Lawful to make use of *Stratagem* and *Fraud*, against any Enemy; provided there be no Treachery or Violation of Compact and *Faith* in it. For as *Agefilas* said, *To Break the Faith of Articles and Leagues, is no less than a Contempt of G O D. But to Circumvent an Enemy, is well enough Consistent with Justice, and may be attended with as much Glory as Success* (f). And the proper Sense of That Famed Saying of *Cleandridas*, implies no

(a) *Seldenus*, de J. N. & G. Sec. Hebr. l. 6. c. 3. & 12.

(b) *Lucan*. *Pharsal*. l. 3. v. 100, 101.

(c) *Gellius*, l. 7. c. 3. A Gladiator that prepares himself to fight, must accept of these Conditions of Combat, either to kill his Enemy, or to fall himself; but the Life of Man is not confin'd by any such hard and severe Laws, as to oblige us to do others Injuries First, that we might not Suffer them our Selves.

(d) V. *Cumberland*. de Leg. Nat. C. 2. f. 15. in fin. *Bacon's* *Essays*, c. 19. *Seneca*, *Oedip*. v. 542, 543. *Stat ingens arbor atque umbra gravi sylvas minores urget*.

A lofty Tree that stands, which with its Shade  
Oppresseth all the Under-wood. —

*Procop*. *Hist. Goth*. l. 4. *Herodes* *Orat*. de Repub. Neighbouring Nations are never concern'd at the Mischiefs which befall one another from their own Domestick Broils and Quarrels; the weaker have no reason, because thus they are secure from being enslaved, they that are equal in Strength, think of gaining a Superiority by it, and the strongest of purchasing an easier Conquest. *Polyb*. l. 1. c. 83. A Man should never trust another with so much Power, as to place him out of his reach, when he is to contest with him about any Right that is confessedly his own. *Appianus* *Alexand*. *Lybic*. p. 32. Ed. *Steph*. Tho' it be a Friend, yet it is necessary to be cautious how he is made too Great (1) *B*. l. 1. c. 76. Ed. *Oxon*. (e) *De Augmen*. *Scient*. p. m. 348. (2) See Mr. *Barbeyrac's* Fifth Note upon this Section. (f) *Plutarch*. *Apophtheg*. *Lacon*. p. 209. B.

more; *When the Lyon's Skin fails, It is necessary to put on the Fox's* (a).

VII. But the better to understand how far it is Lawful to pursue *Revenge*, and use Violence against an Enemy, it will be necessary to observe; That there is a great deal of difference between the *Liberties* which a *State of Hostility* simply considered, gives a Man against his Enemy, and the *Liberties* which the *Mercifulness and Gentleness of the Law of Nature* would suffer him to take. The *Law of Nature* obligeth Men to a mutual Exercise of the Offices and Duties of *Peace*; and the Person that First violates them to my Prejudice, releases me, as far as lies in his Power, from paying any of those Offices to himself: And in Consequence, as long as he professes himself my Enemy, he gives me a *Liberty* to use *Violence* against him *in infinitum*, or as far as I please. Especially since, if I am not allow'd this *Liberty*, but necessarily obliged to confine my Violence within certain Bounds, and in no case to proceed to Extremities, the proper End of *War*, whether *Offensive* or *Defensive*, can never be obtain'd. And therefore every open *publick War*, seems to have something in it, like such a sort of *Compact, Try Your Strength, and I will try Mine*. And this holds, not only where my Enemy resolves to push Things to the Utmost against me, but also, tho' he designs to destroy me, without going to Extremities. For he hath no more Right to give me a slight Wound, than one that may prove Mortal. And therefore, it is not only so far Lawful for me to use *Violence* against my Enemy, till I have repulsed the Danger he threatned me, or till I have recovered, or forced from him what he either Unjustly Deprived me of, or Refused to Pay me; but I may further oblige him to give me *Caution* for the Future. Which if he suffers to be forced from him, he sufficiently discovers, that he still entertains Malicious Designs against me, and that one time or other, he may put them in Execution. Neither indeed is it always Unjust, to return a greater Evil for a less. It may, 'tis true, be objected, that Retribution ought to be made in due Proportion; but it must be said, that this is to be applied only to *Courts of Judicature*, where Punishments are inflicted always by *Superiours*. The *Evils* which are the Effects of a *Right of War*, are properly Punishments, because they are not inflicted by a *Superiour* as such, nor have any Tendency to Reform either the Injurious Person or any Others, but only to defend or regain the Security of a particular Man's Rights and Properties. In pursuance of which End, it is Lawful for me to make Use

of such Means as I think will best prevail against a Person, who by his Injurious Treatment of me, hath put me out of all Capacity of doing him any Injury, till such time as it shall be agreed between us, to forbear *Hostilities*. But now the *Law of Humanity* would have Men consider, not only what an *Enemy* may suffer without Injury, but what it may be proper for a generous *Conquerour* to inflict. And therefore they ought to be particularly careful, that as far as is possible, and their own necessary Defence and future Security will permit, to proportion the Evils they inflict upon their Enemy, to the *Measures* and *Moderation* observed by *Civil Courts* in Punishing *Criminals* and *Offenders*. Upon this *Moderation Grotius* is very large, l. 3. c. 11, &c. ad 16. And the Three Rules he prescribes, l. 3. c. 1. § 2, 3, 4. will give us a clear View of the *Liberties* of *Hostilitie* (1). But besides the Uncertainties and Turns of Fortune, which may happen in *War*, ought to persuade Men to be very temperate in the Use of those *Liberties*, for fear an Alteration in Affairs should, as it were, make their own Weapons recoil, and return upon themselves the Usage they gave others (b). So when *Colonna*, in *Gratianus* (c), gave Orders that the *Turks* which were taken Prisoners in the Fight at *Lepanto*, should be well used at *Rome*, he turn'd to *Mahomet* and said aloud, Learn to be Merciful of Us, You that are generally so Cruel and Barbarous to *Christian Captives*; to which the *Turk* replied, the Cruelty Sir You Object, is, however, pardonable in Us, because We never knew before what it was to be Prisoners, and be left to the Mercy of an Enemy. The *Turks* understood well enough how to take Prisoners, but never thought of being made such. How they are to be dealt with, that supply an Enemy with what he wants, may be seen in the *Author* mentioned before, l. 3. c. 1. § 5. & c. 17.

VIII. I come now to consider what Difficulties and *Enquiries* relate to *Wars* raised by *Common-wealths* and *Civil Governours*. And here it is first to be observ'd, that the *Right of War*, which always attends all Men in the *State of Nature*, is taken away from private Persons in *Common-wealths*; and that therefore in *Civil States*, Subjects are not to punish such as injure them with their own Swords, and as they please; nor endeavour to recover their Rights, when denied them, by their own Force; but they must apply themselves to the *Magistrates* in such Cases, whose Duty it is to take Care that their Wrongs be redress'd, *Satisfaction* be made for Damages sustain'd, *Caution* be given

(a) *Cleandrid. in Polyen. Strateg. l. 2. c. 10. n. 5. Vid. Xenophon. Cyropæd. l. 1. & Grot. l. 3. c. 1. f. 6. add. supr. l. 4. c. 1. f. 19.* (1) See Mr. *Barbeyrac's* 1st and 2d Notes upon this Section. (b) *Vid. Diad. Sicul. l. 10. c. 47. Virg. Æneid. 10. v. 533.*

— *Belli commercia Turnus*  
*Sustulit illa prior, jam tum Pallante perempto.*

(c) *Gratianus de Bello Cyprio. l. 5.*

for the Future, and that every Man be maintain'd in his own Just Rights (a). For tho' at some Times, and in some Cases, private Subjects may be allowed Liberty to Defend themselves with their own Strength; yet such a Liberty is by no means to be called a Right of War. For a Right to make War, implies Power to begin it at my own Discretion, to Continue it as long as I please, and to put an End to it by Compact with the Enemy. But Subjects are never to be permitted to Defend themselves by their own Force, except in Dangers unavoidable (1), and then no longer, than till they have overcome them. And as no private Subject hath a Right of War; so neither is it necessary that Peace should be made by any Compact of the Subjects, when the Authority of the Sovereign hath sufficiently settled it before. Nay, tho' private Subjects be perfectly Reconciled to One Another, yet when all is over, the Magistrate may, if he pleaseth, punish the Injury, which first gave occasion to the Quarrel. But, it may indeed sometimes happen, that any private Subject may assume the same Right of Defence, which he would have had in a State of Nature; for Instance, if he happen'd to come into any place which belongs to no Common-wealth, but continues in its primitive Liberty of Nature. But then in this Case it is to be considered, whether the Person be assaulted by his Fellow-Subject or by a Stranger. For if we suppose by the First, he is allow'd the use of his own Force to resist only the present Danger. But the further Punishment of the Injury must be refer'd to their common Sovereign; except it appears that the Person who makes the Assault, intends to return no more into his own Country, and hath left nothing behind him that can make Satisfaction for the Injury. But if a Man be assaulted in any such Place by a Foreigner, he hath Liberty, if he can prevail against him, to bring him to the last Extremities. And he may also enter an Action against him in the Common-wealth he is a Subject of, and there demand Satisfaction and Punishment, and make use of the Interposition of his own Common-wealth. And then if Justice be denied him, his own Common-wealth hath Right to demand Satisfaction for him in a way of War. And therefore if a Man be set upon in the open Seas, he need not give himself the Trouble to use all his Force; but only just so much as will resist present Danger, because when his Enemy comes back to his own Country, he may enter an Action against him there. But if a Man be assaulted by a Subject used to despise and defie the Authority of the Magistrate, or the Magistrate himself openly refuse to do Justice, he must Right and Defend himself as he can, when

ever he goes out of the Dominions of his own Common-wealth. But if the Magistrate should excuse himself, by pleading the Iniquity of the Times, or the bad State of the Common-wealth, and desireth either that the Prosecution of the Cause should be deferr'd to some other time, or that the neglect of Justice should be thought pardonable in the present unhappiness of the Common-wealth; every Sensible and Good Man ought to acquiesce in, and be satisfied with the Answer.

IX. War is commonly Distinguished into Solemn, and Less Solemn (2). In the first, it is necessary the War should Commence and be directed by the Supreme Authority, on both sides, and that it should be Duly Proclaim'd (3). The Less Solemn Wars are those that either are not publickly Declared, or else that are levied by, or against private Subjects. The first looks like an Incurfion or Depredation of Robbers. The second supposes that one side or other is in Rebellion, or at least in such a way of Life, as can at no time make the War Just. And thus Civil Wars may happen to be a Species of the Less Solemn, when the Common-wealth is so divided, that it doth not appear on which side the Sovereign is engaged. And here it is observable with regard to Solemn Wars, that Authors usually call two distinct People their Generals and Governours concern'd in them Just Enemies, in opposition to Robbers and Pyrates (b). So Cicero says (c), 'A just Enemy is One that hath a Common-wealth, Courts of Justice, and publick Treasure under his Command. And besides also, the Consent and Agreement of his People, and Power, when occasion offers it self, to make Peace, or enter into League. Tho' a Common-wealth is not therefore to be look'd upon as only a confluence of Robbers, when it hath been publickly guilty of some Unjust Things. Neither on the other Hand, can a Company of Robbers assume to themselves the Honour of a Common-wealth, though perhaps there be some appearance of Justice among them (d).

X. And here, upon what Grotius asserts; l. 1. c. 3. s. 4. A Question is moved, Whether a Magistrate properly so called, as such, hath Power to make War? Which I think is to be denied. For since War is a matter of that Nature and Consequence, that it may involve the whole Common-wealth in Danger, to give the Magistrate, as such, Power to Declare, and Determine War by his Own Authority, would be the same Thing with giving him the Sovereign Power (e). It must be allowed indeed, that whatever Branch of publick Business the Sovereign entrusts with the Magistrate, he must be supposed to give him all the Power necessary to the due discharge of his Duty in it. And therefore it is a Maxim of the Roman

(a) Vid. L. 50. t. 17. l. 176. D. de reg. juris, & L. 4. t. 2. D. Quod metus causa gestum erit, l. 11, 12, 13. & L. 43. t. 24. l. 7. s. 3. D. quod vi aut clam. (1) See above, in B. 2. c. 5. s. 7, 8. (2) See Grot. B. 1. c. 3. s. 4.

(3) See Mr. Barbeyrac's First Note upon this Section. (b) Vid. L. 50. t. 16. l. 118. D. de verb. signif. L. 49. t. 15. l. 21. s. 1. & l. 24. D. de captivo, &c. (c) Cic. Philip. (d) Vid. Grot. l. 3. c. 3. s. 2.

(e) Vid. L. 48. t. 4. l. 3. D. ad L. Juliam Majest.

Law (1), 'That every Magistrate that hath Jurisdiction, as such, hath a mixt Authority; which mixt Authority is defin'd by a Moderate Power, to punish Obstinate Offenders, as far as is necessary to support his Jurisdiction, and a due Administration of Justice. But when a Magistrate who is entrusted with Jurisdiction, useth Force only to reduce a few Disobedient Subjects; it is not to be supposed that he is making War; for a coercive Power over Subjects is not a Right of War: War seeming to lie entirely between Equals, or at least those that pretend themselves to be such. But if the Number of the Malecontents, or disaffected Persons grow so incurable, as to make it to be fear'd, that an Attempt to Suppress them would endanger the Safety of the Common-wealth, and the common Officers of Justice are too weak to reduce them, the Magistrate ought to expect the Resolutions of his Sovereign to direct him in his Proceedings in the Matter. And therefore Grotius is under a mistake when he says, l. 1. c. 3. s. 4. 'That if we consider the Thing without Relation to the Civil Laws, every Magistrate as he ought to protect the People under his Charge, so if he be opposed by Force in the exercise of his Authority, he hath a Right to make War. For the Defence and Protection of the People, properly belongs to the Sovereign. And a Magistrate entrusted with Jurisdiction, is only so far to defend Them, as he is obliged to guard the Poor and Weak by Justice against the Oppressions of the Rich and Great. To which End there is no necessity he should have a Right of making War. By the Way it may be observed, that tho' the Slaughter of about Three Thousand Men, at the Command of Moses, upon the Idolatry of the Golden Calf, may with more Propriety be call'd a Punishment than a War; yet that the destruction of the Benjamites (a), looks more like a Rout in War than Punishment, tho' Erasmus is of a different Opinion (b). And here it will not be improper to add something in General, of the Power of Military Magistrates, or of Generals and Leaders, to whose Conduct the War is entrusted by their Sovereign. A General therefore sent to take the Field with an Unlimited Power, may use what Measures he thinks fit, either to Disquiet and Offend his Enemy, or Defend himself; but as he is not empowered to levy any New War; so neither when War is begun, can he make Peace without the Authority of his Sovereign. But Generals confined by Limited Commissions have, 'tis plain, no further Power than those give them. However so much Power every General, whether his Commission be Unlimited or not, may justly assume, to use what Method he thinks best, to Defend himself against the Enemy, when they have Advanced too far, to

give him an Opportunity of making an Honourable Retreat. And in such a Case as this, only what Tully saith ought to be allow'd (c): 'That in Affairs of such unexpected and streightning Circumstances, a Man should not think of staying for the Instructions of the Senate, but be a Senate to himself, and do what he thinks will be best for the Advantage of the Common-wealth. But a Defence indeed, doth not consist only in a brave Resistance, or in repelling or avoiding the Enemy's Attacks; but also in making an Assault upon him, and returning the same Treatment back. And therefore for Example, an Admiral at Sea, who is by his Orders to be only on the Defensive, may yet notwithstanding such a Confinement, upon Provocation sufficient, break in upon the Enemies Fleet, and sink and burn as many of their Ships as he can; all that he is forbidden is to Challenge the Enemy First, when they don't think of Fighting. And so a General at Land, tho' his Instructions be not to Engage the Enemy, may yet if he be Attack'd in his Intrenchments, not only Repulse them when they would force his Camp, but make a Sally, and give them Battle; and if he be set upon in his March, and finds he cannot make a Safe and an Honourable Retreat, he may justly venture a Fight. And therefore a Governour of a Province or Town, especially if he hath any good Number of Souldiers under his Command, ought to make the best Resistance he can, when he is invaded by an Enemy, without expecting Instructions from his Sovereign. But he is not to carry the War into a Foreign Country, without Express Commission. An Inferiour Commander that is left in trust with a Body of Souldiers for the Defence of a Town, or Fort, is obliged to do the utmost he possibly can for its Security; and indeed, to hold out so long in Defence of it, till he sees the Place must inevitably be carried by Storm, and his Forces cut off. And therefore from what has been said, we may judge of the Action of Pinarius, mention'd in Livy, l. 24. c. 37. His Orders were to Defend the Castle of Enna; and to deliver up the Keys of it to Them of the Town, would have forfeited his Head; and therefore when he saw that both himself and Souldiers must necessarily have been left to the Mercy of the Enemy, and be put all to the Sword, unless he prevented it by suppressing the Insurrection that was forming in the Town against him; he did nothing beyond what the Powers he had would allow him, in putting the faithless Citizens to Death; except, perhaps, it was in carrying his Severity too far without Necessity, after he knew the Danger was over. Neither can it be said that Pinarius rais'd a New War (d). For the Publick War was at that time carried on in Sicily, against the Cartha-

(1) V. D. L. 2. t. 1. De Jurisdictione, l. 3. V. etiam L. 1. t. 21 De officio ejus cui mandata est Jurisdictione, l. 5. s. 1.  
 (a) See Exod. XXXII. 27, &c and Judges, XIX. 20. (b) Erasms. Epist. l. 6. ep. 29. (c) Cic. Ep. ad Famil. l. 10. c. 16. (d) As Manlius made War upon the Gallo-Græci. See Liv. l. 38. c. 45, &c. and l. 41. c. 7. and Florus, l. 2. c. 11. ginius

ginians and their *Allies*, with whom *They* of *Enna* endeavoured to join. But whether particularly when a *War* is at an End, the same Arms may be turn'd against them that assisted the Enemy with Succours and Supplies, is more than a *General* hath power to determine. But if a *Governour* of a *Province*, at a great distance from the *Metropolis* of the Empire, be empower'd to make *War* or *Peace* with his Neighbours; the *Wars* he undertakes must be look'd upon to be *Solemn*. Because he that gives another power to do a Thing, must be supposed to be the *Author* of what he doth, in Virtue of that Power. But if a *Governour* that hath no such Power, make *War* upon another, without Authority from his *Sovereign*, it is left to the *Sovereign*, whether he will own the Action of his *Minister* or not. If he owns it, the *War* must be look'd upon to be *Solemn*. And this *Ratification* doth as it were, reflect back an Authority upon the *War*, so that the whole *Common-wealth* is obliged by it. But if the *Sovereign* disown the Action of his *Governour*, the *War* must be look'd upon to be a sort of *Robbery*; and if the *Governour* be given up, or punish'd at home, and *Satisfaction* be made for the *Damages* sustain'd, the *Common-wealth* is not engaged in, or obliged by the *War*. And this was the reason why the *Roman Ambassadour* demanded of the *Carthaginians*, Whether *Hannibal* laid Siege to *Saguntum*, by his *Own* or by the *Publick Authority* (a)? To which the *Carthaginians* rightly Answered, 'That the Question First to be determined was, Whether the Siege of *Saguntum* was contrary to any Articles of *League*, 'between *Them* and the *Romans*? That before this was decided, the *Romans* had no Reason to enquire, whether a Subject of *Carthage* did any thing by his *Own* or *Publick Authority* (b).

XI. It may be further enquired, whether a *Prefect* or *Governour*, that hath no *General*, or *Particular* Commission to warrant him, can justly make *War* upon a *Foreign State* or *Prince*, only upon *Presumption*, or because he believes his *Sovereign* will approve his *Action*? Which in my Opinion must be denied (1). For it is not sufficient to know what it is probable his *Sovereign* would approve, if he were consulted in such a particular Posture of Affairs, but it should rather be considered, what it is probable he would desire should be done without his Advice, when the Matter will bear Time, and the Point is nice and difficult, if a Law were to be made upon it, or where he must determine universally of all such cases. And then no doubt it will appear that it would be pro-

vided, that no *Minister* should undertake any Action in which the *Common-wealth* is nearly concern'd: (such as a *War* is, and especially the *Offensive*, which is the proper Subject of the present *Enquiry*, and which will Generally well enough admit of Delays) without the Advice of his *Sovereign*. And therefore, though it should happen that the *Sovereign* should at the same time think a *War* with a certain Enemy necessary, yet to be sure he cannot be pleased to see his *Minister* go beyond the Bounds of his Duty. Thus *Cambyfes* put his Servants to Death that sav'd *Craesus's* Life, tho' at the same time he was well enough pleased that they had spared him (c).

XII. But now, as Persons that live in a *Liberty of Nature* cannot justly be punished with *War*, unless the Injuries they themselves do to others deserve it: So how it comes to pass, that in a *Civil State*, the Guilt of the Injuries, and the Cause that gives Birth to *War*, diffuse themselves from the Persons that were immediate Authors of them over the whole *Common-wealth*, will be matter of further enquiry. This therefore is certain, that no *Community* whether *Civil*, or *Otherwise*, is obliged by any Action of *Particular Members*, without some culpable *Act* or *Omission* of its own. For how severely soever the *Common-wealth* may threaten, the Subjects are still left to their Natural Liberty, to do otherwise if they please. So that the *Common-wealth* can no way be Responsible for the Actions of the particular Subjects (d). But among the several ways, the *Governours* of *Common-wealths* are involv'd in *Wars*, from the Injuries committed by their Subjects; these Two I think, will most deserve our Consideration, viz. (e) *Sufferance*, and *Reception*. As to the matter of *Sufferance*, it is manifest, that the Person who knoweth the Commission of a Crime, and hath Power to hinder it, without apparent Danger of greater Evil by doing it, and is obliged to do it, must be supposed to be guilty of the Crime himself. For it is necessary the Knowledge of the Fact should be attended with Power to hinder it; one of these separately, not being sufficient to communicate any Share in the Guilt (f). And the *Governours* of *Common-wealths* are presumed to know what their Subjects openly and frequently commit, and their Power to hinder it, is always supposed, unless the Want of it be manifestly proved. 'The guilt of a Crime before it hath been Judiciously tried, remains upon them that committed it; but after Sentence is passed upon it, they are the Criminals that neglect to put the Law in Execution (g).

(a) Livy, l. 21. c. 18.

(b) Vid. Xenophon. rer. Græc. l. 5. Where the Justice of the Action of Phœbidas in seizing Cadmea, is disputed.

(1) See Grot. B. 1. c. 3. f. 5. with Gronovius's Notes.

(c) Herodot. Thalia,

p. 112. Ed. H. Steph. Vid. Senec. de Irâ l. 1. c. 16. Concerning the Action of Piso, Pro-prætor of Sicily. Livy, l. 44 c. 10.

(d) Vid. Grot. l. 2. c. 21. f. 2. and the Examples he there produceth out of Livy, l. 29. c. 16. l. 35. c. 31. l. 45. c. 23. Valerius Maximus, l. 6. c. 6. f. 3, 5.

(e) Patientia &amp; Receptus.

(f) Vide L. 47. t. 6. l. 1.

f. 1. D. si Familia furtum fecerit.

(g) Lycurg. Orat. advers. Leocratem. Polyb. l. 4. c. 27. ab init. Gratianus,

Caus. 1. &amp; 3. distinct. 86.

The case of *Reception*, and how far the Commonwealth gives *Reason* for *War* against it self, by receiving and defending Persons that have injured Others, may be seen at large in *Grotius*, l. 2. c. 21. § 3, 4, 5, 6.

XIII. The same *Author* also, l. 3. c. 2. gives us a full Account of the Nature of *Reprisals*, which are Violent *Executions* made upon the *Persons* or *Goods* of the Subjects of a *Foreign Commonwealth*, that refuseth to Administer Justice (1). In defence of the Equity of which, I further add, that as it is a Natural Consequence of the *Combination* of Men into *Civil Bodies*, that the Injuries which one Member suffers from a *Foreigner*, seem to affect the whole Commonwealth; so it doth not appear to be Unjust, that every particular Subject should be obliged to assist the Discharge of the publick Debts. Since whatever they pay upon that Account, must be refunded to them by the Commonwealth. But if it should be any Man's Misfortune to be a Loser by the *Publick*, he must look upon it to be one of those Inconveniencies, That are almost unavoidable in a *Civil State*; and consider that These are very tolerable Evils, in Comparison of Those, which he must have felt in a *Wild Liberty of Nature*.

XIV. It is manifest that Men often make *War*, not only upon their own Accounts, but also for others (2). But to answer for the Justice of it, it will be necessary, First, that the Party who is *assisted*, should have *Just Reasons* for *War*. And Secondly, that the Party that *assists* should be under some Particular *Ties* and *Obligations* to him that is principally concern'd in the War. Because otherwise it would be very Unjust to assist one Man against another; since as they are Men, they both equally deserve Favour (a). They therefore, whom we not only may, but are obliged to Defend, are First of All our own Subjects. And that not only because they are, as it were, a part of the Government, but because the End Men at First propos'd to themselves by giving up their Natural Liberty, and submitting voluntarily to a *Civil State*, was the enjoyment of such a Defence. So the *Campanians* thought that by yielding Themselves, and All that they had to the *Romans*, they laid a Necessity upon them to Arm in their Protection (b). Tho' in this Instance it may be observed, that since the *Campanians* had exasperated the *Samnites*, and raised an *Unjust War* against them before, the *Romans* could not justly resolve to Defend them, notwith-

standing that they had yielded themselves to be their Subjects, till they had made *Satisfaction* for the *Damages*, and Defray'd the *Expences* of the *War*. But in Defence of any particular Subject, the Government can then only *Justly* make War, when it will be no great Inconvenience, or Disadvantage to the Whole, or the Majority of the other Subjects; because the *Government* is obliged to have a greater Concern for the Whole than for a Part; and the greater the Part is, the nearer it approaches to the Whole. The next to Subjects whom we are obliged to assist, are those *Allies* that have made this particular *Condition* and *Article* of *League* with us. But then all *Allies* are to give Place to our own Subjects, when both cannot be assisted; and that without any breach of the *League*. For no Commonwealth can be more obliged to a *Foreign State*, than to its own Subjects. And therefore in every *Promise* of *Aid* and *Assistance*, the Commonwealth makes, this *Limitation* is implied, *As far as is consistent with the Obligations owing to the Subject*. And therefore it is very Absurd to place any Confidence in a *League*, which it is not the Interest of our *Ally* to observe. But as we ought not to undertake any *Rash* or *Unjust War*, so neither can we be obliged by any *League* to assist an *Ally*, that engages only in such. 'Tis true this holds chiefly in *Offensive Wars*, but it may also bear sometimes in the *Defensive*. For if my *Confederate* is sensible, that he is much weaker than his Enemy, and that his own Forces, and All I can supply him with, will not make him a *Match* for him; and yet is obstinately bent to hazard himself, tho' it be to his Certain Ruine, when he may treat upon tolerably good Terms; I should be a Mad Man to join my self with him, in so extravagant and hopeless an Attempt. And thus far what *Grotius* saith (c) is very true, 'That we are not obliged to send Assistance, when there is no Hopes of Success; for Society is form'd for Good and not Evil. But then it is also to be consider'd that it would be to no purpose to make *Leagues*, if we were to run no hazard, or sustain no *Losses* in the Defence of an *Ally*. Next to our *Allies* are our *Friends*, or those we have join'd our selves to, by particular *Ties* of *Kindness* and *Respect*. To these, tho' we have not promised by exprefs *Article of Treaty*, to send a certain determinate Aid or Supply, yet the Nature of *Friendship* it self supposeth an Interchange, and Union of Faith, and that one *Friend* must be concern'd for the other's

(1) This Definition of *Reprisals* is taken out of our Author's Abridgment *De Offic. Hominum, & Civis*, L. 2. c. 16. f. 10. See Mr. *Barbeyrac's* Note upon this Section.

(a) *Lucan*, l. 4. v. 707, &c.

*Quis conferre duces meminit? Quis pendere causas?  
Qua stetit inde favet; veluti fatalis arena  
Muneribus, non ira vetus concurrere cogit  
Proditos, odere Pares.*

(b) *Livy*, l. 7. c. 31. *Florus*, l. 1. c. 7.

(c) Vide *Grot.* l. 2. c. 25. f. 4.

safety, as far as the stricter *Obligations* he is under will suffer him, and that his *Concern* ought to be much stronger for Him than *that* which is due from one Man to another, by the common *Affinity* and publick *Relations* of Mankind: Tho' sometimes those alone may be sufficient Motives to us to undertake the Defence of a Person manifestly injured and abused: Especially since it may easily be made our own Interest to do it; and since nothing can tend more to promote Publick good, than to punish those that take pleasure in disquieting and injuring Others. And therefore *Solon* upon this view when he was asked, how there might be Fewer Injuries committed in the World, answered, *If they that were not injured, would be as much concerned as they that were* (a). But then we are not to imagine that every Man, even they that live in a *Liberty of Nature*, hath a Right to correct and punish with War any Person that hath done Another an Injury, barely upon pretence, that Common Good requires, that such as oppresses the Innocent, ought not to escape Punishment, and that what toucheth one, ought to affect all. For otherwise, since the Party we suppose to be Unjustly invaded, is not deprived of the liberty of using *Equal Force* to repel his Enemy, whom he never injured; the Consequence *then* would be, that instead of One *War*, the World must suffer the Miseries of Two. Besides, it is also contrary to the Natural *Equality* of Mankind, for a Man to force himself upon the World for a *Judge*, and *Decider of Controversies*. Not to say what dangerous Abuses this Liberty might be perverted to, and that any Man might make War upon any Man upon such a Pretence. The wrong therefore Another Man suffers, is not reason sufficient to engage me in his Quarrel, unless he calls me particularly to his Assistance, so that Whatever I undertake to do, is not to be charg'd upon me, but upon the Person that desires my help. But whether it be lawful to take Arms in Defence of the Subjects of a *Foreign Common-wealth*, against the *Invasions* and *Oppressions* of their *Sovereign*, is a Question; for the Solution of which I refer you to the Opinion of *Grotius*, (1) the safest Answer that can be given to it seems to me to be this, that we cannot Lawfully undertake to defend the Subjects of a *Foreign Common-wealth* in any other Case, than when they Themselves may Lawfully take Arms to repress the insupportable *Tyranny* and *Cruelties* of their own *Governours*.

XV. Of the *Declaration* necessary to *Solemn War*, *Grotius* largely informs us, l. 3. c. 3.

XVI. The same Author, l. 3. c. 4, &c. gives us a long Account of many Nations that never set bounds to Themselves in any of

those *Liberties*, Which as I said before, the *Law of Nature* allows against Enemies. But here it is to be observed; That tho' *Generals* usually give Laws to their Souldiers, prescribing how far they are to use *Hostilities* against the Enemy, and punish the violation of Them upon the Offenders; Yet this is not done because they suppose the Enemy is or may be injured; But because it is necessary that the *General's* Orders should be obey'd, and that *Military Discipline* should be strictly observ'd. So that tho' a Person, who in a *Solemn War* had behaved himself with greater Cruelty and Outrage than the *Law of Nature* will permit, should afterwards happen to be indicted or accused for it in any *third Common-wealth* Unconcern'd in the War; it would be a very Uncommon way of Proceeding, should He be sentenced for a *Ruffian* or *Murderer*, and be used as such. Because as it does not belong to the People of one Nation to enquire what others are guilty of abroad; So there seems to have been a *Tacit* Kind of Agreement of *Nations* that one should not pass Judgement upon the Wars Another engages in. For why should One at a distance from the Dispute, and no *Ally* to either of the Parties engaged, give Himself the trouble of making another's Quarrel his own? Besides, that, even in a *Just War*, it must be allow'd difficult to know what are the just *Measures* of *Self-Defence*, in what Method to exact *Satisfaction* for *Damages*, and what ways to take *Caution* for the Future. So that in short, it is safer to leave these Things to the Consciences of the Parties engaged in the War, than to venture to give sentence upon an Affair, the Condemning of which may be of dangerous Consequence to our selves; Especially since the Parties at War themselves by a *Tacit Sort of Compact* agree, Either to encrease or abate the Heat of the War as they please.

XVII. How far in Particular it is usual to extend the *Liberties* of *War* upon the *Persons* of the Enemy, may be seen at large in the same *Author*, l. 3. c. 4.

XVIII. It may also in the next place, be particularly enquired, Whether it be lawful to *Assassinate an Enemy*? And here *Grotius* (2) thinks that there ought to be a Distinction made between Persons that violate their *Faith* whether *Expresly* or *Tacitly* given, as *Souldiers*, *Subjects*, *Vassals*, *Refugees*; and Persons that were never bound by *Faith*. And that to employ the *Latter* as *Assassines*, is what no Law forbids (b): But that to make use of them, who must by the *Act* be guilty of *Falshood* and *Treason*, is what the more *Civilized* part of Mankind, always look upon as the greatest Infamy and Baseness. Tho' against *Rebels*, *Pirates*, and *High-way-*

(a) *Plutarch* in *Solon*, p. 88. *D. Quintilian* *Inst. Orat.* l. 4. c. 1. p. 270. 'Tis natural for us to Pity the Distressed: *Euripides* *Suppl.* v. 267, 268.

Ἐχεν καὶ πυλῶν δὴς ἀπὸ μίτρας, &c.

(1) *B.* 2. c. 25. f. 8. (2) *L.* 3. c. 4. f. 18.

The Beasts pursued, to Rocks and Cliffs retreat,  
The Slave clings to the Altars of the Gods,  
And States distress'd their Neighbours Aid implore.  
(b) *Mori*, *Utop.* l. 2.

men, the most Scrupulous Princes never doubt to propose even Rewards to the Person that can kill or apprehend them. Nor does any body blame the Conduct, or think the Measure hard; because these are known to be common Enemies, and lie under the Publick *Odium* of all. The same Answer will serve that other General Question, Whether it be lawful to use any Mans Service Promiscuously in War? Where we are to distinguish between them that betray, or Revolt from their Masters and offer themselves Voluntarily, and them that suffer themselves to be corrupted in their Faith by the force of Rewards and Promises. By the common practice of the World the Former may lawfully be employ'd; But as Grotius thinks, l. 3. c. 1. § 21, 22. not the Latter (a). Tho' I think it may very well bear dispute. For supposing the Cause I engage in, be Just, I have Right to divest my Enemy of all Forces and Succours, to make him as defenceless as, and to give him all the disturbance, and do him all the damage, I can, which are the Things aim'd at, in solliciting his Subjects to a Defection. And I do not see any sufficient Reason, why I may not pursue that End, by tempting my Enemies Subjects with the Hope of Rewards, as well as any other way. Especially since it is on all Hands allowed, that an Enemies Subjects may be lawfully frightened by false Threats and shows of fear, to surrender themselves, and consequently to desert their Master. Which sort of Desertion is not wholly excusable; since it is known that by the Laws Military, they that suffer themselves to be imposed upon in that Manner are as liable to Capital Punishment, as they that are guilty of perfidiousness and disloyalty. For Cowardice and Credulity are as inconsistent with the Duty of a Souldier, as Faithlessness and Treachery. And further, tho' Force is the most Lawful, and the Bravest way of attacking an Enemy, yet this doth not make it unlawful, to have recourse to Fraud. And tho' these Deserters I speak of, are certainly criminal Themselves, yet there is no Reason, why the Party that sollicitated them to a Desertion, should bear any share in the guilt of it. Because I don't see any manner of Obligation, why I should abridge my self of the Liberty of making Use of the easiest Methods to obtain my Right, only because by doing so, I may give Them Occasion to be guilty of Sin, who have already by the Injuries they have done me, broken off all Communication of Right with Me. And why may it not be lawful for me to win those with my Money, whom I might otherwise conquer with my Sword? Especially since after all the Propositions and Sollicitations I can make to them, it is still left to their own Choice, whether they will look upon me for an Enemy, or buy my favour by entering into my Service. But in time of Peace there are these two Reasons, why I ought not to importune another Man's Servant, or Subject, Unjustly to desert from his Master, and come over to Me. First, because I have then no lawful Power to intercept any thing that belongs to Another. And Secondly, because I cannot justly punish, or do any Harm to Him, tho' he should refuse to desert, and make Me his Master. Both which are manifestly allowed Me in the Case before us. As therefore the Propriety my Enemy hath, to what he calls his own, is no manner of reason to Me, why I may not take it from Him; so the right he hath over his Subjects is so far insignificant with Me, as I am under no obligations to be in the least concern'd, that He should always inviolably enjoy it. And therefore the Objection usually made against this Opinion, that a Man cannot incite another to do a thing, which He must sin in doing, or that, That Man is guilty of Sin himself who supplies another with a Cause or Occasion of Sin, seems to Me, to hold only between such as are not Enemies. For an Enemy in respect to Me, is in such a State, that as long as I am in pursuit of my Right, and in Arms against Him, I have no reason to trouble my self whether He takes from thence, an Occasion to sin or not. And therefore tho' perhaps my Promises, or my Money may be really the Inducement to Another to be false and desert; yet in Reason, the crime of Falseness and Perfidiousness cannot be charged upon me as my own; because for the Present, the State of War hath entirely broken off all Commerce and Communication of Right, between Him and Me; and He himself, as far as in him lay, gave me an Unlimited, Infinite Power, and Liberty against Himself. And since it is not in the least unlawful to put an Enemy to the Sword, when the State and Posture of War requires it; I do not see why it should be thought Criminal, to offer Him a Temptation that may possibly tempt him into Sin. For it is evidently a Weak Argument, which some produce to the Contrary, that Faith ought to be kept by Enemies; and that therefore an Enemy's Subjects are not to be seduced to Desertion. But after all, a Man should be cautious, that he don't set an Example to others, that one Time or other may be of dangerous Consequence to Himself. And without dispute, it is an Evidence of uncommon Greatness, and Generosity of Spirit, when a Man hath it in his Power, to refuse to make Use of so easy a Way of Acquisition. Besides that, 'It is certainly True (b), that a Man that accepts the Service of a Traytor, tho' upon the heat of his Success, he may think himself obliged by him; yet afterwards when he reflects upon the Action, he will begin to suspect and then to fear, and so to hate the Traytor, tho' he loved the Treason, because he knows he hath had already sufficient Experience of the Insincerity of his Faith (c).

(a) Vid. Quintil. Decl. 255.

(b) Precop. Hist. Getib. l. 1. c. 8.

(c) Vid. Valer. Max. l. 6. c. 5. § 7.

XIX. How far the *Liberties of War* may be extended upon the *Goods* of an Enemy, and Things we call *Sacred*, we are inform'd by *Grot. l. 3. c. 5.*

XX. The *Laws of Nature and Conscience* in a *Just War* allow (1) a Man to make such *Acquisitions* out of what his Enemy possesseth, as will either restore Him what was due to him, or give him an *Equivalent* to it (2), further, and all that, the refusal of the payment of which, gave Birth to the War; And besides, to satisfy himself for the Charge he was at in recovering his right by Force; and to all if there be any thing else, which he thinks necessary to secure further to himself, and take by way of *Caution* from the Enemy. And therefore if a Man insults and oppresseth his *Neighbours*, upon the Confidence he reposeth in his Riches when he happeneth to be overpowered; it is but Just he should be deprived of his superfluous Wealth, that for the future he may learn to be more *Quiet and Peaceable*. But by the practice of the World, a Man makes himself *Absolute, and Perpetual Master and Proprietor* of every thing he takes from his Enemy in a *Solemn War*, tho' much exceeding the *Pretensions* the *War* begun upon, *Vid. Grot. l. 3. c. 6. f. 1, 2.* Where He also sheweth, When both *Moveables* and *Immoveables* may be supposed to be Taken (3). Where it is to be observ'd, that the Right to *Acquisitions of War* is of Force only against any *Third dis-interested Party*. But to give the *Conquerour* a right of *Propriety*, that will hold good against the *Conquer'd*, there must of necessity be a *Pacification and Agreement* between both the *Parties*; otherwise the Right is supposed to continue still in the old *Proprietor*, and whenever He is Strong enough, He may justly struggle to recover it.

XXI. It is also disputed, to whom the *Acquisitions of Solemn War* belong; whether to the whole Body of the *People*, or to any Particular Persons among the *People*, or to them that made the *First Seizure*? (4) Which Controversy I think may thus in short be concluded. It is certain that the *Right of War* is lodg'd in the *Sovereign*, under which Right is comprized that other, of *Arming* the Subjects, of *Leading*, or *Sending* them abroad upon *Expeditions*, as also the *Right to Raise Money* upon them, and other *Necessaries for War*. But since *Wars* are undertaken, Either to recover the *Rights* or *Dues* of the Private Subject, which the Enemy wilfully refuseth to pay, or Else upon some *Publick Cause*, which concerns the whole *Common-wealth*; It easily appeareth, that in the *First Case*, the principal thing to be taken care of is, that the Persons, upon whose *Wrongs* the War began, may be restored to their *Rights*. And the *Overplus* in *This* instance, and in *Wars* that begin from a more *Publick Cause*, All that is *Taken* is *First Acquired* to the *Sovereign*, as to Him that gives

*Authority* to the *War*, whatever *Hands* it first fell into, Whether the *Mercenary Souldiers*, or *Subjects* obliged to *Military Service* upon *Summons* without receiving *Pay* (a). But because *War* lies heavy upon the *Subjects*, Whether they are only *Taxed* to support it, or are obliged to *serve* in it *Themselves*, it is no more than a *Good Prince*, that hath a *Love* for his *Subjects* would yield to, That the *Subjects* should be allowed in *Return* to make some advantage to *Themselves* by the *War*. Which may be done, Either by assigning to them a *Certain Pay* from the *Publick*, when They go out upon any *Expedition* (b), or by sharing the *Booty* among Them, or by giving every One leave to keep the *Plunder* He gets himself, (As the *Custom* was among the *Greeks*, when they proclaim'd *War*, to declare at the same Time, that every Man should have *Free Plunder* (c), ) Or Else by giving the *Booty* to the *Publick*, in order to ease the *Subjects* of the burthen of the *Taxes* for the *Future*. *Mercenary Souldiers* have no Right to any Thing but their *Pay*. What is given them above that, is *Matter of Bounty*; or perhaps *Reward* for their *Good Service*, or *Encouragement* to their *Valour*; *Grot.* in the place, above mention'd is very large upon this Subject. But upon His distinction of *Acts of Hostility* into *Publick* and *Private Acts*, Which are undertaken only upon the *occasion* of the *Publick War*, it may be observ'd, That it may be very justly question'd, Whether every Thing taken in *War* by *Private Hostilities*, and by the *Bravery* of *Private Subjects*, That have no *Commission* to warrant them, belongeth to Them that take it. For *This* is also *Part* of the *Right of War*, to appoint what *Persons* are to *Act* in a *Hostile* manner against the *Enemy*, and how far. And in *Consequence*, no *Private Person* hath *Power* to make *Devastations* in an *Enemies Country*, or to carry off *Spoil* or *Plunder*, without *Permission* from his *Sovereign*. And the *Sovereign* is to determine how far *Private Men*, when They are permitted, are to use that *Liberty* of *Plunder*; And whether They are to be sole *Proprietors* in the *Booty*, or only to share a *Part* in it. So that all that a *Private Adventurer* in *War* can pretend *Right* to, is no more than what his *Sovereign* will please to allow Him. For to be a *Souldier*, and to *Act Offensively* in an *Hostile manner*, a Man must be *Commission'd* by *Publick Authority*. And therefore *Cato* us'd to say, that *no Man had any Right to fight an Enemy that was not a Souldier* (d).

XXII. As to the *Acquisition* of things *Incorporeal*, it is to be particularly observed, that They are never acquired but with the Subject they *inhere* in. The *Subjects* they *inhere* in, are either in *Persons* or in *Things*. Thus to instance, in *Things*; There are often certain peculiar *Rights* inherent in certain *Lands*,

(1) This is shown above, in *B. 4. c. 6. f. 14.* (2) See *Mr. Barbeyrac's* Second Note upon this Section.

(3) *Vid. Grot. d. l. f. 3, 4.* (4) See *Grot. B. 3. c. 6. f. 8, 9, &c.* (a) *Ælian. V. Hist. l. 6. c. 6.* The *Spartan Souldiers* were not allowed so much as the *Spoils* of the *Enemy*. (b) *Vid. Liv. l. 4. c. 60. & l. 5. c. 4.*

(c) *Vid. Polyb. l. 4. c. 26. 36.* (d) *Cic. Off. l. 1. c. 11. Add. Ziegler upon Grot. l. 3. c. 6. f. 23.*

Rivers, Ports, Towns, and Countries, or rather the Persons that are the Proprietors of those Things, are invested with certain Rights, over other Persons and Things. But here it is to be considered, Whether this Right be annexed to this particular Thing, by Personal Compact, or by Real; Or Whether the Person that First united this Right to the Thing, agreed by Compact, that that Right should continue in the Proprietor of the Thing, Whoever He might happen to be, or by what Title soever He came to the Possession of it; Or Whether He intended that the Right should be no longer valid, than Certain Persons should possess the Thing by a Certain Title. If the Right be annex'd to the Thing in this Latter Method, it is manifest, that it is not Every One that possesseth himself of the Thing by any Title whatever at Random, that hath Power to exercise that Right; but it must be considered, Whether that Right ought to follow a Title of an Acquisition of War, by its First Institution. But those Rights (1) which are Immediately, and in Themselves applied, and annex'd to Persons, relate either to other Persons or Things. The Rights which are annex'd to Persons, over other Persons, Since they are not obtain'd but with the Consent of the Persons Themselves (and this Consent doth not respect any Man Promiscuously, but only some Certain Men) cannot be supposed to be acquired with the Persons, Tho' perhaps, the Persons they were annex'd to, and lodg'd in, may fall into their Enemies Power. Thus for instance, tho' a Prince happen to be made Prisoner of War, his Enemies have not therefore acquired his Kingdom with Him. And the taking an Husband, or a Father, doth not give an Enemy power over the Wife or Children (a). When indeed an Enemy hath taken the Wife and Husband together, He hath a Right over the Captive Wife, but not because He took the Husband with Her, but solely because He hath made Her his Prisoner. Neither would He have had more or less Power or Right, whether he had taken her Husband at the same time or not. Neither doth the Conquerour acquire any Conjugal Power over the Captive Wife, but barely such a Right as is usually acquired over Captives. As to the Rights that relate to Things, we must distinguish, whether the Person be Member of a Commonwealth, or live out of Civil Government, in a State of Nature. If he liveth in a State of Nature, the Enemy that taketh the Person, is supposed to have taken all the Things with Him, or at least to have possess'd himself of power to take them, because there is no Body to resist Him, or that hath any Right to hinder him from seizing upon all he had. But in Commonwealths, the Thing is not lost with the Person, but the Right of it devolves to other Persons of the same Commonwealth, or upon Default of these, to the Publick. And therefore if a Subject of any Commonwealth

be taken by an Enemy, his Goods that were not taken with Him, are not acquir'd by his Conqueror, but fall to him that would have been his Heir at Law, if he had died a Natural Death. But if the Enemy hath taken the Goods with his Person, that the Things taken are Prize of War, is Title enough to justify his Propriety in them, and it is perfectly needless for him to derive that Propriety from the Person of the Last Possessor, whom He took with Them. And so the Thing is the same, as far as concerns the Right of the Conqueror, to the Things He hath taken, whether He take the Proprietor with them or not.

XXIII. The Fam'd Question once moved in the Great Council of Greece may serve to illustrate what hath been said which Quintilian (b) says, was occasion'd Thus. When Alexander the Great took and destroyed the City of Thebes, He found an Instrument, in which it appear'd, that the Thebans had lent the Thessalians an Hundred Talents. Alexander, because the Thessalians were in his Service, freely gave them up the Instrument. The Thebans who afterwards were restored by Cassander demanded the Debt. The Reasons the Thebans brought to justify their demand, are to be seen in the same Place (b) in Quintilian. To which the Thessalians might have answered. First, that what was taken away by Just force cannot be demanded again. That by the Custom of Nations, the Hostilities committed in Solemn War are look'd upon to be Just; and in consequence, the Former Proprietor can have no Pretension left to any Thing that was taken from him, after a Peace is established. Secondly, that a Right of War is a Valid Title, when a Thing comes to be disputed in the Civil Court. For after a War is ended, if any Controversie arise about any Thing I have taken in the War, 'tis enough to plead that I have a Title to it as prize of War. Thirdly, that What is taken in a Just War may very justly be retain'd in Peace, Especially after the Articles of Peace are settled and agreed upon on both Sides. For then, every Thing is supposed to be left entirely to the Possessor, which He is not expressly obliged to restore by the Articles of Treaty. Fourthly, those Rights which are Properly and Ultimately founded in the Things themselves may be acquired with the Person that is made Captive, supposing the Captive giveth his Consent to transfer them to Me; which Consent I have power to force him to by threatening him with some greater Evil. Wherefore as I can make over an Action of Debt to another Man, and the Effect will be, that the Debtor must be obliged to pay his Debt to him, as much as he was before to me; so if a Captive consent to make over his Action to me, what the Debtor owed before to my Captive is now become due to me. And thus Alexander might, if he pleas'd, have made Himself the Creditor, in the Instance before us, tho' he had left the Theban Commonwealth

(1) See Grot. B. 3. c. 7. f. 4. and c. 8. f. 4. (a) Vid. Grot. d. 1. (b) Inst. Orat. l. 5. c. 10; p. 387, 388.

standing, only by forcing them to *transfer* their *Right* to the *Debt* to him. And indeed, he must be supposed to have made himself *such*, since He made himself *Absolute* Master of *Thebes*, without any *exception*. And therefore had a *Right*, either to demand the *Debt* of the *Thebans*, or to forgive it them. Nay, he might immediately have forced the *Thebans* to remit the *Debt*. And therefore when *Alexander* gave up the *Instrument* of the *Debt*, to the *Thebans*, it is not to be supposed, that he did it for fear the City of *Thebes*, which he had then laid in Ruins, might sometime or other afterwards demand the *Debt* of them, but to give them Assurance, that he himself would never require any thing of them upon that Account. Fifthly, It is Absolutely false, that as long as there is any One Subject of a Common-wealth left alive, that he must be supposed to be the *Creditor* of the whole *Debt*, and consequently, that he hath the same *Right* the Common-wealth had to demand its *Debts*. For those Particular Persons that out-live the utter Dissolution of the *Body* of the Common-wealth can have no manner of Pretence to assume to themselves the *Right* of the Common-wealth; since it is not to be supposed that they any longer constitute it. And it is manifest that *Alexander* totally dissolv'd and extirpated the *Theban* Common-wealth, so that, they that escaped the general Destruction, could not be look'd upon to be a *People*. And they that afterwards re-establi'd the *Common-wealth* of *Thebes*, were manifestly a *New People*. And tho' perhaps the Ancient *Thebans* might have had certain peculiar *Rights*, yet these *New Inhabitants* could not pretend to assume the same to themselves, barely from the Place they liv'd in, unless they obtain'd them all anew. Which was not done with relation to the *Theban Debt*. Sixthly, the *Thebans* did not take any unjust Methods to obtain the *Instrument*, but received it from One that voluntarily offer'd it to them, and who had *Thebes*, and all that belong to it at Mercy, purely with Intent to pardon them the *Debt*.

XXIV. Conquer'd *Nations*, as well as Particular Persons, may be brought under *Dominion*: but that it be *lawful* and oblige the *Consciences* of those who submit to it, it is requir'd, that the Vanquish'd promise Expressly or tacitly to acknowledge the *Conqueror* for their *Master*, and that he for his part will not treat 'em any longer as his *Enemies* (1).

XXV. I shall now briefly enquire how things *Lost* in *War* return to the *ancient Proprietors* and *Masters*. And here in my Opinion, nothing can be more agreeable to natural Equity, than that such as have been made *Prisoners* of *War*, when they find Means to escape out of their *Enemies* Reach, and are under no Obligations of *Faith* to them, and return to their own *Country*, should not only recover their

former *Quality* and *State* in the Common-wealth, but be also restored to all their *Rights*, *Goods* and *Fortunes*. But with Respect to *Things*, whether they be *Moveables* or *Immoveables*, if while the *War* continues, they are retaken from the *Enemy*, either by our *Selves*, by our *Subjects*, or our *Souldiers*, it is just and reasonable, if they are to be distinguish'd, that they should be restor'd to the *Ancient Proprietors*. For since the Common-wealth is engaged to defend and secure the *Subjects* as far as is possible, in their *Goods* and *Properties*, there must, it is evident, be the same *Obligations* upon the Publick to take care that what is taken from them be restored. And it is no *Exception*, that the *Goods* were recovered by the *Souldiers*. For *Souldiers* are only the *Hands* of the Common-wealth, and what they win with their *Swords*, they *acquire* to the Common-wealth, and are not to make their own *Private Purchase*. And since it would be *Oppression* and *Injustice* in the Common-wealth to recover those *Goods* only for it self, which the *Private Subjects* Lost in *War*; there can be no Way left but to return them to the *Ancient Proprietors* (a). Thus in *Homer*, 'tis said that the *Booty* was divided among them, that had lost to the *Enemy* before. How the *Roman Laws* provided in such Cases, and especially with regard to the *Postliminium*, is with much *Exactness* explain'd by *Grotius*, l. 3. c. 9.

XXVI. A whole *Nation*, when it hath Either by its own *Strength*, or by the Assistance of *Friends* and *Allies*, shaken off an *Enemies* *Yolk*, without doubt recovereth its *Liberty*, and *Ancient State*. And if any Part of what they were possess'd of remains still in the *Enemies* Hands; they have just *Pretensions* to attempt to recover it, as long as a *War* is kept on Foot, and *Peace* is not yet concluded. But if a *Third* Common-wealth rescue a *Nation* by a *War*, which was overpower'd and enslaved by *Enemies*, in its own Name, and for its own Advantage, the *Nation* only changeth its *Master*, but is as far from *Liberty* as ever. And we may say the same of a *Part* of any *Nation*. But if a *Part* of a *People* be recovered by the *People* they were for some time divided or torn from, or by their *Allies*, they again *incorporate* with the old *Body*, and return to the *Place* and *Rights* they had before. Tho' perhaps indeed, with an *Ally* it may be agreed, that he may keep what he won from the *Enemy*, tho' it before belonged to us. *Demetrius*, in *Justin*, when he lost his *Kingdom*, chose rather to yield it to *Philip*, than leave it to the *Romans* (b). But tho' a *Part* of a *People* assert their own *Liberty*, and suppress their *Enemies* by their own *Strength*, they must return of *Course* to their *Ancient Body*, and must not pretend to erect a *Separate* Common-wealth by *themselves*, when the old Common-wealth hath not quitted its *Right* to them, as a *Part* of its *Body*.

(1) This Paragraph is taken out of our Author's Abridgment *de Offic. Hom. & Civ. B. 2. c. 16. s. 14.* See *Grot. B. 3. c. 8. s. 15.* See above, in *B. 7. c. 7. s. 3, 4.* See *Mr. Barbeyrac's* Note upon this Section.

(a) *Vid. 1 Sam. XXX. 22. &c. Homer. Iliad. l. 11.*

(b) *Just. l. 29. c. 2.*

## C H A P. VII.

## Of Compacts that relate to War.

**I**T may now be proper to take a view of that Sort of Publick Compacts, which presuppose a *State of War*. And these are of two sorts. *First*, Such as put an end to War. *Secondly*, such as do not put an end to it, but only in some Respects, *qualifie* and *confine* it. but because I consider these *Compacts* in particular, I shall first enquire *in general*, into the *Validity* of those of the latter Sort.

II. All *Compacts* therefore *made with an Enemy*, saith *Grotius* in general, *ought to be observ'd*, l. 3. c. 19. which indeed is true of *Compacts* that tend to *Peace*, but is I think liable to dispute with Relation to such as leave us in a *State of War*, without design to remove it. For I question, whether it be a *Conclusive* Argument, that because a certain particular Man understands what is done, and hath power to give his *Consent* to it; therefore that from his *Promise* Another Person may derive a *Right*, and he himself may contract an *Obligation* to the Other. For a *State of War*, as such, hath no other *Measure of Action* but *Force*. The proper use of *Faith* is to advance *Peace*. And therefore it looks like an Absurdity to employ *Faith* without thoughts of restoring, or preserving (1) *Peace* by it, and much more to make use of it, to *protract* and *carry on* War, rather than put an *End* to it. Besides, when I enter into *Articles of Treaty*, 'tis implied, that I desire the Person I treat with should believe me and rely upon my *Faith*; But now it is a sort of a *Contradiction*, to require of him such a *Dependence* upon me; and yet at the same time to profess, that I resolve to continue his *Enemy*; that is, to do him all the mischief every way I can. For a *State of Hostility* in it self gives a Man *unlimited Liberty*, to take all the *Advantages* he can against his *Enemy*. And it is a *Contradiction* to my *Actions* to make a *Protestation* not to use the *Liberty* of an *Enemy*, while I persist to continue in an absolute *State of War*. And therefore what I said before doth not extend to this Case; *that such as enter into Compact with one another, do by that very Act renounce all Exceptions to one anothers Persons, which may make them suspect one another to be false to their Faith*. For where both Parties do seriously renounce all such *Exceptions*, they are already ceased to be *Enemies*. But where they openly profess that they intend to continue *Hostilities*; the *Evidence of Fact* confutes their *Promises*. And therefore a Man must rather suppose that they only design to impose upon and ensnare one another, and by making one another heedless and secure, to

lay *Trains* for further *Mischiefs*. So when *Narsetas*, in *Procopius*, sent to ask *Totilas*, what Day he would set for *Battle*, His Answer was, *after eight days I'll meet you in the Field*. Upon which, they that were sent return'd and told their Master what was agreed to. But he suspecting some *Falshood*, put himself in a readiness to give his *Enemy Battle* the next day; and He proved not to be mistaken, for the next Morning, before *Intelligence* could be brought by the *Scouts Totilas* was advanced and marching towards him with all the *Body* of his *Army* (a). But then, neither can the Person that happens to be surprized by such a *Compact*, claim any new *Right* against the Person that betray'd him by it; because the *State of Hostility* it self already gives him as much *Liberty* as he desires. If it be said, that such *Compacts* should be observ'd, for fear the *Enemy* when he finds himself deluded, should be exasperated, and pursue the *War* with greater *Rage* and *Obstinacy*: I answer, that this *Objection* allows, that these *Compacts* are to be *measured* only by the *use* and *advantage* of them. And I confess it is true, that *when the time or place for Battle is agreed upon with an Enemy, it is a sort of Injustice to fail in either, because the revenge of it will generally recoil upon the cruel and the faithless* (b). We are not always obliged indeed to make use of the utmost *Liberties* of *War*; nay, it is often the greatest *Glory* to spare an *Enemy*, when it is in our power to ruin and destroy him. But since *War* becomes lawful upon *this Account*, namely, when it is necessary we should defend or assert our own *Rights*, where they are not to be obtain'd by peaceable means, we ought to think that the *shortest* way to the attainment of that *End* is most agreeable to *Nature*. And therefore since by *Compacts*, that tend only to *moderate* and *qualifie* *Hostilities*, the *War* is only drawn out into greater *Length*; 'tis evident they must be contrary to *Nature* (c). But however this be, it is a *Custom* which among others hath obtain'd in the more *Civiliz'd* Part of the *World*, (perhaps out of a particular *Respect* to *Military Bravery*;) that such *Compacts* should be look'd upon to be valid which were not intended to put an *End* to the *State of War*, but only to abate the *Heat* of it, and give the Parties engaged, *Liberty* to take *breath*. Of this sort are *Truces* for certain *Days*, and sometimes *Hours* to bury the *Slain*; The *Agreements* to grant *Passage* through one anothers *Guards* (2); And sometimes that no *Hostilities* shall be used in certain *Places*, upon certain *Persons* and *Things*; that there shall be *Cessation of Arms* at such a par-

(1) See Mr *Barbeyrac's* Note upon this Section. (a) *Procopius Hist. Goth.* l. 4. (b) *Ambros. De Offic.* l. 1. c. 29  
(c) Vid. *Hobbes de Cive*, c. 3. f. 27. (2) See *Grot.* B. 3. c. 21. f. 14, &c.

particular time; that certain Weapons and Instruments of War shall not be made use of. Olearius relates (a), 'That the *Turks* and *Persians* made 'an Agreement, that the Merchants on both 'sides should have free Exercise of *Traffick* and 'Commerce, and *Liberty* to pass to and fro unmolested; because it was the Interest of them 'Both to continue their Trade with one another. For since Men, to gratify their Ambition and Avarice, will often raise Quarrels and foment Wars in the World; it may be thought absolutely necessary to the State of *Human Affairs*, to make War a sort of *Trade* and *Profession*, and to form it into an *Art*; that so at least, the Injuries which the Innocent must suffer may be less insupportable, when the Liberties of the *Sword* and the Miseries natural to a *State of War* are more restrain'd. Besides, the Reputation of being *false* and *treacherous*, and of *deluding* others by *Compacts*, is generally of *dangerous Consequence* to Persons often engaged in Wars; Since no Wise Man will be imposed upon more than once. But after all, a cautious Man can never lay any great Strefs upon such *Compacts*; because if he perswades himself into *Security* by them, he leaves himself open to the attempts of his Enemy. And therefore he ought to be careful, how he agrees to any *such* without manifest necessity, unless he is in a Capacity, upon any *foul Play*, to give himself Satisfaction, or hath other sufficient *Caution* to depend upon.

III. Among other *Compacts*, which do not put an End to the *War*, but only suspend the *Effects* of it; must be number'd *Truces*, which are *Agreements to forbear Hostilities for a particular time, the War still continuing*. Which *Definition* is explained by *Grotius*, l. 3. c. 21. § 1. For *Truces* are sometimes granted for several Years. But in that place, it may be said in *Excuse*, for *Varro* and *Paulus*, that they had regard only to such *Truces*, that are usually made when the Armies on both sides are in the Field and in Motion (1), which are generally limited to few Days, and not to those which put a stop to all *Hostilities*, and *Preparations* for War, and for the time they last, are little different from an absolute *Peace*; particularly where any *Clause* is inserted in the *Truce*, that mentions any *Conference* to be formed in the mean-time, towards the settling a full and entire *Peace*. But it must be observed, that tho' *Truces* of this latter sort, do generally comprehend all the *Territories* and *Dominions* of both the *Parties* engaged in the War; yet it may be, and often is agreed, that the *Truce* shall be observed only in certain *particular Places*, and that the War may be carried on, as it was before in others. For Instance, those Nations in *Europe* that have *Plantations* in the *East* or *West-Indies*, may make a *Truce*, that shall be of Force only in *Europe*, and continue the War all the while in the *Indies*.

IV. But it is a Question, Whether if *Peace* be limited to any *determinate Time*; for Instance, that it shall continue for *Twenty* or *Forty Years*, or the like, it should be look'd upon to be a *Truce*? Now I confess, that in my Opinion, every *Peace* is in its own Nature *Eternal*, that is, when-ever a *Peace* is Concluded, both *Parties* agree never to take up Arms again upon that *Controversy* which first gave birth to the War; but that the *Dispute* shall be absolutely *Silenc'd*; or be referr'd to the *Decision* of *Mediators*; or be some other way amicably *Composed*. And the *Perpetuity* of such a *Peace* is not to be supposed to be interrupted, tho' a fresh War afterwards breaks out between the same *Parties* upon *new Reasons*, and *different* from the *former*. For it is not to be imagined, that a perpetual *Peace* obliges Men always tamely to submit to another's Injuries, without opposing him, or making Resistance. And therefore tho' the Word *Peace* may be used, yet if the *particular Time* be *Limited* for its Continuance, so that the Dispute upon which the War began, is not entirely at an End, it can amount to no more than a *Truce*; which as long as it Continues, obliges them mutually to exercise the *Offices* of *Peace*. Thus the *Lacedemonians* (2) are said to have made a *Peace* for *Fifty Years*, but yet when the War broke out again *Six Years* after, they were complain'd of, only for breach of *Truce*. But then, on the *Other hand*, it may seem absurd to make a *Truce*, as *Romulus* did with the *Vejentians*, for an *Hundred Years* (b). Tho' *Dionysius Halicarnassens*, l. 2. calls it simply a *League*, because there can hardly be any Injury, but must be worn out of Memory, in so long a course of Time; so that to defer the Revenge and Prosecution of it to another Age, seems Unreasonable. *Livy* indeed says, l. 7. c. 20. that a *Peace* was granted to the *Cerites*, but that the *Act* of the *Senate* run only for an *Hundred Years Truce*. But I am inclin'd to think, that the design of that was, that the *Senate* might not seem to lessen their own *Authority*, by appearing easy in pardoning so sensible an *Injury* (c). Thus also *Theodosius the Second*, made a *Truce* with the *Persians* for an *Hundred Years*. And *Diodorus Siculus*, l. 12. c. 60. mentions a *Peace* made for an *Hundred Years*, between the *Ambraciota*, and the *Acarnanians*. And thus *Ferdinand King of Spain*, and *Alphonsus the First of Portugal*, agreed to a *Peace* for an *Hundred and One Years* (d).

V. Since therefore, notwithstanding the *Truce*, a *State of War* continues; which could not be, unless the *Pretensions* were still kept on foot, and the *Controversy* the War begun upon remained Undecided; it is evident, that it would be absurd to desire to make only a *Truce* with an Enemy, and yet require him to give up all his *Pretensions*. For if this be done, an absolute *Peace* is concluded. And it would be

(a) *Itin. Persic.* l. 5. c. 20. (1) *V. D. L.* 49. t. 15. *De Captivis & de Postliminio, &c.* l. 19. (2) *Iustin.* l. 3. c. 7.

(b) *Livy*, l. 1. c. 15.

(c) *Vide Socrom. Hist. Eccles.* l. 9. c. 4.

(d) *Comnestagius de Unione Lusitan.* l. 1.

unreasonable to desire to have Liberty to renew the War without Grounds, when such a particular time is expired (a).

VI. And it is further evident from the Nature of *Truces*, that if after the *Truce* expires, *Hostilities* begin a-fresh, there is no need the War should be *Proclaim'd* again (b). But yet, where the *Truce* is of *long Date*, and hath entirely put a stop to the *progress* and appearance of War; and where there is any *Clause* in the *Truce*, that expressly mentions *Conferences* to be held in order to put an *End* to the Dispute; if it be not *Necessary*, it is at least *Honourable*, sometime before the *Truce* expires, to signify our Design to the Enemy, and to make such Overtures as may convince him, that we take no Delight in War, and that it is no fault of ours, that the *Peace* is not concluded.

VII. It may also be further observed, that all *Truces* which have any *binding Force* and *Obligation* in them, are contracted either by *express Compact*, or by *Acts* that bear such an Affinity to *Friendship* and *Peace*, as they can be referr'd to no other *Cause*. Tho' *Treaties of Peace* have not in themselves the force of *Truces*, except it be expressly so agreed. And therefore an Enemy can have no good reason to conclude, that because I forbear *Hostilities* for a little time, therefore I consent to give him *Truce*. Neither can he charge me with Breach of *tacit Faith*, if after such a *Cessation of Arms*, which he hath been so unhappy as to grow secure upon; I make a sudden *Descent* upon him, and surprize him. And in this *Sense* are those *Authors* to be explain'd, that give such *accidental* Intermissions of *Hostilities* without *Compact*; the Name of *tacit Truces*, as *Justin* and *Livy* frequently do (c); But which must be supposed to mean no more than that for such a time the Enemy lay still, without offering any *Action* in the same manner as is usual upon *formal Agreements*, or *Truces*.

VIII. As for the Time, *Truces* are generally limited to, I refer you to *Grotius* in the place before-cited, § 4. But I cannot by any means allow what he there insists upon, that the *Day* from which the *Measure* of the *Time* is to commence is not included within that *Measure* or *Compass* of *Time*, because (says he) the force of the Proposition (From) implies *Separation* and *Division*, and not *Union* and *Conjunction*. For certainly, the *Beginning* of any thing is a part of that which it *Begins*. And therefore if, for Instance, it be agreed that there shall be a *Truce* for *ten Days*, from the *first* of *July*, I believe it would be difficult for any Man to interpret this otherwise, than to take in the *first Day* of that *Month* within the *Compass* of the *Truce*. Besides, it is not true that the Particle (From) hath always such a *Force* as to *divide* what it is join'd with, from what follows it. For it

often signifies a *Beginning comprehended* within that which it begins. Thus what Expressions are more *common*, than *From Head to Foot*, and *from the Beginning to the End* (1)?

IX. When *Truces* begin more particularly to oblige the *Subjects* on both sides, we may find in *Grotius*, in the *Place before-cited*, § 5.

X. What *Liberty* a *Truce* allows and what it forbids, *Grotius* also accounts for in the same *Chap.* § 6, &c. But here I confess I am of Opinion, that *Acts* barely *Defensive* are lawful in *Truces* of any sort; tho' perhaps *Truce* was desired and obtained upon some other *Pretext*. Thus for Instance, tho' *Truce* be granted only to *Bury the Slain*, yet I should not think it unlawful to make use of it to Retreat to a *Place* of better *Defence*, or to Repair or Raise a *Fortification*; or if a *Besieged Town* request *Truce* only to defer the *Assault*, I should not question but that they meant also to take in fresh *Supplies* of Men and Provisions. And *Grotius's* Reason to the contrary, seems to me to have no force in it, l. 3. c. 21. f. 10. that since the *Truce* makes for the Advantage of One *Party*, the Other that granted it ought not to be prejudiced by it. For since Men cannot by any sort of *Compact* give up their *Right* of *Self-Defence*; the *Party* that granted such *Truce* can only charge the *Fault* upon his own Easiness and *Ill Conduct*, that he did not take sufficient care that the Enemy should have no opportunity to *re-inforce* himself (d). So *Tissaphernes* in *Xenophon*, made *Truce* with *Agefilaus*; but continued his *Preparations* for War all the Time. And I do not think that if he really signified his Circumstances to his *Master* the King of *Persia*, and had leave from him to enter into *Articles* with the *Lacedemonian*, that he was guilty of Perjury only for Arming, and putting himself in Readiness to expect any *Event* (e).

XI. When the *Truce* expires *Grotius* says, that a Man taken in his Enemy's *Territories*, and forcibly stopp'd, may be detain'd *Prisoner*, l. 3. c. 21. § 9. (2).

XII. When either *Party* breaks *Truce*, the *Party* injured is at *Liberty* to renew the War without making new *Proclamation* of it. Tho' if he thinks it convenient he may forbear till the *Truce* expires. But if it happen'd to be *Agreed*, that the *Party* that first broke *Truce* should be liable to pay a certain Sum of Money by way of *Penalty*; where the *Money* is demanded and paid accordingly, it is evident that there is no *Pretence* for War left. For the reason why the *Party* pays the Money is, because he is willing to keep himself secure from War. But on the other Hand, if the *injured Party* make War, he must be supposed to *recede* from his Right to the *Penalty*. Tho' it must certainly be contrary to the *Agreement*, to declare War immediately and neglect the

(a) Vide Baudium de Inducis belli Belgici, p. m. 128.

(b) Vide Grotium, l. 3. c. 21. f. 3.

(c) Vide Just. l. 6. c. 7. Livy, l. 2. c. 18, & c. 64, & l. 23. c. 46.

(1) See Mr. Barbeyrac's Note upon this Section.

(d) Vide Xenophon. Orat. de Agefil. laudibus. Cornel. Nepos, Agefil. c. 2.

(e) See Montaign's

Essays, l. 1. c. 6.

(2) See Mr. Barbeyrac's Note upon this Section.

*Penalty.* For it is not usual in such *Compacts*, to leave it to choice, whether the *Penalty* shall be accepted, or the War be renewed (a).

XIII. *Compacts* that relate to *Safe-Conduct*, that secure *Free Passage*, and *Return* through *Places* in an *Enemies Power*, and how they are to be *interpreted* are largely explained by *Grotius*, l. 3. c. 21. § 11, 12. to whom I refer you.

XIV. *Compacts* relating to *Redemption of Captives* (1) are allowed much *Favour* among *Christians*, especially when the *Captives* are detained in *Barbarous Countries*; and even the *Treasures* and *Consecrated Vessels* of the *Church* are sometimes justly given for *Ransom* (b). The *Practice* indeed of the *Old Romans* is known to have been contrary (c): For when *Hannibal* permitted them to Redeem their *Captives*, the *Senate* answered, *That they that would be made Prisoners when they had Arms to Defend them, were very unnecessary Subjects* (d). And *Plato* (e) determines, *That in his Common-wealth, If a Souldier were made Prisoner he should be left to the Enemy's Mercy, tho' they were willing to give him Liberty.* Nor were they without reason thus *Severe*. For (as the *Disclaimer* says) (f), 'The greatest Glory in War is *Victory*, and next to *Victory*, the greatest is to *Die* for the *Cause* you engage in: There is indeed a *Third Way* too, but that a *dishonourable one*, which is to fly when there is no *Hopes* of *Conquest*. But then it may be said in excuse for such a *Person*, that he reserved himself for a second *Trial*, and that he hath still *Courage* to meet his *Enemy* once more. But a *Man* that yields in the *Heat* of *Fight*, that lays down his *Arms* and tamely submits to the *Conquerour's Mercy*, must for ever be given up for *Lost*. For what hope can be entertain'd of a *Person* that had rather be a *Slave* than *Free*, and that makes *Captivity* his *Choice*? What is to be observed upon this sort of *Compacts* may be seen in *Grotius*, l. 3. c. 21. § 23, &c. to the 28<sup>th</sup> Section. I shall only add this *Story* (g) out of the *Life* of *Castriot*; A *Young Man* of the *Barbarous Nations*, that happened to be made

*Prisoner*, was presented to *Musachius* for his *Share* of the *Booty*; who agreed to give him his *Liberty* for two *Hundred Pieces* in *Gold*. The *Young Man* immediately took the *Money* out of his *Pocket* and offer'd to give it for his *Ransom*: But *Musachius* refused to accept it, or to give him *Liberty*, telling him that *That Money* was his *Own* before when he became *Master* of his *Person*. But when the *Case* was brought before *Castriot*, he determined in *Favour* of the *Young Man*.

XV. Of *Compacts* of *Generals* of *Armies*, and what *Observations* may be made upon them, see *Grotius*, l. 3. c. 22. But to the 8<sup>th</sup> Section of it. I add, That *Generals* have power only to grant *Truces* of *Shorter Date*, and not such as withdraw all *Appearance* of *War*; for these are to be granted only by the *Sovereign Power*.

XVI. Lastly, How far *private Persons* have Power to make *Compacts* with an *Enemy*, may be seen at large in the same *Author*, l. 3. c. 23. (2). To which I add the *Custom* observ'd formerly between the *English* and *Scots*, with regard to *Compacts* of this *Kind*. If any *Person* (says the *Historian Buchanan*, l. 9.) did not make his *Appearance* at the *Day* appointed, this was his *Punishment*. 'In the *Publick Meetings* upon the *Borders* between the two *Nations*, (which usually were held in order to the recovering and restoring what had been lost on either side in *War*) If any *Person* happen'd to complain of another's *Falseness* to him, he only carried *Publickly* a *Glove* or *Ganilet* upon the *Top* of his *Spear*: And this they look'd upon to be the greatest *Disgrace* that could be inflicted. Nor was it usual for *Persons* that had thus violated their *Faith*, ever after to be received by *Friends* or *Relations*, or ever to be admitted to the *Acquaintance* or *Conversation* of *Persons* of *Reputation* or *Quality*. It was also a *Memorable Compact* which happen'd to be made between a *Roman* and a *Gothick Souldier*, mention'd by *Procopius*, when they were both fallen into the same *Pit* (h), by which they promised to *Assist* one another; and the *Goths* afterwards ratified their *Agreement*.

(a) Vide Grot. l. 3. c. 21. f. 11, 12.

(1) See Grotius in the Place above-mentioned, f. 23, &c.

(b) Vide L. 1. c. 2. l. 21. C. de S. Ecclef. Gratian. Jus Canon. Cauf. 12. Quæst. 2. c. 13, 14, 15.

(c) Livy, l. 22. c. 59, 61. Herat. Carm. L. 3. Od. 5. Silius Italicus, l. 10.

— Noxam superaverat omnem,

Armatam potuisse capi. —

(d) Eutrop. l. 3. c. 6.

(e) De Republ. l. 5. p. 662. Ed. Wech.

(f) Quintil. Declam. 339.

(g) Vide Marinus Barletius de Vita Castriotæ, l. 7.

(2) See Mr. Barbeyrac's Note upon this Section.

(h) Procopius Hist. Goth. l. 2. c. 1.

## CHAP. VIII.

### Of Compacts that restore Peace.

I Should now consider that sort of *Compacts* which entirely put an *End* to *War*; but *Grotius* is so large on this *Subject*, l. 3. c. 20. that all I can add upon it, will be only a few

things he happen'd to omit. The *Principal Doubt* on this *Head* is, Whether an *Exception* of *Fear Unjustly* given, is sufficient to disannul or rescind these *Compacts*? Which *Grotius* in the

the Case of a *Solemn War* denies, l. 2. c. 17. § 19. and l. 3. c. 19. § 11. Because it is contrary to the Common Practice of the *Laws of Nations*; and because it would be otherwise impossible to put an end to This sort of *Wars*, which are known to be very frequent, when it is the Publick Interest of the World that there should. But it must be said, That the Extortions and Ravages of *Unjust War*, can never be retain'd or defended by Conscience. And as it is beyond Dispute, that an *Unjust Conquerour* is obliged to make Restitution; so I cannot think it appears by any *Law of Nations*, that it is unlawful to plead an *Exception of Fear* against him. And tho' there were such a *Law*, yet I confess I do not apprehend, what Injury it would be to the common Quiet and Security of Mankind, if no notice is taken of it. For according to *Grotius* (1), whatever be the *Justifiable Cause* of *Solemn War*, the Effect of it is the *Acquisition* of the *External Dominion*, as he calls it, of what belongeth to the *Enemy*. If therefore the *Vanquish'd* return a *Solemn War* upon his *Conquerour*, however he may have no other *Justifiable Reason* for doing it, beside that of *Fear*; yet if he happeneth to be successful, he will not only recover what he himself lost before to his *Unjust Enemies*, but possess himself also of what he can win from his *Conquerour*. And therefore a Man must be very impudent, that imagines to secure himself in the Possession of what he hath *Unjustly* gotten, but by the same Force and Violence that made him at first Master of it. And it is equally absurd in a *Conquerour*, after he hath forced the *Vanquish'd* to submit to hard *Terms* and *Conditions* of Peace, not to see them obey'd while he hath him under his Reach, and at Mercy: But to content himself barely in the *Agreement* and *Compact* of the *Vanquish'd*, and then leave him in a Posture which may give him Power to turn the Game upon him (a). And therefore in *Reality*, the *Case* seems to be This, if a *Prince* be invaded with an *Unjust War*, and after he hath offer'd peaceably to *Concert* and *Compose* the Difference, be forced to Consent to *Rigorous Demands*, and accept an *Hard Peace*, he is under no Confinement from any Law, while the Peace continueth unsettled, not to object his *Exceptions of Fear*; or afterwards as he seeth Opportunity, to endeavour to give himself *Satisfaction* for the Injury. And so *Polybius*, l. 3. c. 30. pronounceth, that the *Carthaginians* had Just Reasons for their declaring a *Second War* against the *Romans* upon this Account, because while they were embroil'd in Troubles and Confusions at Home, the *Romans* forced them to give up *Sardinia*, and Extorted a vast Summ of Money from them. And therefore saith That *Author*, the

*Opportunity* the *Carthaginians* took to *Revenge themselves*, was of the same kind with that the *Romans* had taken to injure them. But the State and Decision of the Case will be different, if the Parties engaged in a War consent at first, as it were, to a *Contract of Fortune*; That is, if while the Reasons of War lie yet in Dispute, They reject all Terms of *Accommodation*, take Arms, and commit the Justice of their Pretensions, and the Pursuit of their Revenge, which might have been determined and ended by *Treaty*, or some other way of *Composition*, to the Event of War. For in this Case, the Sword is evidently made Judge of the Dispute, and both Parties put the Controversie upon this Issue, *Either I will Right myself, and Redress the Injuries I have Suffered, or Lose or Suffer more*; and they that begin a War with such Resolutions as these, have no more Reason to complain of the Injustice done them, than a Man would have that is hired to Fight a *Duel* and happeneth to be wounded in it. And therefore, where a Man pushes on the Contest to such Extremities, and then finds the Fate of the Day turn against him, he must be content to say as one of *Plautus's* (2) *Sofia's* did to 'other, *Well, do as You please, since you have the Strongest Arm* (b).

II. It hath likewise been a Question variously Disputed, Whether the Common-wealth or Government is obliged to observe a *Treaty* or *Peace* made with *Rebellious Subjects*? *Grotius* is very large in the *Affirmative*, l. 3. c. 19. § 6. &c. But in my Opinion the Case in a shorter and clearer View is this. A *Prince* that hath suppressed his *Rebellious Subjects*, may deal with Them as he sees best; but if he recovereth them by *Compacts*, the very Nature of such a *Negotiation* is an Evidence that he pardons the Crime. So that the *Compact* is not to be declared void, upon pretence of the *Rebellion*: But the *Rebels* are by that *Accommodation*, restored and re-united to the Common-wealth, and are supposed to promise Obedience to it. And the *Observation* of those *Compacts* by the Common-wealth, The *Rebels* may well suppose to be the *Condition* of the Obedience they promise. So that in *Kingly Governments* especially, such a *Composition* may sometimes obtain the Force of a *Capitulation* or *Fundamental Law*. But as *Gramondus* observes, 'When *Subjects Rebel* purely that they may Force their *Prince* to Yield to their Demands, they certainly quit the only Bond of Security *Subjects* can have, their *Allegiance* to their *Sovereign* (c).

III. What Power the Common-wealth hath to *Excuse* the Goods (d) of the *private Subject* upon a *Pacification*, must be discovered from the Nature of (e) the *Transcendental Propriety* (3): Upon the Force of which, the *Goods* and

(1) See B. 3. c. 7. f. 6. and c. 10. f. 5.

(a) Vid. Guicciardin. Hist. l. 16. sub. fin. & l. 17. sub. init.

(2) Plaut. Amphitr. Act. 1. Scen. 1. v. 240.

(b) Vide L. 47. t. 10. l. 3. f. 3. D. de Injuriis, & L. 9. t. 2. l. 7. f. 4. D. ad L. Aquiliam.

(c) Gramond. Hist. Gall. l. 2.

(d) Circa condonanda Bona.

(e) Dominium eminens.

(3) See Grot. B. 3. c. 20. f. 7, 8, 9, 10.

*Fortunes of private Men*, whatever Title purchased and possessed by, may be given up, whenever the Necessities of the *State* and the *publick* Interest require it. But with this Consideration, that the *State* is obliged to make good such Losses to the *Subject*, out of the *publick Revenues*, either immediately, or at least as soon as it is able. But whether a particular *Subject's* Goods ought to be *excused*, or taken from him, must in a *Monarchy* be determined by the *Prince*. And the whole *Body* of the *Subjects*, upon his Command, is obliged to make Satisfaction to the Person that has sustain'd Loss upon the *publick* Account beyond his own Proportion. But the *Foreigners* that are left to the Possession of such *Goods*, need not trouble themselves to enquire, Whether it was for the Interest of the *Common-wealth* to part with them or no. For the *Act* of the *Prince* is sufficient to give them a just and lawful *Propriety*; because of the *Presumptions* that attend the *Actions* of *Princes*, and because there could be no way of negotiating with *Foreigners*, without admitting that things are justly disposed, when managed under the Conduct of the *Head* of the *Common-wealth*. Besides, as the *Laws of Society* oblige the Rest of the *Subjects*, to make Good what hath been given up to the *Enemy*; so they seem to engage them also to the Relief of those Persons that have suffered Losses by the War; especially if it began without any particular Fault of theirs (a). Though it is too Evident, that the unfortunate *Subjects* have hardly any where other Redress or Satisfaction, than to be told that it was an Unforeseen and Unavoidable Calamity.

IV. If the *Time* be limited, in which the *Conditions* of the *Peace* are to be performed (1), it must be interpreted in the strictest Sense; so far as to exclude all Excuses for the least Delays, except such as are manifestly the Effects of Force and Necessity, and such as give no Jealousy of Design and Subterfuge. The Reason is plain; because a short Delay may make a strange Turn and Alteration in Affairs. If therefore either of the Parties should be indulged in deferring Performance of the *Conditions*, it would be easy for them to find Occasions, to elude the *Agreement*. Besides that, it must be a vast Expence to a *Prince* to maintain a *standing Army*; as he must in Prudence be obliged to do, till the *Articles of Peace* are put in Execution.

V. Sometimes (2) the *Peace*, and the *Conditions* of it, are left to be determin'd by a *decisive Battle*; in which sometimes only *two* particular Combatants for both sides, and sometimes *two*, and sometimes *three* on each side, and sometimes *whole* Armies engage. And

here a *difficult* Question occurs; Whether the Fate of the *Common-wealth* may lawfully be committed to the Fortune of such a Fight? This seems indeed to be a way to prevent a greater Effusion of Blood, and to reduce the Miseries and Calamities of War to lesser Compass. But then on the other side, it is more satisfactory, promiseth fairer, and looks like a better Venture to stand the Shock even of a bloody War, than to lose the *Security* and *Liberty* of the *Common-wealth* all at once in such an Engagement. Since, on the other hand, the War may be set on foot again, and perhaps the Success of it be changed after two or three unhappy Encounters or Defeats. But indeed when there are no Hopes of making a good End of a War, though the whole *Force* of the *Common-wealth* should engage, if the *Enemy* will admit of it, the Dispute may justly be decided by some such sort of *Combat*, as the least of two Evils. Nay, and where *Princes* themselves make War upon their own *private Disputes*, without any Respect to the *Interest* or *Rights* of the *Common-wealth*, the *State* may easily give them leave to decide the Controversy between themselves by *single Combat*. And we have an *Example* of this Nature in *Diodorus Siculus*, l. 4. c. 60. (b). Tho' *Princes* ought not to proceed to such violent Methods while the Matter in Dispute is doubtful and uncertain. But here it must be observed, that they that leave the Issue of the Controversy to the Event of *Combat* or *Battle*, may determine as they please of *what* themselves are possessed of, but cannot transfer or lose to others any of those *Rights* which are not in their Power to dispose of. And therefore if a *Prince* set his Kingdom to *Stake*, except it be his in a *Patrimonial Right*, it will signify nothing, unless he hath his *Peoples* and their *Consent* for it, that have by Birth a Right of *Succession*. But farther, in such *pitch'd Battles* it often comes to a Dispute on which side the *Victory* lies. And here it is to be consider'd, that generally such *Fights* are *Decisive*, and put an End to the Controversy they began upon. And therefore where *two particular Combatants* engage, the *Victory* must be declar'd for him that kills his *Enemy*, or at least that so weakens and disables him, as to force him to confess himself conquer'd; as *Turnus*, when he was wounded, doth in *Virgil* (3). Where a greater *Number* fight, That Side is *Victorious* which destroys the *Enemies*, or puts them into such Disorder, that they are not able to make longer Resistance. But where the Quarrel is left to be disputed between *two* entire *Armies*, The Plunder of the Field, The burying the Slain, The lodging upon the Place of Action, The offering *Battle* a second time, are not in them-

(a) *Vid.* L. 17. t. 2. l. 52. s. 4. *D. pro Socio*, & t. t. *D. de lege Rhodiâ, de jactu*, L. 14. t. 2. (1) See *Grotius*, in the above-cited place, *Seç.* 25. (2) *Vid.* *Grot.* *ubi supra*, c. 42, &c. (b) *Dionys. Halicarn.* l. 3. p. 149, 150. *Ed. Lips.* When the *Generals* design only to assert their own Power and Authority, the single Combat between them is an Honourable and Necessary way to end the Dispute; but when the *Common-wealths* themselves contend for Superiority, the Uncertainty of such a Trial, makes it mean as well as unsafe to venture it.

(3) *Virg. Æn.* 12. v. 931, &c.

selfes any Proof of *Victory*; since all these may happen when the Battle is fought with equal Bravery and equal Loss. But if other Circumstances concur, there may perhaps be Arguments enough to prove the Enemy fled. And certainly when an Enemy retreats so far as to quit the Field after the Engagement, it is a just Suspicion that he is fled. But when neither Side can show any good Arguments to prove a *Victory*; Matters continue in the Posture they were in before the *War*, and the *Parties* must either come to a new *Trial* by the *Sword*, or end the Dispute by *Treaty* (a). Thus when the Dispute was between the *Lacedemonians* and *Argives* about the *Thyreatick* Lands, it was agreed in a *general Assembly* of the *States of Greece*, that the Controversy should be decided by Battle between a select Number of Subjects on both sides, and that the *Lands* should fall to the Conquerors. The *Lacedemonians* pitch'd upon *Othryades* for their Part to command in the Engagement; and the *Argives* made choice of *Thersander*. Two of the *Argive* Party surviv'd the Fight, *Agenor* and *Cronius*, who came Home and brought News of their own *Victory* to the *State*: But after the Battle had been some Time over, *Othryades*, with the little Life he had left, made a Shift to support himself with Pieces of broken Launces, took off the Shields from

the dead Bodies, and erected a *Trophy* with them, leaving upon it an Inscription in his own Blood, *To Jupiter Guardian of Trophies*. For my part I should make no doubt to pronounce the *Victory* for the *Argives* (b).

VI. As to *Hostages* (1) given for the *Ratification* of the *Peace*, besides what we find in *Grotius* (2), it may be further observ'd, that if the *Hostage* happeneth to be the *Prince's Heir* and *Successor* that giveth him up, when that *Prince* dies, he is no longer to be detain'd as an *Hostage*, though the *League* doth not expire at his Death. For this *Case* is supposed to be tacitly excepted; That he should be no longer an *Hostage* when he succeeds himself in the room of the *Principal*: But then he is obliged to substitute another in his stead whenever it is demanded.

VII. There is also another way of securing *Peace*, and that is when others, and especially such as interposed as *Guarantees* and *Mediators* of the *Peace*, engage their *Faith* that the *Articles* shall be observed on both sides; which *Engagement* of theirs implies a sort of *Agreement*, by which they oblige themselves to assist the *Party* invaded contrary to *Treaty* against the injurious *Aggressor* (c). But the *Guarantees* are not obliged to send *Aids* to any *War* that begins upon other Reasons, than the *Violation* of the *Articles of Peace*.

(a) Vid. Plut. in Parallis Herod. Clio. (b) Vid. Jo. Meurf. Miscell. Lacon. l. 4. c. 14. (1) See the 2d Chapter of this Book, Sect. the last. (2) See Grotius, B. 3. c. 20. f. 52, &c. (c) V. Diad. Sicul. l. 4. c. 55.

## C H A P. IX.

### Of Leagues.

I Shall in the next place consider that *Species* of *Publick Compact* (1), which is usually called, *Leagues* (2). *Pliny* in his *Natural History*, l. 7. c. 56. gives *Theseus* the Honour of being the First that made or used them: which is not to be allowed, in any other Sense, than that perhaps he might be the First in *Greece* that entred into *League*, or that perhaps annex'd certain *Rights* and *Solemnities* to be observ'd at the making of them. The most proper *Division* of them arises from the *Matter* of them; And from thence they may be divided, First, into *Leagues* that constitute what was an *Obligation* of the *Law of Nature* before. Secondly, into *Leagues* that superadd some Particulars to the *Duties* of *Natural Law*; or at least that, where these are too *General* and *Indefinite*, restrain them to *certain* and *particular* *Articles*.

II. Under the *first Head* may be rank'd all *Leagues* (3) that provide barely for the Exercise of *Civility* and *Humanity*, or to prevent *Injuries* on either hand, See *Genes. XXI. 23.*

And in the *League* the *Lacedemonians* made with the King of *Persia* there was this *Article* (a), *Whatever Towns and Countries the King is at present in Possession of, and were before in the Possession of his Predecessors, shall continue in Subjection to him. And no Lacedemonian, or Ally to the Lacedemonians, shall make War upon them, or injure them any other way, or demand Tribute from them upon any Pretence whatsoever. The King shall have the entire free Rule in his own Dominions.* But perhaps it may be thought, that by this *Article* the *Lacedemonians* renounced all *Claims* and *Pretensions* whatever, in *Asia*: For *Asia* was the King's notwithstanding the *Lacedemonian League*. And 'tis Essential to all *Propriety*, both that what is *mine* should be free from the *Invasions* of other Men, and that I should have *Liberty* to do with it as I please. With this *League* may be compar'd the *Treaty of Peace* between the *Athenians* and the *Persians*, *Diad. Sicul. l. 12. c. 4.* 'Tis certain the *Athenians* look'd upon such *Leagues* to be necessary; especially

(1) See Grot. B. 2. c. 15. f. 1, &c. (2) See Mr. Barbeyrac's Note upon this Sect. (3) Vid. Grot. ubi supr. f. 5.

between *Nations* that never had Intercourse with one another before. And no wonder, since the greatest part of the World had lost the Sense of that *Law of Nature*, that there was a sort of *Natural Kindred between Men*; and therefore that it was highly Criminal for them to injure one another without Grounds of Provocation. Nay, so far was this Truth unknown to them, that the common Opinion was, that *Offices of Humanity* were due only to *Fellow-Subjects*; that all *Strangers* and *Foreigners* were *Enemies*, and might lawfully be treated as such upon any Prospect of Advantage (a). However, at this time of day, when all *Nations* almost know more of the *Law of Nature*, are more strict in the Observation of it, and more polish'd in their Manners, such *Leagues* may be supposed absolutely unnecessary (1); unless, perhaps it be allow'd, (as it is between particular Men,) that when the First Advances are made towards Acquaintance, Good Breeding should make the *Preliminaries to Friendship* a little ceremonious and solemn. As *Cicero* says in his *Epistles* (b), 'In every new Acquaintance must be consider'd, what are the first Steps to be made, and by what Recommendations the Passage is to be opened to Friendship. In any other Respect, 'tis a Scandal to human Nature that any Civil People should enter into any *Treaty*, the *Articles* of which, have no further Intent than to provide that the *Law of Nature* should not simply and directly be broken; as if a Man could not have a proper Sense of his Duty, unless he bound himself under such an *Obligation*. Such *Leagues* indeed are commonly call'd no more than *Treaties of Friendship*. But certainly the strict proper *Notion of Friendship*, also includes much more than the common *Offices of Humanity*. For tho' the *Actions* due to *Friendship* are not so *Determinate*, as those due by *Compact*; yet in general every Man will allow that it is the *Duty* of one *Friend* to impart Himself and his *Fortunes* to the Relief of the Other, to provide for his Happiness and Security, to assist him with Advice, support him with Counsel and Comfort, to protect him as far as he has Power from Evils and Dangers which threaten him; And that all this is to be done with greater Intensity of Passion, than common *Offices of Humanity* pay'd to other Men indifferently require. Further, Under this Head *Grotius* reduces all *Leagues* made for the *Establishment* of mutual *Correspondence* and *Hospitality*, and of *Trade* and *Commerce*, as far as due by *Right of Nature* (c). But that All are not properly *Allies* and *Confederates*, who have made an *Agreement* barely to observe common *Duties of Humanity*, may appear from *Livy*, l. 41. c. 24. Where the *Achaians* upon Displeasure conceiv'd against King *Perseus*, forbid the *Macedonians* their Country. Whereupon *Macedonia* became the

Refuge to all their fugitive Slaves, the *Achaians* not daring to attempt to recover them by pursuing them thither. But *Perseus* to regain their good Opinion promised them, that if they would take off the *Prohibition* of Intercourse between *Macedonia* and *Achaia*, he would send them back their Slaves. Upon which the Matter was debated in the Meeting of the *States of Achaia*. *Callicrates* opposed their gratifying the King, for Fear of giving Umbrage to the *Romans*; And on the other Hand, *Arco* contendd that notwithstanding their League with the *Romans*, they might safely accept the King's Offer and satisfy his Desire, urging, That the thing in Debate, was not whether they should enter into any new Alliance or Confederacy; but only whether they would give and take the Liberty of Trade; to let their Country be open to the *Macedonians*, that they might have free Passage into theirs, and that their Slaves might not be out of Reach when they fled thither. And that all this was not inconsistent with their Alliance with the *Romans*, since that did not oblige them to act particularly against *Perseus*.

III. Secondly, Leagues which superadd to the Duties Men owe one another by the *Law of Nature* are of two sorts, some equal, others unequal. The First are such as are alike on both sides (2); or, when not only the Engagements and Promises are either simply, or, in Proportion to the Strength of either Party, on both sides equal; but also when the Manner of passing them is equal, so that neither of the Parties is obliged to harder Conditions, or left any way obnoxious to the other. The unequal I shall consider by and by. *Isocrates* (3) distinguishes after the same manner, 'That *Covenants* or *Leagues* are equal, when the same equal Right is divided to both Parties; and that That is a *Command* or *unequal League*, when one hath harder Terms than the other, (for I see no Necessity of adding contrary to Justice.) The End of both sorts is chiefly the Advancement of Society. And this Society either relates to *Commerce*; or to *Community of War*; or to *Mutual Promises* of Aid and Supplies in *Wars Offensive* and *Defensive*; or in short, to any other Matter. *Equal Leagues* relating to *Commerce*, may be various. For Example, Suppose it be agreed that none of the *Subjects* of the *Confederate Commonwealths*, shall be obliged in any of the *Ports*, or any other *Parts* of the *Territories* belonging to one another, to pay *Custom* or *Toll*; or not more than is paid at present; or not above a certain *Rate* or *Quantity*; or not more than *Subjects*, or other *Allies* pay; and the like. *Equal Leagues* relating to a *Community of War* are settled thus; When for Example, it is agreed that both the *Confederates* shall furnish out an equal Aid of *Men* and *Ships* and other *Necessaries* for *War*; and that, either both when either of the *Con-*

(a) V. Grot. l. 2. c. 15. f. 6.

(1) See above in B. 2. c. 2. f. 11.

(b) Cic. Ep. ad Fam. L. 13. Ep. 10.

(c) Vid. Supra, l. 3. c. 3. f. 9, 11, 12.

(2) See Grot. B. 2. c. 15. f. 6.

(3) Isocrat. Panegy. p. 132.

*federates* is invaded by *Enemies*, or make *War* upon others, or only when either *Party* is invaded. Sometimes *Aids* and *Supplies* are promised only for a particular *War*, or against a particular *Enemy*, or against all *Enemies* in general, excepting only the particular *Allies* of each *Confederate*. Lastly, Leagues about any other *Matter* are *Equal*, when it is agreed that *one* shall have no *Forts* upon the others *Confines*, that *one* shall not defend the other's *Subjects*, or receive them into *Protection*, but apprehend and send them back to the *other*; that *one* shall not give the *other's* *Enemies* *Passage* through his *Country*; and the like.

IV. Having thus explain'd the *equal Leagues*, it will be easy to understand what are the *unequal* (1). And these are when either the *Promises* are *unequal*; or when either of the *Parties* is obliged to *harder* Conditions. The *Promises* may be *unequal*, either with Regard to the *superior* or *inferior Confederate*. The *First* happens when the more powerful *Confederate* promises his Assistance to the other, without requiring the like; or when the *Aids* he promises, are greater than what the *other* promiseth; or when the *other* is not bound to bring Proportionate *Aids*. The *Latter* happens, when the *inferior Confederate* is obliged to *Conditions* of larger Extent than the *other*. Some of this sort of *Leagues* include a *Diminution* of the *Sovereign Power*. Of this Nature was the *League* between the *Romans* and *Carthaginians*, in the End of the *second Punick War*; by an *Article* of which the *Carthaginians* were not to begin any *War* without Leave from the *People* of *Rome*. And thus *Armenia Major* received its *Kings* from *Rome*, tho' it paid no *Tribute* to the *Romans* (a) (2). On the other hand, Those *Leagues* are no *Diminution* to the *Sovereign Power* which include only a \* *Transient Burthen*; or one which may be complied with once and for all. For Instance, if when a *Peace* is concluded, one *Party* is obliged to pay the other's *Army*; to defray the *Charges* of the *War*; or to pay a *Sum* of *Money* by way of *Mulct*; or when either *Party* is obliged to dismantle *Towns*, demolish his *Forts*, evacuate certain *Places*, remove from certain *Countries*, give *Hostages*, deliver up *Ships*, and *Arms*, and the like. Thus in the *Articles of Treaty*, which *Porsenna* allowed the *Romans* upon their *Exclusion* of the *Kings*; it was particularly mention'd, That *they should have no Instruments of Iron for any Use, but in Husbandry* (b). And here by the way, the *Story* which *Procopius* relates in the *Fourth Book* of this *History of the Goths*, may perhaps deserve *Observation*. 'When the *Truce* was made between *Justinian* and *Cosroës*, by the *Conditions* of it, *Justinian* was to pay *Two Thousand Libræ* of *Gold*; Whereupon *Isdiaganus* the *Persian Am-*

*bassador* demanded immediate *Payment*; but *Justinian* propos'd rather to pay every *Year* *Four Hundred*, thinking by that means to lay the stronger *Obligations* upon *Cosroës*, not to break the *Truce*. But the *Romans* complied at last, and paid the entire *Sum*, for fear a *Yearly Payment* might look like *Tribute*. So common (saith the *Historian*) it is for *Man* to be more afraid of a *dishonourable Name*, than *dishonourable Actions*. But here it may be ask'd, Whether such *unequal Leagues* as are attended with *permanent* and *perpetual Burthens* do always and in themselves lessen and impair the *Sovereign Power*? or, Whether an *unequal Confederate* may be supposed to retain his *Sovereign*? Now *permanent* and *perpetual Burthens* are such as these; When the *one* is obliged to have the same *Allies* with the *other*, and not on the contrary; When *one Party* is obliged not to build *Forts* in such particular *Places*, not to levy *Forces* or raise an *Army*; (And this was one of the *Conditions* of the *League*, between the *Romans* and the *Latines*, That the *Latines* should make no *Levies* of *Men*, nor set any *Officers* of their own over them, or send them out upon any *Expedition*. The necessary *Consequence* of which was, that the *Romans* pass'd the *Decrees* of *War* or *Peace*, and that the *Allies* were *Partners* only in the *Toyl*, while they took the *Conduet* themselves, and enjoyed the *Honour* and the *Benefit* of the *Victory*) (c). That *one* shall not have above a *certain* number of *Ships*, shall not build new *Cities*, set out *Fleets* to *Sea*, raise *Souldiers* in such particular *Places*; and the like; (3) But especially when one of the *Confederates* is obliged to pay a *Deference* and *Submission* to the *Other*; or what is the same thing, to acknowledge him *Superiour* in *Dignity*, and to express a *Reverence* to him in all his *Actions* (d). Thus the *Athenians* allowed their *Allies* their separate *Liberties*, and erected a *Popular Form* of *Government* among them; But reserved the *Superintendence* and *supreme Direction* of *Affairs* to *Themselves*. *Grotius* answers this *Question*, L. 1. c. 3. s. 21. out of L. 49. t. 15. l. 7. s. 1. D. de *Captivis*, &c. But the *Difficulty* lies in the following *Words* of the *Civilian*, At fiunt apud nos rei ex civitatibus federatis, & in eos damnatos animadvertimus. But the *Subjects* of our *Confederates* are brought to *Tryal* before *Us*; And we pass *Sentence*, and punish them. For this certainly implies *Subjection*, when another hath a *Right* to *Summon* our *Subjects* to appear and stand their *Tryals* in his *Courts*, and to *punish* them according to *Sentence* given. The *Story* of *Decius Magius* in *Livy*, is an *Instance* of this (e). But particularly, that which *Pausanias* relates (f). When upon the *Motion* and *Instance* of *Callicrates*, the *Roman Legate* charged the *Greatest Men*

(1) Vid. Grot. ubi supra, l. 7. (a) Appianus Alexand. Præfat. p. 2. A. Ed. H. Steph. Vid. Procop. Hist. Gothic. L. 1. c. 6. The Agreement Peter made with Theodatus, concerning Sicily. (2) V. T. Liv. l. 30. c. 37. \* Onus Transitorium. (b) Plin. Nat. Hist. L. 34. c. 14. See also 1 Sam. XIII. 19, 20. (c) Vid. Dionys. Halicarn. l. 8. (3) See Mr. Barbeyrac's Second Note upon this Section. (d) Vid. Isocrat. Panegy. (e) Livy, l. 23. c. 7. (f) Pausanias in Achaicis.

among the *Athenians* with being in *Perseus's* Interest; *Xenon*, who was one of them, upon Confidence of his Innocence in that Matter, answered, That he did not doubt but he could clear himself of that Charge, even before the *Roman Senate* it self; Which the *Legate* immediately took the Advantage of, as if he had appeal'd to *Rome*, and thereupon he and several others were sent to *Rome*. And yet *Polybius* informs us (a), speaking of those that were sent thither, *That the Senate did not think that it belonged to them to bring them to a Tryal*. And therefore, the Answer to the Difficulty mention'd is easy, That the former part of the words must be understood of the Primitive Times of the *Roman Commonwealth*, when they were strict in their Observance of the Laws of *Confederacy*, and us'd to make a *Distinction* in their Carriage and Treatment, between such as voluntarily entered into an *Alliance* with them, and such as their Arms had Conquered. And this *Cicero* confesses, That the old *Romans* thought themselves obliged to protect their *Allies*, and never assumed the Command over them (b). And *Scipio* made it a particular Part of their Commendation, that the *Romans* did not confine the *Foreign Nations* to their Interest by *Severity* and *Servitude*, but by the Tyes of *Friendship* and *Alliance*. But the latter words refer us to after Ages, when the Respect and Reverence they had to their old *Confederacies* ran low, and their *Allies* as well as the conquer'd *Nations* were reduced to equal Terms of *Slavery* (c). So *Sylla* forced all the *Roman Allies* that had been Free till his time to pay *Tribute*. At which Time it was also common to bring the *Subjects* of the *Confederate States* to *Rome* to be tried, and to punish them there, as *Roman Subjects*. But it is evident, that in the *Epistle* of *Proculus*, between the former and latter Words, there were several intermediate things mention'd. But here *Grotius* after he hath tediously recounted the several Kinds of Disputes, which might happen between *Allies* and *Confederates*, at last dismisseth the *Difficulty*, without answering any thing to it (d). However, it is well observ'd by wise Men that it generally happens, That if the Party *Superiour* in the League, be considerably stronger, and more powerful than the other *Confederate*, he will by Degrees arrive at an *Absolute Sovereignty* over

them, especially if the *Confederacy* be Perpetual, and allow him a *Right* to place *Garrisons* in their *Towns* (e).

V. Another Question *Grotius* enters upon, (f) is this, Suppose two Parties both *Allies*, and *Confederates* to a *Third*, make *War* upon one another, which of them the *Third Confederate* ought to assist (g)? In which Place it may be added, that in all *Leagues* which a *Prince* enters into with his *Neighbours*, upon the Points of Assistance and Supplies, this *Exception* ought always to be supposed, *If the Condition and Circumstances of my own Kingdom will permit?* For that Consideration ought always to over-balance, not only any private Respect, but even the *Ties* of Blood and Affinity (h). For since it is impossible a *Prince* should be under nearer or stricter Obligations to an *Ally*, than to his own *Subjects*; 'tis plain he can make no *Promise* that can be binding to any *Confederate*, when it is manifestly inconsistent with the good of his own *Subjects*. It was said by *King Francis* the First in *Guicciardine*, that he thought the *Oath* he took at *Rhemes* was of the strongest Obligation; and by that the *Kings* of *France* were obliged not to alienate any part of the *Patrimony* of the *Crown* (i). And in this Sense, what my Lord *Bacon* saith, in his *Wisdom of the Ancients*, c. 5. may be very well admitted, 'That there is but one true and proper Bottom of Faith among Princes, and that is Necessity (a Deity of great Power with the Great) the Danger of the State, and the Communication of Profit. And *Aristotle* speaks very plainly (k). Advantage seems to be the main cause of Confederacies, between Commonwealths (l). *Polybius* says of the *Rhodians* (m), that they made no *Alliance* with the *Romans* for a *Hundred and Forty Years* together, tho' they sent them Assistance in several *Wars*; And the Reason of this, he saith, was, 'Because they were willing to appear fair to all the World, and to give every *Prince* hopes of their Assistance and Friendship, but at the same time unwilling to abridge themselves of any Part of their Liberty, by binding themselves under *Oaths* and *Compacts*, to adhere to the Interests of any one *Nation*. Sir *Thomas Moor* would have his *Utopians* forbear entering into *Confederacies* upon other Reasons (n). But a *Prince* that suffers by an *Alliance*, that expires upon

(a) Polyb. Excerpt. Legat. 105. (b) Cic. Off. 1. 2. c. 8. (c) Vid. Liv. 1. 42. c. 1. Appian. de Bello Civ. 1. 1.

(d) Vid. Anton. Matth. de Criminibus, ad tit. ad L. Jul. Majestatis, c. 1. f. 5, 6.

(e) Vid. Bodin, de Repub. l. 4. c. 6. Isocrates Archidam. p. 217. People that are jealous of their Liberty, should avoid all unequal Confederacies, for there is hardly any difference between Them and Slavery.

(f) L. 2. c. 15. f. 13. (g) Vid. Simlerum de Repub. Helvetiorum, l. 1. p. 119. (h) Vid. Gallium, l. 2. c. 29.

(i) Guicciardine, Hist. 1. 16. (k) Arist. Nicom. 1. 8. c. 5.

(l) Arist. Rhet. l. 3. c. 14. 'Tis incredible, that any Man should choose to do a thing without any prospect of Advantage by it. Valer. Flaccus, l. 4.

Certa fides animis idem quibus incidit hostis,

They're certain Friends that have a common Foe.

Isocrates Orat. ad Philip. p. 156. A Commonwealth hath no regard, either to Enemies or Oaths, or any thing else, further than it thinks it tends to Advantage: Thus *Polybius* l. 2. c. 47. saith of *Aratus*, that he knew *Kings* naturally look'd upon none, either as Friends or Enemies, but rated Friendship and Enmity, purely according to their own Profit. *Andr. Maurocenus*, Hist. Venet. l. 1. speaking of the State of *Venice*, saith, We measure our Alliances, and Friendships only by the Credit and Interest they bring Us. (m) Ployb. Excerpt. Legat. 93. c. 6.

(n) More, Utop. l. 2.

a Change of Affairs with his *Confederates*, must charge the misfortune upon himself, that he did not make a stricter Search into the *Circumstances* of his *Ally* (a). Tho' an Honourable *Confederate*, when he finds that the Posture of Affairs he is in will not suffer him to continue any longer in the *Alliance*, should give Advice of it to the *Others* that are concerned, that they may have time to provide for themselves, and secure their own Interest. For it is certainly the *highest Pitch of Baseness possible, to Sacrifice a Friend to save my self* (b). And therefore in all *Leagues of War*, it is look'd upon to be a very important and necessary *Article*, that no *one* of the *Confederates* shall make a *separate Peace* with the *Common Enemy*, excluding the rest of the *Allies*. Tho' 'tis reasonable *this Article* should be understood with this *Limitation, supposing the other Confederate or Confederates, do not refuse to comply with fair Terms and proper Overtures of Peace*. For in such a Case, *this* looks like a Violation of the *Confederacy*, and in consequence the other *Ally* may justly take *separate Measures* for his own Security. But then *this* also must be allowed in a *mitigated Sense* only, and with *certain Alleviations*, that it may not be a *Pretext* to elude *Confederacies*, and that *one* of the *Allies* may not in some Sense be made the *Other's Judge* (c).

VI. Another *Celebrated Distinction of Leagues* is that which divides them into *Real* and *Personal*. The *Latter* are such as are made with the *Prince*, purely with Relation to his *Person*, and expire with him. The *Former* are such as are made with the *Kingdom* and *Common-wealth*, rather than the *Prince* or *Government*; and these outlive the *Ministry* and the *Government* it self under which they were first made. To which of these Every *League* belongs, will appear from what follows. This therefore is certain, that whatever *Leagues* are made with a *free People* are in their own Nature *Real*, and must continue till the *Term* limited in the *League*, notwithstanding that the *Government* by whose *Intervention* the *Leagues* were made, may die or be changed. And hence we may refer, that if a *Free People* enter into a *League*, and afterwards the *State* of the *Common-wealth* happen to be changed from a *Democracy*, into a *Monarchy*, the *League* is still in force, because the *People* is the same, tho' the *Form* of the *Common-wealth* be changed. And because a *Prince* call'd to the *Throne* by the *free Voice* of the *People* is always suppos'd to take the *Sovereign Power* upon him, together with all the *Obligations* contracted by the *People*, when it lay in their Hands. Besides, *Leagues* are made by them that are invested with *Sovereign Power*. The *Common Subject* of which *Power* is the *Common-wealth*; and *Sovereign Power* is the same, both when it is exercised by the common

*Suffrages* of the *whole Body* of the *People*, and when it is afterwards entrusted to a *Prince*, created by the *Consent* of the *People*. But here all those *Leagues* are excepted, that were made only for the *Preservation* of the *present State* of the *Common wealth*. For *Example*, suppose *two Free Common-wealths* enter into a *Confederacy*, by which they agree to *Aid* and *Assist* one another, against all such as shall endeavour by Force to subvert the *present Establishment* of the *Government* in either *Common-wealth*. For if afterwards, either of the *two Nations* freely consent to an *Alteration* of the *State* of their *Common-wealth*, the *Reasons* ceasing, the *Confederacy* is supposed of Course to expire. But however in the *General*, tho' every *League* made with a *free People* be *Real*; Yet it does not follow on the other Hand, that therefore every *League* made with a *Prince* is *Personal*, and dies with him. For the *Inserting* a *Person* in a *Compact*, doth not make the *Compact Personal*, but only shows by what *Person's Intervention* the *Agreement* was made (d). But because it is evident, that *Princes* make some *Leagues* with no farther Intention, than that they should continue till their Death; and *others* with Design to derive them down to their *Successors*; it must therefore be enquired, What are the *Marks* whereby we may distinguish, which *Sort* every *Regal League* ought to be reduced to.

VII. And it is *Grotius's* Opinion (e), that it is easier to discover this, from the *Form* and *Phrase* of the *League* it self, than from any *General Rules* or *Observations*. And thus all *Leagues* will appear to be *Real*, in which 'tis expressly mention'd, either that they are to be *perpetual*; or that they are made for the *Common Good*; or made with the *Prince* and his *Successors*; or when a particular *Time* is limited for the Continuation of them. But besides, the other *Words* of the *League* sometimes, and sometimes the *matter* of it; and sometimes the *Motives* of entering into it, may make a *Conjecture* easy in *this* Case. If the *Conjectures* are equal on both sides, *Favourable* (†) *Leagues* must be supposed to be the *Real*, and the (\*) *Odious*, the *Personal*. The *Favourable Leagues* are those that are made for the *Advancement* of *Commerce*. Not that all *Leagues* of *War* are *Odious*; For the *Defensive* generally incline to the *Favourable Part*; the *Offensive* have more of that which is *Odious* in them.

VIII. But how far a *Successor* is obliged by the *Leagues* of the *Prince* his *Predecessor*, is what we may take a more distinct View of. For in the *First Place* 'tis certain, that if the *Predecessor* make a *Peace*, the *Successor* is obliged by it. For by a *Peace* 'tis manifest, all past *Injuries* that gave Birth to *War* are forgotten, the *Articles* of the *Peace* being duly observed. And then *Secondly*, 'tis beyond dispute, that the

(a) Vid. L. 50. t. 17. l. 19. init. D. de reg. juris.

(c) V. Joh. Labard. Hist. Gall. l. 5. p. 313. Ed. Paris. An. 1671.

(e) Grot. L. 2. c. 16. f 16.

(†) Favorabilia

(b) Euripid. Iphigenia in Tauris. v. 605, 606, 607.

(d) Vid. L. 2. t. 14. l. 7. f. 8. D. de Pañtis.

(\*) Odiosa.

*Successor* is obliged to stand to all those Lawful *Agreements*, by which his *Predecessor* transferr'd any *Right* to a *Third Person*. And again *Thirdly*, It is also certain, that when one of the *Confederates* hath performed what the *League* obliged him to, and the *Prince* dies before he *Satisfies* What was required on his *Part*, the *Successor* is obliged to *Satisfie* it. For since what the *Other* performed upon a *Condition* of an *Equivalent* to be paid him, did either really, or at least was intended to promote the Advantage of the *Common-wealth*; it is evident, that unless the *Equivalent* be paid him, he hath a *Right* to demand *Restitution* or *Satisfaction*, for what he perform'd, in a manner before it was due; and consequently, that the *Successor* is obliged to *refund* all back, except he chooseth to pay the *Equivalent*, according as the *Articles of Confederacy* before determined. *Lastly*, as to these *Leagues*, Where nothing hath been *Performed* on *Either hand*; or Where the *Performances* have been *Equal*, it may I think be said in *General*; that the *Prince* if he entered into the *League* as *Head* of his *People*, and with design to advance the *Publick Good* by it, must be supposed to have made a *Real League*, and to have obliged his *Successor* by it. Because such a *League* affects the whole *Mass* of the *People*; and the *Succeeding Prince* the *Head* of them, enters upon the same *Rights*, and takes upon him the same *Incumbrances* with his *Predecessor*. But where the *League* directly regards the *Benefit* of the *Prince's Person* and *Family*; 'tis evident that when he dies, or that is extinct, the *League* must also be at end. But it is grown into a *Custom* upon any new *Succession*, to renew the *Leagues*, tho' in themselves undoubtedly *Real* at least in *general Terms*, for fear any *Dispute* or *Exception* should arise, that since the *Common-wealth* hath not yet perceived the use and advantage of such a *League*, that therefore it hath no other *Bottom* but his *Faith* that made it, and doth not descend to the *Successor*. And especially since the design of every *League* is to promote the *Publick Good*; and since the *Successor* may perhaps have *Sentiments* in Relation to that different from his *Predecessor*, he hath in consequence a *Right* to take different *Measures*; and therefore may neglect a *League*, which he thinks is now grown uselefs and *Unserviceable* to the *Common-wealth* (a). And here it may be observed, that where several Different *Leagues* have formerly pass'd *Interchangeably* between *Nations*, and they afterwards renew them in *General* (1), the *League* that was last made, must be supposed Chiefly to be renewed. Since the *latter* always lessen the *Force* of the *Former* (b). And therefore it was unpardonable *Inadvertence* and *Neglect* in the *Ambassadors*, that went to renew a *League* with King *Ptolomy*, and in them too,

who sent them without knowing what *Treaties* and *Leagues* had formerly pass'd between that *Prince* and the *Achaians*, or which of them, the *Achaians* were desirous to *Renew*.

IX. And here Enquiry may be made, Whether if one of the *Princes* of a *League* happen to be *expos'd* and *expell'd* by his own *Subjects*; the other *Confederate* be obliged to send him the same *Aids* and *Supplies*, which were promised when he was in Possession of his *Kingdom*? *Grotius*, in the Chapter before quoted, § 17. affirms that he is. Because a *Prince* unjustly *depos'd* and *expell'd*, hath still a *Right* to his *Kingdom*, tho' he hath lost the *Possession*. To me, so much in this Case seems to be certain, That if the *Terms* of the *League* expressly mention and intend the *Defence* of the *Prince's Person* and *Family*, he ought to be assisted in the *Recovery* of his *Kingdom*. But if the *League* was formed for *publick Good* only, 'tis a disputable Point, Whether the *exil'd Prince* can demand *Assistance* in *Vertue* of his *League*. For the *Aids* mention'd, are presumed to have been promised against *foreign Enemies*, without View of this particular Case. Not but that still such a *League* leaves Liberty to assist a *lawful Prince* against an *Usurper*. And thus if while we are engaged in *League* with a *free People*, an *Intestine Domestick Enemy* endeavours to *enslave* them, we may with Justice send them *Assistance* to suppress him, before he is grown into a *lawful Prince*. For the \* *Qualities* in *Leagues* (as suppose it be expressly mentioned, that the *League* is made with the *Prince* and his *Successors*;) imply a *strict* and *proper Right*, and intend such *Princes* only as have a *Just Title* to the *Kingdom*, not that keep it by bare *Usurpation*, or that have no other *Title* to depend upon, but *Force* and *Power*.

X. It is also a famous Question, Whether it be provided by the *League*, that neither of the *Confederates* shall *Injure* or *Invade* the other's *Allies*? By *Allies*, is meant such only as were *Allies* at the time the *League* was made, or such as were afterwards taken into *Alliance* on either side. What was urg'd in a *Dispute* of this kind between the *Romans* on one hand, and the *Carthaginians* on the other, at the Beginning of the *Second Punick War*, may be seen in *Polybius*, l. 3. c. 25. 27. and *Livy*, l. 21. c. 19. The Decision *Grotius* makes of it is this (c), That it was no *Breach of League* either for the *Carthaginians* to make *War* upon the *Saguntines*, though after, they were taken into *Alliance* by the *Romans*, or for the *Romans* to undertake to defend them. For it may happen without *Breach of League*, that of *Two Confederates*, One may make *War* upon, and the *Other* assist the same *Party*. And it is usual in *Leagues* to make *Articles* that relate particularly to such Cases, See the *Leagues* made between the *Romans* and the *Carthaginians* in

(a) Vid. Johan. Labard. *Hist. de Reb. Gall.* l. 5. p. 74, 75. Ed. Par. An. 1671. (1) See above in B. 5. c. 12. f. 6. In the Beginning. (b) Vid. Polyb. *Excerpt. Legat.* 41. \* *Qualitates.* (c) *Grot.* l. 2. c. 16. f. 13.

the Time of the *Tarentine War*, *Polyb.* l. 3. c. 25. Tho' when *Confederates* are so far engaged in opposite Interests, 'tis Evident, they must be upon the Brink of an open *Rupture*. For the Sense of *Pain* is the *same* whether the Wound be given in another's *name*, or in the *Striker's* own; but it is yet clearer, when the *Seat* of the *War* happens to be carried into the *Assisting Prince's Country* (a).

XI. And it is to be further observed, That *Leagues* limited to a particular *time*, when *that* expires, must not be suppos'd to be *tacitly* renewed. Both because no Man can be presum'd to bind himself rashly by new Obligations (1); and because otherwise it could never be known how long a *League* is to continue. And therefore if after the *League* expires, some *Acts* of *seeming Alliance* are continued, they are to be look'd upon as *Acts* of *Kindness* and *Good Nature*, but not as Arguments of the *Renovation* of the *League*. For *Friendship* continues after the *League* is at an End. Again, it is evident from the Nature of all *Compacts* (2), That where one of the Parties refuseth to stand to the *Conditions* of the *League*, the other is at Liberty to break too. *Confederates* may indeed agree, That though *one Article* of the *League* be neglected, yet the *rest* shall be inviolably observed. But then the other Party is not obliged to perform the *Equivalent* to the *neglected Article*, and so not to suffer any positive *Evil* by it.

XII. I come now to consider the Nature of \* *Engagements*, or those *publick Compacts* which are made by *Ministers of State* (3), in *Negotiations* relating to the *Sovereign Power*, but without *Advice* and *Command* from it. And here, The First Question is concerning that difficult Case, Where if the *Engagement* is pass'd *absolutely* without *Proviso*, or *Condition* of being *accepted* and *ratified* by the *Sovereign*, and the *Sovereign* afterwards refuse to give it any *Ratification*; What the † *Engagers* are obliged to do in Satisfaction to the Party they made the *Engagement* to? This was a Case once warmly disputed among the Old *Romans*, upon the *Engagement* made at the *Furcæ Caudinæ*. The Story is at large in *Livy*, l. 9. c. 8, &c. And indeed if the *Measure* of that Matter were to be given by *strict Justice*, it must be said that the *Romans* were neither obliged to *ratify* the *Engagement*, nor to set things in the Posture they were in before. But then it had been enough for them to *surrender up* the Persons that made it (b). But if the State of the Case be rather *estimated* by *Equity*, certainly the *Romans* ought to have *ratified* the

*Agreement*, however it was concluded without their *Advice* and *Consent*. The *Consuls* indeed had not Power to *determine War*, *conclude Peace*, or enter into *League* with an *Enemy* without particular *Instructions* and *Commissions* from their Masters, the *Senate* and *People*: yet since they did not presume upon the *People's* Consent without very *good Reason*; when it was impossible otherwise to save the Lives of many Thousand Citizens, the *Flower* of all the *Roman Common-wealth*; and when the *Enemy* had perform'd all that could seem *Equivalent* to a *formal Peace* and *League*; the *People* in reason, ought to have *confirmed* the *Conditions*, especially since there was nothing intolerably *hard* or *unjust* in them (c). For it would have been enough for the *People* to have stood Resolutely to their *Principle*, That their *Magistrates* could oblige them to nothing without their own *Consent* and *Command*, if the *Samnites* had demanded any thing that was Unreasonable and Insupportable. But 'tis Clear, the great Mortification to that proud ambitious *People* was, That their *Army* was forced to submit to the Ignominy of passing under the *Jugum*. Which was indeed very ill Conduct in the *Samnite General*. For that *Disgrace* did not lessen the Strength of the *Romans*, but only provok'd and exasperated that *fierce People* to revenge the Dishonour. However the *Roman Army* very well deserved the Treatment they met with, for venturing rashly to pass a Place they were Strangers to, without sending before to discover it. And it was certainly their wisest way rather to submit to the *Disgrace*, rather than suffer the Strength of *Rome* to be cut off. And here the Arguments *Lentulus* offered to persuade the *Engagement* may be consider'd, *Liv.* l. 9. c. 4. And further, That a *Common-wealth* may often be obliged to *ratify* the *Acts* and *Promises* of its *Generals*, because of their *Authority*, and to oblige them not to go over to the *Enemy*. Hence *Tacitus* saith, *Ann.* 12. 'That *Mithridates* was 'at a loss whose Pity he should address himself to; because None of the *Romans* had 'Powers large enough to give him any Assistance in Depending upon their Promises. But in the Case before us 'tis manifest, that the haughty *Romans* never consider'd, that they might some time or other be forced to accept as hard Conditions themselves as they had imposed upon others. However it was a Strain of Generosity in the *Samnites* not to accept the *Surrender* of the *Sponsors*: And it was an extravagant Action in *Posthumius*, when the *Surrender* was offer'd, to strike the *Fecialis*, and

(a) V. *Justin.* l. 3. c. 7. (1) See *Grotius*, B. 2. c. 15. f. 14. (2) See the above quoted place of *Grotius*, f. 15. \* *Sponsiones.* (3) See Mr. *Barbeyrac's* First Note upon this Section. † *Sponsors.* (b) V. *Grot.* l. 2. c. 15. f. 16. *Val. Max.* l. 4. c. 8. f. 1. *Jo. Mariana.* Hist. *Hisp.* l. 21. c. 11. (c) See *Guicciardine's* Hist. L. 12. p. m. 342 & 344. Where he talks of the Engagement *Tremolius Divione* made to the *Switzers*. Sir *W. Temple*, in his *Observations* upon the Government of the *United Provinces*, saith, That in the Year 1668. he prevail'd with the States-General to conclude Three Treaties, and upon them draw up and sign the several Instruments in the space of Five Days, without any Recourse to the Provinces, and from them to the several Cities, whereby the Interest and Arts of others, the Affair would have been opposed and eluded, tho' it was of the greatest Importance to the States that it should be concluded. He adds, That doing this without Commission from their Principals, they ventured their Heads if they had been disown'd by their Provinces.

then cry out that he was a *Samnite* Subject, and that, contrary to the *Laws of Nations*, he had injured a *publick Minister*; and therefore, that the *Romans* might carry on their *War* with more *Justice*. The *Judgment of Livy* upon this whole Proceeding may perhaps deserve our Observation, The *Sponsors*, says he, after they had been offer'd to be yielded up, and were not accepted, return'd back to the *Roman Camp*, *sua fide liberati*, Absolv'd from their own *Faith*

and *Engagement*; But he adds Doubtfully, *for san & publica*, and perhaps from the *Publick*.

XIII. The Last Question upon this Subject is, If the *Sovereign* knows that his *Ministers* have pass'd *Promise* and *Engagement*, and is silent upon it, Whether it may be infer'd from thence, that he *owns* and *approves* it? But for an Answer to this, I refer you to *Grotius*, L. 2. C. 16. §. 17.

## CHAP. X.

*Promiscuous Compacts of Sovereign Princes.*

I Am, in the next place, to consider the Difficulties which relate to any sort of *promiscuous Compacts* made by *Sovereign Princes*, which may be reduced to these *Three Heads* (1). First, Whether a *Sovereign Prince* has any particular Power, with Regard to *Compacts* that affect himself? Secondly, What *Liberty* he hath in *Obligations* contracted with his *Subjects*? And Thirdly, How, and how far he can *oblige* his *Succeffors*.

II. The First Difficulty therefore is, That since a *Prince* has the Power to reverse any *Contract* made to the Prejudice of his *Subjects*, and can restore them to the State they were in before such a *Contract* was made, or upon *just* Reasons *release* them from their *Obligation* to observe it: Whether he cannot make Use of the same Power in Cases that concern himself? For Example, Supposing that by *Fraudulence* or *Force*, or through Indiscretion of *Age*, he should have *agreed* to *prejudicial* Terms; or hath been any other way notoriously abused in his *Contracts*; or bound himself by any *rash Oath*? (2) And here it is to be *observed*, that the *Question* as it is stated in this *rude Form*, and as the *Words* of it lie, implies a *Contradiction*. For to *restore* Persons to the State they were in, and to *release* from *Oaths*, are *Acts* which bear *Relation* and *Tendency* to another Person; and which are derived and flow from one invested with *Power* and *Authority* over the Person that is to be *restor'd* and *releas'd*. And therefore the *Question* ought rather to be stated thus; Whether, when a *Prince* has prejudiced himself, by consenting to certain *Obligations* and *Conditions* of *Contract*, upon a Sense of the Injury he suffers, he may by his own *Authority* declare, that by Reason of certain *Faults* adhering to the *Contract*, he looks upon himself to be released from the *Obligation*? To which it may be answer'd; That as Persons that live in a *Liberty of Nature* and own no *Subjection*, are under their own *Conduct*, and are Judges in their own Affairs; so if they are *Unjustly* injured in their *Contracts*, they may by their own *Authority* demand *Restitution*, or *Amend-*

*ments* to be made to their *Agreement*; on Supposition the *Prejudice* and *Injury* they sustain be *visible* and *manifest*. For when the thing is disputed, the Matter must be referred to the Decision of *Arbitrators*. And therefore if a *Prince*, since he is still in Possession of his *Natural Liberty*, find any *Abuse* put upon him in the *Terms* he has consented to, he may by his own *Authority* declare to the Party concern'd; that he will not be obliged to stand to any such *Contract*. And there is no Necessity that he should procure a *Release*, since the *thing* is in its own Nature incapable of producing *Obligation* or *Right*. Thus *Lewis XIII.* of *France* declared, That *there lay a just Appeal* from the *King under Confinement and Bonds*, to the *King at Liberty*. But because it may sometimes happen, that ill Men when they have a Mind to put a Cheat upon the World and falsifie their *Faith*, may pretend an *Abuse* or *Fault* in their *Contracts* to cover their own *Frauds* and *Perfidy*; therefore under *Civil Government* it is very necessary to enact, what *Acts* shall in their own *Right* be look'd upon to be *invalid* and *null*, and what are to be examin'd into and determin'd by *Sentence of Court*.

III. But when the Case lies between the *Prince* and his *Subjects*, the *Difference* of the Circumstance will, I think, deserve a *distinct* Consideration. A *Prince's Minority* is supposed to continue as long as the *Administration* of the *Government* and *Affairs* of the *Kingdom* remains in the Hands of his *Governours* and *Tutors*; and during their *Administration*, the *Prince* himself can make no *Contract* with any Person of a *foreign State*: But if he enter into any *Contract* with a *Subject*, and afterwards find himself injured in it, I see no Reason why he should not enjoy the same common Benefit of the Law which he allows and secures to other Men, otherwise *his* Condition would be more confin'd than that of *private* Subjects: Nor can any *Renunciation* of *Exceptions* which might be made to his *Minority*, be supposed of Force sufficient against the *Presumptions* of the *real* Weaknesses that *Age* is liable to. A *Prince*

(1) See *Grotius*, B. 2. c. 14. (2) See *Grotius*, in the place above-mentioned, *Seff.* 1, 2, 3, 4, 5.

cannot disannul the *Treaties* and *Compacts* that were lawfully made by his *Governours* with *foreign Powers* or *Persons*, when he is come to *Age*, upon Pretence that they were made in his *Minority*. Because then, nothing could be pass'd with any *Security* under a *Prince* that happen'd to be a *Minor*. However the *Prince's Governours* the *Regents* are obliged to give an Account of their *Administration*. But no *Exception* whatever of *Fear*, *Injury*, or *Fraud* is of Force against any of those *Capitulations*, which in *limited Monarchies* the *People* propose, and the *Prince* consents to, at his *Accession* to the *Government*. For if the *Capitulations* or *Conditions* seem'd too strict and severe, the *Prince* had his *Liberty* of accepting or refusing them; the *People* would not have forced him to take the *Government* upon him. And it is not to be supposed, that any *People* would be so inconsiderate, as to tie up the *Hands* of their *Prince* with such *Laws* as must make the *Sovereign Power* weak and feeble, and his *Government* unactive and unprofitable. And here I will by the way enquire, Whether *David* could have retracted his *Oath*, when he swore not to punish *Shimei* that cursed him as he fled from *Absalom*? And I confess in my Opinion he could not. For the *King* was under no Apprehension of Force or Fear when he gave him his *Oath*, neither could he be thought to have sworn out of Rashness or Indiscretion; but on the contrary, rather with mature Consideration and Design, that upon so remarkable an Instance of his Clemency, the *People* that had been engaged in the *Rebellion*, might return the more Willingly, and with greater Assurance of being pardon'd, to their Obedience. Neither was the Promise of Impunity in it self unlawful; For the *King* might very justly, and without Injury to any *Man*, pardon a Crime which was committed purely against his own *Person*. But it hath given further Matter of Dispute to some, Whether he can be excused for leaving such a Remembrance of *Shimei's* Crime in his last Commands to *Solomon*. In my Opinion, *David* did nothing in this, contrary to his former *Oath*; For he did not leave any *Command* with his *Son* to punish *Shimei* for his Crime; but only advised him to keep a strict Eye upon that malicious bad *Man* and *Enemy* to his *Family*, and to take Care that he did not create him any fresh Disturbance; and that if he should afterwards find him guilty of any Misdemeanour, not to be easy to forgive him. And therefore *Solomon* commanded him to live in *Jerusalem* under the Eye of the *Court*, and forbid him to pass over the Brook *Kidron*, that he might not insult upon his Impunity, nor conceive any secret Satisfaction in seeing the Place where he had with so much Bitterness reviled and cursed *David*. But *Divine Providence* so disposed, That he should break those easy Con-

*ditions* which he had himself approved and consented to, that there might be just Occasion given to take off so ill a *Man* by punishing him as he deserved.

IV. But here it is to be observed, That however *Princes*, when they enter into any particular *Acts* with their *Subjects*, not as *Princes* but as other *private Men*, are presumed always to comply with the *positive Laws* of the *Common-wealth* which relate to the *Validity* of such *Acts*; yet since they are above the *Civil Laws*, they are under Necessity of following those *Laws* always in their *private Acts*. And therefore if they voluntarily and advisedly enter into any *Contract*, that would otherwise be *Invalid* in *Law*: They are supposed to have exempted that particular *Contract* from the Force of the *Laws*, where there are such, and and to declare that no *Nullity* shall ensue upon that Account. For otherwise, all that was done would signify nothing (a). And I think it is very reasonable to allow, that if a *Prince* find himself very much injured in a *Contract*, which at first he did not perceive, he may if he please annul, or at least correct and amend it (b).

V. That no *Prince* hath Power to release himself from his *Oath*, when there lies no *Objection* either against the *Validity* of his taking it, or the *Matter* contain'd in it, or the *Circumstances* belonging to it, upon Pretence that it is lawful for him to relieve his *Subjects* in some particular *Oaths*, I think is evident. For the *Oaths* which he has Power to vacate in his *Subjects*, have always this *Condition* annex'd to them, *If it please the Sovereign*. And 'tis certain it would be impossible to bind any *Obligation* upon a *Man*, if he reserves to himself a Power to break from it, whenever he thinks fit (c).

VI. But though *Princes* are as much obliged in *Conscience* by their *Promises* and *Compacts* as *private Men*; Yet, in this Respect, there is a Difference between the *Obligation* of a *Prince* and that of a *Subject*, that 'tis easy for the *Prince* to force the *Subject* to stand to *Terms*, when perhaps he would willingly go back; but a *Subject*, as long as he is such, hath no way to oblige his *Prince* to give him his *Due*, when he refuses it. But no wise *Prince* will ever refuse to stand to a *lawful Contract*; since he must necessarily consider, that his *Honour* and *Security* depends upon the Credit he hath of observing his *Compacts*; and that it is the worst thing that can be said of a *Prince*, that he observes not himself that *Justice* which it is his *Duty* to administer and support. But however, if a *Prince* upon *Contract* give the *Subject* Liberty to enter an *Action* against him in his own *Courts*, the *Action* it self proceeds rather upon natural *Equity* than the *Civil Laws*; as if it were implied, that upon the Knowledge of his *Obligation*, he would not refuse the Per-

(a) Of the *Action* of *Philip II.* of *Spain*, That by a Fetch of *Law* would have released himself from paying his *Debts*. See *Grot. Hist. Belg.* l. 5. (b) *Vid. Grot.* l. 2. c. 14. f. 2. (c) *Vid. Grot.* l. 2. c. 14. f. 3.

formance of it. And therefore the *End* proposed by such an *Action* is not to force the Prince to stand to the *Contract*, but only to make it appear to the *Subject*, that the *Prince* had *obliged* himself to observe it. And in such *Tryals*, there should be no regard had to *Honour* or *Greatness*. but *Judgment* ought to be given barely according to the strongest *Probabilities* of *Argument* (a).

VII. It may also happen that the *Subjects* may be deprived of a *Right* acquired by *Contract* (1), either by Way of *Punishment*, or by the *Force* of the *Transcendental Property*. \* Always supposing in this Case, that the *Necessities* of the *Common-wealth* demand it, and that the *Publick* ought to make *Restitution*. And therefore for the same reason the *Prince* may defer his *Payments*, when any pressing *Exigence* of *State* obliges him to turn the *Money* another way, which should have been paid the *private Subject*. And from hence it appears, what is to be determined about the *Tabula novæ*, or *general Discharges* from *Debts* or *Obligations*, which *Solon* call'd *Στοιχθισια*, or the *shaking off a Burden* (b).

VIII. But *Lastly*, that it may appear, whether and how far a *Prince* hath *Power* to transmit an *Obligation* upon a *private Contract* down to his *Successors*; it is to be first considered, whether the *Prince's Kingdom* be his *Patrimony*, or whether he posses it only as it were upon an *Usufructuary Right*. A *Successor* to a *Prince* that holds his *Kingdom* in the *Former Right*, since he succeeds to all his *Goods* and *Possessions*, must be supposed to inherit all *Debts* of *Princes* that posses their *Kingdoms*; in the *Latter*, *Grotius* l. 2. c. 14. § 10. &c. is of *Opinion*, that the *Successors* are not *immediately*, and purely because they *succeed* them in the *Kingdom*, *obliged* to discharge them. For such *Princes* do not derive their *Right* to the *Throne* from the *King* their *Immediate Predecessor*, but from the *People* themselves. But ever *these Successors* are *obliged* by the *Debts* of their *Predecessors*, *mediately* and by *Interposition* of the *Common-wealth*, not as upon their own *Account*, but as they are *Heads* of the *Common-wealth*. For in the last *Resort* the *Debts* of the *Prince* affect the *State* it self, as they were contracted by the *Head* and *Governour* of it. And the *Truth* of it this, that *Princes* have *Power* to devolve *Debts* upon the *Common-wealth* it self, is evident from hence, that sometimes it would be impossible to supply the *Necessities* of the *State* otherwise than by *contracting* such *Debts*. And since the *Administrations* and *Security* of the *Common-wealth* is entrusted with the *Prince*, he must be allowed to have the *Command* of all those *Means*, without which that *End* cannot be *pursued* or *obtain'd*. But then on the other

hand, this *Power* to *oblige* the *Common-wealth*, ought to be strain'd no farther than the *Prince* can have *Good Reasons* for *Contracting* the *Debt*. But then again, neither ought the *Prince* to be so far *limited*, as not to have *Power* to devolve any *Debts* upon the *Common-wealth*, but what have *actually* given some *Advantage* to the *State* (tho' 'tis fit *Inferior Magistrates* should be so confin'd (c). But 'tis sufficient if he hath a fair *Probability* in *Reason* for what he attempts, tho' perhaps the *Event* may fall out contrary to his *Expectations*. And therefore upon the *Whole*, all *Contracts* made by the *Prince*, *oblige* the *Common-wealth*, unless when they are manifestly *absurd* or *unjust*. And when the *Case* is *doubtful*, 'tis always to be presumed in *favour* of the *Prince*. And such *Contracts* as these, also *oblige* the *Successor*, as he is the *Head* of the *Common-wealth*. Nay, the *People* themselves will be *obliged* by them, if they should change their *Form* of *Government*, and erect a *free State*. And so whatever a *free People* contract, *devolves* upon and *oblige* the *Person* they afterwards confer the *Sovereignty* upon, tho' they give him never so *full* and *absolute* a *Power*. And this I think is a better way of deciding the *Question*, than by distinguishing between the *greater* and the *lesser Injuries*. For in the *Administration* of *publick Affairs*, the *Probability* of the *Means* ought to be allowed a *fairer* *Consideration* than the *Success* of the *Event*, since an unforeseen *Accident* may sometimes break and distract the wisest *Measures* and *Designs*.

IX. What hath been said of the *Contracts* of *Princes*, may also be applied to their *Grants* and *Donations* (2), viz. that they cannot be *recall'd* by the *Successors* where they were made upon *fair* and *favourable Reasons* (d). Yet 'tis certain on the contrary, That *Galba* endeavoured to recover the *Largeesses* and *Donatives* made by *Nero*, allowing no *Man* to keep more than the *Tenth Part* of his *Liberality* (e). So also the *Roman Senate* reduced those *Cities* to a *Tributary State*, that had bought their *Privilege* or *Immunity* of *Sylla*. *Cicero* indeed thought them too severe in it (f). And I think indeed it had been but reasonable to have refunded them their *Money*, since it had been employ'd in *Publick Uses*. And so *Basilius* of *Macedon*, when his *Predecessor Michael* had exhausted the *Publick Treasure*, published an *Edict*, commanding all *Persons* that had received any of the *Money*, and could give no *fair Account*, why, or for what they received it, to return it again, or at least the *half part* of it (g). But indeed as to *Grants* of this Nature, it ought to be considered out of what they are made. If the *Prince* give out of his own *Pocket*, or *Estate*, without dispute the *Grant* is *irrevocable*. And if he distribute his *Bounty* out of the *Revenues*

(a) *Heliad. Æthiop.* l. x. (1) See in *Grot.* the place above quoted. f. 7. \* *Vi Domini eminentis.*  
 (b) *Vid. Plutarch. Solon. Cic. Off. l. 2. c. 24. ad fin.* (c) *Vid. L. 12. t. 1. l. 27. D. de rebus Creditis. &c.*  
 (2) See *Grot.* ubi supra, f. 13. (d) *Vid. Sueton. in Tito. c. 8. Plin. L. 10. Ep. 66. Gratian. Caus. 25. Quest. 1. c. 15.* (e) *Vid. Sueton. in Galba. c. 15.* (f) *Cic. Off. l. 3. c. 22.* (g) *Vid. Hæmon Qsorium de Reb. gest. Emanuel, l. 1. Where he gives an Account of the Grants King John made just before his Death.*

or *Income* of those *Goods* or *Possessions* which are intrusted to his *Administration*, it ought always to be considered, upon *what Reasons* and with *what Caution* and *Moderation* the *Donations* were made. For as no Body denies but that the *Prince* hath *Power* to reward the *Services* of his *Friends* and *Subjects* out of the *Publick Moneys*, as far as the *Riches* and *Occasions* of the *State* will allow; so if the *Money* of the *Nation* be profusely squander'd away upon *Persons* that do the *Common-wealth* neither *Credit* nor *Service*, and the *publick Stock* is lavish'd away only to satisfy their *Ambition*; in my Opinion, they should be replenish'd from their *Purses*, that at first exhausted it. It was the wisest Method *Ferdinand King* of *Arragon* observ'd, never to part with any of the *Lands* that belonged to his *Crown*; and his *Reasons* were good, that *Princes* that alienated their *Lands*, generally created themselves more *Enemies* than *Friends* by it, because they made some of their *Subjects* so great by it, that they would always be suspicious and fearful of being deprived of their *Rights* (a). What hath been said with Relation to *Grants*, may also be applied to *Privileges* and *Immunities*, namely, that it ought to be considered upon *what Reasons*, and with *what Caution* and *Moderation*

they were given; and whether they are consistent with the *common Peace* and *Security* of the *State*. For without dispute, these *Things* are of far greater Concern than the *unwary Easiness* of the *Prince*. And indeed all *Privileges* are to be confin'd under such *Limitations* and *Restrictions*, whenever they begin to lie heavy upon the other *Subjects* (b). So when the *Romans* demanded an *Aid* of *Men* and *Money* from the *Celtiberi*, and they thought to excuse themselves by pleading the *Privileges* that had been granted them by the *Romans* themselves, the *Historian* says, 'That what they insisted upon was allowed to be true, but that the *Senate* when they gave such *Privileges*, always annexed this *Exception*, that they were to continue in force as long as it should seem good to them and the *Roman People*, and no longer (c). *Lewis King* of *France*, after he had reduced the *Genoese* that had revolted from him, disannull'd all the *Agreements* and *Treaties* formerly pass'd between him and that *State*, and gave them all back again by the way of *Privileges*, not as *Compositions* or *Compacts*; that so it might be always in his *Power* to recal them. Perhaps indeed that was not to hold with relation to *Privileges* of all Kinds, but to such only as were to have barely a *Precarious Dependence*.

(a) Vid. Bæcl. ad Grot. L. 1. p. m. 107. Grot. L. 2. c. 14. f. 12. Laurentius Valla de rebus gestis. Ferdinand. Arrag. L. 3. (b) Vid. L. 43. t. 8. l. 1. f. 16. D. ne quid in loco publico, &c. Demosthen. Orat. adv. Leptin. (c) Appian. Iberic. Guicciardine Hist. L. 7.

## C H A P. XI.

### *How Subjection ceases.*

**A**Mong the *Several Ways* by which Men cease to be under *Subjection*, it is by *Some* thought to be *One*, when a *Prince* dyes and leaves no *Heir* or *SUCCESSOR* behind; or gives his *Kingdom* for lost. For then (*they say*,) every particular *Subject* is left *free* to a *Liberty of Nature*. But since it is clear that a *Kingdom* in such a Case, is not *Absolutely dissolved*, but only reduced to a State of *Interregnum*; It follows, that tho' the *Obligation* of the *Subjects* to the *Prince* they have lost, are indeed at an *End*; Yet that they continue still united to one another, by the *Original Bond* and *Compact* of *Society*.

II. But now the usual way by which *Subjection* ceases is, When a *Man* by *Permission* of his *Own Common-wealth* voluntarily removes into *Another*, and settles Himself and his *Effects*, and the hopes of his *Fortune* there (1). How far such *Voluntary Removes* may be permitted, must be discovered by the *Methods* by which *Subjects* are admitted into the *Com-*

*mon-wealth*. For some *Persons* are forced to put themselves under the *Protection* and *Governement* of certain *Common-wealths*, by being conquered in *War* or reduced to the last *Necessities*. And what *Liberty* is allowed to these must be known by the *Laws* of those *Common-wealths*. But if a *Person* *Absolutely free*, that never knew what it was to be *Subject*, (Such as the *Patriarchs* and *Masters of Families* of old,) or is at *Present* free from any *Subjection* he had been under *before*, voluntarily joyn himself to any *Common-wealth*; it must also be determined by the *Constitutions* of that *Common-wealth*, what *Liberty* to remove thence was left him (2). For in some *Common-wealths* no *Man* is permitted to leave them without the *Express Consent* of the *Governement*. In others, a *Man* may be allowed that *Liberty*, if he will submit to certain *Impositions*; as suppose, if he will pay a certain *Sum* of *Money*, or leave part of his *Goods* behind him (a). But where there are no *Laws* about the

(1) See Grot. B. 2. c. 5. f. 24.

(2) V. D. L. 49. t. 15. De Captiv. & de Postliminio, &c. l. 12. f. 9.

(a). Ovid. Metam. l. 15. v. 28, 29. speaking of the *Argives*,

— Prohibent discedere leges,  
Panaq; mors postea est patriam mutare volentem

The *Laws* forbid my flight, and threaten Death  
To those that leave the Land which gave them breath  
Matter,

Matter, we must be determined by *Customs* arriving from the *Nature of Civil Subjection*. What *Custom* admits of, every *Subject* is supposed at liberty to use. But if *This* gives no Light to the Matter, and the *Compact* of *Subjection* makes no Mention of it; it must be presumed, that every Man reserved to himself the *Liberty* to remove at Discretion, and that he chose rather to be a *Citizen of the World*, (as *Socrates* said,) than a *Subject* in any particular Common-wealth (a). For when a Man enters himself into a *Common-wealth*, it cannot be supposed that he gives up all Care of himself and Fortunes, but rather that by so doing he takes the best *Expedient* to defend and secure Both. But because it often happens, that the Nature of the *Government* does not suit with every Private Man's particular Circumstances, or he thinks at least he can make his *Fortune* with more *Advantage* elsewhere; And since it would be unreasonable to *Reform* and make *Alterations* in the Common-wealth at the desire, and for the benefit only of a Few *Private Subjects*; the only Method left is, to give them leave to *Remove*, and provide for themselves where they think best. 'So *Demaratus* the Father of King *Tarquin*, fled with his Family to *Corinth*, and settled there, because he could not bear the Insolence of the *Tyrant Cypsellus*, wisely preferring *Liberty*, tho' in *Banishment*, to *Servitude* at *Home* (b). So also Sometimes it is known, that there is not sufficient Encouragement allowed to Men of Parts in their own *Nation*. And some have found it true by Experience, that a *Prophet hath no honour in his own Country* (1). For Men of base natures, are apt to look with envy upon Persons that would rise by their own Worth to an Height of Greatness above their reach; when perhaps they remember themselves once *Superiour*, at least upon the *Level* with them; And as *Lacydes* said (c). *Statues ought to be seen at a distance*, because too near a View lessens the Beauty of them. Now to deny such Persons the Liberty of *Removing* would in effect be all one, with laying a Command upon Men free and at their own disposal, not to presume to rise above the *Rank* and *Condition* of their *Ancestors*. But the Common-wealth also it self may make Advantages by these *Removes*, by inviting in, Persons of Worth and Eminence from *Abroad*. 'By the Constitution of the *Roman* Common-wealth, no *Citizen* could be forced to leave the Common-wealth,

'or if he pleased, not to leave it, when he was made Member of Another he prefer'd to it. 'And therefore *Tully* says (d), That a little before his Remembrance, several *Citizens* of *Rome*, Men of Credit and Fortunes, voluntarily left that and settled themselves in other Common-wealths. And the Way, saith he, lies open from every *State* to *Ours* and from *Ours* to every other. And this *Right* he often very highly extols (e). Or is it any Objection against what is here said, that the *Father of Families*, who at first erected the Common-wealth, may be supposed to have bound one another by *Compact*, to assemble and unite their strength in common. For even in other *Societies* any *Member* has Liberty to leave it, so it be not with *fraudulent design*, at an *ill time*, or to the *Prejudice* of the other *Members*, especially if the *Society* were not established with any particular Limitation of *Time*. And therefore many Common-wealths have appear'd to be very little concern'd when their *Subjects* left them, as being already overstock'd with Men, and glad to have their Numbers lessened.

III. But however, since 'tis generally the *Interest* of every Common-wealth to know the Number of its *Subjects*; they that remove ought in Point of *Duty* or *Honour* to signify their *Departure*; unless a Man has good Reason to suppose, that it will be no *Publick* concern whether he leaves it with such Ceremony or not. But all Persons that have engaged themselves in any particular *Service* or *Employ* for a certain time, ought without Question to have the *express* Consent of the Common-wealth for their *Remove*. For Example, *Subjects* that are sent on *Embassies*, *Expeditions*, or that are entrusted in any other *Business* which they undertook upon particular *Compact* and *Agreement*. But besides, a *Remove* ought to be at a *Proper time*, and when it is not directly against the *Interest* of the Common-wealth to suffer it. For Example, (to make use of the Instances in *Grotius* in the place above quoted,) when the *Publick Debts* are great, a *Subject* should not have leave to depart, except he would pay his *Share of them* before he *Remove*; nor when the Common-wealth is engaged in *War* upon *Presumption* of the *Number* or *Bravery* of *Certain Subjects*; And especially when there is danger of *Invasion*, or of being *besieged*; Except the *Subject* that would depart can be sure to leave others be-

(a) Valerius Flaccus, *Argon. L. 7. v. 227, &c.*

*Omnibus hunc potius communem animantibus orbem,  
Communes & crede Deos; patriam inde vocato,  
Qua redit itque dies; nec nos diis nata Malignis  
Cluserit hoc uno semper sub frigore messis.  
Fas mihi non habiles, fas & tibi linquere Colchos.*

The World to all, her ample Fields extends,  
And God and Providence are common Friends;  
Where e're the Day discovers distant Earth,  
The Country's mine; nor are we doom'd by Birth  
To this cold frozen Soil; but unconfin'd,  
May change our Country, as we change our Mind.

(b) Cic. *Tusc. Quæst. l. 5.* (1) Luke IV. 24. (c) *Diog. Laert. l. 4. f. 60.* (d) Cic. *Orat. pro Balbo, c. 13.*

(e) O jura Præclava, atque divinitus jam inde a Principio Romani nominis a majoribus nostris comparata, &c. Cicero d. l. What noble Rights are these! Which by the Blessing of Heaven have been enjoy'd by us and our Ancestors, ever since the *Roman* State began, that none of us should be forced to leave our Country, or to stay in it against our Wills. This is the immoveable Foundation of our Liberty, that every Man is Master of his Right, and may keep, or resign it, as he pleases.

hind him, every way as fit to *defend* the State as himself (a). Neither can they be Good Subjects that serve their *Country*, as *Horace* (1) speaks of his *Friends*, *Diffugiunt cadis cum facie siccatis amici, ferre jugum pariter dolosi*, that is, Who when they have drain'd all they could from it, leave it to struggle with Misfortune by it self. But then it must be observed, that by *Removing* in this Place I understand the *departing* out of the *Dominions* and *Territories* of the *Common-wealth*, and not the *denying* its *Authority*, and continuing to live in its *Dominions*. For the *Common-wealth*, when it *bounds* its *Power* within *Certain* Limits, is supposed at the *same time* to prohibit every Person to inhabit within that *Compass*, who will not acknowledge its *Authority*. And therefore it may be observ'd *By the way*, that the *Grandeos* of *Spain* were very much mistaken, when they thought themselves released from the *Obligations* of the *Common-wealth*, by renouncing the *Laws* of their *Country*, and then retiring to other Places. Tho' it was usually supposed that when that was done, they might lawfully take up *Arms* against their *Prince*, and begin *open Hostilities*, without incurring the guilt of *Treason* and *Rebellion* (b). From what has been said we may infer, what *force* those *Avocatory Commands* may be supposed to have, by which the *Common-wealth* endeavours to recall its Subjects from *Employments* in *Foreign Countries*. For Instance therefore, if a *Subject* that is under no particular *Ties* or *Restraints* remove from his *Common-wealth*, where that *Liberty* hath always been *promiscuously* allowed, and settles *himself* and his *Effects* under the *Protection* of a *Foreign State*; the *Common-wealth* he left hath no longer any *Authority* over him. And therefore it is to no purpose to think to *reduce* Such an one by threatening him with loss of *Fame*, which is the utmost that can be done, when he is determined not to obey. But the *Common-wealth* hath still *Authority* over *Subjects* that depart either contrary to the *Laws*, or are *obliged* to it by any particular *Ties*, or hold *Possessions* of *Goods*, especially of *Immoveables* under its *Dominions*, or are absent only upon *Travel*, and reserve to themselves the *Right* of *Subjects*. And by the way, it was a prudent Law of *Solon's* which *Plutarch* (2) mentions in his *Life*, by which he obliged the *Athenians*, 'To admit no Persons into their *Common-wealth*, except such as were condemned to perpetual Banishment from their *own Country*, or else such as remov'd with their whole Families to *Athens*, for the convenience of Trade and Employment in the *Arts* they profess'd. And this Law it was said he made, not so much to keep out *Foreigners*, as to invite them to settle at *Athens*, by giving them assurance of incorporating them into the *Body* of the *Common-wealth*.

' For he made no doubt, but *both* these sorts of *People* would make very good *Subjects*, the *one* because they *voluntarily* quitted, and the *other* because they were forced out of their *own Country*. But further, since the *Common-wealth* really hath no *Power* or *Authority* over *Persons* free from all *Civil Obligations* to it, it is manifest, that if the *new Common-wealth* They settle in, send them in *Quality* of *Ambassadors* or *Publick Ministers* to the *State* they left; that they ought to be received agreeably to their *Characters*, and enjoy all the *Privileges* of *Ambassadors*. One of the chief of which is to be *free* from the *Authority* and *Power* of the *Common-wealth* they are sent to. For if this be thought too great an *Honour* to be shown to Persons who have formerly been *Subjects*, 'tis easy to deny them *Reception*. Nay, to carry the thing farther, if for Instance, a *Subject* in the *Face* of his own *Common-wealth* engage his *Faith* to a *Foreign State*, in order to take upon him to *Negotiate* for it there, under the *Character* of *Ambassador* and *publick Minister*; the *Common-wealth* must be supposed to have releas'd him from all *Civil Obligations* to it self. Since it is impossible the same *Subject* should be capable of two *Obligations* of the *same Nature*. And in consequence, that Person must from that time be admitted to all the *Rights* and *Privileges* of an *Ambassador* in his own *Country*, which by a sort of *Fiction* he is supposed to have *changed*.

IV. But however to *depart* in *Companies*, great Numbers together, *Grotius* (3) thinks *unlawful* for *this Reason*, because such a *Liberty* would be utterly *inconsistent* with the *Nature* of *Civil Society*. And in *Morality* that must be judged *necessary*, without which an *End* proposed, cannot be attain'd; and that *inconsistent* with it, which prevents or destroys the *End* (c). But the truth of this Opinion may I think be question'd (4), for if it be lawful for *particular Subjects* to *remove* as they please themselves, why is it not lawful for *greater Numbers* to take the same *Liberty*, who all propose to themselves the like Conveniences of bettering their Fortunes by *changing* their *Country*; supposing none of those *Objections* against it that were mentioned before? For it is nothing to the purpose to answer that by *this means* the *Common-wealth* must be enfeebled and dissolved. For where a Person hath no *Right* to *detain me* contrary to my own *Inclinations*, he suffers no *Injury*, tho' perhaps by my *Departure* some *future Benefit*, but not yet *due*, is *intercepted* from him. There is no necessity such a *particular Common-wealth* should have so many *Millions* of *Subjects*, or should always appear formidable to its *Neighbours*, any more than it is that any particular *private Man* should be worth so many *Thousand Pounds*, tho' 'tis true indeed, that neither one nor the other ought to be re-

(a) Vid. Lycurg. Orat. contr. Leocratem. (1) B. 1. Od. 35. v. 26, 27, 28. (b) Vid. Mariana de rebus Hisp. L. 13. c. 11. (2) Plutarch, p. 91. F. (3) Ubi supra. (c) V. Liv. 1. 41. c. 8, 9. (4) See Mr. Barbeyrac's Note upon this Section.

duced to a lower Condition by unjust Means. And therefore I think there is but little Force in Grotius's Argument. For though perhaps, *this* or *that* particular Common-wealth may be much weakened, or perhaps by continual Drains in time be utterly dispeopled, where the Subjects are permitted to desert in Numbers together; yet Civil Society among Men, is no Danger of being absolutely dissolved by it. For the Corruption of one Common-wealth is the Generation of another, and what is lost in one place is gain'd in another. Nature, when Men began to encrease and spread themselves over the World, formed and divided them into Civil Societies, but never gave Command that such or such a particular Common-wealth should stand for ever in an uninterrupted Course of Greatness and Fortune. Babylon was exhausted by Seleucia, and that by Ctesiphon (a). However, when Companies depart, they are obliged as well as particular Subjects, to depart out of the Dominions and Territories of the Common-wealth. For otherwise there must ensue such Distractions and Confusions, as would necessarily be fatal to all Governments; that is, if whole Cities or Provinces were allowed Liberty, to withdraw at pleasure from their Obedience, and either to put themselves under the Protection of Other, or to erect separate States of themselves.

V. I shall now in the next place enquire, Whether and how far those Persons may be justified, that pretend to be Refugees and Deserters only with Design to injure them that receive them, and to bring some Advantage to their Prince or Country. It is indeed to be excused from great Imprudence, to be easy in giving Credit to such sort of Men, 1 Sam. 29. 4. nor does the World generally appear dissatisfied, that Traitors are punish'd though their Treason hath taken Effect (b). Yet it ought not to be thought therefore Lawful or Honourable for me to betray a Man, because I find him of an easy Temper, and likely to be taken by the Train I have laid for him. Nor is any Man obliged to serve his Country at the Expence of his Honour and Conscience, as has been already shewed. And without Dispute, for a Man to engage his Faith, purely with Design to make Advantage by the Violation of it, in doing Harm to a secure and heedless Enemy, is a very great Sin. And it was no Question an execrable Saying of Lysander's, or Philip's, That Children were to be cheated with Trifles, and Men with Oaths (c). If therefore a Deserter expressly engages his Faith, he cannot break it without Sin, whatever Pretence or real Design he may have of advancing their Interest he deserted from. It may perhaps be replied, That since they that give Reception to Deser-

ters, know before-hand, that they can do them no Service without Sin, and that no Man can lay any binding Obligation upon himself to commit Sin, and therefore that the Faith given by Deserters, signifies nothing; it follows, That no Injury is done them, if they are imposed upon by their own Credulity in depending upon such slender Arguments. But I answer, That it is Foreign to the Question, to enquire whether it be a Sin or not, to make use of the Service of Deserters. For it does not follow, that if I sin my self, in employing such a Person in my Service, That therefore, for that Reason he hath a Right to do me an Injury. As it does not follow; That because if a Man hire a Ruffian to commit Murther, he contracts the same Guilt with the Villain himself, Therefore it is lawful for the Ruffian to kill also the Persons that hired him. It is commonly said indeed, that Deserters are received by the Laws of Arms †; that is, that it is contrary to the Laws of Arms, not to give Admittance to Persons that leave the Enemy and come over to us, as Grotius and Cujacius explain that Law (d). But whether we ought to understand this Passage of the External Laws of Arms (as Grotius calls it,) or of the Internal, may very well be Matter of Dispute. But however, if a Man will defend that all Persons have absolute Liberty to make use of the Assistance of Deserters; methinks it should not be thought so proper for that Purpose to insist, That even God himself makes use of the Actions of the Devil and wicked Men; as to plead the Favour which ought to be allow'd to the Justice of Arms taken up, either to punish the Insolence of an injurious Enemy, or to assert and regain just and oppressed Rights (1). For upon the Supposition of this Favour, a Prince engaged in a just War, needs not think himself obliged to make a curious Enquiry, Whether the Deserters gave over Hostilities against him upon Honourable Motives or not? And since he may presume, that they had good Reasons that moved them to relinquish the Cause they were before engaged in, he cannot contract Guilt by seeming to give Encouragement to unjust Desertions. But however this be, 'tis certain, that it is utterly Unlawful to make Faith an Instrument to deceive and abuse Mankind. And again, 'tis also certain, that where a Deserter owns he deserted without reasonable Cause, his Faith can signify little; since it must either tend to advance new Treasons, or to continue the old; And therefore that it must be very great Imprudence to lay any Stress upon it (e). But Deserters therefore that propose to ingratiate themselves with them that receive 'em, and yet to carry on their secret

(a) Vid. Plin. Nat. Hist. l. 6. c. 26. (b) Vid. Vopisc. in Aurelian. c. 23. (c) Vid. Ælian. Var. Hist. l. 7. c. 12. † V. D. l. 41. De acquirend. rerum dominio, l. 51. (d) Cujac. Obf. 4. c. 9. Grot. l. 3. c. 1. f. 22. (1) See the Sixth Chapter of this Book, Sect. 16. (e) Liv. l. 22. c. 22. Vid. ap. Eund. Orat. Indibilis, l. 27. c. 17. and that of Cn. Marcus to the Volsci, in Dionys. Halicarnass. l. 8. And that of Segestes, in Tacitus, Ann. l. 1. c. 58. Neque odio patriæ, &c. This I did not out of any Ill Will I bear to my Country (for Traitors are hated even by those they design'd by their Treason to oblige) but because I look'd upon it to be the common Concern both of Romans and Germans, and because I was more inclined to Peace than War. Vid. Ammi. Marcellin. l. 18. c. 11. in fin.

*Designs* under the Mask of *Refugees*, generally pretend that the insupportable Nature of the Injuries they suffered, forced them to take this only way for their Security. The Stories of *Zopyrus* (1) and *Sextus Tarquinius* are very well known; and what *Arts* the one used to gain upon the Credulity of the *Babylonians*, and the other upon the *Gabinians* (2). So *Mezeras* the *Syrian*, as *Florus* calls him, or *Abarus* the *Arabian*, as *Appian*, or *Ariamnes* as *Plutarch*, that drew *Craesus* into the Plains, gained Credit with him by extolling the Favours and Obligations he had received from *Pompey*, and by relating the Misfortunes he had suffered in espousing the *Roman Cause*. *Virgil* (3) seems to describe the Cunning of *Sinon* with more than usual Life and Beauty, that he might free the *Trojans* from the Imputation of being an imprudent credulous People. For first, *Sinon* pretends he was a Person mortally hated by *Ulysses*, a Man the *Trojans* would easily think bad enough to be guilty of any Fraud that could be charged upon him, and to whom to be an Enemy was with them the greatest Recommendation. The Cause of this Animosity between *Ulysses* and himself he then derives from the Death of *Palamedes*, who was put to Death for having imposed the continuing the War. He goes on with his Story, That he was at last doom'd to be sacrificed, not by any Oracle or Command from the Gods, that he might not seem to have refused even to be made a Victim for the common Safety; but only by the Malice of *Calchas*, who was suborn'd and hired to do it by *Ulysses*. And certainly an Injury of so high a Nature as this might very well justify him in saying, He thought himself now releas'd from all Obligations to his Country. And yet with much Perswasive Art and Cunning, he first of all beseeches Heaven that it might now be lawful for him to renounce Faith and Love with those *Greeks*, that were so unjust and unkind to him tho' he had once considered them as Country Men and fellow Subjects. And yet all he could say was hardly enough to overcome the *Trojans*, till the Gods themselves seem'd to confirm the Truth of what he had said by a very Ominous Accident. But after all, 'tis certainly true, That a *Deserter that comes over to an Enemy singly by himself, without betraying some considerable Advantage to him, brings but a poor Prize with him either of Credit or Value*. But however such Persons are not to be look'd upon as *Deserters*, that go over privately to an Enemy with Design to surprize, or make a sudden *Attack* upon him, without engaging their *Faith* to draw their Swords in his Assistance. And it is not to be supposed, that such are under any *tacit Engagement* upon this Account, Because 'tis not probable they would make any Attempt against an Enemy, when they were within his Reach. For such

a *tacit Obligation* can be presumed only in Persons, who go over to a *foreign State* in time of *Peace*, and not in *War*.

VI. The next Enquiry I shall make is, Whether the Commonwealth on the other hand can *forcibly eject* the *Subject* at Pleasure, and without antecedent Transgression. *Cicero*, in the Passage before cited, makes it one of the *Foundations of Liberty*, That a *Subject* should not be forced to change his Country. But now admitting this to be true, The *State* of the Commonwealth is not therefore granted to be *Inferior* in the least to that of *private Subjects*, because they are allowed to have Liberty to remove as they please, when the Commonwealth has not Power to *force* them to depart against their Will. For when a Man puts himself under the *Protection* of any Commonwealth, he does, at least for the present, entrust himself and *Fortune* entirely with it, and that at least, must necessarily be exposed to *Distraction* and *Ruin*, if he may at any time be *forcibly ejected* from it. And since this would be the greatest Hardship imaginable upon the *Subject*, every Man must be supposed to have made an *Agreement* with the *State*, That he should not be forced to leave it contrary to his own *Demerits*. But now on the other hand, the Commonwealth doth not build its *Fortune* and *Security* upon a few common Subjects, and therefore loses little or nothing by the *Departure* of some Few of them. For where the great and particular *Trust* is placed in any Subject of *extraordinary Value*, 'tis usual to oblige him by particular *Ties* and *Agreements* not to leave the Commonwealth without *Licence* from the *Government*. And certainly it hardly deserves any Man's Envy, that the Subject in this *Particular*, should be allowed to have more *Liberty* than the Commonwealth. For the other *Advantages* which the Commonwealth enjoys more than, and beyond the Subject, are of much larger Extent. So when a Subject refuses to conform to the Commands of the *Sovereign*, 'tis an easy thing to force him to comply. But when a Subject is dissatisfied with the *publick Administration*, he hath nothing else to do, but to *submit* and be *patient*, or to *remove*. But however, there is sometimes a less *invidious Way* made use of in Commonwealths to *remove* suspected or useless Subjects, or burthenfome Numbers of them, to make room for the *others*; and that is by sending them abroad in *Colonies*. Tho' *Colonies* indeed generally consist of Persons that Voluntarily offer themselves, either upon the Hopes of mending a Broken and Decay'd Fortune; or else, that are out of Humour with the *Government*, and willing to be out of its Sight, when they find they are not to expect Favours from it. So *Isocrates* perswaded *Philip* to build (a) '*Cities in Asia*, and to *people* them 'with such sort of Persons whose *Poverty* forced them to lead loose vagabond Lives,

(1) V. Herodot. l. 3. &amp; Justin. l. 1. c. 10.

(2) Liv. l. 1. c. 53, 54.

(3) V. Virgil. Æn. l. 2. v. 57, &amp;c.

(a) Orat. ad Philip.

‘and to rob and pillage the Country; in short, ‘with the Scum and Refuse of the People. And he commends the Prudence of that Method in the *Athenians* (b). What Account is to be given of that Custom, common among the *Ancients*, both of *barbarous Nations* as well as the *Greeks*, of sending out great Numbers of their Young People in Search of new Seats, as it were under the Conduct of some *Titular God*, to whom they were supposed Sacred, may be seen at large in *Dionysius Halicarn.* L. 1. And the same Author is of Opinion, That the *Aborigines* were a Settlement of this Kind, that is of Young People, who after the Custom of their *Countries* had been consecrated to the Gods, sent in Quest of new Seats, and that settled wherever their Valour or Fortune carried them (c). And so *Pliny* tells us, That the *Picentes* were sent out by the *Sabines*, Upon a Vow which they look’d upon to be sacred. And *Strabo* says the *Samnites* were descended from the *Sabines* the same way (d). ‘So *Lydus* ‘and *Tyrrhenus* (as *Paterculus* tells the Story) ‘upon a great Scarcity, threw Lots which of ‘them should take his Share of the People, and ‘go out in Search of new Seats (e). And *Paulus Warnefridus* † gives very near the same Account of the People of *Scandinavia*. But *Colonies* may be, and often are settled in different Methods. For either the *Colony* continues a Part of the *Common-wealth* it was sent out from; or else is obliged only to pay dutiful Respect to the *Mother Common-wealth*, and to be in a Readiness to defend and vindicate its *Honour*, and so is united to it by a sort of *unequal Confederacy*; or Lastly, is erected into a *separate Common-wealth*, and assumes the same *Rights* with the *State* it is descended from.

VII. A Man ceases to be a *Subject against his Will*, when for some *Crime*, whether truly or wrongfully laid to his Charge, he is ejected out of the *Common-wealth*. For when the *Common-wealth* refuses to own any Man for a *Member* of it, and forces him to depart the *Dominions*; he is releas’d from all *Obligations* which before, as a *Subject*, he ow’d to it. Upon which he is left to his own Choice to settle where he can. And as long as he continues in this *Exile*, the *Common-wealth* hath no *Authority* over him. So *Jolaus* (f) (1) said, That the *Argives* had no Power to bring him away from *Athens*, when they had before

condemn’d him to *Banishment*. But certainly to be forced into *Banishment*, if upon a *false Accusation*, is a very great *Injury*, (though a Man of Courage will not want Supports under such a Misfortune.) And if upon a *real Crime*, a very severe *Punishment*. *Philo the Jew* thinks it worse than *Death* it self (g). For though the *exiled* Person may perhaps be allowed to enjoy the best or greatest Part of his Estate in his *Banishment*, yet the Difficulties and Inconveniencies that must attend removing it to another place are unavoidable. It must be allowed too, that ’tis a very sensible Affliction to a Man to be forced to part with his *Relations* and *Friends*; And besides, to be judged a Person unfit to live any longer in the *Common-wealth* is a severe Disgrace, and must leave a foul Blot upon a Man’s Honour and Memory (h); Nor can a Man have lost less than all sense of Shame, that can have no Apprehensions of the *Infamy* of it (i). *Tully* saith much on the other hand to the contrary, but it does not seem to me of much Force (k). ‘*Banishment*, says he, is so ‘far from being a Punishment, that I think it ‘a Refuge only and Security from it. For when ‘Men fly from Punishment and Misfortune, ‘they only change the Air and Soil, remove ‘and settle in other Countries. And therefore, ‘by the *Roman Law*, *Exile* is never made a ‘Punishment, as it is in those of other *Common-wealths*. But when Men would avoid *Imprisonment*, *Death*, or *Ignominy*, or other ‘Punishments which the Laws appoint, they ‘take Sanctuary in *Exile*; If they choose to stay ‘in the *Common-wealth*, and suffer the Law, ’tis ‘certain they cannot be deprived of the *Right of Subjects*, but with their Lives; but because there are none that will make that ‘Choice, their *Rights* are not forcibly taken ‘away from them, but they voluntarily relinquish and resign them (l). It was indeed peculiar to the ancient *Roman Constitution*, that no Man should be forcibly deprived of his *Right* of being a Member of that *State* (m). And by the *Porcian* and *Sempronian* Laws it was provided, that no *Magistrate* should inflict Capital Punishment on any *Citizen* without the *People’s* Consent. But that *Criminals* might not enjoy absolute Impunity, and none seem to be ejected, or forced to quit his *Privilege of Citizen*; they would have had it believed, that the *Citizens* Voluntarily chose *Exile* to escape Punishment (n). But the Necessity of

(b) In *Panathenaic*. See *Bacon’s Essays*, c. 33. (c) *Dionys. Halicarn.* l. 2. *Plin.* N. H. L. 3. c. 13.

(d) *Strabo*, l. 5. Vid. *Justin.* l. 24. c. 4. & *Festum in Ver sacrum & in Mamertini.* Liv. L. 34. c. 44.

(e) *Paterculus*, l. 1. c. 1. † *Paulus Warnefridus de gestis Longobardorum*, l. 1. c. 2. (f) *Eurip. Heraclid.* v. 186.

(1) See *Grotius*, B. 2. c. 5. f. 25. (g) *Philo Judæus de Abrahamo*, p. 359. A. Ed. Paris. (h) *Oppian. Halicut.* l. 1. v. 274, &c. (i) As *Juvenal* describes *Marius*, Sat. 1. v. 47, 48, 49.

————— *Hic damnatus inani*

*Judicio, &c.*

*Exul ab octava Marius bibit & fruitur Diis*

*Inanis.*

————— Contemns his Infamy,

Can rise at Twelve and get him drunk e’re Three.

Enjoys his Exile, and’s condemn’d in vain.

(k) Vid. *Cic. Orat. pro Cæcina*, c. 3. (l) *V. Polyb.* l. 6. c. 12. (m) *Cic. pro domo sua hoc jus a majoribus prolatum, &c.* C. 29. This is a Right we all received from our Ancestors, That no *Roman Citizen* should ever lose that Privilege but by his own Choice. (n) *Diodorus Siculus*, l. 3. c. 5. mentions an Institution of a quite contrary Nature among the *Æthiopians*. *Sallust. Bell. Catilin.* *Cæsar* in his Oration to the Senate tells them, That there were Laws, by which no *Citizen’s* Life could be taken from him, but that after *Condemnation* he should be permitted to go into *Exile*; and again afterward, *Banishment* was always allowed the condemn’d *Criminal*.

the Delinquents leaving his *Country* was sufficiently implied in the forbidding all that were condemn'd to *Capital Punishment*, the Use of *Fire* and *Water* within the *Roman Dominions*. Though it is to be confess'd, that when *Banishment* is inflicted, Care should be taken that the *Common-wealth* may be secure from all Danger that may happen, by making the Person banished an *Enemy* to It. For which Reason some *Nations* never punish with *Banishment*; As the *Turks* and *Moscovites* now, and formerly the *Jews* tho' they might be rather supposed to have had Regard to other Reasons, *viz.* That they might not change their Religion. The *Relegatio* is a milder sort of *Punishment*, by which the Criminal is not entirely divested of the *Right of a Subject*, but is only confined to inhabit within a particular District, or else prohibited coming within a particular part of the *Dominions*. They that lay under this latter Penalty, were by the *Romans* properly called (*Interdicti*) *Persons interdicted* (a). But to be banished some particular *Countries* and *People*, may well enough be thought no *Punishment*; As *Diogenes* said, when one told him that the *Sinopenses* had condemn'd him to *Banishment*, *And I have condemn'd them to stay where they are.*

VIII. Again, A Man is forced, *against his Will*, to change his *Common-wealth*, when he is subdued and mastered by a powerful *Enemy*, is forced to put himself under his *Protection*, and to submit to his *Authority* as a *Subject*, whether at the same time he be removed into another *Country* or not. And this Method must be allowed to be lawful, not only for *particular Subjects* to take, at least for such as are under none but the common *Obligations of Subjection*; but also for entire *Cities* and *Provinces*, when they find no other way left open for their *Safety* and *Preservation* (b).

IX. Sometimes also it happens, that a *Subject* upon *Injury* done by him to a *Foreign Commonwealth*, is by his own *Sovereign* deliver'd up to the *injured State*, to prevent *Wars* that might otherwise follow upon his Account. *Herodotus*, in his *Calliope* (1), gives us the Story of *Timegenides* and *Attaginus* to this purpose, who had been Authors of engaging the *Thebans* in an *Alliance* with the *Persians*. And here a Question is moved, Whether a *Subject* surrendered by his own State or *Common-wealth*, but not accepted by the *other*, continues a *Member* of that which was his own or not (2)? *P. Mutius* was of Opinion that he did not (3), because when a *Subject* is deliver'd up by the publick Voice and Consent of the *People*, he seems to be as much *ejected* out of the *Common-wealth* as he would be, had he been forbid the *Use of Fire and Water*. And the same Question was disputed with great Heat in the Case of *Mancinus* (4), who

had been surrendered at *Namantium*, but not received. For when *Mancinus* afterwards offered to go in to take his place in the *Senate*, *Rutilus* the *Tribune* of the *Commons* stop'd him, and refused him *Admission*; telling him, That when the *Pater Patratus*, to release the *Common-wealth* from the *Obligations* of the *Treaty* he had signed, surrendered him up to the *Enemies* of the *Roman State*, he then ceased to be a *Roman Citizen*. However, when the Case was debated and put to the Vote, the *Majority* declared in Favour of him; and among others for this Reason, That no Person could properly be said to have been delivered, who was not accepted by the Party the Offer was made to. Now to me the State of the Controversy seems to be this, The *Common-wealth* that suffer'd the *Injury*, hath a *Right* to prosecute the *Subject* of the *Foreign State* with *War*. But by the *Surrender* of him, he is entirely consigned over to the *injured Commonwealth*, and may be punished as one of its own *Subjects*. And if he be received, the *Common-wealth* he was formerly a *Member* of, must be supposed to quit all *Right* to him; since by publick Consent and Approbation, he is delivered up to the *Authority* of the *Foreign State*. But if the *injured Commonwealth* refuse the Offer, and decline the *Acceptance* of the *surrendered Person*, the *State* that offered the *Surrender* may dispose of him as it pleases, and may either absolutely *eject*, or punish him according to the *Demerits* of his Crime. But if no *Punishment* happen to be inflicted on him, it is not to be supposed that he hath lost the *Right* of a *Subject*. For the *Act of Surrender* is in its self only a *Tender* made to the *Foreign State* of that *Right*, which every *Common-wealth* hath over its own *Subjects*, and not an utter *Abdication* and *Renunciation* of him. And therefore the *Surrender* doth not in it self deprive any Man of the *Right* of a *Subject*, unless it be declared by any particular *Law* in express words, That in a Concurrence of such Circumstances, the Person shall be supposed to have forfeited all *Rights* of a *Subject*. And *Cicero* is of the same Opinion, For, says he (c), *A Citizen that hath been delivered by the Pater Patratus, if he is not accepted by the Enemy, retains the Rights and Privileges of a Citizen entire* (5). But from what hath been said it may be infer'd, That if the *Surrender* is accepted, and afterward the Person that was given up should happen by some Chance or other to return to his own *Country* again; he cannot be admitted as a *Subject*, but by a new Grant of Favour (d). For the *Right of Postliminium* belongs only to Persons forced to submit to an *Enemy's Power*, contrary to the *Consent* and *Approbation* of their own *Common-wealth*; not to those that are *voluntarily* given up to *Foreign Authority* by their own *State*.

(a) Vid. Brisson. *Select. Antiq.* l. 3. c. 5. Anton. Matthæ. *de Crimin. ad Tit. de Pena*, c. 1. f. 6, 10. (b) Vid. Grot. l. 2. c. 6. f. 5. (1) Pag. 344. Ed. H. Steph. (2) See Grot. B. 2. c. 21. f. 4. (3) Vid. D. L. 50. t. 7. *De Legat.* l. 17. (4) Vid. Freinshemii *Supplementor. Livianor. Decas*, in Lib. 55. (c) Cic. *Orat. pro Cæcina*, c. 34. (5) Vid. Ciceron. in *Topic.* c. 3. Vid. etiam *de Orat.* l. 1. c. 40. & l. 2. c. 32. (d) Vid. L. 49. t. 15. l. 4. *D. de Captiv. & Postlim.* &c.

## C H A P. XII.

*Of the Changes and Dissolution of the Common-wealth.*

**C**hanges happen in the Common-wealth Three Ways; First, It may be so *changed* as still to continue the same; Secondly, it may be so *changed* as still to continue, tho' not the same it was before; Thirdly, it may be so *changed* as to be utterly destroy'd. The First sort of *Change* happens when the *Form* of the Commonwealth is changed; as when a *Monarchy* changes into an *Aristocracy*, or an *Aristocracy* or *Democracy* change themselves into a *Monarchy* (1). For in either of these *Changes* the *Essential Form* of Civil Government is still preserv'd, only the *Accidental Form* which results from the *proper Subject* of *Sovereign Power* is changed (2). So that the *People* are the same, whether the Government be *Monarchical*, *Aristocratical*, or *Popular*. Nay tho' it should happen, that a *free People* should in some War with a *Sovereign Prince*, be reduced to so entire a *Subjection*, as to be made an *Accession* to his *Patrimony*, yet they do not cease to be the same *People* as long as the *Conqueror* governs them as a distinct and separate *Kingdom*, and does not annex them as a *Province* to another *People*. For since the *People* in a large Extent, may be supposed to comprehend the *Sovereign Power*, it is no material Difference, whether the *Prince* exercises the *Government* over them in the most Full and Absolute manner, or not. For either way he is *Head* of one, and the same *Body*.

II. From what hath been said, the Question proposed by *Aristotle* (3) may be answered, Whether if a *Common-wealth* from a *Tyranny*, or an *Oligarchy*, become a *Free Popular State*, It be obliged (4) after such a *Change* to observe the *Treaties*, *Capitulations*, *Pacta Conventa*, and other *Acts*, made during the *Government* of the *Tyrant* or *Oligarchy*? The Reasons of the Negative are, That the *Acts* of a *Tyrant* or *Oligarchy* are not *Acts* of the *Common-wealth*, and that the *Common-wealth* can be obliged by its own *Acts*; That the *Common-wealth* is concern'd only where the *Advancement* of the *publick Good* is consider'd, and that where it is otherwise, the *Right* and *Name* of a *Common-wealth* is abus'd, and *Force* and *Violence* only have the *Rule*. But these Reasons are certainly weak. For not to repeat, what was said before (5) concerning *Tyranny*; A distempered and disordered *Head* is certainly a *Head*; and the *Acts* of an *Head*, though indisposed, are look'd upon to be *Acts* of the *Common-wealth*. And a *Common-wealth* must not be denied a *Being*, because it is in some Disorder. There was a Dispute of this Nature formerly among

the *Athenians* which begun upon this Occasion. The *Thirty* that govern'd the *Athenian State*, borrowed Money of the *Lacedemonians* upon *publick Faith*, after the *Athenians* had ejected the *Thirty* and recovered their *Liberty*, the *Lacedemonians* demanded their Money of them; the Matter was debated at *Athens*, and it was resolved that it was *Just*, and for the *Peace* of the *State* to pay it. *Demosthenes's* Opinion of the Case was (a), *That the People chose rather to pay the Money, than not make good their Articles of Agreement*; And again, (he says) speaking to the *Athenians*, *And then You consented to pay your Money to Those that had injured you, rather than go back from any part of your Articles* (b). Nay, though a *Common-wealth* should be reduced to a *Province*, and lose the very Nature of a *Common-wealth*, yet the *Debts* it has contracted are still due. For *Debts* being founded in the *Common-wealth*, not precisely as *such* a *Common-wealth*, but as possessed of *certain Goods*, whoever is *Master* of those, must take the *Debts* with them.

III. But tho' the Case seems to be beyond Dispute, as to the *Debts* contracted for the Use of the *Common-wealth*, and supposed to continue upon the whole *Body* of it; yet whether All the *Acts* of an *Usurper* will fall under the like Determination, when he is *deposed* or *ejected*, is still a Question. If an *Usurper* indeed make a *League* with a *Foreign State*, for mutual Supplies of *Aid* against some *common Enemy*, and then either divide the *Booty* of War with his *Confederate*, or sell Part of it to him; The *League*, the *Donation*, and the *Sale*, must continue in Force after the *Usurper* is deposed. For the *Foreign Common-wealth* acquires a solid *Right* from such *Acts*, because it agreed upon Them with the *Usurper* as *Head* of his *Common-wealth*, and in Appearance for its Interest and Advantage: And there was no Reason why the *Foreign Common-wealth* should concern it self what *Title* the *Usurper* might have to this *Government*; supposing there be no other Fault in the *Acts* supposed. But then the Difficulty is, if any *Usurper* by Oppression and Violence rife his own *Subjects* of their Goods and Fortunes, and sell them to *Foreign States*, Whether upon Dissolution of *Government*, They can demand them back again? *Bæcler* (c) thinks they may, and that if they that bought them did it *Advisedly* and *Deliberately*, they ought to acknowledge their Fault, and be content to part with what they could neither buy, nor the other sell, without *Injustice*. He adds, Nay though they knew

(1) See *Grot. B. 2. c. 9. f. 8.* (2) See above, in *B. 7. c. 5. f. 1.* (3) *Aristot. Pol. l. 3. c. 3.* (4) *V. Grot. ubi supr.*  
 (5) In *B. 7. c. 8. f. 3, 8.* (a) *Demosthenes contra Leptin.* (b) See *Isocrates in Areopag.*  
 (c) *Bæcler. Dissert. de eo quod agit Civitas.*

nothing of the Case when they bought them. All which may perhaps appear reasonable enough in *Foro Conscientiæ*; but if we consider the General Practice of the world, I don't see how the Sufferers can recover what they have been thus deprived of. For as long as the *Usurper* continues his Oppressions, he is look'd upon to be an *Enemy* to the Common-wealth, and the *Spoils* he takes from his Subjects when transferr'd to *Foreign States*, are retain'd with the same Pretences of *Right* as other *Acquisitions* of *War* (1). But if the *Usurper's* Government has been confirmed by the Consent of his Subjects, *Foreigners* may pretend *Right* to the Goods of his Subjects, as *Lawfully Confiscated*. For as in other Cases, *Nations* at Peace with, and unconcern'd in the Wars of their Neighbours, treat the Parties engaged with equal Respect, attending only to the Event: So *Foreign States* are not supposed to be concern'd what Measures their Neighbours take in their Government at Home. But the *Unjust Acts* of *Usurpers* which are confin'd within the Common-wealth, may, when their Government expires, be rescinded and repeal'd by a *Lawful Power*, as far as the Occasions of the Common-wealth require. And by the *Acts* is also meant, not only the *Laws* They made, but all *Grants* and *Alienations* whatsoever, contrary to the *Constitutions* of the Common-wealth.

IV. In the next Place, it is a common Question, What *Place* ought to be allowed *Princes* that have rais'd themselves to *Sovereign Power* over *People* before *Free*, and what to *Free People* after Extirpation of *Kingly Government*? To this *Grotius* answers (a), that a Common-wealth may challenge the same *Place* after such a *Change*, which it had by it self, or Representative in any Assembly before. But to me it seems necessary to distinguish, whether for Example, the *Prince* that has obtain'd the *Government* of the *People* before *free*, continue in the *Assembly* or *System* he was before Member of: Or whether he divides from it, and enters upon a *Separate* Administration of his own Affairs. For in the *First* Case, without dispute he can have no Precedence to any other *Place* than what the *free People* were before contented with, notwithstanding that *Greatness* and *Majesty* with which the *Persons* of *Sovereign Princes* are invested. And so on the other hand, a *free People* after Extirpation of *Kingly Government*, may demand the same *Place* in any *Common Assembly* which was allowed to their *Princes* before. But if the *Prince* or *People* separate from their *Old Assemblies* or *System*, the *Place* that anciently belonged to them ought to be no Prejudice to them, or be any Argument for the *Precedence* of others that had formerly that *Privilege* in the *Common Assembly*; since all *Sovereign Powers* are naturally equal.

V. *Changes* which so *disguise* the Common-

wealth, that it appears no longer the same, happen generally these two Ways; either *First*, when *One* Common-wealth breaks into *Two*, or *More*; or *Secondly*, when *Many* distinct Common-wealths Unite into *One*. The *First*, may be the Effect either of *Mutual Consent*, or else of Force of *War* (2). Different *Common-wealths* may be Form'd out of one by *Common Consent*, by sending out *Colonies* in the manner usual in *Old Greece*. For the *Romans* afterward, (who are followed now by the *Nations* of *Europe*,) when they sent a *Colony* abroad, continued it under the *Jurisdiction* of the *Mother Common-wealth* or *Greater Country*. But the *Colonies* planted by the *Greeks*, and after their Method, constituted *Particular Common-wealths*, were oblig'd only to pay a kind of *Deference* and *dutiful* Submission to their *Mother Common-wealth* (b). But however a *Colony* settled after this *Form* is not oblig'd to pay the *Debts* contracted by the *Mother Common-wealth*, Unless that Article was expressly agreed upon when the *Colony* was settled. Because All *Publick Debts* in the last Resort affect the *Goods* and *Effects* of the Common-wealth, which the *Colony* ('tis supposed) hath no share in. And tho' *Particular Persons* in the *Colony* might perhaps have enjoy'd the Benefit of those *Debts* while they were *Members* of the *Old Common-wealth*; yet when the *Mother Common-wealth* dismisses them *Free*, It seems to declare that they shall not be liable to pay any thing upon that Account. But indeed, upon a stricter View, the Common-wealth is not really in it self *Changed* upon the sending out *Colonies*; Neither doth it cease to appear the same; but only, as in a *Natural Generation*, one Common-wealth gives Birth to another. But where a *Kingdom* divides by common Consent into *Two* or *more distinct Common-wealths*, the *Publick Patrimony*, with all the *Debts* and *Incumbrances* upon them, ought to be equally shared among them. Tho' indeed when such *Separations* are made by mutual *Agreement*, there is commonly express *Provision* made for such *Cases*.

VI. Another *Change* in the Common-wealth, and by which it ceaseth to be the *Same*, is, Where *Two People* Unite (not by way of *Confederacy* or *Subjection* to one common *Sovereign*, but) in such a manner that the *Two States* grow entirely into *One*. In which Case *Grotius* (3) thinks, that the *Rights*, which the *particular* Common-wealths that make the *Union* enjoy'd before, are not lost, but communicated to the *Whole Body*, as also the *Debts* and *Incumbrances*, unless the contrary hath been particularly agreed upon (c). But it must be considered, whether the *Two* or *More People* Unite with design to erect a *New* Common-wealth, where all are to enjoy the same *Rights*; as suppose *Two Distinct People* subject to a *Government* of the *Populace* abolish

(1) See *Grot.* B. 3. c. 9. f. 14.

(a) *L.* 2. c. 9. f. 8.

(2) See *Grot.* ubi *Supra*, f. 10.

(b) *Vid.* *Thucyd.* l. 1. *Hen. Valerius* ad *Excerpt.* *Peiresc.* p. 6. & 7. *Hobbes* de *Cive*, c. 9. f. 8.

(3) *Ubi* *Supra*, f. 9.

(c) *Vid.* *Liv.* l. 1. c. 52. *init.*

their *Form of Constitution* and unite into one *Kingdom*; or *Two Kingdoms* take away their *Fundamental Laws*, displace the *Ancient Line Royal*, and set up a new *Kingdom*. By this *Union* 'tis manifest, that their former *Common-wealths* are subverted, and a *New One* erected upon their Ruins. But when *One Common-wealth* unites with *Another*, in such manner that *One* keeps its *Government and States*, and the *Subjects* of the *other* change their *Country*, and are taken into the *Rights and Privileges* of the *Foreign Common-wealth*, it is evident that *One* is swallowed up and lost in the *Other*. But that which remains doth not cease to be the *same*, tho' from such an *Accession* it receiveth a considerable *Increase in Strength and Power*. But there are no ways of *Uniting distinct Common-wealths*, so that Each shall preserve its own separate *Constitutions*, and be as it was before; but by strict *Alliance and Confederacy*, which rather gives Rise to a *System*, than a *Common-wealth*, properly call'd.

VII. The last *Change*, that by which the *Common-wealth* entirely ceaseth to be, happens when the *People* themselves are either *dissolved*, or *destroyed* (1). It is a common saying, that *Kings are Mortal but Common-wealths Eternal* (2). By which it is not meant, that it is impossible that a *People* should ever be scatter'd or utterly extinguish'd by any *Violence or Fatal Period*; but that they do not suffer such *Decays of Nature*, as particular *Men* do, after a certain *Course of Years*. For tho' *Individuals* change, yet there continues a constant *Succession*, either by *Resort from Neighbouring States*, or by the natural *Issues of Procreation at Home*. By a continual *Course* of which *Successions*, the *People* always appear the *same*, and possess the *same Rights and Privileges*, tho' particular *Subjects* are frequently changed (a), As *Virgil* saith of his *Bees*,

*Ergo ipsas quamvis angustus terminus ævi  
Excipiat, (neque enim plus septima ducitur ætas)  
At genus immortale manet, multosq; per annos  
Stat fortuna domus, & avi numerantur avorum.*

Tho' seven short Springs conclude their vital Date,  
Yet by re-peopling their decaying State,  
Their Ancient Stocks eternally remain,  
And in an endless Race their Children's Children reign.  
Mr. Addison.

The *Sense* of the *Old Philosophers* upon the *Diversity of Bodies* will perhaps give us a clearer view of this matter. And *Plutarch*

tells us, (b) that *some Bodies* (according to them) are compounded of *Parts disjoin'd*, as a *Navy, an Army, and the like*; others consist of *compact'd Parts*, as an *House, a Ship, &c.* a third sort are framed of *United Parts*, such as are combin'd into one *Nature*, as *Every particular Animal* (c). Which in other Words may be thus express'd; A *Body in general* is a thing contain'd by some *Habitude, Coherence, or Tie*, so that it constitute *One*. The *Ligament, or Tie*, by which the *Parts of a Body* are join'd and united, is threefold, *Natural, Artificial, and Moral*. The *Natural Tie or Bond*, is that by which *Natural Bodies* are contain'd, the *Artificial* is that by which things otherwise divided in *Nature*, are by *Human Industry* brought to *Unity and Continuity*: and the *Moral Tie* lastly, is that by which several *Individuals* are connected by *Human Institution*, and supposed to make one *Body*. And this *Body* may indeed consist of *Beast*, as in a *Flock or Herd*: But here, I suppose it to extend no further than to a *Combination of a Number of Men*. And from these different *Modes of Union*, result those three sorts of *Bodies*, the *Natural, Artificial, and Moral*. All which are supposed to continue the *same*, as long as that *Connection* which at first join'd the *Parts* together, is not all at once dissolved and broken. And thus therefore a *Man* still appears the *same*, tho' innumerable little *Particles* of his *Body* perspire; and are constantly supplied with new, from the *Nutrimment* he takes in (d). And tho' some of the *Ancients* thought *Theseus's Ship* (about which they had so many *Disputes*), the *same*; tho' in *Tract of Time* it went through so many *Repairs*, that hardly any thing remain'd of the *Materials* it was first built with (e). *Plutarch* says on this Subject (f). *A Common-wealth is One entire Body, which comprehends a Number of Members, and resembles the Natural, that it neither loseth its nature by Succession of Years, nor is it liable to Change by alteration of time, but always preserves the same Affections and Properties, that are agreeable to its Constitution, as long as it continues united by common Ties and Obligations, and preserves the Unity of a publick Body*. He adds, *That particular Men are more exposed to the Injuries of Time, than Common-wealths; for if a Man be absent from his Friend but a few Years; at his Return he discovers a Change in his Constitution and Face, and often such Alterations in his Humour and Behaviour, that he hardly knows him again.*

(1) V. *Grotium*, ubi *Supra*, f. 3.

(2) *Tiber.* apud *Tacit.* *Annal.* L. 3. c. 6.

(a) Vide *Lucianum*, in *amoris*, p. 888. Ed. *Amst.* T. 1. *Nature*, being sensible that *We* were all framed of perishing Matter, and that *Fate* had given so short a *Period* to every *Man's Life*, provided that the *Loss* of one *Man* should be repair'd by the *Birth* of another; and balanced the *Number* of *Them* that died with a new *Generation*, that so by continued *Successions* we might in some sense, live to *Immortality*, *Virg.* *Georg.* l. 4. v. 206, &c.

(b) *Plutarch.* *conjug. Præcep.* p. 142. F. (c) Vide L. 4. t. 3. l. 30. D. de *Usurp. Usucap.* & L. 6. t. 1. l. 23. f. 5. D. de *rei vindicat.* *Seneca* *Epist.* 102. (d) *Brown.* *Relig. Med.* S. 36. This very *Body* I carry about me came in at my *Mouth*, and all this *Bulk of Flesh* lay once upon my *Trencher*; in fine we devour our own selves. *Seneca* *Epist.* 58. *Plut.* de *Ei* apud *Delph.* edit. *Xyland.* p. 392. A. B. *Lucret.* l. 3. v. 860, &c. But this *Passage* must be cautiously interpreted, that it may not reach the *Article of the Resurrection*. (e) *Plut.* *Theseus.* p. 10. C. Vid. L. 5. t. 1. l. 76. D. de *Judiciis.* Vid. L. 7. t. 4. l. 10. D. quibus modis *Ususfructus* amittitur. Tho' this *Law* seems to be contrary to those in L. 46. t. 3. l. 98. S. ult. D. de *Solution.* in l. 83. f. 5. Vid. *Dionysium Halicarnassæum*, l. 1. de *Casâ Romuli.* *Alex. ab Alex.* andro. l. 3. c. 1. *Mich. Piccardus ad Polit. Aristot.* l. 3. c. 3. (f) *Plutarch.* de *fera Num. Vindict.* p. 555. B. C. Edit. *Wesh.*

But if a Man after Thirty Years absence, come again into the same Common-wealth, he not only finds the same Houses and Buildings, but the same Institutions, and the same Manners and Dispositions in the People (a). Tho' indeed it is impossible but in long Course of time, A Nation should receive some Alterations and not appear the same as to all Effects (b). Hobbes (*Philos. Prim. c. 11. f. 7.*) chooses to express the same thing thus, *When any thing is denominated from such a Form, which is the Principle of Motion in it, as long as that Principle remains, the Individual is the same.*

VIII. But notwithstanding the Truth of all this, it is possible for a Common-wealth to be utterly destroy'd; And that either when the *Materiale* of the People or *whole Number* of *Subjects* perish or scatter, or when the *Moral Tie* which joins the People together is utterly broken and dissolved; the *Materiale* or *Body* of the *People* perishes, either when the *Parts* absolutely necessary to the Subsistence of the *Body* are taken away, or when the *Body* it self is destroy'd. Grotius (c) gives us several Instances of *Nations* utterly destroy'd all at once, by *publick Fatalities*. And here Enquiry may be made, whether if after such a general Desolation some Weak *Remainders* are left that cannot be call'd a *People*, They may be supposed to retain the *Rights* of their *Ancient Nation*? Grotius is of Opinion, l. 2. c. 9. §. 4. That the *Propriety* which the *People* had, as They were *private Persons*, might still subsist in their *Remains*, but that nothing belongs to them which agreed to the *People*, as *Such*: That is, that They may claim *Inheritance* of the *Possessions* and *Substance* of those that were once their *Fellow Subjects*, but have no *Right* to assume *Sovereign Power*, or any of those *Rights* that are the necessary Consequents of it (d). But however, if the *Few* that are left were reduced to so thin a Number not by *War*, but some other *Casual Misfortune*, and are able to defend themselves against the *Invasions*

of their *Neighbours*, till either by *Supplies* of their own Growth or by invitations to *Others* to settle among them, They grow up again into a *People*, I see no reason why They may not claim the *Rights* of the *Former People* (e). Especially since it has not yet been agreed what *Number* of *Masters of Families* is necessary to make a *People*; and since when first Mankind divided into *Nations*, a very *small Number* made a *People*. In *Justin* (f) *Artaxerxes's* Fifty Sons are call'd *Tantus Populus*, and *Niobe* calls her *fourteen Children* a *People* (g). Again, a *Multitude* of Men of which a *People* consists is broken and dissolved, when not every *Particular Subject* perishes; But when upon *Pestilence*, *Discontent*, or *Sedition* they voluntarily *desert* and *scatter* elsewhere; or else are *disunited* and *forcibly carried* away, so that they can never meet or make *Head* again. And therefore it was *Flattery* rather than *Truth*, when the *People* of *Ilium* boasted, that they were *Ancestors* to the *Romans* (h).

IX. The *Form* or *Species* of the *People* is destroy'd, (1) if either the *whole*, or the *perfect Community of Right* be lost. The *Community of Right and Government* is entirely lost, when the *Subjects* scatter different ways and settle in *different Common-wealths*, whether they retain *Personal Liberty*, or are forced to submit to a *Condition of Slavery*; the Story of *Capua* is an Example of this Nature (i). A *perfect Community of Right* between the *Members* of the *same Common-wealth* is lost; when tho' the particular *Subjects* are allowed their *Personal Liberty*, and are permitted to inhabit their own *Cities*, and live in their own *Country*, yet they are under the *Government and Dominion* of a *Foreign State*. And such a *People* are usually said to be reduced into the *Form* of a *Province*. But barely the *changing Country*, *evacuating Towns*, *Law of Forts*, are not *Alterations* sufficient to make a *People* cease to be the *same*.

(a) Vid. Grot. l. 2. c. 9. (b) Vid. Supra, l. 8. c. 3. f. 29. (c) L. 2. c. 9. f. 4. Vid. L. 7. t. 4. l. 21. 31. D. quib. modis Ususfruct. amit. &c. (d) Vid. D. d. 1. (e) Vid. Justin. l. 5. c. 6. n. 5. (f) L. 10. c. 1. s. 6. Ovid. Met. l. 6. v. 197. (g) Apuleius Apolog. Fifteen Freeman make a People. Vid. L. 3. t. 4. l. 7. f. 2. D. quod cujuscunque Univerfit. &c. Where the Title of a Community (a Corporation, not a Commonwealth) is said to remain in one Person, but that he is under a Necessity of taking in Associates in time. (h) Vid. Buchanan Res. Scot. l. 4. fin. How the Scots were dispers'd by Maximus, Just. l. 28. c. 1. & l. 31. c. 8. (i) Grot. ubi Supra, f. 6. (i) Vid. Liv. l. 26. c. 16.

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