Application to their Functions.

them to discharge their Functions according to the Rules prescribed to them by the Laws of God and Man, most certainly it is a duty required of them, and that in the first place too, to exercise their Functions, which implies a diligent and faithful application to their Functions, and an obligation to perform every one of them.

II.

2. They ought to reside in the place where their Functions are to be exercised.

The first Rule of this Application which Officers of Justice owe to their Offices, is that which obliges them to residence in the place where their Functions are to be exercised; and as there are some Courts of Justice in *France*, where the Officers do the duty by turns, for the space of six months at a time, so the Officers appointed for each six months ought to be personally resident during that time.

III.

3. They ought not to absent themselves except when there is just cause

Residence consists in a continual abode in the place where it is due; so that the Officer give diligent attendance there, and do not absent himself except for some just cause, of which he himself is to judge, and which he ought to weigh in the balance of the account which God will require at his hands of the discharge of his Office.

IV.

4 Residence is one of the principal duties of those who have the direction of the Proceedings in Causes.

This duty of Residence is more especially incumbent on those whose business it is to regulate the proceedings in Causes, and this duty being strongly enough recommended to them by their interest not to lose the perquisites which may accrue to them by the said attendance, it is but seldom that they fail in that duty; but they who are obliged to be present only at the time of giving Sentence in Causes, not finding the same advantage therein, have no other motive that obliges them to a constant attendance, besides the indispensible engagement they are under to be present, altho' they reap no manner of profit or other advantage thereby; so that it is in order to acquit themselves of this obligation that they are induced to be punctual in their Residence.

V.

5. They ought to join to Residence, a diligent attendance on their Functions.

Seeing Residence is necessary only to facilitate a diligent attendance on the several Functions wherein the presence of the Officer is necessary, the duty of Application obliges him to join to his Residence a diligent attendance on every one of his Functions; and even those Judges who are not to give Sentence singly by themselves, such as the Judges of the Courts of Justice which consist of several Members, and who may therefore fancy that their absence will be no hindrance why Justice may not be very well rendred by the other Judges, are not for all that dispensed with from being present at the Report and final Decision of Causes; for this duty is common to them all, and every one of them ought to fear lest his absence should be prejudicial to a good Cause: so that every one ought to contribute with his skill and knowledge to the rendring of Justice impartially, and ought not to excuse himself from this duty by relying on the integrity and capacity of the other Judges; for, without entertaining any bad thoughts of them, he may be allowed to fear lest Justice and Truth should not be sufficiently defended, seeing very often the ablest and the clearest sighted persons may be mistaken, either in the facts, or in the reasoning, and that the views and notions which other less skilful persons have of the matter, do sometimes bring them over to sentiments which before they did not approve of: Thus, every Judge ought to give a diligent attendance to his Function, for the discharge of which it is to be presumed that he is capable; for if he wanted capacity, it would be his duty to betake himself to some other Profession rather than that of a Judge.

VI.

6. Other duties of Officers of Justice

Besides the Residence and diligent Attendance which Judges are obliged to on account of their Functions, they are bound to apply themselves with great exactness to the performance of every one of them in particular, so as to discharge them in the manner that their duty requires of them: which consists in general in a right understanding of the facts of which they are to judge, in weighing the circumstances, in balancing the reasons on one side and on the other, and in giving that attention and patience in the discharge of their Functions which the duty of rendring Justice demands of them. This vigilance, this attention, and this patience, are more especially necessary to those who are the Reporters of Causes; for they are obliged to look into all the Writings and Papers exhibited in the Cause, and to

to inform themſelves exactly of the rights of the parties; and in fine they ought to be careful never to do any thing that may be of prejudice either to the intereſt of particular perſons, or to that of the Publick [a].

[*For explaining what is mentioned in this Article of Reporters of Cauſes, it is neceſſary to obſerve, that in the Courts of Juſtice in* France, *which conſiſt of many Judges, it is the practice, for the greater diſpatch of Juſtice, for the Judges to appoint one of their number to examine the proofs that have been made on both ſides, in a Cauſe depending before them, and to report the merits thereof to the whole Bench, that they may give a Definitive Sentence thereon. And the Judge who is ſo appointed, is called the Reporter of the ſaid Cauſe. This practice is in uſe in the ſupreme Court of Juſtice in* Scotland, *which conſiſts of fifteen Judges, and which in its firſt Inſtitution was modelled much after the manner of the Courts of Juſtice in* France. *So that the Cauſes depending before the Court of Seſſion in* Scotland, *are diſtributed among the Lords of Seſſion, who have their ſeveral Cauſes to report to the whole Bench. Stairs* Inſt. of the Law of *Scotland*, lib. 4. tit. 2.

[a] Omnis cujuſcumque majoris vel minoris adminiſtrationis univerſæ noſtræ reipublicæ judices monemus ut nullum reſcriptum, nullam pragmaticam ſanctionem, nullam ſacram adnotationem, quæ generali juri vel utilitati publicæ adverſa eſſe videatur, in diſceptationem cujuſlibet litigii patiantur proferre: ſed generales ſacras conſtitutiones modis omnibus non dubitent obſervandas. *l. ult. ff. ſi contr. juſ.*

VII.

7 *One Officer may diſcharge the Functions of another, in caſe of abſence.*

Since it often happens that Judges cannot attend punctually on all their Functions, and that they may be hindered from it by a neceſſary abſence on ſome other occaſion, and by other lawful impediments, the Laws have therefore taken care to have their abſence ſupplied; for there is no Officer whoſe Functions another perſon may not exerciſe in his abſence, according to the Order and Regulations that are preſcribed in ſuch caſes: and as for the cauſes which may ſerve as a lawful excuſe, either for Non-Reſidence, or for the non-performance of ſome Functions, the Reader may conſult the Rule explained in the ſixth Article of the third Section of the foregoing Title.

TITLE V.

Of the FUNCTIONS and DUTIES of ſome other Officers of Juſtice, beſides JUDGES, whoſe Miniſtry is a part of the Adminiſtration of Juſtice.

THE Adminiſtration of Juſtice implies the uſe of many ſorts of Functions beſides thoſe of Judges; for what they decree would be to no purpoſe, if there were not Miniſters to put their decrees in execution: and in order to have them executed, it is neceſſary that they ſhould be taken down in writing, and that they ſhould be depoſited in the hands of other perſons than the Judges themſelves. Thus as to the Voluntary Juriſdiction, whatever is ordained for regulating the Adminiſtration of Juſtice, the Policy, and other Matters, requires the uſe of theſe two ſorts of Functions; and they are alſo neceſſary for what relates to the Contentious Juriſdiction, and to Decrees and Sentences between parties. It is for this Function of taking down in writing, and of keeping the Orders, the Decrees and Sentences, and other Acts of Courts of Judicature, which are to be preſerved, that Regiſters have been eſtabliſhed; and in order to put them in execution, it was neceſſary to have Apparitors and Bailiffs: And ſeeing both in the voluntary and contentious Juriſdiction, there was occaſion for publick Priſons for the keeping of Priſoners, whether they were arreſted for Debt, or for Crimes, or Offences; it was likewiſe neceſſary that there ſhould be perſons charged with the cuſtody of the Priſoners; and this is the Function of thoſe Officers called Jailers. But as for the contentious Juriſdiction, ſeeing Juſtice is rendered only to thoſe who deſire it, and that it is for the dignity thereof that the demands, the defences, and the other proceedings, which are to be made in the

preſence of the Judges, be made with that order and reſpect that is due to their character, and which would be often violated by the parties themſelves, who beſides are generally ignorant of the method of Judicial Proceedings, Proctors have been eſtabliſhed, who repreſent the Parties in Judgment, make prayers and requeſts in their names, carry on the proceedings in the Cauſe, and perform the other Functions belonging to their Offices.

Beſides theſe Functions which are neceſſary for the Adminiſtration of Juſtice in all ſorts of Affairs, ſmall or great, without diſtinction, there are other Functions, whereby the Rights of the Parties are to be deduced, and ſupported by Principles of Law, whether it be by Argument at the Bar, or Pleadings in writing, which Functions have required the Miniſtry of perſons capable thereof, and are exerciſed by Advocates. But there is this difference between this Miniſtry and all the others of the ſeveral Functions of the Adminiſtration of Juſtice, that whereas for the diſcharge of the other Functions particular Officers have been eſtabliſhed, that of Advocates has been left free for all perſons who have obtained the Degrees of Batchelor and Licentiate in the Civil and Canon Law, and who have taken the Oath of an Advocate in a Sovereign Court of Juſtice; for, as ſhall be hereafter explained in the ſixth Title, the Functions of Advocates are of ſuch a nature, that their Miniſtry could not be erected into an Office.

It is in conſideration of this peculiar quality of the Function of Advocates, which does not require that their Profeſſion ſhould be erected into an Office, as it is neceſſary for all the other Functions which are required in the Adminiſtration of Juſtice, that we have not inſerted in the foregoing Titles, and that we ſhall not put down in this Title, that which relates to the Miniſtry and Functions of Advocates, and that we have reſerved them for a Title apart, which is the Title that immediately follows.

Beſides theſe ſorts of Functions of Regiſters, of Proctors, of Apparitors, of Bailiffs, and of Jail-keepers, which are neceſſary in the Adminiſtration of Juſtice, there is another ſort of Functions which belongs to the Order of this Adminiſtration, but in a manner altogether different, and that is the Functions of Publick Notaries, who are eſtabliſhed for two principal uſes which the Acts that are paſſed before them have; one is, that their Signature ſerves as a proof of the truth of the Acts which they ſign; and the other, that their Preſence and their Signature gives to thoſe to whom others oblige themſelves by Acts ſigned by them, a Right of Mortgage; which they would not have by a private Act or Writing, ſigned only by the Party: and this makes a Function of Voluntary Juriſdiction which is annexed to their Offices, as the ſame has been explained in the twenty third Article of the firſt Section of the firſt Title.

Seeing theſe Functions of Publick Notaries are a matter of too narrow an extent, to require a diſtinct Title to themſelves; and that, as we have juſt now obſerved, they are a part of the Order of the Adminiſtration of Juſtice; we ſhall explain them under this Title, together with the Functions of Regiſters, and other perſons, whoſe Miniſtry makes a part of this Adminiſtration. So that this Title ſhall be divided into five Sections: the firſt, ſhall be of Regiſters; the ſecond, of Proctors; the third of Apparitors, and Bailiffs; the fourth, of Jailers; and the fifth, of Publick Notaries.

SECT. I.

Of the Functions and Duties of Regiſters.

OF all the Functions which belong to the Order of the Adminiſtration of Juſtice, there are none which have ſo great a connexion with thoſe of Judges, as the Functions of Regiſters; for it is their buſineſs to write down what is dictated or pronounced by the Judges, and to be Depoſitaries of the Decrees, Sentences, and other Acts, which are to be preſerved, and to give Exemplifications of them to the parties; and it is their Signature that is the proof of the truth of what they ſign. So that next to the Functions of Judges, thoſe of Regiſters are the firſt in the Order of the Adminiſtration of Juſtice.

We ſhall not here give the definition of the Office of a Regiſter, that we may avoid repeating what has been ſaid thereof

thereof in the eighteenth Article of the first Section of the first Title; neither shall we attempt to explain all the several Functions of Regisiters which are different according to the different Offices, and which in *France* are distributed among several Offices, and among several Regisiters, such as those for Presentations, for the Distribution of Causes, those where the Minutes of the Court are deposited, those which have the custody of the Decrees, Sentences, and other Acts of Court, the Regisiters of Deeds, and others; which detail is sufficiently known and regulated by the Ordinances, and does not come within the design of this Book: and we shall confine our selves in this Section, to the general Rules of their Functions, and the Duties which are consequences thereof.

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1. *Definition of Regisiters.*
2. *The chief duty of Regisiters.*
3. *They are obliged to secrecy.*
4. *It is their duty to take care of the things deposited in their hands.*
5. *Other duties of Regisiters.*

I.

1. *Definition of Regisiters.*

REgisters are Officers appointed to take down in writing, by the direction of the Judges, the Decrees, Sentences, Judgments, and the other Acts which are sped Judicially, to remain Depositaries of that which ought to be preserved, and to give out Exemplifications thereof to such as have an interest therein[a].

[a] *See the eighteenth Article of the first Section of the first Title.*

II.

2. *The chief duty of Regisiters.*

Seeing the principal Function of Regisiters is to set down in writing that which is pronounced, or dictated by the Judges, their principal duty is to write the same exactly and faithfully: for altho' what they write ought to be revised by the Judges, who ought to sign it, yet for want of due exactness, and much more for want of fidelity in the writer, some words may be easily altered, expressions may be added or left out, and by errors of this kind, or surprizes, occasion may be given to injustices, which may escape being taken notice of by such Judges, as happen to be either not very clear sighted, or not very attentive.

III.

3. *They are obliged to secrecy*

The Regi[illegible], having often knowledge of what is transacted privately in the Courts of Justice, before the final Resolutions be taken; and being the Depositaries of what is decreed, and which ought not to be made known to the parties till the due time, they are obliged to the duty of secrecy, not only as to what passes before Judgment, and which requires secrecy, but also as to what is decreed, until the time comes that it is to be made known to the parties.

IV.

4. *It is their duty to take care of the things deposited in their hands.*

The Function of Regisiters, which makes them Depositaries of the Decrees, Sentences, and other Acts, and of the Register-Books which are to remain in the Office, makes it a duty incumbent on them to be careful in preserving those Records whilst they continue in their hands, and till they are removed from their Office into the publick Archives, where they are to remain for ever.

V.

5. *Other duties of Regisiters.*

The other duties of Regisiters are reduced in general to a capacity for their Functions, to probity in the discharge of them, integrity and fidelity which are required in every one of them, to be guilty of no manner of Extortion, and to be contented with the common and ordinary Fees.

SECT. II.

Of the Functions and Duties of Proctors.

WE give the general name of Procurators or Attornies, to those who manage some affairs for other persons, having a power from them so to do; and the reciprocal Engagements between the said Procurators and those who constitute them, that is to say, who nominate them, and commit their Affairs to them, have been explained in the Title of Proxies in the Civil Law in its Natural Order. This it is not of

those Procurators in general that we treat here, but of those who have this quality under the Title of an Office, that they may exercise that Function in Law-Suits for the Parties who impower them. For it is the usage with us, that whereas it was naturally lawful for the Parties themselves to explain to the Judges their Rights and their Pretensions, or to chuse, in their absence, Proctors who should perform that office for them, and that this was also the usage in the *Roman* Law; one is obliged in *France* to have a Proctor in all sorts of Causes, and they can chuse only out of the number of those who have this quality under the Title of an Office; and this usage hath had its Origine from two causes, which rendred it necessary, as has been observed in the Preamble of this Book: For on one part, the liberty which the Parties themselves had to explain their Rights before the Judges, was attended with passion, confusion, noise, and with an irreverent behaviour, which violated the respect due to Justice, and disturbed the Order thereof: And on the other part, the proceedings necessary for the carrying on of Causes to a final Sentence have made it necessary to make use of Proctors who understand them, and who may be obliged to observe the Order of Judicial Proceedings, which the greatest part of Parties are ignorant of, and which cannot be observed without the assistance of such persons as are daily conversant in those matters. Thus for example, it is necessary for carrying on a Law-suit, that he who is summoned should appear to the Citation, and that he and his adverse Party should explain to one another their mutual demands and pretensions, and communicate to each other their Proofs, their Writings, and their Exhibits; which makes it necessary that Proctors should be resident in the place where the Law-suit is to be carried on, for otherwise it would be necessary that for every Assignation, or Act sped in the Cause, the Parties who may chance to live in places remote from the seat of Justice, should be put to great charges, and suffer great delays, in summoning and warning each other to give their presence at the speeding of the several Acts; and this would likewise be attended with many other inconveniencies, which it is not necessary to mention here.

One may be able to judge by this general Idea of the Ministry of Proctors, what their Functions are, and at the same time what their Duties likewise are, seeing they ought to be proportioned to the use for which they are established, as will appear by the Rules which follow.

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1. *Definition of Proctors.*
2. *The use and primary duty of Proctors.*
3. *They ought to abstain from all unfair practices, which the interest of their Clients may stand in need of.*
4. *They ought to exercise their Ministry with moderation, and to abstain from all manner of surprize.*
5. *They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.*
6. *The Office of Proctors implies Functions, which in the Order of the Administration of Justice are to be performed even in unjust Causes.*
7. *Sequel of the foregoing Article.*
8. *Proctors are not allowed to draw up the Writings which serve to establish and found the Right of their Clients.*
9. *Other duties of Proctors.*

I.

PRoctors are Officers established to represent in Judgment the Parties who impower them to appear for them, to explain their Rights, to manage and instruct their Cause, and to demand Judgment[a]. 1. *Definition of Proctors.*

[a] *See the nineteenth Article of the first Section of the first Title.*

II.

Seeing the use of Proctors has been established in order to remove from Tribunals the liberty which parties had to vent their passions, their anger, and to commit irreverences and other abuses, which are consequences of the want of the respect that is due to Judges, the primary Function of Proctors, and their chief duty is, to look upon themselves as having espoused the interest of their Clients, in order to defend them so far as Justice may demand, and as if they themselves were the Parties concerned, but free from their passions, and capable of demanding Justice with that respect and decency that is due to the Tribunal thereof[a]. 2. *The use and primary duty of Proctors.*

[b] *See what has been said touching this use of Proctors in the Preamble of this Section.*

III.

3 They ought to abstain from all unfair practices which the interest of their Clients may stand in need of.

It follows from this first duty of Proctors, that seeing they are bound to defend their Clients only in what is just, and without passion, they ought to abstain from all unfair practices which the interest of their Clients may perhaps stand in need of; and if their Clients should require such assistance from them, the quality of being their Proctor would be so far from obliging them to render them such services, that it obliges them on the contrary to gainsay and oppose such practices, and rather to abandon the defence of their Clients than to be aiding to them in any unlawful courses, which they ought to hinder by all ways that Justice and Prudence may require [c].

[c] *See the Ordinances of* Charles VII, *in* 1446. *Art* 34. *and of* Francis I. *in* 1355. *Art.* 10. *and others relating to this matter.*

IV.

4 They ought to exercise their Ministry with moderation, and to abstain from all manner of surprize.

This duty of Proctors to espouse the interest of their Clients without their passions, obliges them to exercise their Ministry with that moderation, that mildness, and that civility, which is reciprocally due among persons whose Profession is to demand only Justice, without any private Interest; and this duty implies with much more reason that of an upright fidelity in abstaining from all manner of surprize [d].

[d] *See the Ordinance of* Charles VII. *in* 1446. *Art.* 18. *quoted on the last Article of this Section. Altho' this Ordinance hath not a direct relation to this Rule, yet it may be applied to it.*

V.

5. They ought not to protract the proceedings, the length of which often proves the ruine of all the parties.

If Proctors, in the exercise of their Office, are obliged to abstain totally from the passions and injustices of their Clients, much more are they obliged not to substitute their own passions in the room of those of their Clients, and not to deprave the integrity of their Ministry, by mixing with it views of their own proper interest, which it is easy for them to favour in the exercise of their Functions, whether it be by protracting the Law-suits, that they may reap the advantage of a superfluous number of Proceedings and Writings, or by using other unfair means which we see practised by some, and which are of greater or lesser consequence, and more or less criminal, according to the nature of the Affairs, the variety of Incidents which may happen to be joined with them, and the occasions given thereto by the confusion which follows from that multiplicity of proceedings, such as in Seizures of Goods, Decrees and Orders touching the Sale of them, and the stating the claims of Creditors, and in other affairs of the like nature; where the injustices of multiplying and protracting the proceedings, and other acts of greater oppression, do often end in nothing less than the ruin of many Families, both on the part of the Debtors, and on that of the Creditors [e].

[e] Nemo ex industria [illegible] habeat jurgium. *l.* 6. §. 4 *Cod. de postul.*

It is in order to prevent the multitude of proceedings, that they are expresly prohibited to make any new Writings, or to add any thing to the Process after the Cause is determined.

We forbid Proctors and all others to make any new Writings, or to augment the Rolls therewith after the cause has been adjudged, under the penalty of four times the value, to be paid by him who transgresses the said Order; which Penalty it shall not be in the power of our Judges to mitigate, and the Offenders shall moreover be suspended from the execution of their Offices, *&c Ordinance of* Lewis XIV. *in* 1667. *Art.* 11. *of Gosts.*

See the tenth Article of the same Title.

VI.

6. The Office of Proctors implies Functions, which in the Order of the Administration of Justice are necessary to be performed even in unjust Causes.

Altho' it be the duty of Proctors not to espouse the injustice of their Clients, and that it would seem for this reason that a Proctor ought not, no more than an Advocate, to engage in the defence of an unjust Cause, yet nevertheless their Office implies Functions which in the Order of the Administration of Justice are necessary to be performed even in unjust Causes. Thus for instance, it is a Rule in the Order of Judicial Proceedings, that those who are cited to appear ought to give an appearance, and to constitute a Proctor with whom the Plaintiff may carry on his Cause, and bring it to Judgment; and if he who is cited does not appear, a default is decreed against him, whereof he must pay the costs: which obliges the Proctor who is imployed by a Defendant against a demand that is highly just to present himself in Judgment, that is, to appear for his Client, that he may prevent the taking of a default against him; and how unjust soever the Cause of this Defendant may be, yet the Proctor, who should know it to be such, would nevertheless be obliged to appear [f];

pear[f]; for his appearance may perhaps produce a very good effect, by putting an end to the Law-Suit.

[f] *See the Ordinance of 67. Title 4. of Presentations.*

VII.

7. *Sequel of the foregoing Articles.*

Besides the Functions of the nature of those which have been explained in the foregoing Article, Proctors may likewise exercise the Functions of their Office in behalf of unjust Causes in another sense, and that even in cases where it would not be justifiable for Advocates to exercise theirs. For whereas the Function of Advocates being to give counsel to the Parties, it obliges them to discern between pretensions that are just, and those that are not, and not to undertake the defence of unjust Causes, Proctors may be ignorant of the Rights of the Parties, and are not bound to examine into the Questions of Law. Thus they are not bound to abstain from serving their Clients, except in cases of a crying injustice, or where the injustice is known to them; for in these cases they would make themselves accomplices in an Injustice, by praying or soliciting for their Clients, what they are persuaded their Clients themselves ought not in conscience to demand, and what it would be unjust to grant them[g].

[g] *See the preceding Article.*

VIII.

8. *Proctors are not allowed to draw up the Writings which serve to establish and found the Right of their Clients.*

Seeing the Functions of Proctors are limited to what relates to the Proceedings or Assignations in Court, and the instruction of the Cause, and that it is no part of their Ministry to write, or to argue at the Bar for their Clients, except in so far as relates to their Functions; they are prohibited by the Ordinances of *France*, to draw up Writings which may serve to establish and found the Rights of their Clients; and these sorts of Writings ought to be drawn up and signed by Advocates[h].

[h] *See the Ordinance of Francis I. of the twelfth of February 1539. Art. 59.*

Altho' it is not necessary that Proctors should have a capacity to establish and found the Rights of their Clients, yet they ought to have a capacity for their Office that is publickly approved of.

No person shall be admitted a Proctor in our Court, until he has been duly examined by our said Court, and found capable. *Ordinance of Charles the Seventh in 1446. Art. 27.*

IX.

9. *Other duties of Proctors.*

The other duties of Proctors consist in acquiring a thorough Knowledge of the Rules of their Profession, in applying themselves to the Affairs committed to their charge, with such a vigilance, diligence, and care, as that their Clients may not be any way surprized, and that their Causes be carried on without any delay; and likewise on their part that they observe with respect to the adverse Party every thing which the Order of Justice and a fair upright dealing may require. They are to content themselves with the ordinary Fees and Perquisites of their Office, without exacting any more than what is settled by the Rules and Orders of the Court; they are to serve the poor for nothing, as they are required to do by Law; they are to serve those who by reason of their poverty, or because of the power of their adversaries, are forced to apply to the Judge to have a Proctor assigned them: they are obliged to abstain from all manner of Extortion, and to beware especially of the crime of compounding with their Clients for what may be made of the Causes with which they are charged, or for a share of it, and of treating with them in any manner, which may directly or indirectly have the like effect[i].

[i] Præterea nullum cum litigatore contractum quem in propriam recipit fidem inear advocatus, nullam conferat pactionem. *l. 6. §. 2. C. de postul.*

See the fifth Article of the second Section of the following Title.

See in relation to the capacity required in those persons who exercise these Functions, the Ordinance of Charles *the Seventh in 1446. Art. 47. quoted on the foregoing Article. See that of* Lewis XII. *in 1507. Art. 118. and of* Henry II. *in 1551. Art. 9.*

See the Ordinance of Charles V. *in 1364. Art. 7.*

See the Ordinance of the 30th of August 1536. Chap. 4. Art. 38.

SECT. III.

Of the Functions and Duties of Apparitors and Bailiffs.

Altho' Bailiffs have not altogether the same Functions as Apparitors or Tip-staves, and that for instance, the Intimations touching the proceedings in a Cause are made to the respective Proctors by the Apparitors, and not by Bailiffs; and that it is the Apparitors who

who call the Causes at the time of Hearing; yet seeing Apparitors do likewise exercise several Functions in common with Bailiffs, as for example, Executions, Orders of Court, Seizures of Goods, Imprisonments, and others; it was proper to comprize under one and the same Section the Rules which are common to these two sorts of Officers, to avoid the making two Sections of Rules that are altogether the same: which will be of no manner of prejudice to the distinctions which are made between them on account of their Name, their Rank, and of some other Functions which may distinguish them, such as those of Apparitors for the services which they do about the persons of the Judges, whether it be in the Court where they administer Justice, or on occasions of Ceremony, or otherwise.

[*We must observe here, that the word* Apparitor, *in its proper Acceptation in* England, *is meant only of such Officers as attend the Spiritual Courts, to serve the Processes thereof, and to perform the other inferior Ministerial Acts which are requisite for the due Administration of Justice therein. The Officers who attend the Execution of Justice in the Temporal Courts in* England, *are distinguished by the names of* Bailiffs, Sergeants, *or* Tip-staves.]

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1. *Definition of these two sorts of Officers.*
2. *Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.*
3. *Intimations.*
4. *Executions.*
5. *Other duties of Apparitors and Bailiffs.*

I.

1. *Definition of these two sorts of Officers.*

Apparitors are Officers appointed for executing the Orders of the Courts of Justice; which implies the Functions of making the necessary intimations, either for carrying on the Causes, in order to obtain Sentence, or for putting the Sentence in execution, and compelling the several persons that may be any way concerned, by the usual ways, to a compliance with whatsoever the Order of the Administration of Justice may render necessary; and Bailiffs are also Officers, who under another Title exercise the same Functions as Apparitors[a].

[a] *See the twentieth and twenty first Articles of the first Section of the first Title.*

II.

2. *Two principal Functions of Apparitors and Bailiffs; Intimations and Executions.*

These Functions of Apparitors and Bailiffs may be reduced to two principal Functions; one, of Intimations, or Citations, and the other, of Executions and Constraints; and each of these sorts of Functions obliges them to the duties which are suited to them, and which shall be explained in the Rules which follow[b].

[b] *See the following Articles.*

III.

3. *Intimations.*

As for Intimations, or Citations, the duty of this Function consists in giving to the persons to whom the Intimations are made, Copies of the Orders or Acts of Court which they intimate to them; for it is in order to let them know the tenour of them that the intimation is necessary; and they ought to leave the said Copies either with the persons themselves, or in their absence with some of their servants, and to return a Certificate of the day on which they served the Process, and to mention therein the very hour of the Service, in such cases wherein that exactness is required[c].

[c] *The Returns, or Certificates, made by Sergeants, in relation to any Execution, Seizure or Arrest, shall mention the day, and the time of the day, whether before or after noon, that the same have been made, and the said Sergeants shall set down at the bottom of their Returns what they took for their Fees, and sign the same,* &c. The States of *Blois*, Art 173.

See touching this matter the Ordinance of Francis I. *Art.* 12.

IV.

4. *Executions.*

As to Constraints, Seizures, Executions, Imprisonments, and other the like Functions, the duties thereof consist in exercising them with the necessary force, but without violence, and with that moderation and humanity which the Ministry of Justice does demand, in seizing only the Moveables which are liable to be attached, leaving to the Debtors such things as the Law does not allow to be taken from them by Execution, in making an exact Inventary of the Goods which they seize, and in not charging the persons into whose hands the things are deposited with more than what is really delivered to them; and when there is any resistance made to them in the execution of their Office, either by the Parties themselves,

or other persons, they ought to make a faithful Report thereof without adding any thing to the truth.

[d] *As to the moderation and humanity which those persons ought to have who execute these sorts of Offices, see the Edict of* Amboise, *art.* 6. *which strictly prohibits Sergeants to use any arrogant or insolent language in the Executions wherein they happen to be imployed, upon pain of Corporal Punishment to those who disobey.*

V.

5. *Other duties of Apparitors and Bailiffs.*

All the other duties of Apparitors and Bailiffs are reduced to their being well instructed in the duties of their Functions, and the executing them with that uprightness and fidelity which the Order of Justice requires, not to be guilty of any Extortion, and to rest satisfied with what may be lawfully due to them according to the Usages and Regulations of the several Courts, and in doubtful cases, with what the Judges shall order them for their labour and pains [e].

[e] *We enjoin our Sovereign Courts of Justice, as well as all other inferior Courts, to regulate the Fees of Registers and Sergeants; and other Ministers of Justice.* States of *Blois*, Art. 159, 160.

This Order does likewise carry, that if they take greater Fees than those which have been regulated by the Judges, they shall be punished with death.

As to all the other duties of Apparitors or Sergeants, see the Ordinances of Philip IV. *in* 1302. *art.* 18. *art.* 27. *of* Francis I. *in* 1535. *chap.* 6. *art.* 10. *and in* 1536. *chap* 20. *art.* 3. *and that of* Charles VIII. *in* 1490. *art.* 3.

SECT. IV.

Of the Functions and Duties of Jailers.

The CONTENTS.

1. *Definition of Jailers.*
2. *They ought to be appointed by Authority of Justice.*
3. *Two different sorts of duties of Jailers.*
4. *They ought to have a watchful eye on the prisoners.*
5. *They ought to be more particularly watchful over Criminals.*
6. *Besides the care of watching the prisoners, they ought to treat them with as much humanity as it is lawful for them to shew them.*

I.

1. *Definition of Jailers.*

JAilers are the Keepers of the persons of Prisoners, whether they be committed for Crimes, or for other causes.

II.

2. *They ought to be appointed by Authority of Justice.*

The interest which the Publick hath in the safe custody of Prisoners, does not allow that there should be any other Prisons besides those in publick places, which are set apart for that use; and this charge of Prisoners *is* a publick Function which a bare private person cannot exercise. Thus the Keeper of the Jail ought to be nominated to this Function by the Authority of Justice; and it is an Office which the King has the disposal of [a].

[a] Jubemus nemini penitus licere per Alexandrinam splendidissimam civitatem vel Ægyptiacam diœcesim, aut in quibuslibet imperii nostri provinciis, vel in agris suis aut ubicumque domi privati carceris exercere custodiam. *l.* C. *de priv. carc inhib.*

[*In* England, *the Custody of the County Jails is incident to the Office of the Sheriff, and inseparable from it, except in some particular cases, as in the Prisons of the* King's-Bench, *and* Marshalsea *in* Surrey, *the Custody whereof is particularly excepted from the Sheriff, and reserved to the proper Officers who have the Grant thereof. And altho' the Jail it self does belong to the King, and is to be repaired at the common charge of the County, yet it belongs to the Sheriff to put in such Jaylers or Keepers as he will answer for, and from whom he ought to take good Security to indemnify him.* Stat. 14 Ed. 3. ch. 10. 19 H. 7. ch. 10.]

III.

3. *Two different sorts of duties of Jailers.*

This Function of Jailers implies two different sorts of duties; the one is of those which respect the Publick, and the persons who are interested in the safe custody of the Prisoners; and the other of those which relate to the Prisoners themselves; and these two sorts of duties are reduced to the following Rules.

IV.

4. *They ought to have a watchful eye on the prisoners.*

The duty of Jailers towards the Publick, and the persons who are interested in the safe custody of prisoners, consists in having a watchful eye over them; so that they are to be answerable for the Escapes of the Prisoners, except where they are rescued by force, which cannot be imputed to them.

V.

5. *They ought to be*

Besides the care of watching the Prisoners, to prevent their escape, for

what

more particularly watchful over Criminals

what cauſe ſoever it be that they are committed to priſon, the care of Priſoners accuſed of Crimes obliges moreover the Jailers to keep the ſaid Criminals in Irons and Dungeons, when it is ſo ordered by a Court of Juſtice. They ought further to take care that thoſe Offenders, and all others who are charged with Crimes, for whoſe Trial and Conviction it may be neceſſary that no perſon ſhould have any acceſs to them, be kept ſtrictly purſuant to the Order that is given, and that nothing be delivered into their hands until it be firſt duly viſited and examined, whether it be any thing that may ſerve as an Inſtruction to the Criminals, to help them to elude the proofs of the truth, or ſome inſtrument of death, or poiſon, to thoſe of whom there may be ground to fear leſt deſpair ſhould move them to anticipate their Condemnation by a voluntary death

VI.

6 Beſides the care of watching the priſoners, they ought to treat them with as much humanity as it is lawful for them to ſhew them

The duty of Jailers towards the priſoners, obliges them to join to the ſafe cuſtody of their perſons, all manner of humanity [b] that is conſiſtent therewith, whether it be in what relates to their Lodging [c], and the Furniture thereof, their Diet, if they have the charge of it, the receiving viſits from their Friends, when that may be granted them, and the other civilities and kindneſſes of the like nature.

[b] In quacunque cauſa reo exhibito, ſive accuſator exiſtat, ſive cum publicæ ſollicitudinis cura produxerit, ſtatim debet quæſtio fieri, ut noxius puniatur, innocens abſolvatur. Quod ſi accuſator aberit ad tempus, aut ſociorum præſentia neceſſaria videatur, id quidem debet quam celerrimè procurari. Interea vero reum exhibitum non per ferreas manicas & inhærentes oſſibus mitti oportet, ſed proliciores catenas, ſi criminis qualitas etiam catenarum acerbitatem poſtulaverit, ut & cruciatio deſit, & permaneat ſub fida cuſtodia. Nec vero ſedis intimæ tenebras pati debebit incluſus, ſed uſurpata luce vegetari, ac ſublevari: & ubi nox geminaverit cuſtodiam, in veſtibulis carcerum, & ſalubribus locis recipi. ac revertente iterum die, ad primam ſolis ortum illico ad publicum lumen educi, ne pœnis carceris perurgatur: quod innocentibus miſerum, noxiis non ſatis ſeverum eſſe dignoſcitur. Illud etiam obſervabitur, ut neque his qui ſtratorum fungiuntur officio, neque miniſtris eorum liceat crudelitatem ſuam accuſatoribus vendere: & innocentes intra carcerum ſepta lecto dare, aut ſubtractos audientiæ longa taberconſumere, non enim exiſtimationis tantum, ſed etiam periculi metus judici imminebit, ſi aliquem ultra debitum tempus inedia, aut quocunque modo aliquis ſtratorum exhauſerit, & non ſtatim cum penes quem officium cuſtodiæ eſt, atque ejus miniſtros capitali pœnæ ſubjecerit. *l. 2. C. de cuſtod. Reor.*

[c] Quoniam unum carceris conclave permiſtos ſecum criminoſos includit: hac lege ſancimus, ut etiam ſi pœnæ qualitas permixtione jungenda eſt, ſexu tamen diſpares diverſa claſſiorum habere tutamina jubeantur. *l. 3. C. eod.*

SECT. V.

Of the Functions and Duties of Publick Notaries.

THE Functions of Regiſters and Proctors, and thoſe of Apparitors and Bailiffs, are exerciſed either for the Adminiſtration of Juſtice in the Supreme Courts of Juſtice, or elſewhere, for executing the Orders thereof, and are thereby diſtinguiſhed from the Functions of Notaries, which are exerciſed out of the Courts of Juſtice, and without any neceſſity of their having a particular order or warrant for executing them: but their Miniſtry is exerciſed voluntarily, to engage either by Covenants, or otherwiſe, thoſe who are willing to give to their Obligations, or other Acts, the publick Form which renders them authentick; which is the proof of their truth, and which gives to them a full and perfect execution, as has been already remarked at the end of the Preamble of this Title, and which ſhall be hereafter explained in this Section.

The CONTENTS.

1. *Definition of Notaries.*
2. *Different ſorts of Functions of Notaries.*
3. *They ought not to go beyond the bounds of their Function.*
4. *They are obliged to keep carefully and diligently the Original Minutes which are depoſited with them.*
5. *The conſequence of the Acts which they ſpeed obliges them to great ſecrecy.*
6. *Other duties of Notaries.*

I.

NOtaries are Officers eſtabliſhed, to give to Acts which are ſped in their preſence the character of the publick form, and of the Authority of Juſtice, which makes that thoſe Acts carry along with them the proof of their truth; for whereas private Acts which are ſigned only by the parties themſelves, are liable to be called in queſtion, until

1. *Definition of Notaries.*

til they be verified, and proof made that they have been ſigned by the perſons whoſe names they bear; and altho' the truth of the ſaid private Acts ſhould be confeſſed or proved, yet they do not give a Right of Mortgage on the Eſtates of thoſe who bind themſelves; whereas the ſame Acts ſped before Notaries, whether there be only one Notary with Witneſſes, or that there be two Notaries without Witneſſes, according to the different Uſages of places, are Authentick, and have this effect, that their truth is proved by the Signature of the Notaries, and that they give a Right of Mortgage. Thus the Function of Notaries implies a kind of Authority, and voluntary Juriſdiction, which they have by vertue of the Title of their Offices for theſe two effects.

II.

2. Different ſorts of Functions of Notaries.

Seeing it is neceſſary in an infinite number of divers Acts, that they ſhould be Authentick, and that they ſhould have this character of the publick Form for either of the effects mentioned in the preceding Article, the Functions of Notaries extend to all ſorts of Acts, where this formality may be neceſſary, ſuch as Contracts of Marriage, Teſtaments, Deeds of Gift, Partnerſhips, Sales, Exchanges, Contracts of hiring and letting to hire, Leaſes, Tranſactions, Compromiſes, Obligations, Proxies, or Letters of Attorney, Aſſignments, Delegations, Acquittances, Tenders of Money for a Payment that is refuſed, or for a Power of Redemption, and all other Acts. Notaries may alſo make Inventaries of the Goods of Succeſſions, where the Heirs are Minors, or where the Heirs are deſirous to enjoy the benefit of an Inventary, or in the caſes of Succeſſions that are abandoned, of the Effects belonging to Bankrupts, or others, according as they may be called to the ſaid Functions by the Parties concerned, or may be appointed to do it by an Order of the Judge, as ſometimes Regiſters are; for this Function is a part of the Miniſtry of Juſtice, and the Judges themſelves do often exerciſe it.

III.

3. They ought not to go beyond the bounds of their Function.

These different Functions of Notaries, and whatever elſe may belong to their Office, oblige them in the firſt place to have a capacity for exerciſing them, and to know how to diſtinguiſh in the Acts, where there may be occaſion for their Miniſtry, between thoſe whereof the forms are ſufficiently known to them, and thoſe which are of ſuch conſequence as to demand more ſkill and learning than is requiſite in their Profeſſion, eſpecially in places where Notaries are leſs ſkilful, and in affairs where the difficulties require the advice of Advocates; for altho' it is the buſineſs of the Parties themſelves to take good advice, yet it is prudent for Notaries not to undertake a thing that is beyond their capacity, and at leaſt to acquaint the Parties of the difficulties which they are not able to underſtand, and which it is neceſſary to have adjuſted, as in Tranſactions and other Treaties.

IV.

4. They are obliged to keep with fidelity and diligence the original Minutes of Acts.

Seeing there are many Acts paſt before Notaries, of which the Originals, which are called Minutes, ought to be preſerved for ever, ſuch as Contract of Marriage, Deeds of Gift, Contracts of Sale, Teſtaments which Teſtators leave in their cuſtody, or which after their death are depoſited in the hands of a Notary, and divers other acts; it is the duty of Notaries to preſerve carefully, faithfully, and in good order all thoſe Original Minutes, and to grant Exemplifications of them to the Parties, and other perſons who ought to have them, or who have a right to demand them; and they ought to take for drawing up the Acts, and for delivering out authentick Copies of them, no more than what is due by Law.

V.

5. The conſequence of the Acts which they ſpeed obliges them to great ſecrecy.

The conſequence of keeping ſecret many Acts which are paſt before Notaries, makes it a duty incumbent on them to keep inviolably the ſecret, not only of what paſſes between the Parties before the Acts are ſigned, but alſo of the Acts themſelves after they are finiſhed; for if Notaries are bound to ſecrecy even in relation to Acts which in their own nature are ſuch, that the keeping of them ſecret is of no great importance, becauſe they owe this fidelity to the intention of the Parties, which they cannot violate without prevaricating: the want of this ſecrecy in Teſtaments, and other Acts of all kinds, would tend to diſturb the peace of Families,

milies, and would occaſion other great Inconveniencies, for which their infidelity or indiſcretion would make them anſwerable, both towards God and towards the Publick, according to the quality of the facts and the circumſtances.

VI.

6 *Other duties of Notaries.*

All the other duties of Notaries are reduced to the having ſuch an entire fidelity, and taking all poſſible care to avoid in the diſcharge of their Functions every thing that may be contrary to Juſtice and to Truth, ſo that not only they may commit on their part nothing againſt either of them, for that would be to violate in the higheſt degree their firſt and chief duty; but that they have no hand in any fraud, in any ſurprize, and that they even oppoſe all ſuch ways if the Parties ſhould offer to make uſe of them; and that in fine they make themſelves inſtruments of promoting Juſtice and Peace between the Parties, on which depends the quiet of Families, the ſecurity of their Eſtates, the validity of Engagements, the ties of Partnerſhips, and of all ſorts of Commerce of the greateſt moment, and that they mediate and negotiate affairs of the greateſt conſequence to all perſons, in a manner that is ſuitable to Functions that are ſo neceſſary and of ſo great importance; and they ought to proportion the profits or recompence which they may pretend, not to this great conſequence of their Miniſtry, but to that which Uſage, the Regulations of the places, and an upright integrity altogether void of intereſt will allow them to take, and moderating even the Fees which they may juſtly claim with reſpect to perſons who are not able to pay them according to their labour; and that in conſideration that they receive frequently Gratuities from other perſons far above what they could reaſonably expect for their labour.

TITLE VI.

Of ADVOCATES.

ALtho' Advocates are not of the number of Officers, as all thoſe are who exerciſe in the Order of the Adminiſtration of Juſtice the Functions which we have been ſpeaking of hitherto; yet ſeeing the deſign of this Book is to explain the Functions and Duties, not only of the Officers, but alſo of the other perſons who partake in the publick Functions; and that thoſe of Advocates reſpect the Publick, and are a part of the Order of the Adminiſtration of Juſtice; they are likewiſe a part of the ſubject matter of this Book: ſo that it is neceſſary to explain here what are the Functions of Advocates, and what are the duties which are conſequences thereof.

The profeſſion of Advocates, is to give counſel in Affairs that are propoſed to them, and to plead and write for the Parties who intruſt them with the management of their Cauſes, if they find them to be juſt. And ſeeing there are few perſons who do not ſome time or other ſtand in need of the aſſiſtance of thoſe Functions, that many are obliged to have frequent recourſe to them, and that often for Affairs which concern their Honour, their Eſtates, the ſtate and condition of their Perſons, the peace and quiet of their Families, and where their deareſt and moſt important intereſts are at ſtake, the conſequence of this Miniſtry of Advocates gives them in the Publick ſo conſiderable a Rank of Honour, that we know that at the time that the Commonwealth of *Rome* was in its moſt flouriſhing condition, the perſons who occupied the firſt Dignities in the State diſtinguiſhed themſelves likewiſe by the Function of defending in Courts of Juſtice the Cauſes of thoſe who made choice of them for their Patrons and Defenders, and whom they called their Clients; and they embraced that employment, that they might thereby have an occaſion to give proof on one hand of their Courage in Cauſes which engaged them to ſtand up in defence of Juſtice oppreſſed

oppreſſed by perſons in Power and Authority; and on the other hand to diſplay their Learning and their Eloquence; and by theſe two ways they endeavoured to acquire at the ſame time the univerſal eſteem of the whole Republick, and the love and affection of thoſe who had been their Clients. It was becauſe of this ſingular Honour annexed to a Profeſſion which had all theſe advantages, that it was exerciſed without any fee or reward, and that ſome Advocates having begun to take of their Clients, either preſents, or ſome other payments, one of the Tribunes of the people, *Cincius* by name, cauſed a Law to be made, which was called after his name the *Cincian* Law, by which this Commerce was prohibited; but in proceſs of time people began to think, that ſuch a Commerce was juſt and reaſonable; and it certainly is ſo according to the general reaſon, that every Service deſerves a Recompence, *either from the Publick, if the Functions* which are exerciſed regard the Publick, or from particular perſons, if the Services which are rendred be of ſuch a nature, as that they would be chargeable to thoſe who render them, when the perſons who receive them would reap a conſiderable profit thereby, without making a grateful return for them: and ſince it is juſt that the Miniſters of the Goſpel, who are bound to ſerve the Church without Covetouſneſs, and upon other views than that of their private intereſt, ſhould not be without a Subſiſtence, and that care *ſhould be taken to give it them*, altho' they ſhould be negligent in demanding it; it is likewiſe juſt that every lawful Profeſſion ſhould yield to him who exerciſes it a recompence ſuitable to his labour, and to the ſervice which he renders. So that altho' the Profeſſion of Advocates be not exerciſed now-a-days without a recompence, and that it hath not that dignity annexed to it which it had at *Rome*, when it was there exerciſed *gratis*, and by the chief perſons in the Republick; yet it has ſtill the eſſential characters of Honour annexed to Functions, which in their nature imply the uſe of the firſt qualities of the Mind, and of the other vertues of the Heart. For as to the Faculties of the Mind, it is requiſite that an Advocate ſhould have them in perfection, and that he ſhould join to a clear *Underſtanding* and a ſolid *Judgment* the Knowledge of the Sciences of his Profeſſion, and the Art of writing and ſpeaking well: And as for the Heart, he ought to have it upright, and to join to the uprightneſs of his intention a charitable diſpoſition to defend his Clients, and eſpecially the Poor, the Widows, the Orphans, and other perſons who groan under oppreſſion, and he ought to be armed with a Reſolution, a Courage, and a Zeal that may animate him againſt Injuſtice, and ſtir him up to defend Juſtice and Truth againſt all perſons whatſoever without diſtinction. It is by the help of theſe qualities that an Advocate may acquire an Honour far ſuperior to that which thoſe perſons acquired who exerciſed this Profeſſion at *Rome*, who had nothing elſe in view beſides their own glory, and whoſe merit was chiefly owing to their Ambition.

[a] *If we have ſown unto you ſpiritual things, is it a great thing if we ſhall reap your carnal things?* 1 *Cor.* IX. 11.

Do ye not know, that they which miniſter about holy things, live of the things of the temple? and they which wait at the altar, are partakers with the altar? Even ſo hath the Lord ordained, that thoſe which preach the goſpel, ſhould live of the goſpel. *Ibid.* ver. 13, 14.

It is becauſe of the nature of theſe Functions of Advocates, which are ſo frequent and ſo neceſſary to all perſons, and which are of ſo great conſequence, that it is reaſonable that every one ſhould chuſe an Advocate according to his mind, who may have the endowments which he deſires; and the importance of this Profeſſion makes it neceſſary that there ſhould be Advocates of a great capacity, and of a long experience, and who may be endowed with ſingular talents for Cauſes of the greateſt moment, eſpecially in the ſupreme Courts of Judicature, which afford frequent occaſions of ſpeaking in publick of other matters beſides Law, where their Miniſtry is neceſſary, and where they ought to diſplay the ornaments of Learning and Eloquence. Thus it was juſt to leave all perſons at liberty to engage in a Profeſſion of this nature, according as they find that they have talents for ſucceeding in it, and in which thoſe who are inferior to others in riches and wealth, may ſtrive to outdo them by an improvement of their natural parts; which makes it reaſonable that the Profeſſion of Advocates ſhould be open to all perſons who have the neceſſary qualifications for being admitted into it, and not confined

to any particular ſet of Officers, who ſhould have the ſole right of exerciſing the Functions thereof, excluſive of others. Thus in *France*, for exerciſing the Functions of an Advocate, the only qualification that is required, is that of having the Degrees of Batchelor and Licentiate in the Faculties of the Canon and Civil Law in ſome Univerſity, and of taking an Oath in a proper Court of Juſtice to execute faithfully and diligently the Functions of his Profeſſion.

It is upon theſe grounds of the Nature of the Miniſtry of Advocates, that we muſt judge of the detail of their Functions, and of their ſeveral Duties: which ſhall be the ſubject matter of two Sections; one relating to their Functions, and the other concerning their Duties.

SECT. I.

Of the Functions of Advocates.

The CONTENTS.

1. *The firſt Function of Advocates.*
2. *The ſecond Function of Advocates, to undertake the defence of Cauſes, if they find them to be juſt.*
3. *The third Function of Advocates, to draw up the Writings.*
4. *Particular Functions of Advocates in certain Courts.*
5. *Affinity between the Functions of Advocates and Proctors.*

I.

1 *The firſt Function of Advocates.*

THE firſt Function of Advocates, is to give their advice concerning affairs, about which they are conſulted; ſuch as to know if he who aſks counſel ought to undertake a Law-Suit; if he ought to ſubmit to a demand that is made to him, or if he ought to defend himſelf againſt it; if he ought to appeal from a Sentence, or acquieſce in it; if he ought to preſent a Requeſt or Petition againſt a Decree, or comply with it; how he ought to regulate the diſpoſitions of his Teſtament, the conditions of a Marriage Settlement, of an Agreement; and how he ought to carry himſelf in other difficulties of the like nature, in affairs of all kinds[a].

[a] *The conſequence and dignity of this Function was formerly ſo great that it was exerciſed by perſons of the higheſt Rank in the Commonwealth of* Rome, *at the time that it was in its greateſt ſplendor; and even at this day it procures a very great Honour to all thoſe who exerciſe it purſuant to the Rules which ſhall be explained.*

II.

2. *The ſecond Function of Advocates, to undertake the defence of Cauſes, if they find them to be juſt.*

The ſecond Function of Advocates, is to undertake the defence of Cauſes that are put into their hands, if they find them to be juſt, in order to plead them in the Courts where they exerciſe their Profeſſion, whether it be the merits of the Cauſe it ſelf, if it is ripe for Sentence, or the Incidents which may deſerve to be argued by Council[b].

[b] Qui laborantium ſpem, vitam, & poſteros defenduut. *l.* 14. C *de advoc diver. judicior.*

This duty of Advocates to undertake the defence of Cauſes which they find to be juſt, implies that of abandoning them, if afterwards they ſhould happen to diſcover any injuſtice in them.

The Miniſtry of Advocates implies two different Functions, which are the foundations both of the dignity of their Profeſſion, and of the Rules of their duties, that of the Counſel or Advice which they ought to give to the Parties who conſult them, and that of the defence of the Cauſes which they have adviſed to be undertaken. In giving Counſel or Advice, they perform the Function of Judges towards their Clients; and in the defence of Cauſes they repreſent their Clients before the Judges. As Judges, and the firſt Judges which their Clients have, they are bound to declare unto them Juſtice and Truth, as pronouncing to them the Judgment of God himſelf; and as their Defenders, they ought to repreſent their Clients diveſted of all their paſſions, and to defend them before the Judges as in the preſence of God. So that Advocates are as it were the Mediators of Truth and Juſtice between the Judges and their Clients; for they are the diſpenſers of Truth and Juſtice in reſpect of the Clients, and they are the defenders thereof with regard to the Judges. It is this dignity of their Miniſtry which gives them this advantage, that as the Holy Scripture hath given the name of God to thoſe to whom God commits this Authority, by making them Judges of other Men, ſo it has given the name of Advocate to him who has been made choice of to be both the Mediator towards God, and the Judge of all Men.

III.

3. *The third Function of Advocates, to draw up the Writings.*

The third Function of Advocates, is to draw up the Writings that are neceſſary for carrying on the Cauſe, in order to eſtabliſh the pretenſions of their Clients, whether it be by Arguments deduced from the Law, or proofs of Facts, ariſing from Deeds, or the examination of Witneſſes, or otherwiſe, and to confute the contrary pretenſions of the adverſe Party by the ſame ways, and in general, to draw up all the ſeveral Writings, Demands, Defences, Replications,

plications, to prepare Arguments on points of Law, and others, which may require the aſſiſtance of their Miniſtry [c].

[c] *By the Ordinance of* Charles V *in* 1364, *art.* 3. *of* Charles VII. *in* 1446. *art.* 24. *and* 37 *and by that of* Charles VIII *in* 1490. *art.* 92. *they are required to draw their Writings in as concise a manner as is possible.*

IV.

4 Particular Functions of Advocates in certain Courts.

There are other Functions of Advocates, which are peculiar to ſome Courts of Juſtice, and not common to all. Thus in *France*, in ſome Courts it is the buſineſs of an Advocate to pray that Letters Patents or Commiſſions for the principal Offices in the State be there regiſtred, and to make an Harangue on that occaſion. Thus in the Royal Courts, where there is not a ſufficient number of Judges, to try Offenders, who are to be there tried without Appeal, by the Provoſts of the Mareſchals of *France*, the Ordinances direct Advocates to be taken, to ſupply the number of the Judges [d]. Thus in the ſame Courts, and other inferior Courts, the ſenior Advocate, in the abſence of the Judges, ſits upon the Bench, and performs the other Functions of a Judge, as the ſame is likewiſe directed by the Ordinances [e]. Thus in the Juriſdictions of ſome Seneſchals, and in ſome Preſidial Courts, the Advocates exerciſe the Profeſſion of Proctors, and perform the Functions both of an Advocate and of a Proctor [f].

[d] *See the Ordinances of the* 20th *of* March, 1533. *of the* 5th *of* February, 1549. *art.* 2. *and others*

[e] *See the Ordinances of the* 11th *of* April, 1519. *art.* 2. *and of* December, 1540. *art.* 15. *in defaults of Advocates, the ſenior Proctor exerciſes the Function of Advocate in the ſmall Juriſdictions.*

[f] *The Uſage of the Towns where the Advocates do the buſineſs of Proctors, is approved of by the* 58th *Article of the Ordinance of* Orleans, *which permits Advocates to exerciſe the Function both of Advocate and Proctor.*

V.

5. Affinity between the Functions of Advocates and Proctors.

All the Functions of Advocates in the Miniſtry of Juſtice, and which are exerciſed for the ſupport and defence of the intereſts of their Clients, have this in common with the Functions of Proctors, that they repreſent their Clients diveſted of their paſſions. Thus it is eſſential to thoſe Functions, that they be exerciſed only in the defence of Juſtice, and that they defend it only by ways that are worthy of it: which obliges Advocates to the duties which ſhall be explained in the following Section [d].

[d] *See the following Section.*

SECT. II.

Of the Duties of Advocates.

The CONTENTS.

1. *Firſt duty of Advocates.*
2. *Advocates who are named Arbitrators, ought to have the capacity of Judges.*
3. *They ought to defend their Cauſes by the force of Truth and Juſtice, and not by falſhood, tranſports of paſſion, injurious words,* &c.
4. *They are prohibited to maintain or defend unjuſt Cauſes*
5. *They ought not to exerciſe their Functions out of a motive of Gain.*

I.

THE firſt duty of Advocates, is to render themſelves capable of their Profeſſion [a], not in ſuch a manner as that they ſhould be obliged before they enter upon the exerciſe of their Profeſſion to be capable of all the Functions of it, of pleading all ſorts of Cauſes, and of giving counſel and advice; but they ought not to undertake any Function, unleſs they have a capacity for it, nor engage themſelves any farther than in proportion to the Experience which they have acquired; for there is this difference between the capacity of Advocates, and that which is neceſſary to Judges, that Advocates engage themſelves voluntarily in their Functions, according as they are willing to embrace the occaſions thereof; but Judges cannot enter upon the exerciſe of their Office, until they have firſt acquired a capacity for it; ſo that they ought from the very firſt beginning, to have a degree of capacity anſwerable to their Miniſtry.

1 *Inſtit. of Al* [illegible]

[a] *It is for this Reaſon that the Kings of* France *have made Ordinances, which prohibit thoſe to exerciſe the Function of an Advocate, who have not taken the proper Degrees, which are a Proof of their capacity for the ſaid Profeſſion.*

See

See the Ordinance of Francis I. *in* 1535. *art.* 1 [*In* England, *no person is admitted to practice as an Advocate in the Court of Arches, and other supreme Courts of Ecclesiastical Jurisdiction, or in the High Court of Admiralty, until they have regularly taken the Degree of Doctor of the Civil and Canon Law in one of the Universities.*]

II.

2. *Advocates who are* [illegible] *ought to have the capacity of Judges.*

In the cases where Advocates are called to exercise the Functions of Judges, as has been said in the fourth Article of the preceding Section, they are obliged to the same duties of capacity, integrity, and application, as Judges are, according as has been explained in the fourth Title[b].

[b] *See the fourth Article of the preceding Section.*

III.

3. *They ought to defend their Causes by the Rules of Justice and Truth, and not by false Allegations, or any part of passion immodest words, &c.*

As Advocates are to represent their Clients without their passions[c], so they ought to imploy in the defence of the most just Causes, nothing else but Justice and Truth, and to abstain not only from advancing untruths in matters of fact, from all disingenuity, from all manner of surprize in their reasonings, and from all other unfair practices, but likewise from giving ill language, from transports of passion, and from every thing which may be inconsistent not only with Justice, but even with the decorum and respect that is due to the Seat of Judgment[d].

[c] *See the last Article of the foregoing Section.*

[d] Ante omnia autem universi advocati ita præbeant patrocinia jurgantibus, ut non ultra, quàm litium poscit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant. Agant, quod causa desiderat, temperent se ab injuria. Non si quis adeò procax fuerit, ut non ratione, sed probris putet esse certandum: opinionis suæ imminutionem patietur. Nec enim connivendum commodanda est ut quisquam, negotio derelicto, in adversarii (sui,) contumeliam aut palam pergat aut subdole. Præterea nullum cum eo litigatore contractum, quem in propriam recipit fidem, ineat advocatus: nullam conferat pactionem. *l.* 6. §. 1 & 2. *C. de postul.*

The Ordinances of France *contain the same prohibitions both to Advocates and Proctors, upon pain of suspension from their Office, and of a Fine at discretion.* See the Ordinance of *Charles* VII. in *April*, 1453. art. 54.

IV.

4. *They are prohibited to maintain or defend unjust Causes.*

If it is not lawful for Advocates to defend Justice by any unfair means, much less is it lawful for them to maintain or defend unjust Causes; and those who transgress this duty render themselves accomplices of the injustice of their Clients, and guilty of perjury by breach of their Oath; for by their Oath they swear to observe the Ordinances, and they prohibit them to maintain or defend bad Causes, enforcing the said prohibition under the penalty of making good to the Parties all their Costs and Damages[e].

[e] *See the fifty eighth Article of the Ordinance of* Orleans

It would be very strange if Advocates should be allowed to defend a Cause that is manifestly unjust, for it would be to erect the Tribunals of Justice into Sanctuaries for Robbers.

☞ *By the* Roman *Law this Oath was reiterated in every Cause, where the Advocates after Contestat or of Suit were obliged to swear upon the Holy Gospels, that they would defend with all their force what they should judge to be true and just; and that they would abandon the defence of the Cause which they should find at first to be unjust, or of which they should afterwards discover the Injustice.*

Patroni autem causarum, qui utrique parti suum præstantes auxilium ingrediuntur, cùm lis fuerit contestata, post narrationem propositam, & contradictionem objectam, in qualicumque judicio majore, vel minore, vel apud arbitros, sive ex compromisso, sive aliter datos, vel electos, sacro-sanctis Evangeliis tactis juramentum præstent, quod omni quidem virtute suâ, omnique ope, quod verum & justum existimaverint, clientibus suis inferre procurabunt, nihil studii relinquentes, quod sibi possibile est: non autem creditâ sibi causâ cognitâ, quòd improba sit, vel penitus desperata, & ex mendacibus allegationibus composita, ipsi scientes prudentesque malâ conscientiâ liti patrocinabuntur, sed & si certamine procedente aliquid tale sibi cognitum fuerit, à causa recedent, ab hujusmodi communione sese penitùs separantes. *l.* 14. §. 1. *C. de judic.*

This Oath was not only taken by Advocates; but all sorts of Judges, and even Arbitrators, were likewise obliged to take it.

Sancimus omnes judices, sive majores, sive minores, qui in administrationibus positi sunt, vel in hac regia civitate, vel in orbe terrarum, qui nostris gubernaculis regitur, sive eos quibus nos audientiam committimus, vel qui à majoribus judicibus dantur, vel qui ex jurisdictione sua judicandi habent facultatem,

cultatem, vel qui ex recepto, id eſt compromiſſo (quòd judicium imitatur) cauſas dirimendas ſuſcipiunt, vel qui arbitrium peragunt, vel ex authoritate ſententiarum & partium conſenſu electi ſunt, & generaliter omnes omninò judices Romani juris diſceptatores, non aliter litium primordium accipere, niſi priùs ante ſedem judicialem ſacro-ſanctæ deponantur ſcripturæ, & hæ permaneant non ſolùm in principio litis, ſed etiam in omnibus cognitionibus uſque ad ipſum terminum, & definitivæ ſententiæ recitationem; ſic enim attendentes ad ſacro-ſanctas ſcripturas, & Dei præſentia conſecrati, ex majore præſidio lites diriment, ſcituri, quòd non magis alios judicant, quam ipſi judicantur: cùm etiam ipſis magis, quàm partibus, terribile judicium eſt. Siquidem litigatores ſub hominibus, ipſi autem Deo inſpectore adhibito cauſas proferunt tractandas. Et hoc quidem jusjurandum judiciale omnibus notum ſit, & Romanis legibus optimum à nobis accedat incrementum, & ab omnibus judicibus obſervandum: &, ſi præterea tur, contemptoribus periculoſum ſit. *l.* 14. *C. de judic.*

V.

They ought not to exerciſe their Functions out of a motive of gain.

The Honour of the Profeſſion of Advocates engages them not only to maintain and defend Juſtice and Truth [f], and to make uſe of no unfair practices in the exerciſe of their Miniſtry; but the ſaid Honour demands moreover, that they ſhould embrace their Functions upon other views than that of gain [g], and that not only they ſhould abſtain from all manner of prevarication [h], from purchaſing the Rights of their Clients, or bargaining with them for a ſhare of what they ſhall recover [i], from protracting the Law-ſuits [l], from giving counſel to both Parties [m], from acting as Judges in Cauſes wherein they have been concerned as Advocates [n], and from all other ſort of miſdemeanour; but they ought alſo to abſtain from all manner of covetouſneſs, and from the ſordidneſs of being too difficult to be pleaſed in their Fees: but they ought to reſt ſatisfied with a moderate recompence according to their labour, and in proportion to the nature of the Affairs, the condition of the Clients, and their circumſtances [o], abſtaining in their Writings from all things that are uſeleſs and ſuperfluous [p]; and they ought to ſerve the poor *gratis*, as they are enjoined to do by the Ordinances [q], which oblige the Judges to aſſign Council to thoſe perſons who by reaſon of their poverty, or the credit and intereſt of their Adverſaries, would be able to find none [r]; and it is on ſuch occaſions as theſe, in the Cauſes of poor and mean perſons, of Widows, of Orphans, and of thoſe who ſuffer any oppreſſion by the power and authority of their adverſaries, that Advocates ought to ſignalize themſelves in the exerciſe of their Functions by a generous defence of Truth and Juſtice againſt perſons of the greateſt power and intereſt [s].

[f] Juramentum præſtent, quod omni quidem virtute ſuâ, omnique ope, quod verum & juſtum exiſtimaverint, clientibus ſuis inferre procurabunt. *l.* 14 § 1 *C. de judic.*

[g] Apud urbem autem Romanam etiam honoratis qui hoc officium putaverint eligendum, eo uſque liceat orare, quouſque maluerint, videlicet ut non ad turpe compendium ſtipemque detorrem hæc arripiatur occaſio, ſed laudis per eam augmenta quærantur. Nam ſi lucro pecuniaque capiantur, velut abjecti atque degeneres, inter viliſſimos numerabuntur. *l.* 6 §. 5. *C de poſtul.*

[h] Si patronum cauſæ prævaricatum putas, & impleveris accuſationem, non deerit adverſus eum pro temeritate commiſſi ſententia. atque ita de principali cauſa denuò quæratur. Quòd ſi non docueris prævaricatum, & calumnia notaberis, & rebus judicatis, à quibus non eſt provocatum ſtabitur. *l.* 1. *C. de Advocat. diverſ judicior.*

[i] Litis cauſa malo more pecuniam tibi promiſſam ipſe quoque profiteris, ſed hoc ita jus eſt ſi ſuſpenſa lite ſocietatem futuri emolumenti cautio pollicetur. *l.* 1. §. 12. *ff. de extraord. cognit.*

Si qui advocatorum exiſtimationi ſuæ immenſa atque illicita compendia prætuliſſe ſub nomine honorariorum ex ipſis negotiis quæ tuenda ſuſceperint, emolumenta ſibi certæ partis cum gravi damno litigatoris & deprædatione poſcentes fuerint inventi, placuit ut omnes qui in hujuſmodi ſævitate permanſerint ab hac profeſſione penitùs arceantur. *l.* 5. *C. de poſtul.*

[l] Nemo ex induſtria protrahat jurgium. *l.* 6. §. 4. *C. de poſtul.*

[m] *See the Ordinance of* Octob. *in* 1533. *Chap.* 4. *Art.* 35.

[n] Quiſquis vult eſſe cauſidicus, non idem, in eodem negotio ſit advocatus & judex: quoniam aliquem inter arbitros & patronos oportet eſſe delectum. *l.* 6. *C. de poſtul.*

See the Ordinance of October 1535. *Chap.* 4. *Art.* 16.

This Rule, which forbids Advocates to act as Judges in Cauſes wherein they have appeared as Advocates, is to be underſtood only of ſuch Cauſes where thoſe who have been Advocates in them are appointed Judges by the Judges themſelves, and not of thoſe Cauſes where the Parties agree to take their Advocates for their Judges and Arbitrators, as ſhall be ſhewn in the following Title.

[o] Nemo ex his, quos licebit accipere, vel debebit, aſpernanter habeat, quod ſibi ſemel officii gratia

ria libero arbitrio obtulerit litigator *l. 6. § 3 C. de poſtul.*

Nam ſi lucro pecuniâque capiantur, velut abjecti atque degeneres, inter viliſſimos numerabuntur. *l. l. §. 5. in f.*

See the Ordinance of April *in* 1453 *Art.* 45.

[p] *V. Baſilic. l. 2. t. 33. art. 3.*

See the Ordinances of King John *in* 1363; *of the twenty eighth of* October 1446, *Art* 37, *of* April 1453, *Art.* 53; *of* October 1535, *Chap.* 4. *Art* 4. *and the following Articles, and ſeveral other Ordinances.*

[q] *See the Ordinance of* Charles V. *of* 1364, *Article the ſeventh.*

[r] Obſervare itaque eum oportet, ut ſit ordo aliquis poſtulationum, ſcilicet ut omnium deſideria audiantur, ne fortè, dum honori poſtulantium datur, vel improbitati cedtur, mediocres deſideria ſua non proferant: qui aut omnino non adhibuerunt, aut minus frequentes, neque in aliqua dignitate poſitos advocatos ſibi proſpexerunt Advocatos quoque petentibus debebit indulgere (*proconſul*) plerumque fœminis, vel pupillis, vel alus debilibus, vel his qui ſuæ mentis non ſunt, ſi quis eis petat vel ſi nemo ſit, qui petat, ultrò eis dare debebit. Sed, ſi qui per potentiam adverſarii non invenire ſe advocatum dicat, æque oportebit ei advocatum dare. Cæterùm opprimi aliquem per adverſarii ſui potentiam non oportet; hoc enim etiam ad invidiam ejus, qui provinciæ præeſt, ſpectat, ſi quis tam impotenter ſe gerat, ut omnes metuant adverſus eum advocationem ſuſcipere. *l 9 §. 4 & 5. ff de off. Proc. & leg.*

See the Ordinance of the thirtieth of Auguſt 1536, *Chap.* 1. *Art.* 38.

[s] Advocati qui dirimunt ambigua fata cauſarum, ſuæque defenſionis viribus in rebus ſæpè publicis ac privatis lapſa erigunt, fatigata reparant, non minus provideant humano generi, quam ſi prælus atque vulneribus patriam parentesque ſalvarent. *l 14 C de advocat. diver. judic laborantium ſpem & poſteros defendent. d l in f.*

It was becauſe of this Honour which attends the Functions of Advocates, that their Functions are preferred in one of the Roman *Laws to that of judging Cauſes, for the Miniſtry of Advocates demands, not only the capacity and integrity which are neceſſary to Judges, but likewiſe a much larger extent of Learning, together with the gift and art of ſpeaking in public, and of joining the Ornaments of a ſolid Eloquence to the force of Reaſon, and a Knowledge of the Laws, and becauſe at the time of enacting the ſaid Law, thoſe who judged Cauſes were not always the Magiſtrates themſelves, but perſons whom they made choice of to judge by themſelves, or whom they called to aſſiſt them with their counſel and advice, and that the Function of Advocates might be exerciſed by perſons of a more conſiderable Rank than that of thoſe Judges; the quality of Advocate was more conſiderable than that of the ſaid Judges, who might, without derogating from their Honour, quit the Function of a Judge, to put themſelves in the Rank of Advocates.* Quiſquis igitur ex his quos agere permiſimus vult eſſe cauſidicus, tam ſolum quam ſumet tempore agendi, ſibi ſciat eſſe perſonam quousque cauſidicus eſt. Nec putet quiſquam honori ſuo aliquid eſſe detractum, cùm ipſe neceſſitatem elegerit ſtandi, & contempſerit jus ſedendi. *l. 2. §. ult. C. de po[illegible]*

It may be remarked here on all that has been ſaid in this Title concerning the duties of Advocates, that there are three ſorts of Cauſes in which they are imployed, one ſort is, of thoſe that are notoriouſly unjuſt; others are manifeſtly juſt; and there is a third ſort that are doubtful

As for the Cauſes which are notoriouſly unjuſt, whether they be contrary to the Law of Nature, or againſt the Poſitive Law, it is never lawful to defend them, in the ſame manner as it is never lawful to ſteal, nor to defend an unjuſt act. And if the Parties themſelves cannot carry on theſe ſorts of Cauſes without abandoning the Rules of their Conſcience, and committing a moſt enormous crime, which is odious in the eye of Man, and ſtill more abominable before God, becauſe they uſe his Authority to make it ſerve as an inſtrument of their Injuſtice; the Advocates who defend and maintain thoſe Cauſes, are ſo much the more guilty and criminal, in that they make themſelves accomplices in the malice of their Clients, and prevaricate in the exerciſe of their Function, and in the moſt eſſential duty belonging to it, which is that of diſſuading their Clients from proſecuting Cauſes that are unjuſt. But thoſe who undertake the defence of ſuch Cauſes againſt poor and indigent perſons, make themſelves acceſſaries to a Crime, the enormity of which can hardly be well expreſſed. The Holy Scripture compares the offering of him who offers to God the goods of the poor as an Alms or Sacrifice, to the Oblation which one would make to a Father by ſacrificing his Son before his eyes [a]. *By what words therefore could it deſcribe the action of thoſe who preſent themſelves before the Tribunal, not of the Mercy, but of the Juſtice of God, not to offer to him the Goods of other people, and to diveſt themſelves of them, but to wreſt them out of the Poſſeſſion of the right Owners, and to appropriate them to themſelves, and who have the boldneſs to invocate the Judges to be Executors of this Injuſtice.*

[a] Whoſo bringeth an offering of the goods of the poor, doth as one that killeth the ſon before his father's eyes. *Eccleſiaſticus* xxxiv. 20.

As for Cauſes that are juſt and equitable, the only Rule is to defend them by no other ways than what are juſt, without lying, and without trick; for if Actions that are juſt of themſelves, become unjuſt when they are not performed with the circumſtances of Juſtice, according to the ſaying of the Wiſe man [b], *much more ought the actions of Juſtice it ſelf to be accompanied with Truth and with Juſtice;*

and if all men owe to one another, in all their actions, truth and godly sincerity, according to the expression of St. Paul, *they owe it infinitely more to God himself, and in his Tribunal, which is the Seat of Justice*[c].

[b] For they that keep holiness holily, shall be judged holy. *Wisd of Sol.* vi 10.

[c] For our rejoicing is this, the testimony of our conscience, that in simplicity and godly sincerity, not with fleshly wisdom, but by the grace of God, we have had our conversation in the world, and more abundantly to youwards. 2 *Cor* 1. 12.

As for Causes that are doubtful, the chief Rule whereby Advocates are to govern themselves therein is not to take those Causes for doubtful, which may be rendred such by covering Injustice with the appearances of Justice; but to take sincerely all those for doubtful whose Decisions are uncertain, whether it be on account of the circumstances of the facts, or by reason of the obscurity of the Law, or because of other considerations, which makes Justice doubtful in such sorts of Causes; and Advocates ought to determine themselves therein according to their own Knowledge and Conscience, and they ought neither to engage in them, nor to defend them in any other manner, nor by any other means than such as are lawful in the defence of Causes that are just.

All these Rules of the duties of Advocates may be reduced to two Maxims; one, never to defend a Cause that is unjust; and the other, not to defend just Causes but by the ways of Justice and Truth; and these two Maxims are so essential to the duties of Advocates, and so indispensibly necessary, that altho' they seem to be rather Maxims of Religion, they are however in proper terms expressed in the Laws of the Code *and* Digest.

TITLE VII.

Of ARBITRATORS.

ALL the matters which have been treated of hitherto, are in their nature so much a part of the Publick Law, that there is not any one of them that does belong to the Private Law, and which has come under our consideration in the Book of the Civil Law in its Natural Order; but the subject of this Title is of such a nature, that it has relation to both: so that it contains some Rules which are a part of the Private Law, and others which belong to the Publick Law; which proceeds from the nature of Arbitrations, and from the quality of the power which Arbitrators have to judge of differences of which they are chosen Judges. For it is necessary to consider two things in Arbitrations: the first, is the Agreement of the Parties, which is called a Compromise, by which those who are desirous to make an end of a Law-suit depending between them, or to prevent their going to Law, give power to certain persons whom they make choice of to examine their pretensions, and to decide them, and oblige themselves to perform whatever shall be awarded by those whom they take for Judges: and the second is, the Function of the Arbitrators chosen by the Parties, and the duties which are consequences thereof. What relates to the Agreement of the Parties, is a matter that belongs properly to the Private Law, and it has been discussed in the first Tome of the Civil Law in its Natural Order, together with the other sorts of Covenants, and under the the Title of *Compromises:* and what concerns the Function and Duties of the Arbitrators is a matter of the Publick Law, seeing it is a kind of Administration of Justice. Thus, altho' we have already explained under the Title of *Compromises* the quality of the Power which Arbitrators have to judge by the effect of the consent of the Parties, yet we have not there explained the Rules of their Functions and Duties; and what has been said in that Title of

Compromiſes touching the Power of Arbitrators, relates only to the effect which the Compromiſe ought to have, in order to give to the ſaid Power the extent, or the limits which the Parties intend it ſhould have. Thus we ſhall explain in this Title that which concerns the Functions and Duties of Arbitrators with reſpect to the Function of adminiſtring Juſtice, which belongs to the matters of the Publick Law, and which we ſhall make the ſubject of two Sections; one, of the Functions of Arbitrators, and their Power; and the other, of their Duties.

SECT. I.

Of the Functions of Arbitrators, and their Power.

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I.

1. *Arbitrators have the ſame power as Judges, altho' they are not Judges, by a Title which gives them that quality.*

ALtho' Arbitrators are not Judges by vertue of a Title which gives them abſolutely that quality, and that they are Judges only of the Parties who have named them, to determine that which is referred to their Judgment by the Compromiſe, yet they exerciſe the ſame Functions as Judges would do if the Parties were pleading in Judgment. Thus, Arbitrators may direct the proceedings in the Cauſes which they are to judge, may give Interlocutory Sentences, may grant Delays, may examine Witneſſes, and after a full information may pronounce a Definitive Sentence, which may put an end to the differences, whereof they were choſen Judges [a].

[a] Compromiſſum ad ſimilitudinem judiciorum redigitur, & ad finiendas lites pertinet. *l. 1. ff. de recept.*

Tametſi neminem prætor cogat arbitrium recipere, (quoniam hæc res libera & ſoluta eſt & extra neceſſitatem juriſdictionis poſita) attamen ubi ſemel quis in ſe receperit arbitrium, ad curam, & ſollicitudinem ſuam hanc rem pertinere prætor putat: non tantum quod ſtuderet lites finiri verum quoniam non deberent decipi, qui eum quaſi virum bonum diſceptatorem inter ſe elegerunt. Finge enim, poſt cauſam jam ſemel, atque iterum tractatam, poſt nudata utriuſque intima, & ſecreta negotii aperta, arbitrum vel gratiæ dantem, vel ſordibus corruptum vel alia qua ex cauſa nolle ſententiam dicere. quiſquam poteſt negare, aquiſſimum fore prætorem interponere debuiſſe, ut officium quod in ſe receptum impleret. *l. 3. § 1. ff. de recep. l. 14. §. 1. C. de judic.*

II.

2. *The Function of Arbitrators determines by their definitive Sentence.*

After the Arbitrators have pronounced a Definitive Sentence, their Functions are at an end, and they have not ſo much as the power to put it in execution, even although there ſhould lie no Appeal from their Sentence; but the Party who intends to ſue for the effect of the Sentence, ought to apply himſelf to the Judges in Ordinary, that he may obtain their Order againſt him who refuſes to execute it, to oblige him either to acquieſce in the Award, or to pay the Penalty ſtipulated by the Compromiſe [b].

[b] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ perſecutionem. *l. 2. ff. de recept.*

According to the uſage in France, *he who deſires to have the Award put in execution, applies to have it ratified, that is, confirmed by the Judge in Ordinary, and if there lies an Appeal from the Award, the ſame is determined in the manner as ſhall be explained in the eighth Article.*

III.

3. *Arbitrators being Mediators, are not obliged to judge according to the rigour of the Law.*

Seeing Arbitrators are choſen, in order to accommodate as much as to judge the affairs that are put into their hands, and that for this reaſon they are as it were Mediators, to whom the Ordinances of *France* give the names of *Arbiters*, Arbitrators and amicable Compounders, their Functions are not reſtrained to the ſame ſeverity, nor to the ſame exactneſs as that of Judges: but

but whereas Judges ought to regulate their Sentences according to the Rights of the Parties, without any other mitigation than what the Laws allow of, according to the quality of the Affairs, and according as the facts and circumstances may require, pursuant to the Rules which have been explained in their proper place; the very nature of Compromises pointing out to the Arbitrators that each Party is willing to abate something of what they might hope for in Justice, and for the love of peace to forego a part of their interests, this disposition of persons, who instead of the Ordinary Judges make choice of Arbitrators, impowers those whom they chuse to prefer the considerations of peace and quiet to the rigour of Justice, which might leave still occasions of strife and contention. Thus we see sometimes that in doubtful cases, where the Judges are obliged to decide in favour of one or other of the Parties without any medium, Arbitrators make use of expedients and temperaments, such as the Parties themselves would do, if instead of a Sentence they should take the way of terminating their differences by an amicable Agreement [c].

[c] *See the Ordinance of* June 1510, *Art.* 34.

IV.

4 *The Ordinances of* France *oblige the parties to refer some affairs to Arbitration.*

The motive of preserving peace between the Parties being more especially favourable in the case of near Relations, and in Family Affairs, the Ordinances in *France* oblige those who have differences touching the Partitions of Inheritances among near Relations, Accompts of Guardianships and other Administrations, the Restitution of a Marriage Portion, and of a Dower, to refer the same to Arbitrators; and they ordain that in case any of the parties refuse to name Arbitrators on their part, the Judge shall name them. And the Ordinances do likewise direct, that all differences among Merchants in relation to their Trade, and among Partners in relation to their Partnership, be determined by Arbitrators: which gives unto the Arbitrators who are named for all these sorts of differences, a right to terminate them with all possible diligence, in order to avoid the delays of Judicial Proceedings; and also a right to qualify the Awards which they give on Affairs of that kind with such temperaments of Equity, as they shall find that the facts and circumstances may deserve [d].

[d] *See the Ordinance of* August 1560, *Art.* 2, 3, *and* 4, *and that of* Moulins, *Art.* 83, *and of* 1673, *Chap of Partnerships, Art* 9, *and the following Articles.*

[*Although in* England *there is no particular obligation laid on parties to refer their differences to Arbitration, as the custom is in* France *in some cases; yet our Statutes recommend References to the Subject, and more particularly to Merchants and Traders, as an useful Expedient to end their differences with the greater ease and expedition. And in order to give the greater force and efficacy to the Awards of Arbitrators, the parties are allowed to agree among themselves that their Submission of the Suit to the Award or Umpirage of any person or persons, may be made a Rule of any of his Majesty's Courts of Record, that the Parties may be thereby finally concluded.* Stat 9 & 10 Gul III. cap. 15. *entitled*, An Act for determining differences by Arbitration.]

V.

5 *The power of the Arbitrator extends only to the affairs mentioned in the Compromise.*

The power of the Arbitrators is regulated by the Compromise, as to what concerns the differences which they are to determine, and whatever they may decree beyond that, in relation to matters which are not comprehended in the Compromise [e], will be without effect: and as to the differences of which the Compromise makes them Judges, they have power to exercise therein the Functions which have been just now explained, and what else may be regulated by the Compromise.

[e] De officio Arbitri tractantibus sciendum est omnem tractatum ex ipso compromisso sumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere possit, cautum est, non ergo quodlibet statuere arbiter poterit, nec in re qualibet, nisi de qua re compromissum est. *l.* 32. §. 15. *ff. de recept.*

☞ *There are two sorts of causes which make it impracticable for certain Affairs to be referred to Arbitration: one relates to the Affairs in which the Publick has an interest; thus as the Publick is concerned that Crimes should be punished, it would be altogether fruitless to refer them to Arbitration, and the Reference it self would be a proof of the Crimes: and the other cause regards the Affairs where the honour of the Parties who should refer them to Arbitration would be engaged; for whereas one may with decency refer to Arbitration any common interest, it would be contrary to good manners to expose to the Judgment of Arbitrators an interest of Honour, seeing that would be wilfully to hazard the loss of it, which cannot be imputed to those who defend their Honour before the Ordinary Judges, because they are under a necessity to*

to take them for Judges; thus he whose Legitimacy is called in queſtion, or whoſe Nobility is controverted, or againſt whom any diſpute of the like nature is ſtarted, cannot refer ſuch a matter to the deciſion of Arbitrators. Thus it is commonly ſaid of Affairs which perſons look upon to be dear and of importance to them, that they do not ſubmit them to Arbitration: which confirms the Remark that has been already made, that thoſe who refer their differences to Arbitration, agree to depart from ſome of their Rights for peace and quiet ſake; and which one ought not to do in an Affair which concerns his Honour; ſuch as is the Queſtion which relates to one's State, to know whether he is a Baſtard or a legitimate Son, Noble or Ignoble; for in theſe ſorts of Cauſes it is neceſſary to have for Judges thoſe who have naturally Authority and Dignity joined with the Right of judging.

De liberali cauſa compromiſſo facto, rectè non compelletur Arbiter ſententiam dicere: quia favor libertatis eſt ut majores judices habere debeat. *l.* 32. § 7. *ff. de recept qui arb.*

In litibus, in quibus, utrum ingenuus, an libertinus ſit aliquis, quæritur, quinquennii præſcriptionem (poſt quod divino adjutorio opus eſſe veteres leges præcipiebant) in poſterum ceſſare ſancimus: & hujuſmodi lites etiam poſt memoratum tempus, ad exemplum cæterarum, vel in provinciis apud earum moderatores, vel in hac alma urbe apud competentes maximos judices examinari. Quod etiam ſi clariſſima perſona ſuper tali conditione vel etiam ſervili quæſtionem patiatur, tenere cenſemus. *l. ult. C. ubi cauſ ſtat. ag. deb.*

See the ſeventh and eighth Articles of the firſt Section of Compromiſes.

VI.

6. There are ſome matters which cannot be referred to Arbitration.

The power of Arbitrators is circumſcribed to ſuch matters as the parties are at liberty to refer to Arbitration; and if the Compromiſe ſhould happen not to be within theſe bounds, the Arbitrators would give judgment to no purpoſe, and they would even render themſelves guilty of diſobedience to the Law: Thus, for example, it being for the intereſt of the Publick that Crimes ſhould be judicially puniſhed, one cannot compromiſe a Crime[f]; and there are other matters which cannot be referred to the judgment of Arbitrators, as has been explained in the Title of Compromiſes, and in the Remark on the preceding Article.

[f] Julianus indiſtinctè ſcribit ſi per errorem de famoſo delicto ad arbitrum itum eſt: vel de ea re de qua publicum judicium ſit conſtitutum, veluti de adulteriis, ſicariis, & ſimilibus: vetare debet prætor ſententiam dicere nec dare dictæ executionem *l.* 32 §. 6. *ff. de recept. qui arb.*

VII.

7. The Sentences of Arbitrators have not the ſame effect as thoſe of Judges.

The Sentences of Arbitrators have not the ſame effect as thoſe of Judges; for they oblige thoſe who refuſe to execute them no further than to pay the Penalty ſtipulated in the Compromiſe: ſo that if he who finds himſelf aggrieved by the Award of Arbitrators chuſes rather to pay the Penalty, than to ſubmit to the ſaid Award, it will remain without any other effect than that of intitling the other party to recover the Penalty[g].

[g] Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2 *ff. de recept.*

VIII.

8. There lies an Appeal from the Awards of Arbitrators.

The favour of Awards given by Arbitrators, does not hinder the parties aggrieved from appealing from them; and in *France* the Appeals from thoſe Awards go directly to the ſupreme Courts of Juſtice, from whence there lies no Appeal, whether it be to the Parliament, or to the Preſidial Courts in matters which comé under their Juriſdiction.

[h] *See the Ordinance of* Auguſt, 1560. *art* 1.

IX.

9. If the Award is not pronounced within the time limited by the Compromiſe, it remains without effect.

If there is an Appeal entred from an Award, or if the Award not having been given within the time limited by the Compromiſe, it remains without effect, one of the parties refuſing to prorogue it, that is, to renew it, and to grant to the Arbitrators another delay, or time for giving their Award, the Acts which ſhall appear to have been ſped in execution of the Compromiſe for preparing the Cauſe for Judgment, will ſubſiſt for the effect which they ought to have. Thus, for example, if any of the parties had confeſſed the truth of a fact that was in diſpute, or if proof had been made thereof before the Arbitrators, thoſe Acts might be produced in Court, and the Judges would

would have that regard to them, as the quality and form of the ſaid Acts might deſerve [1].

[1] Ad hæc generaliter ſancimus, in his quæ apud compromiſſarios facta ſunt, ſi aliquid in factum reſpiciens, vel proteſtum eſt vel atteſtatum, poſſe eo & in ordinariis uti judicus. *l. penul. in f. C. de recept arb.*

X.

10. Perſons who are incapable of being Arbitrators.

All theſe Functions of Arbitrators which have been juſt now explained, agreeing only to perſons in whom there is no obſtacle which renders them incapable thereof, one cannot take for Arbitrators perſons in whom there are any ſuch obſtacles. Thus Women, perſons that are deaf, or dumb, and others who labour under the like incapacities, cannot be Arbitrators.

[1] Sancimus, mulieres ſuæ pudicitiæ memores, & operum, quæ eis natura permiſit, & à quibus eas juſſit abſtinere, licet ſummæ atque optimæ opinionis conſtitutæ in ſe arbitrium ſuſceperint, vel, ſi fuerint patronæ, etiam ſi inter libertos ſuam interpoſuerint audientiam ab omni judiciali agmine ſeparari, ut ex earum electione nulla pœna, nulla pacti exceptio adverſus juſtos earum contemptores habeatur. *l. ult. C. de recept.*

Neque in pupillum, neque in furioſum, aut ſurdum, aut mutum, compromittitur. *l. 9 § 1. ff. eod.*

It would ſeem by this text that it is only Infants under fourteen years of age, that are incapable of being Arbitrators, and that an Adult may exerciſe this Function after having attained the age of fourteen: but it is ſaid in the forty firſt Law of the ſame Title, that it is neceſſary to have attained twenty years of age: it is a difficult matter for ſuch caſes to happen, but if it ſhould ſo fall out that a young man under twenty years of age, of an extraordinary capacity, had been named an Arbitrator, and had given an Award in the matter referred to him, it would not be null by the Uſage in France, *as it would have been at* Rome *by the forementioned Law, and there was no other remedy but that of an Appeal. For according to the Uſage in* France, *the Acts in which there are Nullities, are not null until they are declared to be ſo by a Court of Juſtice, which is the reaſon why it is ſaid that Nullities do not take place in* France. *For we have no particular Law that ſettles the age at which perſons may take upon them the Office of an Umpire.*

Cùm lege Julia cautum ſit, *ne minor viginti annis judicare cogatur*: nemini licere minorem viginti annis compromiſſarium judicem eligere, ideòque pœna ex ſententia ejus nullo modo committitur. Majori tamen viginti annis, ſi minor viginti quinque annis ſit, ex hac cauſa ſuccurrendum, ſi temerè auditorium receperit multi dixerunt. *l. 41. ff. de recept.*

Sons living under the Juriſdiction of their Fathers may be Arbitrators.

Sed & filius familias compelletur. *l. 5. ff. de recept.*

SECT. II.

Of the Duties of Arbitrators.

IT is to be remarked here touching the duties of Arbitrators, that we do not obſerve ſome Rules relating to the ſaid duties which were eſtabliſhed by the *Roman* Law [a], and among others three of thoſe that are the moſt remarkable.

[a] Tametſi neminem prætor cogat arbitrium recipere (quoniam hæc res libera & ſoluta eſt, & extra neceſſitatem juriſdictionis poſita) attamen, ubi ſemel quis in ſe receperit arbitrium, ad curam, & ſollicitudinem ſuam hanc rem pertinere prætor putat: non tantum quòd ſtuderet lites finiri, verum quoniam non deberent decipi, qui eum quaſi virum bonum, diſceptatorem inter ſe elegerunt. Finge enim, poſt cauſam jam ſemel, atque iterùm tractatam, poſt nudata utriuſque intima, & ſecreta negotii aperta arbitrum vel gratiæ dantem, vel ſordibus corruptum, vel alia qua ex cauſa nolle ſententiam dicere: quiſquam poteſt negare æquiſſimum fore, prætorem interponere ſe debuiſſe, ut officium, quod in ſe recepit, impleret. Ait prætor, *qui arbitrium pecunia compromiſſa receperit.* Tractemus de perſonis Arbitrantium & quidem arbitrum cujuſcunque dignitatis coget, officio, quod ſuſceperit, perfungi; etiam ſi ſit conſularis: niſi fortè ſit in aliquo magiſtratu poſitus, vel proteſtate, conſul fortè, vel prætor: quoniam in hoc imperium non habet. *l. 3. § 1. ff. de recept. qui arb.*

The firſt, which obliged Arbitrators, after they had promiſed to the Parties to decide their differences, to give their Award, and they might even be compelled by Law to do it, and that for this reaſon, that it might ſo happen that an Arbitrator having dived into the bottom of an Affair, and diſcovered the ſecrets of the Parties,

ties, and all their proofs, and intending to favour the bad Cauſe, being either corrupted by bribery, or by ſome recommendation, ſhould refuſe to give his Award, and by that means ſhould do prejudice to the good Cauſe.

According to our Uſage, no ſuch neceſſity is impoſed on Arbitrators, and if the Arbitrator were capable of being corrupted in that manner, it would be of no great ſervice to force him to give an Award under ſuch diſpoſitions; and beſides, ſeeing there may happen cauſes which may oblige an Arbitrator to abſtain from giving his Award, altho' he had promiſed to do it, and even cauſes which he ought not to be obliged to declare in open Court, altho' he were incapable of theſe ſorts of corruptions, we leave Arbitrators at liberty to exerciſe, or not to exerciſe that Function, which ought to be free, and by that means we avoid the inconveniences which it is eaſy to perceive, but Arbitrators do not engage themſelves, nor do they accept of the Compromiſe, but when they do ſome Function relating to the matter that is referred to them, and it is always with a liberty to abſtain from it whenever they ſhall think fit ſo to do.

The ſecond Rule of the *Roman* Law, which made a ſecond duty unto Arbitrators, and which is not received in uſe with us, was that which in the caſes where there were only two Arbitrators named by the Compromiſe, ordained that they ſhould be compelled by the Magiſtrate to chuſe a third perſon, whoſe Sentiment was to be the Award, in caſe the two Arbitrators could not agree [b]: which would not be approved by our Uſage, and which would be even contrary to Equity; for thoſe who agree to refer their differences, mean to have no other Judges but thoſe whom they themſelves make choice of, and if the Arbitrators will have a third perſon joined with them, that cannot be but by conſent of the Parties: and when Arbitrators are named in an equal number, if power is granted them to take in a third perſon, it is always upon condition that the ſaid third perſon be not any ways ſuſpected by the Parties; which preſuppoſes that they are to approve of his Nomination.

[b] Principaliter (quæramus) ſi in duos arbitros ſit compromiſſum an cogere eos prætor debeat, ſententiam dicere quia res ſine exitu futura eſt propter naturalem hominum ad diſſentiendum facilitatem. In impari enim numero ideirco compromiſſum admittitur. Non quoniam conſentire omnes facile eſt: ſed quia, etſi diſſentiant, inventus pars major, cujus arbitrio ſtabitur. Sed uſitatum eſt etiam in duos compromitti & debet prætor cogere arbitros ſi non conſentiant rerum certam eligere perſonam, cujus authoritati pareatur *l.* 17. §. 6. *eod.*

The third of the ſaid Rules, is that which declares, that he who ought to be Judge of a Law-Suit, cannot be Arbitrator of it. It is true, that the dignity and duty of a Judge require that he ſhould not abſtain from the exerciſe of his Functions, nor put himſelf out of a condition of rendring Juſtice whenever any occaſion for the exerciſe of his Miniſtry ſhould preſent it ſelf; and that therefore a Judge, who ought naturally to have the determination of a difference in the quality of Judge, and not as an Arbitrator, ought to remain in that State, and not run the hazard of being diſabled afterwards to adminiſter Juſtice, by reaſon of his engagements in a Compromiſe, which might oblige him to abſtain from his Functions of Judge, either on account of his being excepted againſt, or by reaſon of other conſequences of the Compromiſe: ſo that this Rule is highly juſt. And there is even an Ordinance in *France*, which forbids the Preſidents and Judges to take upon themſelves the Arbitrations of matters depending before the Courts, or before the inferior Judges [d]: which ſeemed to be leſs neceſſary than under the *Roman* Law, where each Affair had not the ſame number of Judges as there are in *France*, where the Courts of Juſtice are compoſed of many Judges; but the ſaid Ordinance is not obſerved; and it is permitted in *France*, to make choice of ſome of the Judges of a Court of Juſtice, to be Arbitrators of Law-Suits, of which they ought to be the Judges, and they prefer to that Rule of the *Roman* Law, the good of Agreements; and although the Parties take care to make choice of the ableſt Judges to be their Arbitrators, and that it may ſo happen that the intended Accommodation not taking effect, the Affair may come to be decided without them, yet they who choſe them for their Arbitrators have

no body to blame for it but themſelves, and they will have for their Judges the others of the Bench who remain. Thus, if we conſider this Uſage with a view only to the publick Good, it does not ſeem to be any ways inconſiſtent with it; and the favour of amicable Agreements may juſtify the ſaid Uſage.

[r] Si quis judex ſit, arbitrium recipere ejus rei, de qua judex eſt, in re ſe compromitti jubere prohibetur lege Julia, & ſi ſententiam dixerit non eſt danda pœnæ perſecutio. *l.* 9. §. 2. *eod.*

[s] *See the Ordinance of* October, *1535. chap.* 1. *art.* 75.

We ſhall not put down in this Section, among the Rules of the Engagements of Arbitrators, that of Capacity; for although it be true that in order to judge of a difference, it is neceſſary to know the Rules of the matter in queſtion, yet it being for the intereſt of the perſons who chuſe the Arbitrators, that they ſhould be capable of judging of the matter, they ſeldom fail to chuſe thoſe whom they eſteem the moſt capable; thus they uſually make choice of Judges or Advocates: but if for the deciſion of a Queſtion in Law, the Parties had made choice of other perſons in conſideration of their good ſenſe and probity, the ſaid Arbitrators might either abſtain from judging, if they found themſelves incapable thereof, or take information touching the difficulties, that they might be able to underſtand them in ſuch a manner as that the Parties might have reaſon to be ſatisfied with their knowledge, and ground to expect from them an equitable Award, which the ſaid Arbitrators might form, either of their own knowledge, according as they might receive light from the ſeveral pretenſions of the Parties, or by the aſſiſtance of perſons whom the Parties ſhould agree that they ſhould adviſe with; and ſuch a choice of Arbitrators as this might be juſtified by the counſel of St. *Paul* himſelf, who for ſo trivial a thing as a Temporal Good, adviſes the faithful to chuſe ſome of the leaſt among themſelves for Judges, rather than carry before the Tribunals of Infidels, pretentions whereof none can be of ſo great conſequence as the Peace which ought to unite them: thus there does not appear to be any inconvenience in chuſing a Citizen, a Gentleman, or other perſon of good ſenſe and probity, for an Arbitrator of Queſtions in Law.

[t] Dare any of you, having a matter againſt another, go to law before the unjuſt, and not before the Saints? Do ye not know that the Saints ſhall judge the world? and if the world ſhall be judged by you, are ye unworthy to judge the ſmalleſt matters? Know ye not that we ſhall judge Angels? how much more things that pertain to this life? If then ye have judgments of things pertaining to this life, ſet them to judge who are leaſt eſteemed in the Church. I ſpeak to your ſhame. Is it ſo that there is not a wiſe man amongſt you? no not one that ſhall be able to judge between his brethren? but brother goeth to law with brother, and that before the unbelievers. 1 *Cor.* i. 2, *&c.*

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I.

1. *Arbitrators ought not to take upon them to judge of matters above their capacity.*

ALthough the choice of the Parties who name the Arbitrators is inſtead of a proof that they are capable of judging the Affairs which are put into their hands, yet it is a duty incumbent on thoſe who find themſelves named Arbitrators by a Compromiſe, not to take upon them the charge of judging matters which are above their capacity, and to ſignify to the Parties the diſtruſt they have of their own abilities, or to excuſe themſelves by ſome other way, unleſs that after their declaration the Parties do ſtill inſiſt on having them for Judges, and that they take the proper meaſures to be inſtructed in the Cauſe, and regulate the differences by ſuch temperaments of Equity

as the Rights of the Parties, and the good of Peace may demand.

[a] And the cauſe that is too hard for you, bring it unto me, and I will hear it *Deut.* i. 17.

Although this paſſage relates to Judges, yet it may be applied here.

II.

2. *They are obliged to diſtinguiſh the Rights of the Parties without reſpect of perſons.*

Seeing it often happens that in Compromiſes each Party names his Arbitrator, and looks upon him not ſo much as being his Judge, but rather as his Advocate, engaged to defend his intereſts, and that for this reaſon they name ſupernumerary Arbitrators, this intention of the Parties does not hinder the perſons whom they name from being really and truly Arbitrators, nor exempt them from the obligation of diſtinguiſhing juſtly between the Rights of the one and the other Party, and of forming conſcientiouſly their ſentiments in relation to the differences which they have to determine; Thus it is their duty not to look upon themſelves as Arbitrators for one Party only, and obliged to judge rather in his favour than in the favour of the other; but they ought to conſider themſelves as Mediators of peace between the Parties, which obliges them, in their choice of expedients for accommodating the differences, not to incline, out of reſpect to the perſons[b], to diminiſh the Rights of one of the Parties rather than thoſe of the other, but to have the ſame regard to both Parties alike, and not to have any other view in curtailing the Rights of one of the Parties rather than thoſe of the other, except the difference that may be between their Rights, ſuch as indifferent perſons to whom the Parties are altogether unknown would have regard to; for this diſtinction of perſons would be an injuſtice, which the liberty allowed to Arbitrators to accommodate matters by temperaments of Equity cannot excuſe.

[b] Thou ſhalt not reſpect perſons *Deut.* xvi. 19.

Judge righteouſly between every man and his brother, and the ſtranger that is with him. *Deut.* i. 16.

That which is altogether juſt ſhalt thou follow. *Deut.* xvi. 20.

Ye ſhall not reſpect perſons in judgment, but you ſhall hear the ſmall as well as the great, you ſhall not be afraid of the face of man, for the judgment is God's. *Deut.* i. 17.

Ye ſhall do no unrighteouſneſs in judgment, thou ſhalt not reſpect the perſon of the poor, nor honour the perſon of the mighty but in righteouſneſs ſhalt thou judge thy neighbour. *Levit.* xix. 15.

He will not accept any perſon againſt a poor man, but will hear the prayer of the oppreſſed. *Eccluſ.* xxxv. 13.

How long will ye judge unjuſtly, and accept the perſons of the wicked? Defend the poor and fatherleſs do juſtice to the afflicted and needy. Deliver the poor and needy, *&c.* *Pſal.* lxxxii. 2, 3, 4.

Judges and Officers ſhalt thou make thee in all thy gates which the Lord thy God giveth thee throughout thy tribes and they ſhall judge the people with juſt judgment Thou ſhalt not wreſt judgment, thou ſhalt not reſpect perſons, neither take a gift, for a gift doth blind the eyes of the wiſe, and pervert the words of the righteous, That which is altogether juſt ſhalt thou follow. *Deut.* xvi. 18, 19, 20.

Although theſe texts relate to the duty of Judges, yet they may be applied here, ſeeing the perſons who are named Arbitrators do exerciſe the Functions of Judges. It is neceſſary to diſtinguiſh among the conſiderations that an Arbitrator may have for one of the Parties more than for the other, thoſe which relate to the perſon barely on account of the favour and affection which the Arbitrator may have for him, whether it be becauſe of the confidence which the Party ſeems to repoſe in him by taking him for his Arbitrator, or becauſe he is his friend, and others of the like nature, from thoſe which regard in the perſons the quality of their Rights; the matter in diſpute being, for example, about a large Sum of Money claimed by one that is rich, from one that is poor, and that by a diſputed Title, the conſiderations of the firſt ſort are a reſpect of perſons that is never allowed; for it is never lawful to prefer in Judgment the intereſt of one perſon before that of another, becauſe one loves him, eſteems him, or has ſome obligation to him, and ſuch a view as this in Judgment is always unjuſt; but it is not to be eſteemed a reſpecting of perſons in an Arbitration upon a doubtful Right, if for the ſake of peace an Arbitrator is obliged to have recourſe to ſome expedient for accommodating the matter in diſpute, and if he inclines to abridge the pretenſions of one of the Parties rather than thoſe of the other, becauſe of the difference that is between them, and which does not proceed from the affection which the Arbitrator has for either of them, but from the quality of their pretenſions, and the circumſtances either of their Perſons or their Rights.

III.

3 *The liberty which Arbitrators have of not rendring Juſtice according to the rigour ought not to be abuſed by commanding injuſtices under the pretext of accommodation.*

The liberty which Arbitrators may have not to render Juſtice according to the rigour thereof, and to make uſe of ſome healing expedients for the ſake of peace between the Parties, hath its bounds and extent according to Equity, and ought not to be extended ſo far as to be a handle to the Arbitrators to commit injuſtices under pretext of accommodating matters: thus it is the duty of Arbitrators to apply the temperaments of Equity with diſcretion; to chuſe them, in the caſes where Equity may require, ſuch as may not deſtroy that very Equity by ſome exceſs, and not to uſe any in the caſes where Juſtice is due in its full extent to demands that are ſo juſt and ſo clear, that they do not admit of any abatement, or of any difficulty [c].

[c] Take heed what ye do: for ye judge not for man, but for the Lord, who is with you in the judgment. 2 *Chron.* xix. 6.

Ye ſhall do no unrighteouſneſs in judgment, in mete-yard, in weight, or in meaſure. *Levit.* xix. 35.

IV.

4. *Arbitrators ought to abſtain from judging of matters which cannot be referred to Arbitration.*

Seeing there are matters which cannot be referred to Arbitration, as has been ſaid in the ſixth Article of the foregoing Section; if there ſhould be any Compromiſe contrary to this Rule, it would be the duty of thoſe who are named Arbitrators to abſtain from judging of ſuch matters.

THE PUBLICK LAW: BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK III.

Of CRIMES and OFFENCES.

We have not in our Language any common word which comprehends in general and precisely every thing that is understood by these two Words, *Crimes* and *Offences*. For the word *Misdeeds*, which might signify both the one and the other, is not of common use. But we not only have no proper word, whereof the meaning takes in all Crimes and Offences; but we have not even any Rule or Usage which distinguishes precisely the meaning of the word Offences from that of Crimes. And altho' we commonly understand by the word Crimes a Robbery, a Murder, Forgery, and other wicked deeds, which deserve the punishment of Death, the Gallies, Banishment, and other great punishments; and that the bare word of Offences is usually understood of actions that are less wicked, and liable to a lesser degree of punishment, but which may nevertheless deserve some punishment, such as injuries, a wound or hurt in a Scuffle, yet sometimes the word Offences is made use of to express the greatest Crimes. Thus it is said, that an Offender has made some disposition of his Goods after the Offence is committed; that a Thief, a Robber, a Murderer has been taken in the very act, but we never apply the word Crime to Injuries, or to wounds in a Scuffle; and to them we give the name only of bare Offences. Thus the word Offence is understood sometimes of Crimes, but the word Crime is never used to express a slight Offence.

It is in consideration of the want in our language of a common term which may agree to all Crimes and to all Offences, that we have entitled this Book of Crimes and Offences: and seeing these two words have different significations, but which are not clearly enough distinguished; in order to give a just

a juſt and preciſe Idea of them, it was neceſſary before we ſhould begin to ſpeak of Crimes and Offences to make this firſt reflexion on the uſe of theſe two words; to which we muſt likewiſe add, that in the *Roman* Law, from whence the ſaid words have been taken, they have not even there a meaning that is peculiar to each of them, and ſuch as may not agree to the other, but they are often there confounded together; neither is there in the *Roman* Law any true and proper word that ſignifies exactly and preciſely every thing that is contained under theſe two words of Crimes and Offences, on which it would be ſuperfluous to enlarge any further here; but it is neceſſary to take notice here of a difference that was made in the *Roman* Law of two ſorts of Crimes or Offences which comprehended them all, and divided them into two kinds, which it is neceſſary to underſtand becauſe of the relation which they have to our Uſage.

The firſt of theſe two kinds of Crimes or Offences, was of thoſe which were called publick; and the ſecond of thoſe that were called private. The publick Crimes were thoſe which the Law allowed all manner of perſons to proſecute in Judgment, altho' they had no particular intereſt therein; and the private Offences were thoſe of which the proſecution was not allowed to any but the perſons who had an intereſt therein. Thus the Crimes of Treaſon, Imbezzlement of the Publick Money, Forgery, Adultery, and many others were publick Crimes. Thus, the Emperors *Arcadius*, *Honorius*, and *Theodoſius* ranked in the number of publick Crimes the Hereſy of the *Manichees*[a]. Thus on the contrary Injuries, defamatory Libels, Theft, Stellionate, or all kind of Cozenage in bargaining, and ſome others were private Offences.

[a] Hinc itaque hominum generi nihil ex moribus, nihil ex legibus, commune ſit cum ceteris. Ac primum quidem volumus eſſe publicum crimen. *l. 4. C. de hæret.*

We ſhall ſhew hereafter how far this diſtinction between publick Crimes and private Offences agrees with our Uſage; but it is neceſſary to obſerve in the firſt place, that altho' in the *Roman* Law they uſed the word Offences commonly for private Offences, and the word Crimes for publick Crimes, yet ſometimes they gave the name of Crimes to private Offences[b], and the name of Offences to all ſorts of Crimes without diſtinction[c].

[b] *Stellionate, or Cozenage in bargaining, was a private Offence, and it is placed in that rank in the twentieth Title of the forty ſeventh Book of the Digeſts; and in the ſixty fourth Title of the ninth Book of the Code, it is called a Crime, altho' it is ſaid in the third Law of the ſame Title that it is not a publick Crime.*

[c] *Altho' in ſome places Offences are diſtinguiſhed from Crimes, as in the eighteenth Section of the ſeventeenth Law. ff. de Ædil. edict. where Offences are oppoſed to Publick Crimes,* quæcunque committuntur ex delictis, non publicis criminibus. *Yet we ſee in other places that the word Offence ſignifies all manner of Crimes. Thus in the ſecond Law,* ff. de re militari, *all the Crimes of Soldiers are called Offences. Thus in the 131ſt Law,* §. 1. ff. de verb. ſignif. *the word Puniſhment is deſined as a general word, which ſignifies the chaſtiſement of all ſorts of Offences, which comprehends very clearly all manner of Crimes, and all manner of Offences, ſeeing they have all of them their proper Puniſhments,* cum pœna generale ſit nomen, omnium delictorum coercitio. *d. l.*

This diſtinction of the *Roman* Law between publick Crimes and private Offences, altho' it is not received with us in the ſame manner as in the *Roman* Law, yet it has been the occaſion of our retaining theſe expreſſions of publick Crimes and private Offences in another ſenſe and meaning; as to which it is neceſſary to obſerve wherein it is diſtinguiſhed from that of the *Roman* Law.

In the *Roman* Law there were no publick Crimes but thoſe which were declared to be ſuch by ſome Law or other; and they were called publick Crimes, becauſe the puniſhment of them was of importance to the Publick, and becauſe for that reaſon whoever was willing to proſecute an Offender for a Crime of this nature, was allowed to do it, as has been juſt now obſerved: and altho' the perſon, if there was any who was injured by the Crime, did not complain of it, the Proſecutor might go on to make proof of the Accuſation, in order to have the Offender brought to puniſhment. But in private Offences, it was only the parties who were injured that could complain thereof, and ſue for the puniſhment of the Offenders, as has been likewiſe remarked, becauſe the puniſhment of theſe Crimes was not thought to be of the ſame importance to the Publick. And they placed in this Rank Theft, Defamatory Libels, the driving away of Cattle, the Crime of thoſe who cut down Trees privately, Stellionate, and ſome others.

By our Uſage no body has a right to carry on a Criminal Proſecution, and to ſue for the puniſhment of a Crime, except the party who is injured, and the publick Officer to whom this charge is committed. And it is for this end that in all Courts of Juſtice which have a

Juriſdiction

Juriſdiction in Criminal matters there are Officers appointed, one of whoſe moſt important Functions is to be careful and diligent in bringing Offenders to Juſtice, as has been taken notice of in another place. Theſe are the Officers who are called the King's Council, who are the Advocates and Procurators General in the Supreme Courts; the King's Advocates and Procurators in the Diſtricts of Bailiffs, Seneſchals, and other Juriſdictions; and the Proctors, who are called Fiſcals, or Promoters of the Office, in the Juriſdictions of Lords of Mannors, as has been already obſerved in the ſame place: So that thoſe Officers being obliged by the duty of their Offices to ſue for the puniſhment of all Crimes, which the Publick is concerned to have puniſhed, it is not allowed for any particular perſon to become an Accuſer of an Offender, and to carry on the Criminal Proſecution in his own Name; but becauſe it may happen that ſome perſons who have a particular knowledge of the proof of a Crime, and who may be induced by ſome motive or other to intereſt themſelves in getting the ſame to be puniſhed, they are allowed to become Informers, that is, to acquaint the King's Procurator, that ſuch a one has committed ſuch a Crime, and to inform him of the circumſtances which may ſerve to prove the fact. This Information, which is taken down in writing in the Regiſtry of the King's Procurator, and ſigned by the Informer, is kept ſecret, ſo that the King's Procurator does not carry on any Proſecution in the name of the Informer, nor is there any mention made of him in any one of the Acts; but if by the event of the Proſecution the accuſed Party is acquitted, the King's Procurator is obliged in that caſe to give him the name of his Accuſer, that he may ſue him for having falſly accuſed him. And as for the Accuſers, who are otherwiſe called Plaintiffs, and are the Parties intereſted, they are particularly named in the ſeveral Acts of the Proceeding, which is carried on in the name, and at the requeſt of the King's Procurator, and upon the complaint, and at the inſtance of the Plaintiff, who is called the Civil Party, becauſe he ſues only for his Civil Intereſt. For there is this difference between the intereſt of the Party, and that of the King's Procurator, that all the ſteps made by the Civil Party tend only, with regard to him, to obtain a Sentence of Condemnation for Damages, or a Civil Reparation of the Loſs which the Crime may have occaſioned to him, but he cannot demand that the party who is accuſed ſhould be condemned to undergo the puniſhment which the Crime may deſerve with regard to the Publick: for it is properly the buſineſs of the King's Procurator to demand that the ſaid Puniſhment be inflicted, whether it be that of Death, the Gallies, or other Puniſhment. And this Policy is conformable to the Spirit of the Chriſtian Religion, which puts into the hands of the Prince and of his Officers, the Right of avenging and puniſhing Crimes[d]; and which forbids private perſons to take vengeance[e]. Thus our Uſage is in that reſpect different from the *Roman* Law, ſeeing it does not give liberty to any private perſon to ſue for the puniſhment of a Crime. Our Uſage likewiſe differs from the *Roman* Law in another reſpect; for whereas by the *Roman* Law many Crimes which deſerved a publick puniſhment were not for all that accounted publick Crimes; we place in the rank of publick Crimes, which may be proſecuted by the King's Procurators, Crimes which were not publick in the *Roman* Law; ſuch as Theft, the receiving of ſtollen Goods, Robbery, the cutting down of Trees by ſtealth, the aſſembling together in a riotous manner to do ſome act of violence, or to carry away any thing by force, the driving away of Cattle, and the breaking of Priſon[f]. For there is not any one of theſe ſeveral ſorts of Crimes, which having been brought before a Court of Juſtice, the King's Procurator may not proſecute, in order to have the ſame puniſhed. For there is none of theſe ſeveral Crimes, which may not be proſecuted at the inſtance of the King, when his Officers have knowledge of them, altho' the party who firſt brought the complaint ſhould deſiſt from it, or agree the matter with the party accuſed.

[d] To me belongeth vengeance. *Deut.* xxxii. 35. If thou do that which is evil, be afraid; for he beareth not the ſword in vain. for he is the miniſter of God, a revenger to execute wrath upon him that doth evil. *Rom.* xiii. 14.

[e] Recompence to no man evil for evil. Provide things honeſt in the ſight of all men. If it be poſſible, as much as lieth in you, live peaceably with all men. Dearly beloved, avenge not your ſelves, but rather give place unto wrath. for it is written, Vengeance is mine, I will repay it, ſaith the Lord. *Rom.* xii. 17, 18, 19. *Mat.* v. 39. He that revengeth ſhall find vengeance from the Lord, and he will ſurely keep his ſins in remembrance. Forgive thy neighbour the hurt that he hath done unto thee, ſo ſhall thy ſins alſo be forgiven when thou prayeſt. One man beareth hatred againſt

against another, and doth he ſeek pardon from the Lord? *Eccluſ.* XXVIII. 1, 2, 3.

[f] *All theſe ſeveral Crimes are ranked in the number of private Offences in the forty ſeventh Book of the* Digeſts.

It was neceſſary to make theſe Remarks on the differences between our Uſage and the *Roman* Law as to the manner in which we conſider Crimes and Offences in whatever ſenſe we take the one and the other of theſe two words; and the Reader may be able to judge by what has been ſaid, that it is of no great importance, and that it would be no eaſy matter to give a juſt and preciſe Idea of the diſtinction between Crimes and Offences; and that it is ſufficient to know that in our Uſage we conſider as Crimes, and as publick Crimes, all Crimes and all Offences whatſoever, in which the Publick is concerned, that they ſhould not be let go unpuniſhed, to the end that they may not multiply thro' impunity, and that the puniſhments may reſtrain at leaſt ſome of thoſe who would not be withheld by other motives. For altho' it be true that the greateſt Puniſhments do not totally prevent any Crime, yet they diminiſh the frequency thereof, and if they were let go unpuniſhed, it would occaſion an infinite multitude of all ſorts of Crimes; and it is for this reaſon, that when ſome Crimes become more frequent than they were, the puniſhment of them is made the more ſevere, in order to reſtrain the growing multitude of Offenders.

It is to this Puniſhment of Crimes and Offences that all the Rules concerning this matter have a relation, and all that ſhall be ſaid thereof in this third Book hath its uſe only with reſpect to this Puniſhment, without which the matter of Crimes would not be a ſubject of Human Laws, and would have for its Rules only the Divine Laws, as to which it is neceſſary to remark the different ways in which the Spirit of the Divine Law, and that of Human Laws conſider Crimes. For in this difference conſiſts the diſtinction between the Conduct which the Paſtors of the Church and the Miniſters of the Spiritual Power ought to hold with reſpect to Crimes; and that which the Miniſters of Juſtice and of the Temporal Power ought to obſerve therein.

The Spirit of the Law of God, who prepares for Crimes which he ſhall not have forgiven in this world other puniſhments than death, and which are more terrible than the ſevereſt puniſhments that can be inflicted in this life, aims at the amendment of the greateſt Offenders, and at reclaiming them to their duties, by working in them ſuch a change as may transform them from being the moſt profligate Wretches into the greateſt Saints; and we ſee ſometimes Offenders, whom God ſuffers to eſcape the puniſhments inflicted by the Temporal Laws, that he may work this change in them, or whoſe hearts he touches even in the midſt of their Puniſhments, as it happened to that Robber, who at the laſt moment of his life made his puniſhment ſerve as a paſſage for him into Heaven. But the Policy of Human Laws, which tends to regulate the Society of Mankind, and to reſtrain all attempts that may diſturb the Order thereof, hath eſtabliſhed Puniſhments proportionable to the different Crimes, and even that of Death it ſelf, againſt ſome which could not be prevented by leſſer Puniſhments; accompanying it ſometimes with torments which ſtrike a greater terror than ſimple Death: and as this uſe of Puniſhments has always been neceſſary in the multitude of Crimes which have always abounded, we have ſeen that in the days where God himſelf was pleaſed to govern in a viſible manner the People whom he had made choice of, and to mix together the Spiritual and the Temporal Government by his Divine Law which he gave to *Moſes*, he there eſtabliſhes the Puniſhment of Death againſt ſeveral Crimes [g]. But when he ſent his Son into the World to plant the Goſpel in the room of the ancient Law, he ſeparated from the Spiritual Miniſtry of Religion, the uſe of the Puniſhment of Death, and of other Corporal Puniſhments, and left it ſolely to the Temporal Powers, that they might thereby maintain, as much as is poſſible, the Order of Society.

[g] And the *Iſraelitiſh* woman's ſon blaſphemed the name of the Lord, and curſed, and they brought him unto *Moſes*, (and his mother's name was *Shelomith*, the daughter of *Dibri*, of the tribe of *Dan*.) And they put him in ward, that the mind of the Lord might be ſhewed them. And the Lord ſpake unto *Moſes*, ſaying, Bring forth him that hath curſed, without the camp, and let all that heard him, lay their hands upon his head, and let all the congregation ſtone him. And thou ſhalt ſpeak unto the children of *Iſrael*, ſaying, Whoſoever curſeth his God, ſhall bear his ſin. And he that blaſphemeth the name of the Lord, he ſhall ſurely be put to death, and all the congregation ſhall certainly ſtone him; as well the ſtranger, as he that is born in the land, when he blaſphemeth the name of the Lord, ſhall be put to death. And he that killeth any man, ſhall ſurely be put to death. *Levit.* XXIV. 11, *&c.* See *Exod.* XXI. 23, 24. *Deut.* XIX.

We

We ſhall not enlarge any further on this diſtinction between the Spirit of Religion, and that of the Temporal Policy; the Reader may ſee what has been ſaid of it in the 10th Chapter of the Treatiſe of Laws, and in the 19th Title of the firſt Book of the Publick Law. It ſufficeth that we remark here the Cauſes of the neceſſity of puniſhing Crimes; as to which it is neceſſary in the firſt place to diſtinguiſh two ſorts of Crimes.

The firſt is of thoſe which without doing any wrong to any particular Perſon, deſtroy the publick Order, and diſturb Society, ſuch as Impiety, Hereſy, Blaſphemy, the deſpair of thoſe who lay violent hands on themſelves, and other Crimes, ſome of which ought not ſo much as to be named. The ſecond is of thoſe which beſides the diſturbance of the publick Order of the Society, do prejudice to ſome Perſons in particular, ſuch as Theft, Robbery, Imbezlement of the Publick Money, the counterfeiting of the King's Coin, Murder, and others. The Crimes of the firſt of theſe two ſorts, deſerve only a ſimple Puniſhment, ſuch as may revenge the Publick of the Crime, and chaſtiſe the Offender; and thoſe of the ſecond ſort deſerve, beſides this Vengeance and this Chaſtiſement, to be puniſhed with a Reparation of the Damage that is done by the Crime, ſuch as the Reſtitution of the thing ſtolen, the indemnifying a Widow whoſe Husband has been killed, and the other Civil Intereſts of the like nature, to the Perſons to whom they are due. So that there are two ſorts of Puniſhments for this ſecond kind of Crimes: that of the Crime it ſelf, without regard to the Damage, by the bare View of the Chaſtiſement which it may deſerve; and that of making good the Loſs occaſioned by the Crime.

Beſides this firſt diſtinction of theſe two ſorts of Puniſhments, which is neceſſary for underſtanding aright the uſe of Puniſhments according to the Spirit of the Laws, we muſt take notice of a ſecond diſtinction of four ſeveral Kinds of the firſt ſort of Puniſhments which have been juſt now mentioned. The firſt, to begin with the leaſt, is that of the Puniſhments which are called pecuniary, which are limited to a Condemnation in a certain Sum of Money without inflicting any mark of Infamy; and we muſt place in the ſame Rank of the firſt ſort of leſſer Puniſhments, the Admonitions and Reproofs which are given in open Court, and which likewiſe do not brand with Infamy. The ſecond Kind is that of the Puniſhments which affect the Honour, and carry with them a mark of Infamy; ſuch as a Condemnation in a Fine to the King, and that ſort of Correction, which is called a Judicial Reprimand. The third, is of the Puniſhments which are inflicted on the Perſon, and on the Body of the Party accuſed, ſuch as Whipping, Marking, the making a publick Confeſſion of the Crime in that ignominious manner which is called in *France, Amande Honorable* [k], Baniſhment, and other Corporal Puniſhments, all which are attended with Infamy. And the fourth is of the ſeveral ſorts of Puniſhment by Death; ſuch as Hanging, Burning, Breaking on the Wheel, and others.

It is eaſy to judge by theſe ſeveral ſorts of Puniſhments, of the divers Views of the Laws which have enjoined them. The firſt of thoſe Views, which is common to all the four ſorts of Puniſhments, is to puniſh and avenge the Crime by the publick Satisfaction which the Offender is obliged to make *h*. The ſecond, which is common alſo to all Puniſhments, is to reſtrain by the Example of the Puniſhments, thoſe who cannot be influenced by better Motives to abſtain from the Commiſſion of Crimes *i*. The third, which agrees only to the three firſt ſorts of Puniſhments, is that of the Correction or Amendment of the Offenders: For altho ſome of theſe Puniſhmentes have in them a ſeverity which exceeds the bounds of Correction, yet they all of them imply the effect of Correction and Amendment, by putting the Offenders in mind that greater Puniſhments are reſerved for them, in caſe they fall into new Crimes; and there are ſome of theſe Puniſhments which are Corrections from the Mouth of the Judges, when they give Admonitions to ſome Offenders; for the end of theſe ſorts of Admonitions is not

[k] ‘This Puniſhment which is ſtiled in *France* ‘ *Amande Honorable*, is when the Criminal is con‘demned to make a publick Confeſſion and Ac‘knowledgment of his Crime, being ſtript naked ‘to his Shirt, bare headed, and bare footed, ha‘ving a Torch in his Hand, and in this Poſture to ‘ask Pardon of God, of the King, of Juſtice, and ‘of the Party whom he has injured. *Imbert Pra‘tique Civile & Criminelle liv.* 3. *chap.* 21.]

h For the Puniſhment of Evil doers, 1 Pet. 2. 14.

i And thoſe which remain ſhall hear, and fear, and ſhall henceforth commit no more any ſuch Evil among you. Deut. 19. 20.

only to puniſh the Offenders by the ſhame of being reprimanded in open Court, but alſo to amend them, and to exhort them to change their Courſe of Life *l*: And we may add for a fourth View of the Laws in enacting Puniſhments, that of putting profligate Wretches and thoſe who are guilty of great Crimes out of a condition of committing new ones; which properly agrees only to the Puniſhment of Death, altho there be others which may have this Effect.

Altho it be certain that the ſeverity of the Puniſhments diminiſhes in a great meaſure the number of the Crimes in a State, and that in proportion as the Laws uſe more precaution, and the Officers are more diligent and careful in finding out and puniſhing Offenders, there are fewer Crimes committed; yet ſtill it muſt be owned that notwithſtanding theſe Remedies Crimes are very frequent; for they cannot cure the Cauſes of the Diſeaſe, which are the *different Paſſions* of Men, ſo ſtrong in a great many and having ſo great a maſtery over them, that even the ſight of the Puniſhment does not deter them from committing the very Crimes which they ſee actually puniſhed in others. Thus thoſe whom Avarice has engaged in a habit of Theft, make no ſcruple to pick Pockets in a Crowd of Spectators that are looking on at the Execution of a Thief; and the acquired habits of other Crimes, and the tranſports of Revenge, and other Paſſions, kindle ſuch a Fire as nothing is able to extinguiſh, and which takes away all manner of thought of the Conſequences of the Crimes, or makes them run the hazard of all Events let them prove what they will.

It is from this Fountain that we ſee daily flow thoſe ſeveral Crimes which are ſo frequent, eſpecially in great Towns, where the occaſions of committing them are more common, and where it is eaſier to conceal the Crimes, and to ſkreen the Offenders from the hands of Juſtice.

This frequency of Crimes, is it then become an Evil without any Remedy, which may at leaſt diminiſh it? And is there no poſſibility to render thoſe Crimes leſs frequent which are moſt common, ſuch as Thefts, Robberies, Murders? Might not we hope from the great and ſingular Example of the diſuſe of Duels, which has been effected in *France*, to be able to procure a diminution of thoſe other Crimes, not by the ſame ways which have been taken to prevent duelling, which would not be applicable to this deſign, but by other ways proportioned to the Cauſes of the Evil? The Cauſes of the frequency of Thefts, of Robberies, and of Murders which are the Conſequences thereof, are Poverty joined with a bad Education, Idleneſs, vicious Habits, Debauchery, and the diſorderly Life which Perſons under thoſe Circumſtances commonly fall into, and from which they are gradually drawn into the Commiſſion of the greateſt Crimes. Many are poor from their Birth, a bad Education trains them up in Idleneſs, and the habit of doing nothing leads them to the doing of Miſchief, which cannot afterwards be ſtopped but by the Force of Juſtice; which comes too late, and ſerves only as a Fence againſt a Torrent, which overflows its Banks.

It would ſeem therefore to be of great advantage to a State, to eſtabliſh therein ſuch a Policy, as might diminiſh in it as much as is poſſible theſe bad Effects, by removing their Cauſes; which are Idleneſs, Poverty, a bad Education, which occaſion ſo many Thefts, Robberies, and Murders which uſually attend Robberies; for theſe are the ſorts of Crimes that are the moſt frequent, and they are ſo frequent only becauſe they ſpring from thoſe three Cauſes which are common every where: So that there is this difference between theſe ſorts of Crimes and all others; that altho there be many other Kinds of Crimes, ſuch as Treaſon both againſt God and Men, Impiety, Blaſphemy, Sorcery, Sedition, Rebellion againſt the Orders of a Court of Juſtice, counterfeiting the King's Coin, Murders, and Aſſaſſinations on account of Quarrels and out of Revenge, Poiſoning, Forgery, Extortions, Adulteries, and others; yet we ſee as many or more Crimes of that one kind of Thefts, Robberies, and of Murders committed by Robbers, as of all the other kinds of Crimes put together. And there is likewiſe this other difference between theſe Crimes and all the others; that altho there be no other Remedy, to prevent the multitude of the ſeveral Crimes beſides

l Interlocutio præſidis, quæ indicta eſt, infamem eum de quo quæris feciſſe non videtur: cum non ſpecialiter ob injuriam vel admiſſam vim condemnatus ſit, ſed ita præſidis verbis gravatus & admonitus, ut ad melioris vitæ frugem ſe reformet. *l.* 29. *C. ex quib. cauſ. inf. irr.*

beſides the Example of Puniſhments, and that it is not poſſible to cure in every one Ambition, Avarice, Debauchery, Libertiniſm, Impiety, Envy, Hatred, and the other Paſſions and diſorderly Affections, which lead to the Commiſſion of thoſe different ſorts of Crimes, even thoſe Perſons who are rich enough, and ſome who have had the Advantage of a good Education; yet it does not appear to be impoſſible for a State to provide Subſiſtence for all the Families in it, either by their own Labour, if that be ſufficient, or by giving them ſuch Aſſiſtance as cannot be refuſed without Injuſtice; by puniſhing thoſe who having nothing of their own to ſubſiſt on, and being able to work and gain their Livelihood, do nevertheleſs ſpend their time in Idleneſs; by making a diligent Enquiry after poor Families, in order to find out and puniſh thoſe who do not work; by viſiting carefully all the Houſes ſuſpected to harbour idle Perſons, and to receive ſtolen Goods; by making all Perſons whoſe Condition is not known, give an Account of the Place of their Abode, of their Family, of their Imployment; and in fine by uſing all poſſible and juſt Precautions for leſſening the number of idle Perſons and Vagabonds, which would of conſequence diminiſh likewiſe the Crimes which proceed from Idleneſs. Such an Inquiry as this would moreover produce this good Effect in the State, that it would multiply in it Manufactures and Trade, and would add to the publick Tranquillity one of the beſt Ways for maintaining it. And altho this Policy does imply a neceſſity of having Officers to put the ſame in execution, and of erecting publick Work-Houſes for employing the Poor; and tho it ſhould conſequently put the Publick to great Charges, yet that would be no inconvenience, for there would be no proportion between the Expence and the Advantages that ſuch a Regulation as this, if well concerted, and well executed, would produce in many reſpects, and even by the bare Effect of diminiſhing conſiderably Idleneſs, and the Vices which are the Conſequences of it.

As for the other ſorts of Crimes, it is to no purpoſe to hope for a total Ceſſation of them, no more than that of the Vices and Paſſions of Men; and we muſt on the contrary own that it is only by a ſingular Effect of the Divine Providence, that the number of all ſorts of Crimes is not much greater, as it certainly would be, if God ſhould abandon every one to his Paſſions; but his Providence over the Society of Mankind moderates in a great many their Inclination to Vices and Paſſions by the bare Effect of Reaſon, and of a leſs corrupted natural Conſtitution; ſo that the greater part of Mankind is free from the Vices and Habits which lead to the Commiſſion of Crimes, and chuſe to contain themſelves within the external Order of the Temporal Policy. And this Order is moreover greatly preſerved by the Union of Religion and the Civil Policy together, and by the good Uſe which ought to be made of the one and of the other, both by Perſons in a private Capacity, that they may keep within the bounds of their reſpective Duties; and alſo by thoſe who have a ſhare in the Government, and in the Adminiſtration of Juſtice, that they may puniſh thoſe who diſturb the ſaid Order

It is by the means of this Providence of God over Mankind, and of the joint Concurrence of Religion and Policy together, that altho the Crimes which diſturb the Order of Society are very frequent with reſpect to the great Evils which they cauſe, yet it may be ſaid in another ſenſe that conſidering the univerſal Bent which Men have to Evil, the Crimes which are ſo exorbitant as to deſerve ſome temporal Puniſhment are too frequent in proportion to the other Evils, which do not amount to that Exceſs: for we muſt diſtinguiſh in the Society of Mankind two ſorts of Evils, which are cauſed by the Paſſions and wicked Inclinations of the greateſt part of thoſe who are Members thereof. The one, of that infinite number of Infidelities, Injuſtices, Cheats, vexatious Law-Suits, Quarrels, Enmities, Diviſions, and other Evils which over-run the Society, and which being the Works of Covetouſneſs, Ambition, Hatred, Anger, Envy, and of all ſorts of unlawful Deſires, Vices and Paſſions, are before God, and in the Language of the Scriptures, ſo many ſeveral Crimes worthy of the Puniſhments which the Divine Juſtice prepares for thoſe who tranſgreſs his Law, altho they do not amount to that Exceſs as to be placed in the Rank of Crimes in the ſenſe which is given to this Word in the Style of Human Laws. And the other of

theſe two ſorts of Injuſtices is that which conſiſts of thoſe to which the human Laws give the Name of Crimes, and which they puniſh with ſeveral Puniſhments, and it is neceſſary likewiſe to diſtinguiſh, among all thoſe Injuſtices of Men, which do not come under the Rank of Crimes, in the ſenſe which human Laws give to this Word, altho they may be Crimes in the ſight of God, between thoſe which create no diſturbance in the Society, and which do hurt to none but thoſe who commit them, and thoſe which beſides that they do hurt to other Perſons than the Authors of them, do alſo diſturb the Order of the Society. The firſt ſort of Injuſtices which create no diſturbance in the Society that deſerves to be revenged by human Laws, and which do hurt to no Perſon, are properly ſpeaking a Matter belonging to the Rules of the Church, which preſcribe Remedies againſt them, and direct her Miniſters in the Method of correcting and reclaiming thoſe who are guilty of them, by Ways proportioned to the Spirit of Religion, which requires Juſtice in the inward Parts of Man, and the temporal Policy does not meddle therewith. But as for the Injuſtices which diſturb the Order of the Society, and which go to that Exceſs as to be ranked among Crimes and Offences, they are not only a Matter which belongs to the Rules and Canons of the Church which forbids them, but they are moreover a Matter cognizable by the temporal Policy, and ſubject to the Adminiſtration of Juſtice, which ought to ſuppreſs all Attempts againſt one another's Right, and maintain every one in their Property, which is the Duty of thoſe who are intruſted with the Care of the Government, and the Adminiſtration of Juſtice. Thus the temporal Policy, whoſe buſineſs it is to regulate the external Order of human Society, exerts it ſelf in two different manners, with reſpect to all the kinds of Injuſtices that diſturb the ſaid Order.

The firſt which reſpects in general all ſorts of Diſturbances, Attempts and Injuſtices, which are not of the number of Crimes and Offences, and which do not deſerve any Puniſhment; and the ſecond, which relates to the Puniſhment of Crimes and Offences that may deſerve Puniſhments or other Correction. And this is what diſtinguiſhes the Subject of this third Book from all the other Matters of the Laws, whether they be of the Publick or Private Law.

We thought it neceſſary to make all theſe general Reflections on this Matter of Crimes and Offences, in order to give an Idea of the Rank which it holds in the Publick Law, and of the Uſe of the Laws which regulate it; it remains now that we ſhould explain what it is wherein the Detail of this Matter conſiſts, and the Views which we propoſe by digeſting it in order.

The Matter of Crimes and Offences conſiſts of two Parts; every one of which hath its Rules of a different nature, which it is neceſſary to diſtinguiſh, and which ought to have their ſeparate Rank. The firſt of theſe two Parts comprehends every thing which relates to the Diſtinctions of the ſeveral kinds of Crimes and Offences, and their Puniſhments; the Rules of the Proportion of the Puniſhments to the Crimes and Offences, in conſideration of their Enormity, their Quality, their Conſequence, the Neceſſity of making an Example, or upon other Conſiderations which may plead for a Mitigation of the Puniſhments; the Rules of the Regard which ought to be had to the different Circumſtances of the Quality of the Perſons, of their Age, the Time, the Place, of the Diſpoſitions of the Offenders, which diſtinguiſh thoſe who offended with Deſign, out of Raſhneſs, by ſome Effect of an Accident, and the other Circumſtances of the like nature; the Diſtinction which ought to be made between the principal Offenders, and their Accomplices and others who may have had ſome hand in the Crimes and Offences; what the Proofs of Crimes ought to be, and in what manner they are gather'd, not only from the Depoſitions of the Witneſſes, and from Writings, if there be any, but alſo from the Mouth of the Offenders themſelves; whether it be by their Confeſſion, or by Conſequences drawn from their Anſwers, as if they deny known Truths, or if they aſſert Facts that are notoriouſly falſe, or if they vary in their Anſwers to Interrogatories, and make other Diſcoveries by which they may be convicted; what are the Caſes wherein it may be lawful to proceed to Torture, which is called the Queſtion; what are the Rules of the Abolition, Remiſſion, or Pardon of Crimes by Letters Patent of the Prince.

The

The ſecond part of the Matters of Crimes and Offences contains that which relates to the Proceedings in criminal Cauſes, the manner of forming Complaints, Accuſations, Denunciations, the taking of Informations and the other Proofs, Decrees for apprehending the Perſons who are charged with any Crime, or for obliging thoſe to appear in Judgment who cannot be impriſoned, their Examinations, the repeating and confronting of Witneſſes when it is neceſſary to have recourſe thereto, and every other thing relating to the Proceedings that are neceſſary for the Inſtruction of Criminal Cauſes.

It is eaſy to judge that theſe two ſorts of Matters being different, they ought to be treated ſeparately, and that thoſe of the ſecond part belong to the Order of Judicial Proceedings, and ought to be explained in the fourth Book, where we ſhall explain every thing that relates to Judicial Proceedings, as well in civil as in criminal Cauſes, and the Matters touching Proceedings in criminal Cauſes ſhall be the ſecond Part of the ſaid fourth Book: So that there remain for the Subject of this Book the Rules which concern the Detail of this firſt part of Crimes and Offences which we have been juſt now explaining, and of which it is neceſſary to draw the Plan.

According to the natural Order of theſe Matters, the firſt Rank ought to be given to that which relates to the Diſtinctions of the different kinds of Crimes and Offences: for before we explain the Detail of a Subject, it is neceſſary in the firſt place to know its Nature; and it is from the Nature of things that we diſcover the Grounds and Principles of the eſſential Truths which relate to them; and when the Buſineſs is to lay down Rules which are the Truths of the Science of Laws, it is from the Nature of that which is their Object that we muſt gather them.

The Diſtinctions of the different kinds of Crimes and Offences may be made differently by divers Views, as by the Difference between publick Crimes and private Offences, taking this Diſtinction in the ſenſe in which it is applicable to our Uſage, as the ſame is explained in the beginning of this Preamble: or by the different Degrees of the Malice and Heinouſneſs of the Crimes, diſtinguiſhing the greater from the leſſer; thus Murders are more heinous Crimes than Thefts, and Seditions greater than Calumnies and defamatory Libels: Or by the Conſequence of the publick Intereſt, which is greater in ſome Crimes than in others; thus Rebellion and Diſobedience to the Orders and Decrees of Courts of Juſtice give greater Diſturbance to the publick Tranquillity than Thefts; and the counterfeiting the Coin more than Forgery: Or by the Difference of the Objects which the Crimes may have relation to; thus Blaſphemy, Impiety, Atheiſm, and the other Crimes of Treaſon againſt the Divine Majeſty relate to God himſelf; thus all Attempts againſt the Prince and againſt the State, which come under the Denomination of High Treaſon, reſpect the Sovereign and the Order of the Government; thus Robberies, Murders, Adultery, defamatory Libels, and other Crimes, affect particular Perſons, either in their Eſtates, Honour, or Perſons: Or by the Difference of the Puniſhments that the different Crimes may deſerve, for ſome Crimes againſt the Divine Majeſty are more mildly puniſhed than others againſt private Perſons; thus Blaſphemy is not puniſhed with Death, as Murder is. We might likewiſe under another view diſtinguiſh between the Crimes which are cognizable by the Judges of the Courts of Lords of Manors, as well as by the King's Judges, and thoſe which are called Royal Caſes, or Pleas of the Crown, which are cognizable only by the King's Judges, ſuch as the counterfeiting of the King's Coin, Sedition, and many other Crimes.

We might likewiſe diſtinguiſh by other Views the ſeveral kinds of Crimes, and place them in different Orders; but it would ſeem that the moſt ſimple and moſt natural way of diſtinguiſhing the ſeveral ſorts of Crimes and Offences, is to conſider in the *firſt* place what is the Character that is common to them all, which places them in the number of Crimes and Offences, and to remark in every one of them what it has peculiar and ſingular in its Nature, which makes it to partake of this Character. This Idea, which may appear to ſome to be ſomewhat obſcure, will be eaſily made clear by a bare Explanation of this Character, and by two Examples of ſome Crimes wherein the ſaid Character is conſider'd.

The common Character which makes all

all Crimes and all Offences, is that they disturb the Order of the Society of Mankind in such a manner as to prejudice the Publick, and so for that reason deserve some Punishment; and this Character is so essential to the Nature of Crimes and Offences, that as it is in all of them, so likewise there are no Actions which have this Character but what are either a Crime or an Offence. Thus Sedition is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince, and therefore deserves some Punishment. And Sedition is an Offence against the Publick, because it disturbs the publick Tranquillity by an Attempt which puts those who ought to obey in the place of those who have the Command, and which makes mutinous and seditious Persons become Dispensers of Authority: and by that means it is an Offence likewise against the Prince. Thus the counterfeiting of the King's Coin is a Crime, because it disturbs the Order of the Society of Mankind, and is an Offence against the Publick, and also against the Prince, and for that reason is worthy of some Punishment. And the counterfeiting of the Coin is an Offence against the Publick, because it occasions an infinite number of Losses to all sorts of particular Persons, disturbs Trade and Commerce, and does Injury to the Prince, who alone has the Right of giving Currency to the Money he orders to be stamped, or of which he is willing to allow the Use.

We see in these two Examples, that each of these two Crimes has the character of disturbing the Order of the Society, and of offending the Publick; and we see in every one of them what it has peculiar and singular in its Nature that makes it to partake of this character: Sedition, by disturbing the publick Tranquillity, and encroaching on the Government and Authority of the Sovereign; and counterfeiting the Coin, by causing Disorders in Trade, and Losses to particular Persons. And it is necessary likewise to discern in each Crime and in each Offence, this Character which is common to them, and to distinguish also in the Nature of every one of them that which it has peculiar in it that disturbs the Order of Society, and which offends the Publick in such a manner as to deserve Punishment; and in order to form this Judgment, and to make this Distinction, it is necessary first of all to consider what there is in the Order of the Society of Mankind, which makes this publick Good, that is injured by Crimes and Offences; and we shall easily perceive in every one of them, wherein it is that its Nature hath this Character.

We take for granted here what has been already explained in the Treatise of Laws, touching the Foundations on which God hath established the Society of Mankind; and as to what concerns the Distinctions of the several sorts of Crimes and Offences, it sufficeth to consider in general the Plan of this Society, according to the Description that has been given thereof in the said Treatise of Laws; and to distinguish in that Plan the divine Order which hath established Society, and made it to subsist by his Providence, by the Ministry of Religion in the Places where it is known, by the Temporal Government, and by the Ties and Engagements which unite Men to one another, in order to their forming their Society: for it is by the Distinctions of those Foundations of the Order of Society, and of those Ties and Engagements which make it as it were different Parts of the Order which God has established in it, that we may be able to judge in each Crime and in each Offence, in what manner it violates the said Order.

According to this view, we may distinguish in the Order of the Society of Mankind, as it were six different Parts which are the Foundations of it, and which compose the said Order; and according as the Crimes and Offences offend differently any one of the said Parts, they may be divided into six kinds.

The first of these parts of the Order of Society, consists in the Dependance on the said Order of God who has formed it, and who preserves it by his Providence, by his Divine Laws, by the Rules of the Law of Nature, and by Religion in the Places where it is known.

The second is the Authority which God has given to the temporal Powers for the Government of the Society.

The third is the general Policy of each State.

The fourth takes in the two sorts of natural Ties which God has made use of for forming the first kind of Engagements

ments which unite Men together: Thoſe two Ties are Marriage, which unites the two Sexes, and Birth, which unites Parents to their Children, and compoſes the Families, which being aſſembled together, form the Society.

The fifth contains all the other kinds of Engagements, which link Men together for all their Wants, which God has eſtabliſhed in order to render them neceſſary to one another, and that they may exerciſe towards one another the ſecond Law, as has been explained in the fourth Chapter of the ſame Treatiſe of Laws.

The ſixth and laſt of theſe Parts, which ought to form the Order of Society, relates to every individual Perſon, conſidering him as a Member of this Body, and with reſpect to what he owes in his Perſon to the Society of which he is a Member; which diſtinguiſhes this ſixth Part from that immediately preceding, which relates to the Engagements of every one towards others in particular, whereas this laſt Part concerns only the Engagements of every individual Perſon to the Publick. Thus, for example, every particular Perſon is obliged both with regard to himſelf, and alſo to the Publick, to make a right Uſe of his Perſon; which makes ſome Actions liable to Puniſhment, altho they appear to be confined to the Perſons of thoſe who commit them, and they are, as will appear immediately, a laſt kind of Crimes and Offences.

Among all the different Manners in which the different kinds of Crimes might have been diſtinguiſhed, as has been already obſerved, we have thought fit to make choice of that of dividing them, according as they offend any one of theſe ſix Parts of the Order of Society, ſeeing it is certain that the Character which is common to Crimes conſiſts in this, that they diſturb that Order; and therefore it is natural to diſtinguiſh them by the Relation which they have to ſome one of theſe ſix Parts, which makes ſix different kinds of Crimes and Offences, which comprehends them all.

The firſt kind is of thoſe Crimes which offend againſt the firſt part of the Order of Society; the Character of which is to attempt ſomething directly or indirectly againſt the Divine Majeſty; ſuch as Blaſphemies, Impieties, Hereſies, Sacrilege, Sorcery and others.

The ſecond, of thoſe which violate the ſecond part of the Order of Society, and which treſpaſs againſt the Prince and the State; ſuch are the Crimes of High Treaſon in the firſt degree, which is againſt the Perſon of the Prince; and in the ſecond, which is againſt the State, and the other Crimes which partake of this nature.

The third, of the Crimes which tranſgreſs againſt the general Policy and publick Order of the State, and which on one part do not eſpecially affect the Intereſt of any one Perſon in particular, and on the other, are not properly Crimes of High Treaſon, altho they encroach upon the Authority of the Prince; ſuch as are the Crimes of unlawful Aſſemblies, of Monopolies, of counterfeiting the Coin, and other ſorts.

The fourth, of the Crimes which violate the natural Ties of Marriage, and of Birth, in ſuch a manner as to diſturb the publick Order of the Society, and of which the Conſequence demands a publick Puniſhment; ſuch as are Adultery, the having of two Wives or Huſbands, which is called Bigamy, a Rape, the impoſing of ſuppoſititious Children, Inceſt, Parricide, Attempts againſt the Perſons of Parents, the expoſing of Children, the Crimes of Mothers who ſuffocate their Children at their Birth, and the other Crimes and Offences which violate theſe ſorts of Ties.

The fifth, of the Crimes and Offences which violate the different Engagements between particular Perſons, and this takes in all the Crimes and Offences which injure any one, either in his Perſon, or his Honour, or in his Eſtate, to ſuch an Exceſs as may deſerve to have ſome kind of Puniſhment inflicted for it by a Court of Juſtice; ſuch as Manſlaughter, Murder, Robbery, Theft, Forgery, Injuries, defamatory Libels, and others.

The ſixth, of Crimes and Offences, which without prejudicing the Intereſts of any particular Perſon, diſturb the publick Order of the Society by the bad uſe which ſome make of their Perſons; ſuch as thoſe who ſpend their time in Idleneſs, Prodigals, thoſe who run into Deſpair, lewd Women, and Perſons who fall into thoſe monſtrous Crimes which are not proper to be named.

It is eaſy to perceive by this Diſtinc-

tion

tion of theſe ſix kinds of Crimes and Offences, that they comprehend them all, and that there is not any one of them of which we may not at firſt ſight judge under which of the kinds it ought to be ranked: and it is only neceſſary to obſerve that there may be ſome Crimes and Offences of a complex nature, which conſiſt of both Characters, and have relation to more than one kind, but even thoſe have their moſt natural Situation in one of the two, which it is very eaſy to diſcern. Thus, for example, a Robbery of Church-Plate is a Sacrilege, and by reaſon of this Character it belongs to the firſt kind of Crimes; but becauſe this Crime does hurt to thoſe to whom the ſaid Plate did appertain, it does by this ſecond view belong to the fifth kind: but ſince the Character of Sacrilege diſtinguiſhes it from other Robberies, it is more naturally qualified by the Name of Sacrilege, and therefore is ranked in the firſt kind.

It is according to this Method and Order that we ſhall explain in this third Book all the different kinds of Crimes and Offences, not by reducing them all to ſix Titles, according to theſe ſix general Kinds, but by ranking them under their proper Titles, and placing the Titles in the Order of theſe ſix Kinds, as they are in the Table, where thoſe of the firſt Kind are the firſt in Order, and the others follow, each in the Order of its Kind.

The Matter of Crimes and Offences takes in two ſorts of Rules: The firſt is of thoſe which are peculiar to each Crime and to each Offence; ſuch as are the Rules which relate to their Nature, their Characters, the Conſequence of making enquiry after thoſe who are guilty of them, and of bringing them to Juſtice, the Puniſhments proportioned to the Quality of the Crime or Offence, and others of the like nature. The ſecond, of ſome Rules which are common, either to all ſorts of Crimes and Offences in general, or only to ſome in particular. Thus the Rules concerning the Regard which ought to be had to the Intention of the Party that is accuſed, and to the Circumſtances, are common to all Crimes and Offences; and thoſe relating to the Effect which the Intention and Circumſtances ought to have, in order to obtain the Pardon of a capital Crime, are proper only to ſome Crimes, and do not agree to all: Thus the Rules which relate in general to the Proofs of Crimes agree to all Crimes and Offences; and thoſe concerning the Proof which is drawn from the Torture of the Perſons who are accuſed, are peculiar to capital Crimes.

In order to diſtinguiſh theſe two ſorts of Rules, and to rank them each in its proper place, we ſhall explain thoſe of the firſt ſort in the Titles proper to each Crime, and to each Offence, according to their different Natures which diverſify the ſaid Rules; and as for the Rules of the ſecond ſort, we ſhall reduce them under ſix Titles, which ſhall be the laſt of this Book. The firſt, where we ſhall explain the Cauſes of Crimes, in the Diſpoſition and Intention of the Criminals and their Accomplices. The ſecond, of the different Circumſtances of Crimes, and the Regard which ought to be had to them. The third, of Accuſations, and the Engagements of the Accuſers. The fourth, of the ſeveral ſorts of Proofs of Crimes and Offences. The Fifth, of the Puniſhments of Crimes and Offences. The ſixth and laſt, of the Ways by which the Perſons accuſed are either cleared or acquitted from the Puniſhments due to the Crimes.

TIT. I.

Of Crimes and Offences.

WE have run through in general all the different Natures of the ſeveral Affairs and Intercourſes which paſs between Men, the Manners by which they communicate to each other the Property and Uſe of one anothers Goods and Labours, and the Ways by which the Goods paſs from one Generation to another. We have likewiſe ſeen that Providence hath thus multiplied the ſaid Communications and Intercourſes, in order to keep Men in the Exerciſe of the Law of Love. And ſeeing all theſe Matters have a relation to this Fundamental Law, all the particular Laws which are the Rules of theſe Matters, are only Conſequences of that primary Law, which is the Foundation and Principle of all the others; and that they all tend to unite

Men

Men together, and to keep them in Peace one with another, without which they cannot obſerve the Law which commands them to love one another

It is this Peace which is the natural Work of Juſtice, and the End of all Laws; but becauſe the greater part of Mankind neither know, nor ſeek after, nor love any other Peace beſides the quiet Uſe of all the Objects of their Self-Love, and that the Deſire of this falſe Peace engages often many Perſons in the purſuit of the ſame Objects, they are ſo far from being united, that they fall out with one another, and come not only to Conteſts and Diſputes, which oblige them to have them regulated by the Ways of Juſtice; but they proceed to Acts of Violence in order to make themſelves Maſters of what their Intereſts and Paſſions deſire. And it likewiſe often happens that without Diviſion, and without Diſputes, the Paſſions of People carry them to Exceſſes of another nature, the Conſequences of which, or the bare ſight of them, gives diſturbance to the Publick. Thus Men are carried differently to the Commiſſion of all the ſeveral kinds of Enterprizes, Violences, and other Exceſſes, which are called Crimes or Offences.

Theſe are the Crimes and Offences that trouble the Peace and Quiet of Societies in ſo many different manners, which ſhall be the Subject of this third Book, and which we are now to conſider, that we may digeſt them into their proper Order.

By a Crime or Offence is meant an Injuſtice which deſerves Puniſhment; not that there is any Injuſtice that does not deſerve a Puniſhment proportionable to the Diſobedience to the Law which it tranſgreſſes, ſince every Act of Injuſtice implies the Violation of ſome Law, and that the Effect of the Law is not only to command and to prohibit, but likewiſe to puniſh thoſe who do not what the Law commands, or thoſe who do that which it forbids: but ſeeing there are two ſorts of Laws, thoſe of Religion, and thoſe of Policy, the Characters and Differences of which ſhall be hereafter explained, Injuſtices are differently conſider'd and puniſhed by theſe two kinds of Laws; and it often happens that Injuſtices, which in Religion are great Crimes, ſuch as Avarice, Hatred, Envy, and others of the like nature, which tranſgreſs the Law of Love in a higher degree, are conſider'd in the Order of the Civil Policy only as Injuſtices of a kind which it takes no manner of notice of, in caſe the Crimes of that nature do not in outward Acts proceed to ſuch an Exceſs as to diſturb the Order of the Society: So that many Injuſtices, which are great Crimes in Religion, go unpuniſhed by the Civil Government; which gives the Name of Crime only to ſuch Injuſtices as deſerve a Puniſhment according to the Preſcription and Rules of the Civil Policy. We ſhall explain in its proper place the Cauſes of this Difference between the Conduct of Religion and that of the Civil Policy: but it ſufficeth here to take notice of one of the Foundations of this Difference, which conſiſts in this, that Religion does not content itſelf with the falſe outward Peace which is maintain'd by Self-Love, but it aims at the eſtabliſhing a true and ſolid Peace, which is the Fruit of an univerſal Juſtice, and an Obſervance of the whole Law; and that Religion likewiſe produces in thoſe who love and obſerve this Juſtice, this two-fold Effect, of forming in the inward part of the Mind and Heart a ſincere Peace, and of keeping them in an outward Peace with all others, and even with thoſe who love not Peace, or who are Haters of it. And thus Religion condemns and puniſhes differently, and by Puniſhments ſuited to its own Spirit and Conduct, all the Injuſtices which violate this double Peace. But ſeeing the Spirit of the Divine Law and of Religion tends principally to reclaim thoſe whom it puniſhes, and to bring them back to the Peace which it recommends to them; this Law of Peace makes uſe only of ſuch Puniſhments in this Life, as ſerve to reclaim thoſe whom it puniſhes, and abſtains from all thoſe Puniſhments which are not proper for ſuch a purpoſe. But becauſe this Spirit of Religion doth not reign in the Multitude, and doth not produce in all Perſons the inward Peace, God has provided by another Method of his Providence, that the Civil Policy ſhould correct or reſtrain thoſe whom the Spirit of Religion doth not mend, and who proceed to that Extravagance as to commit Violences and other Exceſſes, which diſturb the external Order of the Society: and it is for this reaſon that the Civil Policy retaining the univerſal Spirit of the Divine Law for the common Good of the Society, and in

order to contain Men at leaſt in outward Peace as much as is poſſible, makes three different Uſes, according to the Spirit of the Divine Law, of the Penalties and Puniſhments which it eſtabliſhes againſt all Crimes.

The firſt, which is proper to all the Puniſhments, excepting that of Death, is to reform thoſe who are puniſhed.

The ſecond, which is peculiar to Capital Puniſhments, is to put the Criminals out of a condition of cauſing new Troubles in the Society.

The third, which is common to all ſorts of Puniſhments, is the Uſe of Example, for reſtraining by the Sight and Fear of Puniſhments thoſe who abſtain from Crimes only out of fear; and it is this Example that diminiſhes the number of Crimes, which we ſhould ſee multiply to a ſtrange degree if they were let go unpuniſhed

Theſe are the Violences, the Attempts, and other Exceſſes, that trouble the outward Peace and Order of the Society, which the Civil Policy reſtrains by Puniſhments and other Penalties.

We may conſider in the external Order of the Society three ſorts of Goods, the Uſe whereof is neceſſary in it, and upon which no Man can make any Attempt without being guilty of ſome Crime, or Offence The firſt ſort, is Life, and the Liberty of one's Perſon. The ſecond, is the free Uſe of the Temporal Goods, which God gives unto Men, whereby they may be enabled to ſubſiſt in the free Uſe of their Lives and Perſons. And the third, is that Good which is called Honour, and which Men value above all other Goods.

There is no body but what comprehends ſufficiently what the Nature of the two firſt kinds of Goods is, and every one hath the ſame Idea of them; but as for Honour, it is ſuch a Good, that altho it be a real one, yet it is not of ſuch a nature, as that it is very eaſy to conceive a juſt Idea thereof: and ſeeing the neceſſity of underſtanding aright what are the Crimes which offend againſt Honour, makes it likewiſe neceſſary to know what this Honour is which the ſaid Crimes may offend; we cannot forbear enquiring in what manner this Honour, which makes this third kind of Goods, is conſidered in the Order of the Laws, which take it ſo far under their protection, as to inflict Puniſhments, and ſometimes Death it ſelf, for the Chaſtiſement of thoſe who have either raviſhed, or attempted to raviſh it

This word Honour in our Language hath divers ſignifications; for it ſignifies the Reſpect or Conſideration which one has for Virtue, for Merit, for Dignity: and it is in this ſenſe that we are ſaid to honour one.

It ſignifies likewiſe Virtue it ſelf, the Merit, and the Dignity which procure this external Honour; and it is in this ſenſe that we ſay, that thoſe Qualities do honour to a Man.

It ſignifies alſo in a more extenſive and more common Senſe, that advantage which thoſe who live in ſuch a manner, even thoſe of the meaneſt Condition, as not to draw upon themſelves any Cenſure or Imputation from the Publick, have over thoſe Perſons whoſe Life is ſubject to ſome Reproach, which diſcredits them in the eye of the World; and it is ſaid of thoſe Perſons who are of an unblemiſhed Character, that they live like Men of Honour.

It ſignifies that honourable State, in which young Women are who have preſerved their Integrity, and Wives who have not violated their Marriage Vows, and Widows who live chaſte. And laſtly it ſignifies Reputation, that is, the Eſteem which all theſe different kinds of Honour procure to Perſons in publick; and it is in this ſenſe that we ſay of thoſe who injure any one's Reputation, that they take away their Honour.

We may perceive by all theſe different ſignifications of the word Honour, that there is in every one of them that Character which is proper to expreſs the manner in which the Publick conſiders the Condition in which every Man is by his Virtue, by his Merit, by his Dignity, and by his other qualities, according as the ſaid condition and the ſaid qualities procure him Reſpect, or exempt him from juſt Reproach: ſo that Honour, according to all the different ſignifications that have been juſt now taken notice of, is a real Good which conſiſts chiefly in thoſe Qualities, which procure Eſteem, or which exempt from Reproach; and that Eſteem alſo, in which Reputation conſiſts, is a real Good: for altho it is not right to covet and deſire that Eſteem, yet it is a good thing to deſerve it, not only becauſe it is a natural Conſequence of Merit and Virtue, and of other

other good Qualities, but likewiſe becauſe it is of importance in a Society that each Member thereof be conſidered in it according as he is uſeful or hurtful, valuable or deſpicable by his Qualities. And it is not only of importance to the Society, that the Perſons who compoſe it ſhould have the Qualities which may render them uſeful, and may procure them an Honour proportionable to the uſefulneſs and advantages of their Qualities; but it is alſo of very great importance, that the Publick ſhould acknowledge and conſider thoſe Qualities in the Perſons who have them, and ſhould take care that the Diſgrace and Contempt that People fall into by Slander and Defamation, do not render thoſe Perſons either uſeleſs or contemptible, whoſe known qualities may be of ſervice to the Publick. And in fine, it is a natural uſe of Honour in the Order of Society, that it ſupports mutual Love, which nothing begets ſo much as Eſteem: for altho we ought to love thoſe in whom we eſteem nothing but their Human Nature, and the hopes of making them good, yet the Love which is reduced to ſuch Motives, is but of little uſe in the external Order of Society; and that Love which is maintained by the Ties of Honour and Eſteem, is of a more univerſal Uſe, both in Religion, and in the Civil Government.

It is for theſe very eſſential Reaſons, that Honour is a real and a very great Good, both for thoſe who have it, and for the Publick, both in Religion and in the State. And this Good both in the one and the other is of ſo great a Value, that in Religion the wiſeſt and the moſt humble are obliged to prefer Honour to all other Temporal Goods, and to defend themſelves againſt the Calumnies which caſt a ſlur upon it; and in the Civil Policy the Laws conſider Honour in ſuch a manner, that they do not ſuffer Perſons in any Caſe either to wound the Honour of thoſe who have the advantage of it, or to reproach the want of it in thoſe who have it not; and no body can with impunity diſhonour any Perſon whatſoever, whether it be by Calumny, or by reproaching one with a defect which he really has; and it is lawful for none to take away any Perſon's Honour, except the Magiſtrate alone, who may diſgrace or diſhonour in a Judicial way of proceeding thoſe who deſerve ſuch a Puniſhment.

It is therefore in this Point that the Importance and Conſequence of Honour do conſiſt, that ſeeing all Men are obliged to make themſelves uſeful one to another, and to render themſelves amiable by the good Qualities which make them both uſeful and amiable, one ought to prefer to all other Good whatſoever that ſtate of Honour, in which one has the Qualities which render Perſons uſeful and amiable, and the Reputation which puts the ſaid Qualities in uſe: which ſhews that ſolid Honour ought not to be underſtood, to conſiſt, either in vain Qualities, which without Virtue and without Uſe make but an empty Merit, or in the vain Reputation which all thoſe vain Qualities may procure.

It was neceſſary to make here all theſe Remarks, that the Reader may be the better able to diſcern in the ſequel of this Book the different Characters of the Crimes, which offend againſt the different Kinds of Honour; and we may now proceed to conſider the ſeveral Crimes which encroach upon theſe three ſeveral Kinds of Goods, Life, Honour, and Eſtate.

The Crimes and Offences, which attack the Life and Perſon of Man, are Aſſaſſinations, Duelling, Homicide, Poiſoning, Acts of Violence committed upon the Perſon, Blows, and all Exceſſes which wound, diſfigure, lame, or hinder otherwiſe the uſe of the Members, or which prejudice the Health *b*.

The Crimes and Offences which affect Peoples Eſtates, are the ſeveral Enterprizes, Acts of Force and Violence, Frauds, and other ways, by which one encroaches upon the Goods of another, either by Force, or otherwiſe, or by other ways; ſuch as Robbery, Theft, the receiving of ſtolen Goods, Uſury, Forgery, Stellionate or Cozenage in bargaining, fraudulent Bankrupcies, the driving away of Cattle, the cutting down of Timber, ſetting Houſes on fire, removing of Land-marks, and all the Crimes and Offences which occaſion any Loſs or Damage.

The Crimes and Offences which relate to Honour, are all the attempts to blemiſh or wound the Honour of any Perſon; which happens two ways, either by an injurious treatment of the Perſon, or by aſſaulting the Reputation: for one may abuſe another and offend

b A good Name is rather to be choſen than great Riches. Prov. 22. 1.

him in his Honour by Actions, or by opprobrious and injurious Language without leſſening his Reputation; and one may caſt a blemiſh on another's Honour by words, by writing, and by other attempts againſt his Reputation; or one may attack by one and the ſame way, both the Reputation and Perſon of another, either by an Action, or by an Injury, which may have the double Character of offending and diſcrediting.

Beſides theſe three ſorts of Crimes againſt theſe three Kinds of Goods, there are ſome which affect differently, either one or two of the three Kinds of Goods, or all the three together, and which are ſo much the more grievous, altho they often go the rather unpuniſhed, becauſe they ariſe from the Adminiſtration of Juſtice, and becauſe they are peculiar to the three ſorts of Perſons who exerciſe the ſaid Miniſtry. Thoſe three ſorts of Perſons are, the Judges, the Parties, and thoſe who defend in Judgment the Intereſts of the Parties.

The Crimes peculiar to Judges, are Extortion, the taking of Bribes, and other Miſdemeanours.

The Crimes peculiar to the Parties, are Calumny, and all unfair Practices to make out a Right; ſuch as Forgery, and others of the like nature. And the Crimes peculiar to thoſe who defend the Parties in Judgment, are Prevarication, and advancing for Truths what they know to be falſe. And all theſe Crimes attack indifferently, either the Life, or the Perſon, or the Honour, or the Eſtate, or two of them, or all three together; as if the Calumny of the Party, or the Prevarication of the Advocate, or the Corruption of the Judge relate to an Accuſation of a Crime, which endangers the Perſon, the Honour, and the Eſtate.

All theſe different Kinds of Crimes comprehend under them all Crimes of what nature ſoever they may be; and there is not any one which may not be reduced to ſome one or other of theſe ſix Kinds, altho there be ſome Crimes which belong to ſeveral of the Kinds together; as for example, the Theft of a thing dedicated to a ſacred Uſe, which is a Crime compoſed of the double Character of the firſt and ſixth Kind; the counterfeiting of the Publick Coin, which has the double Character of the ſecond and ſixth Kind, and others of the like nature. And altho there be ſome Crimes which ſeem not to come under any one of theſe Kinds, as for example, the change of Name; it is nevertheleſs true that this Crime is never committed by any private Perſon, but out of ſome View which gives it the Character of one of theſe ſix Kinds. Thus when he who changes his Name diſguiſes himſelf with a deſign to corrupt the Wife of one who is abſent, and to give himſelf out for the Husband; the Crime of changing the Name takes the Character of the Crime of Adultery: and if this Change is made with an intention to ſteal, to kill, or to commit other Crimes, it takes its Character from the Crime with which it is connected as a Circumſtance; and the changing of one's Name has always in general the Character of deceiving ſome body, if it is not done with the Circumſtances which may render it lawful *c*.

Seeing there is not any one of all theſe Crimes and Offences of all the ſeveral Kinds, but what deſerves ſome Puniſhment in the Order of the Civil Policy, and that all Crimes are not equal, as the Stoicks falſly imagined, not even the Crimes of the ſame Kind; it is of moment to enquire a little what it is that makes this difference, and renders Crimes more or leſs heinous, and more or leſs puniſhable in the Civil Policy.

There are three Cauſes of the differences between Crimes, or Offences: The Character of each Crime, and of each Offence; the Motive which induced the Perſon to commit it; and the condition of the things which accompany the Crime or Offence, which is called the Circumſtances.

The Character of each Crime, is what is called the quality of the Crime; and it is firſt of all by the quality of the Crime, that we diſtinguiſh between the enormity and heinouſneſs of a Murder, and the ſmallneſs in compariſon of a blow with the hand in a ſcuffle. Thus in the other Crimes and Offences, the motive of the Perſon who commits the Crime, is the Principle which moved him to do it, and made him act. And there are three ways in which one is moved, or engaged to commit a Crime, or an Offence, either out of a

c l. 13. ff. de ſal. Paulus 5. Senten. 25. 20. Cod. de mutat. nom.

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premeditated deſign, in the heat of Paſſion, or thro Imprudence. And it is eaſy to imagine that in the ſame Kind of Crime, a tranſport of Paſſion is much more grievous than Imprudence, and a premeditated Deſign much more heinous than a tranſport of Paſſion.

There are ſome Crimes which cannot be committed but out of a premeditated Deſign, ſuch as Aſſaſſinations, Duelling, Poiſoning, a Rape, Robbery, Theft, and many others; and there are ſome which may be committed, either out of a premeditated Deſign, or in the heat of Paſſion, or through Imprudence, ſuch as Homicide; for one may kill another with a premeditated Deſign to kill; one may kill in the heat of Paſſion, or through Imprudence, without any premeditated Deſign, and only out of a Deſign ariſing in the height of ones Paſſion; and one may kill through Imprudence, as for example, if one ſhould kill his Friend thinking to kill a Beaſt behind a Buſh. And it is this difference of the Principles and Motives which engage Perſons in the commiſſion of a Crime, or an Offence, which is the ſecond Cauſe that diſtinguiſhes between Crimes and Offences, and which renders them more or leſs heinous, according to what paſſes in the Mind and in the Heart of the Perſon who commits the Crime.

The Circumſtances, which are the diſpoſition and condition of the things which attend the Action, and which may have any relation to it, make a third Cauſe of the diſtinction of Crimes or Offences, and produce theſe two Effects; one, to make ſome Actions either criminal or innocent by the bare difference of the Circumſtances; and the other, to make thoſe which are in reality Crimes, more or leſs heinous and puniſhable. Thus for example, Homicide is an Action which under the Circumſtances of a lawful War is innocent, and which is a Crime in the caſe of a Riot or Sedition. Thus it is a ſmaller Crime to ſteal a common thing out of the Houſe of a private Perſon, than to ſteal a thing dedicated to a ſacred Uſe out of the Church.

We do not enlarge here on the ſeveral Kinds of Circumſtances, which are to be conſidered in judging of Crimes, ſuch as thoſe relating to the Perſons, the Place, the Time, and others; reſerving this matter to be treated of when we come to the detail thereof: but it was neceſſary to make theſe general Remarks, in order to give the firſt Ideas of this matter, and to ſettle its Order; and we ſhall only add two Reflections in relation to the Circumſtances. The firſt, that according to the common acceptation of this Word, there are two ſorts of Circumſtances; thoſe which happen in the Perſon who does the Action, of which it is neceſſary to judge, in order to know whether it be criminal or not, or if it be more or leſs heinous; and thoſe Circumſtances which occur outwardly. Thus we conſider in the Perſon his Quality with reſpect to his Actions; and if it is, for example, a Perſon who has been already reprimanded for the ſame Crime, that Circumſtance renders the ſecond Crime more heinous and more worthy of Puniſhment than the firſt. Thus we conſider independently of the Perſon, the Time, the Place, and the other outward Circumſtances, where the Crime has been committed; and theſe two ſorts of Circumſtances, either in the Perſon, or without the Perſon, have this in common, that they diſcover the diſpoſition in which the Criminal was, by the Views and Deſigns which he may have had, and the Circumſtances in which he was.

The ſecond Reflection, is that among the divers Views which we ought to have in the matter of Crimes, one of the chief is that of the Events, which the Laws place in the number of the Circumſtances *d* which aggravate or leſſen the Crime and the Puniſhment: for it is of importance to obſerve, as the foundation of ſome Principles, that altho the Event of an Action be a Circumſtance before God who judges the Heart, and that his Juſtice conſiders only the Views of the Motives, which are the Principles of our Actions, and which give them the Character on which God judges them without mixing in his Judgments the Views of the Events, which he orders and directs without any regard to our Views and to our Deſigns; yet it is nevertheleſs true that in the Civil Policy the Events are conſidered; and it is likewiſe juſt that they ſhould be conſidered, and that of two Actions which are of the ſame Character, both by the quality of the Action, and by the motives of the Criminal, that which is followed by an Event which gives greater diſturbance

d V. l. 16. *ff. de pœnis.*

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to the external Order of the Society, ought to be otherwiſe conſidered by the Civil Policy than that which gives a leſs diſturbance. Thus for example, if we compare in two Quarrels two paſſionate Men who intend to kill, and make a Paſs at their Adverſary with that intent, and if we ſuppoſe that one wounds only, and that the other kills, the Event of Homicide in one of theſe two Quarrels, and the Event of a bare Wound in the other, make in the Civil Policy ſuch a difference between theſe two Crimes, that he who has only wounded will be but ſlightly puniſhed, and he who has killed will be proſecuted for Murder, and cannot eſcape the Puniſhment of Death, unleſs the Circumſtances of the Action may intitle him to the Prince's Mercy. And there is no reaſon to think that there is any thing unjuſt in this Conduct, which treats in ſo different a manner theſe two Criminals, whom nothing diſtinguiſhes but the Event; for altho in the Heart and before God theſe two Actions are equal, yet there are two eſſential Reaſons in the external Order of the Civil Policy for making a difference between them.

The firſt is, that as the Spirit of the Civil Policy tends to regulate the external Order of the Society, ſo it applies it ſelf to the finding out and puniſhing of Crimes, in proportion to the diſturbance which they give to the ſaid Order: and therefore it is but reaſonable that it ſhould conſider in another manner, and puniſh more ſeverely the Actions which produce a much greater diſturbance in the Society than thoſe which are attended with leſſer Conſequences; leaving it to the rigour of the Divine Juſtice to diſcern, and to puniſh more ſeverely the Actions which occaſion the leaſt diſorder in the Society, altho they be as much or more criminal in the Heart as the others.

The other Reaſon is, that it is ſometimes difficult, and even impoſſible to diſcern what has been the Motive and the Principle, which has induced him to act who is fallen into ſome Crime, or ſome Offence; and if there is either more Imprudence, or Paſſion, or a real and true Deſign, when the Action and the Event, and the other Circumſtances leave room to doubt of the diſpoſition and intention of the Perſon who has offended, it would be unjuſt to ſuppoſe that his deſign was more criminal than it appears to have been by the Event and by the Circumſtances; and according as there is room for doubting, it is preſumed, if poſſible, that he has offended out of Imprudence rather than out of Paſſion, and rather out of Paſſion than out of a premeditated Deſign.

But when the Crime is ſuch that it cannot be committed either out of the heat of Paſſion, or through Imprudence, and when it is the effect of a premeditated Deſign, ſuch as Robbery, Theft, Aſſaſſination, and other the like Crimes; if the deſign which is conceived in the Mind, and formed in the Heart, hath produced ſome Motion that hath appeared outwardly, this Motion is conſidered in the Civil Policy as a Trouble which diſturbs the Order of the Society; and although the Event has not enſued according to the Intention, that the Murderer has not killed, that the Robber has not carried any thing away, yet the Law takes for the Event the bare attempts of Crimes of this nature, becauſe thoſe Attempts trouble the external Order of the Society, and ſhew that the Perſons who made them, are of ſuch a Character as to endanger the Life and Eſtate of all Men; and the ſaid Attempts are puniſhed in proportion to their Malignity, and their Conſequences.

By this time the Reader may perceive that all theſe matters of which we have juſt now ſpoken, ought to enter into this Treatiſe of Crimes and Offences, and that it ought to contain the ſeveral Kinds of Crimes and Offences, the three different manners in which they are committed, and the Circumſtances; and it remains that we ſhould conſider in general the other matters which this third Book ought likewiſe to contain.

After this firſt View of the Cauſes and Circumſtances of Crimes and Offences, we muſt in the next place proceed to the matters which are the Conſequences thereof, which are all thoſe which relate to the Puniſhment of Crimes; the Accuſation, the Arreſt, the Cuſtody of the Perſons who are accuſed, the Proofs, the Torture, the Sentence of Condemnation, the Writings exhibited, the Defence and Acquittal of Perſons accuſed, Pardons and Abolitions, or Acts of Indemnity. And it is firſt of all neceſſary to give the general Ideas of all theſe matters, in order to explain them in ſuch a manner as that

that they may be underſtood, both according to our Uſage, and according to the Uſage of the Roman Law, and that they may ſerve as a Foundation to the Principles which are peculiar to them, and alſo in order to ſettle the Rank of every one of them in this Treatiſe.

Seeing Crimes and Offences ought to be puniſhed, it is neceſſary that there ſhould be not only Judges to decree the Puniſhment of them, but alſo Perſons to carry on the Proſecutions againſt the Criminals; becauſe thoſe who are to judge, cannot exerciſe the double Function of Judges and Parties, no more than they can be Judges in their own Cauſes; and let them be Perſons of ever ſo great Integrity, yet they cannot be both Proſecutors and Judges, according to the Rules and Reaſons, which ſhall be ſet down in the matter of Accuſers.

This Proſecution of Crimes may have two Views, one for the Puniſhment of the Crime, and for the publick Example, and the other for the Reparation of the Damage which the particular Perſon who has been injured has ſuſtained: and as we have already obſerved that according to the Conſtitution of our Government, the particular Perſons who have been injured can demand only the Reparation of their Damage, and that Vengeance and the publick Example are the Care of the Publick Officer; we have therefore, according to our Uſage, two ſorts of Perſons who concur with theſe two Views in the Proſecution of Criminals, the Party intereſted who complains, and demands Reparation of his Damage, and the Officer who for the good of the Publick ſues for the Puniſhment of the Criminal: and they concur differently in this Proſecution.

The particular Perſons who are intereſted in the Crimes or Offences may proſecute, or not proſecute, as they pleaſe; but when they proſecute, the Publick Officer ought to be joined with them in the Proſecution, and he cannot refuſe to exerciſe his Miniſtry in conjunction with the injured Party who complains, becauſe every Crime and every Offence deſerves a Puniſhment: and ſince the injured Party cannot demand a publick Puniſhment of the Crime, it is neceſſary that the publick Officer ſhould on his part proſecute the Criminal in order to Puniſhment, while the injured Party ſues for Reparation of his Damage; and it is for this Reaſon that he is called the Civil Party, becauſe altho he proſecutes a Criminal, yet he ſues only for Satisfaction to be made to him of the Damage he has ſuſtained, or the Reparation of his Loſs, which is called Civil Intereſt, and he can never demand the Puniſhment of the Criminal. If the injured Party declines to make his Complaint, the publick Officer is obliged, or not obliged, to proſecute on his part according to the quality of the Crime; for if it is heinous, and deſerves that the Criminal ſhould be made an Example of, the publick Officer ought to carry on the Proſecution, altho the injured Party makes no Complaint; and there are Rules by which he may be able to diſtinguiſh between the Caſes where he may be ſilent, and thoſe where his Duty obliges him to proſecute, altho the injured Party makes no Complaint

There are therefore in *France* two ways, by which the publick Officer ought to proſecute the Puniſhment of a Criminal, one, when he is joined with the Perſon who has been injured, and the other, when he ſues alone, and without the Concurrence of the injured Party: and there are alſo two ways by which private Perſons may accuſe a Criminal; one, when they accuſe publickly, making themſelves Parties, and proſecuting the Criminal; and the other, when they are only Informers without making themſelves Parties. And this Information may be given by two ſorts of Perſons; for it may be given by the Party intereſted, when he either cannot or will not carry on the Proſecution, and only gives in a bare Information: and this is received alſo in great Crimes from thoſe who without any perſonal Intereſt accuſe Criminals, and by this Accuſation they engage themſelves to furniſh the Proofs of the Crime: and altho many Informers are excited more by Paſſion than a Zeal for Juſtice and the Publick Good, and that a Court of Juſtice ought not to give ear to thoſe who are acted only by Paſſion; yet two Conſiderations of importance oblige Magiſtrates to liſten to Informers; one, becauſe there may be ſome Informers who act out of a juſt and lawful Motive, and the other, becauſe the Order of the Government requires for the publick Good that Governours ſhould imitate the Divine Providence which knows

knows how to draw Good out of Evil, and that they ſhould make uſe for the Conviction and Puniſhment of Criminals, of the Lights and Diſcoveries that are to be had from thoſe Perſons who contribute towards it only out of a bad Intention.

The Accuſation being formed, the next ſtep to be taken is to find out the Proofs of the Crime, and when there appears to be Proof enough for bringing the Criminal to his Trial, that he may either clear himſelf or undergo the Puniſhment of the Crime, he is required to give an appearance; and if the Crime be ſuch as that it may be prudent to arreſt his Perſon, at the time that an Order iſſues for his Appearance, he is immediately ordered to be taken into Cuſtody and impriſoned: and in both theſe Caſes, either of Imprisonment, or of his giving an Appearance without any Confinement of his Perſon, he is examined touching the Accuſation that is brought againſt him, with a View to diſcover and find out the Truth, that he may be either acquitted, or convicted

If the Criminal confeſſes the Crime, and the Crime be capital, yet nevertheleſs the Court proceeds to hear the Proofs for it would not be juſt to condemn an innocent Perſon on a falſe Confeſſion: If the Party accuſed denies the Crime, they go on with the Proof of it; and in order to finiſh the Proofs, the Witneſſes are again called, and they ſhew them what they have already declared touching the Fact, to give them an opportunity either to perſiſt in the Truth, if they have told the whole Truth, without making any alteration, or to explain and amend ſuch part of their Depoſitions as they may think neceſſary to be altered: after which the Criminal and the Witneſs are brought face to face, and the Criminal is made acquainted with what the Witneſs has declared, and with the other Proofs; and when the Proofs are ſuch as to make it neceſſary to uſe the Torture, according to the Rules which ſhall be explained in their proper Place, the Criminal is put to the Torture; and afterwards they proceed to give Judgment, and to condemn him to the Puniſhment which his Crime may deſerve.

Puniſhments are the ſeveral Evils which Criminals are made to ſuffer, and which Juſtice uſes, according to the three Views, which we have already taken notice of, either to amend the Offender, or to prevent his falling into the ſame Crime again, and always to make an Example; for Puniſhments are the only means whereby it is poſſible to reſtrain the Licentiouſneſs of Malefactors. And altho this Remedy is imperfect, and that the force of Paſſion ſurmounts in many the fear of Puniſhment, yet it is the only way that can be practiſed, for reſtraining the greateſt part of Mankind: for ſince no one is moved to the commiſſion of a Crime except it be by ſome unlawful deſire of an Object which excites his Paſſion, there is no ſtopping the Violence of the Paſſion but by ſubſtituting in the place of the Object which the Perſon ſets his Heart upon, a contrary Event, which may be ſo diſagreeable as to allay the vehemence of the Paſſion: and it is in order to give to Malefactors a View of this Event, that exemplary Puniſhments are made, by which ſuch a Change is wrought in thoſe who take warning from the Example, that the Motion of Self-Love and of the Paſſion which ſtirs them up to the commiſſion of the Crime, is changed into a contrary Motion of the ſame Self-Love, which without extinguiſhing the Paſſion, avoids either the Crime, or at leaſt the Puniſhment. And it may likewiſe happen that the uſe of Examples may contribute to keep ſome Perſons within the bounds of a true Moderation, and work in them a ſincere Averſion, as well to the Crime it ſelf as to the Puniſhment.

It is for this uſe of Puniſhments, according to theſe three Views, of amending the Criminals, or of putting them out of a condition of committing new Crimes, and of making an Example, that the Laws have eſtabliſhed that great multitude of ſeveral different Puniſhments, not only according to the different Crimes, but differently eſtabliſhed in divers Places and at divers Times for the ſame Crimes.

Seeing all theſe different Puniſhments ought to have this Character, of making thoſe who are puniſhed to feel an Evil which the Crime draws upon them, and of ſtriking a Terrour into others, all Puniſhments may be reduced to the three Kinds of Evils already remarked, which Men may be made to ſuffer: and according to this View the firſt Kind of Puniſhments conſiſts of thoſe which are inflicted on the Perſon, as Condemnation to Death, to the Galleys, Whipping,

ping, Baniſhment, the cutting off a Member, and others of the like nature: the ſecond Kind; is that of the Puniſhments which particularly affect the Honour; for altho every Puniſhment deſtroys or diminiſhes the Honour of the Perſon who is condemned, yet there are ſome Puniſhments which affect particularly the Honour, ſuch as that ignominious publick Confeſſion of the Crime which in *France* is called *Amande Honorable*, and a publick Reprimand given by the Judge to the Criminal in open Court; both which Puniſhments brand the Criminal with Infamy, altho they do not touch either his Perſon, or his Eſtate, as in the caſe of a Judicial Reprimand: and the third Kind of Puniſhments conſiſts of thoſe which take away the Goods of the Criminal, or a part of them; as when he is condemned to make reſtitution, to repair the Damage he has done, to pay a Fine, or when all his Eſtate is declared to be forfeited.

All theſe Puniſhments have this in common, that altho they do not all of them directly affect the Honour of the Perſon that is condemned, yet there is not any one of them but what carries Diſhonour along with it; and even thoſe Puniſhments which are the ſlighteſt, ſuch as the being condemned to give ſome Alms to the Poor, the receiving an Admonition, and which do not inflict that Infamy which is called Legal Infamy, and which renders the Perſons who are noted therewith, incapable of certain Functions, do nevertheleſs ſtain, or blemiſh the Honour in the general Eſteem of Men: And ſometimes the three Kinds of Puniſhments are all accumulated together, as in the caſe of thoſe who are condemned firſt to make a publick Confeſſion of their Crime in an ignominious manner, and afterwards ſuffer Death, and their Eſtates confiſcated, which always attends the Puniſhment of Death.

The Perſons who are accuſed may avoid the Puniſhments three ways, by juſtifying their Innocence, by a particular Pardon from the Prince, and by an Abolition or general Act of Indemnity.

When the Perſon who is accuſed juſtifies his Innocence, he is not only freed from the Puniſhment, but acquitted of the Crime; and there needs no Pardon from the Prince, nor Indulgence from the Judge, to him againſt whom no Crime is proved, or who clears himſelf againſt the Proofs which have been offered againſt him; and he is acquitted either for the want of Proof to convict him, or by the effect of the Proofs which he alledges for his Innocence, and which he confirms.

The Pardon of the Prince, which would be ſuperfluous to ſuch as are wrongfully accuſed of a Crime which they have not committed, is neceſſary to thoſe who have committed a Crime, which in its nature may deſerve Death, or who have been Accomplices in the Commiſſion of ſuch Crime, but who are under Circumſtances which may intitle them to the Prince's Pardon, and to have the Puniſhment remitted. Thus for example, if he who has killed a Man, which is a Crime that deſerves Death, has killed without any fore-thought Malice, by a mere Accident; or if he has killed him to ſave his own Life, defending himſelf in that manner which in the Civil Policy is called a lawful Defence, becauſe in the external Order of the Civil Policy the ſame is excuſed, or forgiven; or if he was privy to the deſign of the Perſon who killed one in his Company, it is neceſſary in theſe Caſes that the Criminal ſhould have recourſe to the Prince, to obtain from him a Pardon of the Crime, and a Remiſſion of the Puniſhment: Which ſhews plainly the difference between the innocent Perſon who has not killed, and him who has killed, or has contributed to the killing of another, with whatever Circumſtances the Homicide may be attended; becauſe the one is abſolutely free from all manner of Crime and from all manner of Fault, and the other is ſo far involved in the Crime, or in the Fault, that he ſtands in need of a Pardon.

An Abolition, or Act of Indemnity, is neceſſary for thoſe who are convicted, and who cannot plead an excuſe from any of the Circumſtances; for in that caſe if the Prince is diſpoſed to Pardon, he muſt do it by another way than that of a ſpecial Pardon and Remiſſion, which are founded upon Circumſtances, and he muſt of his own free Will and Pleaſure, and by virtue of his abſolute Authority, aboliſh the Crime, and the Puniſhment, out of Motives which induce him to prefer Impunity to Puniſhment; ſuch as the Conſideration of the perſonal Merit of the Criminal, or the Regard which the Prince has for his

Family, or upon other Views, of which he is to render an account to God alone.

Seeing Pardons, Remiſſions, and Abolitions are in uſe only for Crimes which of their own nature deſerve to be puniſhed with Death, we have not ſet down among the ways by which Perſons who are accuſed avoid the Puniſhments, that of Death, and Flight; for there are ſome Crimes which Death it ſelf does not prevent an Enquiry to be made into them, and Puniſhments to be inflicted for them; and Flight is it ſelf a Puniſhment, and does not free one from all the other Puniſhments.

THE

THE PUBLICK LAW; BEING A SUPPLEMENT TO THE CIVIL LAW IN ITS NATURAL ORDER.

BOOK IV.

Of the Ways of terminating Law-Suits, and Differences, and of the Order of Judicial Proceedings.

IT is not enough for the Knowledge and Exercise of the Science of Law, to know throughly the Nature, the Principles, and the Detail of all the several Matters which are the Subject of Contests, of Differences, of Crimes and Offences, and all the Divisions which trouble and molest the Peace and Union that ought to link the Members of a Society together; but it is likewise necessary to know the Ways that are made use of for judging and deciding these Differences, these Divisions, and Affairs of all kinds.

There are three different ways by which an end may be put to all sorts of Affairs and Disputes between particular Persons, comprehending under these Words of particular Persons, all sort of Persons whatsoever, without excepting even Communities.

The firſt is the voluntary Agreement which the Parties make among themſelves, either wholly by themſelves, or by the Mediation of their Friends, by their Counſel, or by the Advice of ſome third Perſon, without waiting for any formal Judgment or Award.

The ſecond is the choice of ſome Perſons to whom they give power to regulate and to adjuſt their Differences.

The third, which becomes neceſſary when thoſe who have any Diſpute together, where one of them will not hearken to any of the two firſt Ways, is to go before the Judges, whether it be that one Party is drawn thither, or that he inclines to draw his Adverſary into Judgment.

We do not place in this Rank of the Ways of terminating Differences, two other Ways, which ſeem to produce the ſame Effect. One is Tyrannical, when one of the Parties impoſes Silence on the other by his Violence; and the other full of good Nature, and of Chriſtian Patience, when one of the Parties being deſirous of Peace, and deſpiſing that which is the Ground of the Difference, abandons, not out of Negligence, but out of Prudence and a Principle of Virtue, either that which he has a right to demand, or that which is unjuſtly raviſhed from him. Theſe two Expedients cannot be reckoned among the Ways of ending Differences; for one of them is a Crime liable to Puniſhment, altho it be very frequent, and yet ſeldom puniſhed; and the other is a Virtue ſo little known, that many give it another Name; and few of thoſe who know it are willing to practiſe it: And beſides, the Violence of ſome, and the Patience of others, not rendring to every one what belongs to him, are not Ways of terminating Differences, no more than an Inability to go to Law, and the other Ways by which People may abandon their Right.

We have reſtrained theſe three Ways of terminating Differences to ſuch as are between particular Perſons, of what Nature ſoever they may be; for in Crimes where the publick Concern for Puniſhment is mixed with the private Intereſt of particular Perſons, altho the particular Perſons may, as to what concerns their private Intereſts, make an end thereof by any of theſe three Ways which they pleaſe to make choice of, yet they cannot meddle with any thing that relates to the publick Intereſt; for the Officer who is charged with the care of it can uſe only the Way of a Judicial Proſecution, becauſe he is not Maſter of the publick Intereſt, ſo as to diſpoſe of it, as private Perſons are at liberty to do with their Intereſts what they pleaſe; for this Officer being obliged by the Duty of his Office, to ſue for the Puniſhment of the Crime, he cannot faithfully diſcharge this Duty, but by proſecuting the Criminal without any Terms of Accommodation, and before the Judge, who is the only Perſon to whom the publick Intereſt has been intruſted.

Theſe three Ways of putting an end to the Differences between particular Perſons, have their Names, their Natures, and their Principles wholly different.

The firſt, which is the voluntary Accommodation to which the Parties agree, is called a Tranſaction, that is to ſay, a Treaty concerning a Difference that is either begun, or ready to begin, and which puts an end to it

The ſecond, which is the Choice of one or more Perſons who are taken for Judges, is called Arbitration, becauſe they give the Name of Arbitrators to the Perſons who are taken for Judges, and to whom they give power to terminate the Difference by a Sentence, which is called for that reaſon an Award or Arbitrament, and the Treaty by which they give them this Power is called a Compromiſe, becauſe the Parties promiſe mutually to execute whatever the Arbitrators ſhall decree And becauſe the Arbitrators being choſen only by Perſons in a private Capacity, have not the Authority of real Judges, who exerciſe the publick Function of judging, it was neceſſary to give unto their Sentences another Force than that of the publick Authority, and ſuch as might be proportionable to the Power which the Arbitrators derive only from the Parties who have named them. And it is for this reaſon that whereas the Sentences of Judges are executed by the natural force which they have from Authority, the Want of Authority which private Perſons cannot give to thoſe whom they chuſe for their Arbitrators, is ſupplied by another Way which is in the power of the private Perſons themſelves, and that is, the agreeing to a Penalty to which they bind and engage themſelves by the Com-

Compromiſe, promiſing thereby that he who ſhall refuſe to execute the Award, ſhall be bound to pay the Penalty to the other; ſo that the whole Effect of Compromiſes is reduced to the Payment of this Penalty *a*, which is called the Penalty of the Bond; and he who is not ſatisfy'd with the Award, may chuſe either to pay the Penalty, or to perform the Award.

The third Way of terminating Differences and Law-Suits, and which is much more frequent than the two others, is the Recourſe which is had to the Judges, which is called the Way of Juſtice, not that it is more juſt to have recourſe to this Method, than to make an end by an Arbitration, or by a Tranſaction: for on the contrary, it is infinitely more conformable to the Divine Law, and conſequently more juſt, and likewiſe more profitable, to ſhun this Way, and to ſeek for Peace, even with the Hazard of ſome Loſs, rather than to go to Law, and expoſe ones ſelf to the Conſequences which all Law-Suits are attended with, and which are equally contrary to Charity and to Self-Love. But this third Way of ending Law-Suits and Differences is called the Way of Juſtice, becauſe it is juſt that the lawful Authority ſhould judge and determine the Law-Suits and Differences which the Parties themſelves would not make an end of another Way, and that it ought to be Juſtice which accompanies that Authority, and alſo becauſe it is Juſtice which the Parties ought to expect by this Way. And laſtly, altho it ſhould happen that the Judges who judge in the laſt Reſort, and who have the Authority of putting the laſt end to all Law-Suits, ſhould render a Judgment that were not juſt, yet it is juſt to abide by it; and there would be no likelier Way of introducing Rebellions and Seditions, and conſequently nothing more unjuſt, than to leave particular Perſons at liberty to reſiſt Authority, and to render to themſelves the Juſtice which they had not been able to find in the Place where they ought to have had it. And it is only Sovereign Princes, who owning no common Superior from whom they may demand Juſtice, when they cannot agree among themſelves, are naturally engaged in the way of War, which is a kind of Recourſe to the Judgment which God, who alone is their common Maſter, ſhall think fit to pronounce between them, by the Succeſs which he ſhall give to the Arms of the contending Parties.

These are therefore the three Ways of terminating Law-Suits and Differences, by Tranſaction, by Arbitration, and by the Way of Juſtice, which ſhall be the Subject of this laſt Treatiſe; and becauſe the particular Matters of Tranſactions and Arbitrations are of no large Extent, and that it is natural to come to the Way of Juſtice, when none of the other two Ways ſucceed, this general Treatiſe of the Ways of terminating Law-Suits and Differences, and of the Order of Judicial Proceedings, ſhall be preceded by two particular Treatiſes, one of Tranſactions, and the other of Compromiſes and Arbitrations, and that of the Order of Judicial Proceedings ſhall follow afterwards.

We ſhall not point out here the particular Matters which ought to come into the Treatiſe of Tranſactions and Arbitrations, for beſides that they are of no great Extent, it ſufficeth to give here theſe general Ideas, to ſhew the Nature and Order of the ſaid Matters; but as to what concerns the Order of Judicial Proceedings, the multitude and variety of the Matters which it contains, have obliged us to ſet down here the Ideas that are neceſſary, for conceiving aright the Nature thereof, and digeſting them in their proper Order.

As we have ſeen at the beginning of the general Diviſion of all the Matters of the Law, that it is neceſſary to conſider Perſons, Things, and the Ways by which Perſons make uſe of the Things; ſo likewiſe it is neceſſary to conſider in the Matter of the Order of Judicial Proceedings, the Perſons who are concerned therein, the Things that are there tranſacted, and the Ways in which they are tranſacted.

The Perſons who are to be conſider'd in the Order of Judicial Proceedings, are the Parties who are at variance with one another, the Judges who are to render them Juſtice, and all thoſe whoſe Miniſtry is neceſſary, either to act for the Parties, and to defend their Rights, or to demand that Juſtice may be done them.

The Parties come into Judgment four Ways, which give ſo many different Names to thoſe who are at Law. He who

a Ex compromiſſo placet exceptionem non naſci, ſed pœnæ petitionem. *l.* 2. *ff. de recept.*

who comes to demand Juſtice, and who calls another into Judgment, againſt whom he demands Juſtice, is named the Plaintiff or Demandant; he againſt whom Juſtice is demanded is called the Defendant, and when it happens that a third Perſon pretends ſome Right in a thing that is conteſted between the Plaintiff and Defendant, and that without citing any one, or being cited himſelf, he comes in for his Intereſt, he is called the Party intervening, and when he from whom any thing is demanded, pretends that another is bound for him, and cauſes him to be ſummoned, that he may put him in his Place, in order to warrant him in his Title and Poſſeſſion, or that the ſaid Perſon offers himſelf without being ſummoned, and becomes a Party, and he is called the Guarantee or Vouchee, he being called or vouched to Warranty. Thus to ſhew in one Example theſe four Parts, Plaintiff, Defendant, the Party intervening, and the Guarantee. If *John* has ſold to *Peter* an Eſtate which belongs to *James*, and *Peter* being in poſſeſſion, *James* ſummons *Peter* to give him back his Eſtate, and *Peter* ſummons *John* of whom he bought it, to warrant and defend him in his Poſſeſſion, *James* will be the Plaintiff or Demandant, *Peter* the Defendant, and *John* the Guarantee, and if *Andrew* being a Creditor to *James*, and having a Mortgage on the ſaid Eſtate, oppoſes *James* his being put into poſſeſſion, and demands of him that he be allowed to enjoy the Fruits of the Eſtate for the Debt that is due to him, he will be the Party intervening.

Theſe four Ways of going to Law, either as Plaintiff, as Defendant, as Guarantee, and as a Party intervening, are the Ways by which Law-Suits are begun before the Judges in the firſt Inſtance, to whom the Parties ought firſt to addreſs themſelves; but the Law-Suit being decided by the Sentence of the firſt Judges, if one of the Parties is not willing to abide by it, he ought to have recourſe to the ſuperior Judges, and the Way of coming to the ſuperior Judge for obtaining a Reformation of the Sentence, is called Appeal; and the Party who uſes this Way is called the Appellant, whether he was Plaintiff or Defendant, Guarantee or a Party intervening in the firſt Inſtance, and he who defends the Sentence is called the Party Appellate or Reſpondent.

The Judges are of ſeveral ſorts, and differently diſtinguiſhed, either by the Difference of Authority in the ſame kind of Juriſdiction between the inferior Judges from whom the Cauſe is appealed, and the ſuperior Judges before whom the Appeal is brought: And there are many other Differences between the Judges. But as to what relates to the Order in Judicial Proceedings, it ſufficeth to conſider in the Perſon of every Judge his Function to adminiſter Juſtice to the Parties in the full extent of his Miniſtry, which comprehends every thing that he ought to regulate, both during the Inſtruction of the Cauſe, and at putting an end to it by a final Sentence, as alſo that which concerns the Execution of his Judgment.

Beſides the Miniſtry of the Judges, we are to conſider in the Order of Judicial Proceedings that of another kind of Officers, which is of ſingular importance and neceſſity in all the Affairs where the Publick is any way concerned, whether they be Civil or Criminal, and who in theſe kinds of Affairs, and in all thoſe which are committed to their Charge, are in the place of Parties.

Next to theſe firſt Officers whoſe Functions are accompanied with Authority and Dignity, we conſider in the Order of Judicial Proceedings the other Officers whoſe Miniſtry is neceſſary either to the Judges or to the Parties. Thus Regiſters are neceſſary both to the Judges and to the Parties, to write down every thing that the Judge orders and decrees; and Apparitors and Bailiffs are neceſſary for executing it, and for making Intimations to the Parties.

Beſides the Perſons already mentioned who are neceſſarily to be conſider'd in the Order of Judicial Proceedings, there are likewiſe two other ſorts of Perſons neceſſary for the Parties; for the greateſt part of Mankind being either unfit or unwilling to appear in Judgment, or occaſioning a great many Inconveniences when they do appear in Perſon before the Judges, by the Tranſport of their Paſſions, their Eagerneſs in defending their Intereſts, and being alſo for the moſt part ignorant of their Rights, and of the proper Arguments to ſupport them, all theſe Conſiderations of the Intereſt of the Parties, and of the Decorum which ought to be obſerved in the Diſtribution

of

of Juſtice, have made it neceſſary to employ in moſt Tribunals Perſons who may give conſtant Attendance, and who are throughly verſed in the ſeveral Steps that are to be taken, in order to have a final Deciſion of Differences and Law-Suits: for which reaſon Proctors have been eſtabliſhed to repreſent the Parties; and out of the number of thoſe who exerciſe this Miniſtry, each Party may and ought to chuſe one who may perform for him all the Functions for which they are eſtabliſhed, unleſs it be in ſuch Tribunals, where the Parties are allowed to inſtruct and plead their own Cauſe, without the Aſſiſtance of Proctors.

And becauſe there are many Differences and many Law-Suits relating to Matters, which require the Knowledge of the Principles of Law, which cannot be had without much Study and Experience, and which neither the Parties themſelves, nor their Proctors, have had an opportunity of acquiring; it was neceſſary that there ſhould be Perſons who had a thorough Knowledge of all theſe Matters and Principles, and who might be able to explain and defend the Right of the Parties, either by word of mouth, or by writing, according as there is occaſion to inſtruct the Cauſes in one or other of theſe two Ways, and theſe are the Perſons who are called Advocates, who exerciſe, or may exerciſe, theſe three Functions, of giving Counſel and Advice to the Parties, of writing in defence of their Rights, and of pleading their Cauſes for them.

Having taken this general view of the Perſons who are concerned in the Order of Judicial Proceedings, it is proper in the next place to conſider the things which are there tranſacted.

It is uſual to give the general Names of Acts and Proceedings to every thing that paſſes in the Order of Judicial Proceedings; and becauſe the ſaid Acts and Proceedings are ſped by certain Forms regulated by Uſage, or preſcribed by the Ordinances, we call the manner of ſpeeding the ſaid Acts, Forms, and we give alſo the ſame Name to the Acts themſelves. Thus, for example, we ſay that a Proceeding is according to form, or that all the Forms and Formalities have been obſerved therein, when it has all the Acts that are neceſſary for making it regular: And it is in this ſenſe that we ſay that the Libels, the Anſwers, and the other Acts, are the Formalities neceſſary to be obſerved. And we ſay in another ſenſe, that an Act is according to Form, when it is done after the manner that the Laws preſcribe, and the Forms or Formalities ſignify in this ſenſe the right Ways of ſpeeding the Acts.

It is not only to explain the Meaning of theſe Words of Forms and Formalities that we make here this Remark, it is neceſſary upon another account, which is of much greater Importance, and that is for diſcovering an Abuſe that is very common, which is occaſioned by theſe two Words, and for ſhowing the right uſe that ought to be made of them

Seeing theſe Words of Forms and Formalities ſignify indifferently both the Acts or Proceedings themſelves, and the Ways of ſpeeding the ſaid Acts and Proceedings, and that often the ſaid Ways are indifferent, altho the Acts themſelves be moſt neceſſary, it is dangerous to confound the Meaning of theſe Words, and to imagine that becauſe the Ways of ſpeeding ſome Acts are indifferent, we may ſay the Forms are alſo indifferent, becauſe there are Forms which are very eſſential, whether we underſtand by this Word the Acts themſelves, or the Ways of ſpeeding them.

In order therefore to conceive the right Idea which we ought to have of theſe two Words, Forms and Formalities, it is neceſſary to diſtinguiſh and to conſider in each Act that which is natural and eſſential in it, and which makes it neceſſary in the Proceeding, and that which is eſſential or indifferent in the way or manner of doing it. One ſingle Example will be ſufficient to illuſtrate all that has been ſaid of Acts, and of the Ways of ſpeeding them.

Every body knows that in order to decide a Difference between two Parties, it is neceſſary to know the Truth of the Facts which are eſſential to the Difference; and that in order to know the ſaid Truth, it is neceſſary to hear both Parties, that each of them may be able to ſhew what the other has falſly advanced or concealed. It follows from theſe Principles, that he who intends to make any Demand before a Judge, ought to bring his Adverſary before him, and that it is neceſſary to have ſome Way of obliging him to come before the Judge, either to deny or to confeſs the Truth, and to own the

Juſtice

ſtice of the Demand brought againſt him; or to defend himſelf againſt it. And this Way that is neceſſary for obliging the Party to appear before the Judge, is the firſt Act that begins all the Law-Suits, and which is ſo natural and ſo neceſſary, for the important Reaſons which we have juſt now taken notice of, that there is no Government whatſoever where the Party who pretends to make any Demand is not obliged to give notice, or cauſe notice to be given to his Adverſary to appear before the Judge; but the Ways of giving notice may be different, and are ſo in effect. Thus in former times at *Rome* the Plaintiff himſelf conducted the Defendant before the Judge; and now it is a publick Officer who cites the Party to appear before the Judge, and makes an Act which is called a Certificate of the Service of the Proceſs, and which contains a recital of the Time and Place where the Proceſs was ſerved, and this Certificate may be made ſeveral Ways, which have been varied with us according to the Inconveniences which have made the ſaid Variation neceſſary.

We ſee by this Example that the Certificate of the Service of a Proceſs, is an Act ſo natural and ſo eſſential, that we cannot have Juſtice on a Demand unleſs it be made after this manner; and we likewiſe ſee that the Ways of citing the adverſe Party are indifferent, but become neceſſary according as they are eſtabliſhed by Law and by Uſage: from whence it follows that it would be falſe and very unjuſt to imagine that Forms have nothing eſſential in them, taking this Word in the common ordinary Acceptation thereof, according to which it ſignifies both the Acts themſelves, and the Ways of ſpeeding them; and the only true Meaning of this Expreſſion which is ſo common, that we ought not to adhere too nicely to Forms, ought to be reſtrained to the Ways and Manners which are indifferent, and which are not eſſential to the Acts. Thus, for example, in the Service of a Proceſs, it is neceſſary that it be done by a publick Officer, that it ſhould have a Date, that it ſhould explain the Demand, that it ſhould be ſerved on the Perſon himſelf who is cited, or that a Copy thereof be left at the Place of his Abode; and ſo for the reſt. But it is indifferent, whether it be conceived in certain Terms, and according to a certain Style; and one may vary, without cauſing a Nullity, the Order and the Terms thereof as one pleaſes. And it is the ſame thing with reſpect to all other Judicial Acts; for in every one of them it is neceſſary to conſider what it has that is natural and eſſential to it, and what belongs only to the Way and Manner in which it ought to be ſped; as to which it remains only that we obſerve concerning this external Form of Acts, that there is in every Place a certain Style, and ſtated and uniform Ways for every kind of Acts, and that the ſaid Stiles and Ways have nothing in them that is of abſolute neceſſity, except what ſerves to expreſs that which is natural and eſſential in the Act; and it ought to ſubſiſt, provided it be done in this manner, altho the Form thereof in other reſpects be different from that of the Style.

What is ſaid here is not to be underſtood of certain Acts, in which ſome Cuſtoms have preſcribed certain Terms to be uſed, and which cannot be alter'd without making the Act null and void, not even altho other Terms of the ſame Signification be ſubſtituted in their room, which the ſaid Cuſtoms obſerve in certain Matters; as in the Cuſtom of *Paris*, with reſpect to the Form of Teſtaments, in the ſame manner as formerly at *Rome*, every Demand was to be made in certain ſolemn Terms, which were ſo neceſſary, that he who erred in one Syllable, loſt his Demand; which ſcrupulous and odious Formalities were firſt aboliſhed by the Emperor *Conſtantine*. But excepting theſe particular Caſes, People are at liberty to make uſe of what Expreſſions they pleaſe, provided they contain what is natural and eſſential in the Acts.

It remains that we ſhould make one Remark more in relation to what is tranſacted in the Order of Judicial Proceedings; that all the Acts ought to be ſet down in Writing, to the end there may remain a Proof of what has been well or ill done, and that nothing be altered to the prejudice of Truth.

It was neceſſary to diſtinguiſh theſe ſeveral Ideas of Acts, of Forms and Formalities, becauſe the ſaid Acts and Forms make up the whole matter of the Order of Judicial Proceedings, and becauſe it is of importance to know how to diſcern aright what is natural, eſſential and neceſſary in every Act, and what part of the Way and Manner thereof

thereof it is which ought to anſwer the Nature of the Act, and the Uſe for which it was intended; and it is for that reaſon that we have thought it proper to make here all theſe general Remarks on this Subject, in order to give an Idea of the Nature and Foundations of this Matter; and we ſhall go through in the ſame manner, and in general the Nature and the eſſential Parts of the ſeveral ſorts of Acts which compoſe the Order of Judicial Proceedings, and which are neceſſary in all Courts of Judicature: But as to what relates to the Way and Manner of ſpeeding the ſaid Acts, we confine our ſelves to what has been ſaid thereof here in general; for it is not the deſign of this Book to lay down a Style of Judicial Proceedings. And ſince our Style and Method in Judicial Proceedings is different from that which was obſerved in the *Roman* Law, and ſeeing we have confined our ſelves to what is common to the *Roman* Law and to our Uſage, it will be ſufficient if we conſider what is eſſential in the Order of Judicial Proceedings.

Seeing the Order of Judicial Proceedings ought to tend only to the Diſcovery of the Truth, and to give an opportunity to the Parties to make it known, and to eſtabliſh their Rights, the moſt ſimple and moſt natural Manner whereof this Order ought to conſiſt, would be for the Parties themſelves to come before the Judge, and to explain their ſeveral Pretenſions; and for the Judge after having heard them to adminiſter to them on the ſpot the Juſtice that ſhould be due to them. But this Way is not in uſe with us, except for ſome ſlight Differences between poor People; where the Matter in debate is very trivial, and which the Parties themſelves are able to ſtate ſufficiently to the Judge; but all the other Affairs of what nature ſoever they may be, are not terminated in ſo ſhort a time, nor ſo eaſily, but they are uſually protracted and embaraſs'd by all the Difficulties which we ſee multiplied in ſo many different manners. And it is not ſtrange that God has ſcatter'd theſe Thorns in a Way wherein the greateſt part of Mankind are led wholly by the Impulſe of Avarice, Ambition, Hatred, Revenge, and of other Paſſions, and in which they walk in a manner ſuitable to the Impulſe that firſt moved them, and which engages them in Lying, in Calumny, in Cavilling and Tricking, and in all the kinds of Injuſtices which we ſee multiplied in all Law-Suits.

The Paſſions of the Parties are not the only cauſe of ſo great, and ſo extenſive an Evil; for if they are the firſt Cauſe that draws down all theſe Evils, as ſo many Puniſhments which God inflicts on them, yet there are other Cauſes mixed with them, which are as it were the Hands which ſcatter among thoſe who go to Law all theſe ſeveral Evils, for the Puniſhment of ſuch as deſerve them, and for exerciſing the Patience of thoſe who make a good uſe of them.

It is eaſy to judge that theſe other Cauſes of the multitude of Quirks and Cavils that are ſo frequent in Law-Suits, ariſing from ſomething elſe than the Parties, can proceed only from the other Perſons, who have a ſhare in the Adminiſtration of Juſtice; and that if thoſe who have this Honour, whatever Place they may occupy therein, have not in their Hearts a ſteddy and ſincere Love of Juſtice and Truth, and if they conſider their Miniſtry with any other Views, they will be ſo far from diſſuading the Parties from making uſe of unfair Practices, that they will be ready to ſuggeſt and to countenance them according to the Quality of their Miniſtry, they finding their account in multiplying unfair Practices, and in prolonging the Steps that are neceſſary to be taken. It is not ſtrange therefore that ſuch a Concurrence of Paſſion in the Parties, and of Intereſt in the Perſons who exerciſe the Functions of Juſtice, and the Eaſineſs of the Opportunity, ſhould produce all theſe horrible Conſequences, which the beſt concerted Laws in the World are not able to put a ſtop to, and which on the contrary make the Laws an occaſion of new Inventions, for multiplying Law-Suits and the Proceedings therein.

We could not forbear making this Reflection, and it ought not to be looked upon as a Digreſſion, either uſeleſs or ſuperfluous; for it is eſſential to the Deſign which we have laid down of conſidering the Nature of each Matter.

Thus we have been obliged to make this general Remark, which is abſolutely neceſſary for diſtinguiſhing the Proceedings which are natural and ne-

ceſſary from thoſe which are the effect, either of the Paſſion of the Parties, or of the Miſdemeanour of thoſe who are concerned in the Adminiſtration of Juſtice; and for ſhewing the Difference between thoſe who exerciſe their Miniſtry according to the Spirit of the Laws, which is the Spirit of Truth and of Juſtice, and who bound their Intereſts by the juſt Rules of their Miniſtry, and thoſe who abuſe their Miniſtry to advance their Intereſt.

That we may be able therefore to judge of what is natural and eſſential in the Order of Judicial Proceedings, and by the knowledge of that to diſcern what is mixed therewith that is vicious or ſuperfluous, it is neceſſary to run over the natural Order which ought to be obſerved in informing the Judges of Juſtice and of Truth.

We have ſeen that the firſt Step by which all Law-Suits are begun, is that of the Summons, or Citation, which he who commences the Suit procures to be ſerved on the Party againſt whom he has ſome Pretenſion; and the ſaid Step is followed, either by the Silence of him who is ſummoned, or by his Appearance; if he continues in Silence till the delay which the Law allows him is expired, it is but juſt that he who cauſed him to be cited ſhould have juſtice done him without hearing his Adverſary, ſeeing he has neglected to make uſe of that Right: and in this caſe, if the Demand be ſufficiently eſtabliſhed by what appears, the Judge may condemn him whoſe Silence is a Preſumption that he has no defence to make.

But when he who is cited, and who is called the Defendant, appears to defend himſelf, that is to ſay, according to our Uſage, conſtitutes a Proctor; the firſt Step on his part, which is the ſecond in the Order of Judicial Proceedings, is that he defend himſelf, or if he has any thing to demand that may be neceſſary for his Defence, that he explain it, and ſo proceed to his Defence, and that his Defence be made known to his Adverſary, to the end he may either conteſt it, or confeſs it; and if by the Demand, and the Defences that are made to it, the Fact and the Pretenſions on both ſides are fully ſtated and underſtood, the Judge may then proceed to give his Sentence.

But if the Defence made by the Defendant obliges the Plaintiff to anſwer it on his part, this Anſwer is called a Reply; and thus the Parties eſtabliſh on both ſides each of them his Right by Writings.

All the Confeſſs of the Parties are of two ſorts; for they can conteſt but one of two things, either the Truth of the Fact, or the Conſequences which are drawn from it. We call thoſe Queſtions of Fact where the Buſineſs is to know the Truth of Facts; and we call thoſe Queſtions of Law, where the Matter is about reaſoning on Facts that are agreed on, in order to draw from them the Conſequences which may ſerve to eſtabliſh the Right of the Parties.

The Queſtions of Facts are reſolved and decided by the Proofs which diſcover the Truth of the Facts in diſpute.

The Proofs of Facts are of ſeveral ſorts, for as we give the Name of Proof to every thing that makes a Truth known, and as there are ſeveral Ways of making known the Truth of Facts, ſo there are alſo ſeveral kinds of Proofs.

All the Ways of proving Facts in a Court of Juſtice are of four ſorts; the Confeſſion of the Party, the Teſtimony of Perſons who know the Fact, the Evidence which ariſes from Deeds and Writings, and the Knowledge of certain Facts, which are linked in ſuch a manner with that whereof we ſearch the Truth, that one may gather the ſaid Truth from the Connection there is between the Fact in queſtion and thoſe of which the Truth is proved. Theſe four kinds of Proofs are common to Matters both Civil and Criminal.

The Confeſſion of the Party againſt himſelf is always a certain Proof of the Fact which he owns, unleſs the contrary Truth were eſtabliſhed in ſuch a manner as that there might be reaſon to think that the Confeſſion is an Effect of Folly or Stupidity in the Perſon who ſhould confeſs againſt himſelf that which is falſe: And this Rule has only one Exception in Accuſations of Capital Crimes, where it is not enough that the Party who is accuſed confeſſes a Crime which is not proved; but other Proofs are neceſſary for putting him to Death beſides his own Confeſſion, which might be an Effect of Melancholy or Deſpair, or proceed from ſome other Cauſe than the Force of Truth.

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In order to come at this Proof, which is drawn from the Confeſſion of the Party, leave is given to thoſe who are deſirous to proceed this way, to propoſe the Facts, wherein it is of importance to them to have either the Confeſſion of the Party, or Anſwers, which may diſcover his Inſincerity, when they ſhall oppoſe to his Anſwers the Proofs of the Facts which he ſhall have denied, or that they ſhall draw from his Prevarications, and the other Defects or Circumſtances of his Anſwers, the Conſequences that diſcover the Truth. And according to the Uſage eſtabliſhed in *France* by the Ordinances, each Party is at liberty to propoſe Facts, and to demand that the adverſe Party be obliged to anſwer them upon Oath, and to declare what he knows concerning each Fact; and they draw afterwards from the Interrogatories and Confeſſions, the Denials, and the other Circumſtances, the Conſequences which may ſerve to prove the Facts, the Truth of which they intend to make appear

The Proof by Witneſſes is that which reſults from the Declaration of two, three, or more Perſons, who have Knowledge either of the Facts in queſtion, or of others which may ſerve towards the Proof of the ſaid principal Facts, and this Proof hath its full Force when the Credit of the Witneſſes is not deſtroyed by any Blemiſh or Imputation, which may render their Teſtimony null or ſuſpicious: for altho it may happen that Witneſſes may give a falſe Teſtimony, and that nothing can be objected againſt them, yet it is of abſolute neceſſity in the Order of the Society of Mankind, that in the infinite multitude of Facts, of which the Proofs are neceſſary, and which depend on the relation made by Perſons who are Witneſſes thereof, to ſuppoſe that thoſe who relate the Facts declare the Truth, when nothing obliges them to make a declaration contrary to it. And this Method of Proof is not only grounded upon this Neceſſity, and upon the natural Order of Things, but it is alſo eſtabliſhed by the Divine Law, which hath made it a Rule.

Written Evidences are of ſeveral ſorts, according to the ſeveral kinds of Acts which People are deſirous to preſerve the Memory of after this manner, in order to make proof of the Truth of them, and alſo according to the ſeveral Ways of preſerving the Acts, and of proving them by the means of Writing.

If the Acts whereof the Memory is to be preſerved, paſs in a Court of Juſtice, the only way of proving the Truth of them is to have them taken down in Writing, and to have the Writing ſigned by a publick Officer, who may by his Signature bear teſtimony of the Truth of the Act which he ſigns. Thus in *France*, Apparitors and Bailiffs ſign the Certificates and Returns which they make of the Proceſſes that they have ſerved Thus the Judges ſign their Sentences. Thus the Regiſters, who are the Depoſitaries of the Sentences, and who ought to give Exemplifications of them to the Parties, ſign the ſaid Exemplifications; and every Officer ſigns the Acts which are to receive their Form and their Proof from his Miniſtry, according to the Rules which the Ordinances and Uſages of Places have eſtabliſhed, both for the Quality of the Acts, and for the Functions of each Officer. If the Acts are not ſped in a Court of Juſtice, but are ſuch as that it is eaſy to foreſee that they may be neceſſary, either for proving the Truth when it ſhall be required, or that there be other Cauſes which make it neceſſary to have a written Proof, as will appear by the Examples; there are two Ways of writing the ſaid Acts according to two kinds thereof which may be made; for there are ſome Acts which in their Nature relate only to particular Perſons who have Buſineſs together, or to their Heirs: as if one borrows of another that which he owes him; if they have any Account to adjuſt between them, if they ſell, exchange, tranſact, and treat together in any other manner: and there are ſome Acts which in their Nature regard other Perſons beſides thoſe who make them, ſuch as Teſtaments, Codicils, Publick Regiſters, in which ought to be recorded the Proof of the Birth of Perſons, of their Marriage, of their Promotion to Holy Orders, of their Death, the Deliberations of Communities, the Collations of Offices, of Benefices, and in general all the Acts whereof

whereof the truth ought to be made manifeſt by an Authentick Proof, and to which People may have recourſe on all occaſions, wherein this Proof becomes neceſſary, whether it be in Judicial Proceedings or on other occaſions: and all the Acts of theſe two Kinds have their particular manners in which they are written.

The Acts which in their Nature relate only to particular Perſons, who treat together, or to their Heirs, ſuch as a Loan, a Sale, an Account, an Acquittance, and others of the like Nature, for proving of Covenants, and other Affairs, may be written in two manners, either by the Parties themſelves, if they can write their Names, or by a Publick Officer, who is the Notary, for Perſons who cannot write. And it is free likewiſe, and often convenient, and even neceſſary for Perſons who can write, to have the Acts ſped in the preſence of a Notary, whoſe Miniſtry hath in *France*, among other Effects, this principal one; that the Acts ſped by a Notary, carry their Proof along with them by the publick Authority which the Character of the Officer gives them, whereas private Writings may be denied, and oblige thoſe who make uſe of them to prove them; and the other, that the Acts ſped by Publick Notaries give a Right of Mortgage on the Eſtate of the Perſon who obliges himſelf, and which a private Writing does not give; becauſe if any private Deed or Writing ſhould be allowed to convey ſuch a Right, it would be an eaſy matter for private Perſons to defeat prior Mortgages, by antedating poſterior Mortgages for Debts contracted after the Settlement of the firſt Mortgage.

All the other Acts which regard other Perſons beſides thoſe who are Parties to them, ſuch as the Acts which have been juſt now taken notice of, as Teſtaments, publick Regiſters, Collations of Benefices, Patents or Commiſſions, and others of the like Nature, ought to be written by Perſons who are veſted with the publick Character and Miniſtry, which impowers them to draw or ſpeed all theſe different Kinds of Acts. Thus, in *France*, Notaries Publick and the Curates of the Pariſh draw up laſt Wills and Teſtaments, and Codicils; the Curates keep the Regiſters of Chriſtenings, Marriages, and Burials: thus Patrons of Benefices give the Preſentations; and all the other different Acts ought to be ſped by the proper Officer who has the Charge thereof, and Notaries Publick ſpeed all Contracts and other Acts between private Perſons.

All theſe ſeveral Acts, of what Nature ſoever they be, have this in common, that they are written Proofs, and that the Truth of the Acts being proved by the Character which either the publick Form and the Signature of the proper Officer, or the Signature of the private Perſons who are Parties to them gives them, they ſerve as a Proof of the Truth of the Fact which they declare and ſet forth.

There is likewiſe a fourth Kind of Proofs, which are called Preſumptions, that is to ſay, Conſequences which are drawn from certain Facts that are known and proved, whereby to gueſs at or infer the certainty of the Fact in diſpute, and of which the ſaid known Facts are Marks and Signs; and theſe ſorts of Proofs are called Preſumptions, becauſe they do not demonſtrate the Fact it ſelf which is to be proved, but prove the Truth of other Facts, the Knowledge whereof diſcovers, points out, and gives room to conjecture and preſume the Fact in queſtion, becauſe of the natural and neceſſary Connection between the Facts that are known and thoſe which we want to know the Truth of. Preſumptions being Conſequences that are drawn from known Facts to the Fact which is to be proved, they are certain or doubtful according as the Connection between the known Facts and the unknown Fact is certain or doubtful: and as there are ſome Facts whereof the Connection with others is indubitable, ſo there are likewiſe Preſumptions which make certain and undoubted Proofs; but thoſe which are founded only upon Facts whereof the Connection with others is uncertain, are not Proofs. Thus for a firſt Example of a certain Preſumption, if it is in proof that two Men having quarrelled, the one followed the other who fled, and that he who fled having taken ſhelter in a Houſe, the other went into it, and came out with his Sword bloody, the Man who was purſued in this manner, being found wounded with a Sword in that Houſe wherein there was no other Perſon; all theſe Facts

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put together carry with them a Proof, that it was this Aggreſſor who killed the ſaid Man, and altho no body ſaw him kill him, yet it is enough that People ſaw the Aggreſſor purſuing the deceaſed with his naked Sword, follow him into the Houſe, and come out again with his Sword all bloody, that they ſaw that the Perſon was dead of his Wounds, and that no body elſe was in the Houſe; for theſe Facts which are proved have a natural and neceſſary Connection with the only Fact which remains to be proved, that it was that Perſon who gave the thruſt which no body ſaw given: this Connection between the ſaid Fact and the others, makes a very ſufficient Proof, from which we may certainly conclude that it was this Aggreſſor who gave the Wound of which the Party died: and this Proof of a Fact which is not known, either by Confeſſion, if the Aggreſſor denies it, or by Witneſſes who ſaw the wound given, or by other ways, is reduced to Conjecture, and Preſumption, that is to ſay, to the natural Conſequence by which we gather from theſe Signs and Tokens, that it being impoſſible on one part, that it ſhould be any other Perſon who gave the Wound, and natural on the other part that it might be given by him who followed in this manner, it is neceſſary to conclude, and impoſſible not to judge him to have been the Author of the Murder.

But for a ſecond Example of a Preſumption that is uncertain, if it is proved that a Man was found all alone near to the dead Body of one who was killed on the High-way, the Conſequence is not certain that he is the Perſon who killed him; for he may perhaps have come there after the Murder was committed, and his Preſence not having a neceſſary Connection with the Murder, the Preſumption remains uncertain, and does not make an undeniable Proof. It appears by theſe two Examples, that Preſumptions may be either certain and unqueſtionable, or doubtful and uncertain; they are certain when they are ſuch, that they make a full and perfect Proof, and that altho no Perſon did ſee the Fact in queſtion, yet one may certainly conclude that it has happened, when they ſee its Cauſes, its Signs, its Effects, its Conſequences, and the other Facts which are inſeparable from it, and ſo connected with it, that it is not to be imagined that the Fact in Controverſy has not happened when we ſee the others, as in the firſt Example: and on the contrary the Preſumptions are doubtful, when they are grounded upon uncertain or falſe Signs, and from which no certain Conſequence can be gathered. So that the whole Force of this kind of Proof by Preſumptions, conſiſts in the neceſſity of the Connection between the known Facts and the Fact that is not known; and the Proofs of this nature are ſtrong or weak, certain or uncertain, in proportion as this Connection is natural and neceſſary, ſure and certain, or as it is doubtful.

It follows from theſe Remarks on this laſt Kind of Proofs by Preſumptions, that ſeeing they depend on the Judgment that is to be made of the neceſſity of the Connexion between the known Facts and the unknown Facts, the Truth of which we want to know, or of the uncertainty of the ſaid Connection, they depend conſequently on making a right judgment of the Cauſes from which the ſaid Connection may be gathered, or not gathered. And whereas there is no great clearneſs of Underſtanding required for diſcovering the Truth of a Fact when it is proved, either by thoſe who ſaw it, or by ſome Writing, a great deal of Underſtanding and Prudence is neceſſary, and alſo Experience, in the Caſes where it is neceſſary to judge by Preſumption, in order to diſcern among the Signs and Tokens which appear, thoſe which are doubtful, from thoſe which are certain; and there is ſtill a greater degree of Underſtanding and Prudence required, when the Signs and Tokens do not appear, in order to find them out and diſcover them.

It is becauſe of this difficulty that the World has juſtly admired the Knowledge and Wiſdom of *Solomon* in that renowned Judgment which he pronounced between the Mother of the Child which was alive, and her who had ſtrangled her own Child; for the matter was to diſcover the truth of a hidden Fact, and of which not the leaſt Circumſtance was known; ſo that no Sign or Token did appear, from which Preſumptions might be formed; and the Wiſdom of this Judgment conſiſted in finding out a Fact which might be known, and which might diſcover who was the Mother; and it was with this View that *Solomon*

expoſed

expoſed the two Women to the danger of ſeeing the Child, which they both pretended to be the Mother of, put to Death, being perſuaded that this danger would ſurprize and trouble the Mother, and that the other could not feel the like Impreſſion, nor ſhew the like Marks, it was the ſurprize and concern which appeared in the Mother, which diſcovered the love and tenderneſs which Nature had given her for her Child, and which made *Solomon* to judge upon a ſure foundation that ſhe was the Mother, becauſe there was a natural and neceſſary Connection between the quality of a Mother and that tenderneſs, and between the ſaid tenderneſs and the trouble at the ſight of ſuch a Danger: and it was this Connection between theſe neceſſary Effects and their natural Cauſes, which diſcovered the Mother with greater certainty than could have been had from the Teſtimony of many Witneſſes: for whereas Witneſſes may deceive, or be deceived, and that the whole force of the Proof by Witneſſes conſiſts in the Preſumption of their having ſufficient Underſtanding and Capacity to know the Facts to which they bear Teſtimony, and of their Fidelity in relating them, and that this Preſumption may be ill grounded, as was that of the Teſtimony of the two Elders againſt *Suſanna*; the Proofs which are drawn from the neceſſary Conſequences of natural Effects to their Cauſes, and of Cauſes to their Effects, are much more certain and more infallible. Thus, for example, the ſudden motion of a Paſſion in him who had forgot his deſign to diſſemble, is a moſt certain proof of the Paſſion which produced that Motion; and the other Effects point out their Cauſes; and the only buſineſs is to know how to diſcern the neceſſity of the Connection between the Effects and their Cauſes, and the neceſſity of the Conſequence between the Facts which do appear, and that which we endeavour to come at the knowledge of: ſo that the common ſaying, that we ought not to judge on Preſumptions, is both falſe and true, according to the two ways of preſuming which we have juſt now taken notice of; for we conclude moſt certainly the truth of the Cauſe from the truth of the Effect, or the truth of the Effect from the truth of the Cauſe, when the Connection is infallible between the one and the other: but we make a falſe Concluſion, when we attribute to one Cauſe the Effect of another, or we conclude without certainty under pretext of an apparent Connection between that Cauſe and the Effect of the other, when we attribute the Effect to its Cauſe, but in a ſlight manner, if the Signs or Tokens thereof are uncertain; or if in the caſe of a Man being killed on the High-way, where one ſingle Perſon is found near to the dead body, if we judge that the ſaid Perſon killed him, we ſhall be in danger, either of judging falſly, becauſe it may be that the ſaid Perſon came there after the flight of the Murderer, or of judging without certainty, and condemning him wrongfully, if there be no other Tokens or Signs which may certainly determine us to judge that the ſaid Perſon is guilty of the Murder, becauſe the caſe being doubtful, it would be unjuſt to condemn him; and it is better to leave to the Judgment of God the Perſon who is truly guilty, when his Crime is not ſufficiently proved, than to run the *hazard* of condemning unjuſtly one who perhaps may be innocent.

Preſumptions are therefore only certain and concluding, when the Connection between the known Fact and the unknown Fact is ſo neceſſary, that it makes us judge with certainty of the truth of the unknown Fact by the knowledge of the other, and this kind of Proof is ſo natural and concluding, that the Laws have eſtabliſhed certain Preſumptions for Truth. Thus, for example, in the Roman Law *b*, if a Man and a Woman being accuſed of Adultery, had defended themſelves againſt the Accuſation on the head of their being too nearly related, and having been for that reaſon acquitted, had afterwards intermarried with one another, they were puniſhed for Adultery upon the bare Preſumption that their Marriage was only an effect of the ſame Paſſion which had brought them under the ſuſpicion of Adultery. Thus in *France*, a Woman who conceals her big Belly and her being brought to Bed, is preſumed to have murdered her Child,

b l. 34. *C. de adult.*

if

if it does not appear that it was buried or chriſtened publickly; upon this Preſumption, that ſhe who was unwilling to be known to be a Mother, has made away, with the Child, whoſe Birth brought a Diſhonour upon her.

Theſe are the ſorts of Preſumptions which are called violent, according to the Expreſſion of Pope *Alexander* the Third [c] in another Example, upon which may be grounded a ſure and certain Judgment.

[c] Alexand. 3. C. 12. *de præſ.*

F I N I S.

An ALPHABETICAL

TABLE

OF THE

Principal Matters

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