Chapter XLIV: Idea Of The Roman Jurisprudence.--Part VII.

1. The goddess of faith (of human and social faith) was worshipped, not only in her temples, but in the lives of the Romans; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements. [159] Yet among the same people, according to the rigid maxims of the patricians and decemvirs, a naked pact, a promise, or even an oath, did not create any civil obligation, unless it was confirmed by the legal form of a stipulation. Whatever might be the etymology of the Latin word, it conveyed the idea of a firm and irrevocable contract, which was always expressed in the mode of a question and answer. Do you promise to pay me one hundred pieces of gold? was the solemn interrogation of Seius. I do promise, was the reply of Sempronius. The friends of Sempronius, who answered for his ability and inclination, might be separately sued at the option of Seius; and the benefit of partition, or order of reciprocal actions, insensibly deviated from the strict theory of stipulation. The most cautious and deliberate consent was justly required to sustain the validity of a gratuitous promise; and the citizen who might have obtained a legal security, incurred the suspicion of fraud, and paid the forfeit of his neglect. But the ingenuity of the civilians successfully labored to convert simple engagements into the form of solemn stipulations. The praetors, as the guardians of social faith, admitted every rational evidence of a voluntary and deliberate act, which in their tribunal produced an equitable obligation, and for which they gave

an action and a remedy. [160]

[Footnote 159: How much is the cool, rational evidence of Polybius (l. vi. p. 693, l. xxxi. p. 1459, 1460) superior to vague, indiscriminate applause--omnium maxime et praecipue fidem coluit, (A. Gellius, xx. 1.)]

[Footnote 160: The Jus Praetorium de Pactis et Transactionibus is a separate and satisfactory treatise of Gerard Noodt, (Opp. tom. i. p. 483--564.) And I will here observe, that the universities of Holland and Brandenburg, in the beginning of the present century, appear to have studied the civil law on the most just and liberal principles. * Note: Simple agreements (pacta) formed as valid an obligation as a solemn contract. Only an action, or the right to a direct judicial prosecution, was not permitted in every case of compact. In all other respects, the judge was bound to maintain an agreement made by pactum. The stipulation was a form common to every kind of agreement, by which the right of action was given to this.--W.]

2. The obligations of the second class, as they were contracted by the delivery of a thing, are marked by the civilians with the epithet of real. [161] A grateful return is due to the author of a benefit; and whoever is intrusted with the property of another, has bound himself to the sacred duty of restitution. In the case of a friendly loan, the merit of generosity is on the side of the lender only; in a deposit, on the side of the receiver; but in a pledge, and the rest of the selfish commerce of ordinary life, the benefit is compensated by an equivalent,

and the obligation to restore is variously modified by the nature of the transaction. The Latin language very happily expresses the fundamental difference between the commodatum and the mutuum, which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had been accommodated for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this mutual engagement, by substituting the same specific value according to a just estimation of number, of weight, and of measure. In the contract of sale, the absolute dominion is transferred to the purchaser, and he repays the benefit with an adequate sum of gold or silver, the price and universal standard of all earthly possessions. The obligation of another contract, that of location, is of a more complicated kind. Lands or houses, labor or talents, may be hired for a definite term; at the expiration of the time, the thing itself must be restored to the owner, with an additional reward for the beneficial occupation and employment. In these lucrative contracts, to which may be added those of partnership and commissions, the civilians sometimes imagine the delivery of the object, and sometimes presume the consent of the parties. The substantial pledge has been refined into the invisible rights of a mortgage or hypotheca; and the agreement of sale, for a certain price, imputes, from that moment, the chances of gain or loss to the account of the purchaser. It may be fairly supposed, that every man will obey the dictates of his interest; and if he accepts the benefit, he is obliged to sustain the expense, of the transaction. In this boundless subject, the historian will observe the location of land

and money, the rent of the one and the interest of the other, as they materially affect the prosperity of agriculture and commerce. The landlord was often obliged to advance the stock and instruments of husbandry, and to content himself with a partition of the fruits. If the feeble tenant was oppressed by accident, contagion, or hostile violence, he claimed a proportionable relief from the equity of the laws: five years were the customary term, and no solid or costly improvements could be expected from a farmer, who, at each moment might be ejected by the sale of the estate. [162] Usury, [163] the inveterate grievance of the city, had been discouraged by the Twelve Tables, [164] and abolished by the clamors of the people. It was revived by their wants and idleness, tolerated by the discretion of the praetors, and finally determined by the Code of Justinian. Persons of illustrious rank were confined to the moderate profit of four per cent.; six was pronounced to be the ordinary and legal standard of interest; eight was allowed for the convenience of manufactures and merchants; twelve was granted to nautical insurance, which the wiser ancients had not attempted to define; but, except in this perilous adventure, the practice of exorbitant usury was severely restrained. [165] The most simple interest was condemned by the clergy of the East and West; [166] but the sense of mutual benefit, which had triumphed over the law of the republic, has resisted with equal firmness the decrees of the church, and even the prejudices of mankind. [167]

[Footnote 161: The nice and various subject of contracts by consent is spread over four books (xvii.--xx.) of the Pandects, and is one of the parts best deserving of the attention of an English student. * Note:

This is erroneously called "benefits." Gibbon enumerates various kinds of contracts, of which some alone are properly called benefits.--W.]

[Footnote 162: The covenants of rent are defined in the Pandects (l. xix.) and the Code, (l. iv. tit. lxv.) The quinquennium, or term of five years, appears to have been a custom rather than a law; but in France all leases of land were determined in nine years. This limitation was removed only in the year 1775, (Encyclopedie Methodique, tom. i. de la Jurisprudence, p. 668, 669;) and I am sorry to observe that it yet prevails in the beauteous and happy country where I am permitted to reside.]

[Footnote 163: I might implicitly acquiesce in the sense and learning of the three books of G. Noodt, de foenore et usuris. (Opp. tom. i. p. 175--268.) The interpretation of the asses or centesimoe usuroe at twelve, the unciarioe at one per cent., is maintained by the best critics and civilians: Noodt, (l. ii. c. 2, p. 207,) Gravina, (Opp. p. 205, &c., 210,) Heineccius, (Antiquitat. ad Institut. l. iii. tit. xv.,) Montesquieu, (Esprit des Loix, l. xxii. c. 22, tom. ii. p. 36). Defense de l'Esprit des Loix, (tom. iii. p. 478, &c.,) and above all, John Frederic Gronovius (de Pecunia Veteri, l. iii. c. 13, p. 213--227,) and his three Antexegeses, (p. 455--655), the founder, or at least the champion, of this probable opinion; which is, however, perplexed with some difficulties.]

[Footnote 164: Primo xii. Tabulis sancitum est ne quis unciario foenore

amplius exerceret, (Tacit. Annal. vi. 16.) Pour peu (says Montesquieu, Esprit des Loix, l. xxii. 22) qu'on soit verse dans l'histoire de Rome, on verra qu'une pareille loi ne devoit pas etre l'ouvrage des decemvirs. Was Tacitus ignorant--or stupid? But the wiser and more virtuous patricians might sacrifice their avarice to their ambition, and might attempt to check the odious practice by such interest as no lender would accept, and such penalties as no debtor would incur. * Note: The real nature of the foenus unciarium has been proved; it amounted in a year of twelve months to ten per cent. See, in the Magazine for Civil Law, by M. Hugo, vol. v. p. 180, 184, an article of M. Schrader, following up the conjectures of Niebuhr, Hist. Rom. tom. ii. p. 431.--W. Compare a very clear account of this question in the appendix to Mr. Travers Twiss's Epitome of Niebuhr, vol. ii. p. 257.--M.]

[Footnote 165: Justinian has not condescended to give usury a place in his Institutes; but the necessary rules and restrictions are inserted in the Pandects (l. xxii. tit. i. ii.) and the Code, (l. iv. tit. xxxii. xxxiii.)]

[Footnote 166: The Fathers are unanimous, (Barbeyrac, Morale des Peres, p. 144. &c.:) Cyprian, Lactantius, Basil, Chrysostom, (see his frivolous arguments in Noodt, l. i. c. 7, p. 188,) Gregory of Nyssa, Ambrose, Jerom, Augustin, and a host of councils and casuists.]

[Footnote 167: Cato, Seneca, Plutarch, have loudly condemned the practice or abuse of usury. According to the etymology of foenus, the

principal is supposed to generate the interest: a breed of barren metal, exclaims Shakespeare--and the stage is the echo of the public voice.]

3. Nature and society impose the strict obligation of repairing an injury; and the sufferer by private injustice acquires a personal right and a legitimate action. If the property of another be intrusted to our care, the requisite degree of care may rise and fall according to the benefit which we derive from such temporary possession; we are seldom made responsible for inevitable accident, but the consequences of a voluntary fault must always be imputed to the author. [168] A Roman pursued and recovered his stolen goods by a civil action of theft; they might pass through a succession of pure and innocent hands, but nothing less than a prescription of thirty years could extinguish his original claim. They were restored by the sentence of the praetor, and the injury was compensated by double, or threefold, or even quadruple damages, as the deed had been perpetrated by secret fraud or open rapine, as the robber had been surprised in the fact, or detected by a subsequent research. The Aquilian law [169] defended the living property of a citizen, his slaves and cattle, from the stroke of malice or negligence: the highest price was allowed that could be ascribed to the domestic animal at any moment of the year preceding his death; a similar latitude of thirty days was granted on the destruction of any other valuable effects. A personal injury is blunted or sharpened by the manners of the times and the sensibility of the individual: the pain or the disgrace of a word or blow cannot easily be appreciated by a pecuniary equivalent. The rude jurisprudence of the decemvirs had confounded all hasty

insults, which did not amount to the fracture of a limb, by condemning the aggressor to the common penalty of twenty-five asses. But the same denomination of money was reduced, in three centuries, from a pound to the weight of half an ounce: and the insolence of a wealthy Roman indulged himself in the cheap amusement of breaking and satisfying the law of the twelve tables. Veratius ran through the streets striking on the face the inoffensive passengers, and his attendant purse-bearer immediately silenced their clamors by the legal tender of twenty-five pieces of copper, about the value of one shilling. [170] The equity of the praetors examined and estimated the distinct merits of each particular complaint. In the adjudication of civil damages, the magistrate assumed a right to consider the various circumstances of time and place, of age and dignity, which may aggravate the shame and sufferings of the injured person; but if he admitted the idea of a fine, a punishment, an example, he invaded the province, though, perhaps, he supplied the defects, of the criminal law. [Footnote 168: Sir William Jones has given an ingenious and rational Essay on the law of Bailment, (London, 1781, p. 127, in 8vo.) He is perhaps the only lawyer equally conversant with the year-books of Westminster, the Commentaries of Ulpian, the Attic pleadings of Isaeus, and the sentences of Arabian and Persian cadhis.]

[Footnote 169: Noodt (Opp. tom. i. p. 137--172) has composed a separate treatise, ad Legem Aquilian, (Pandect. l. ix. tit. ii.)]

[Footnote 170: Aulus Gellius (Noct. Attic. xx. i.) borrowed this story

from the Commentaries of Q. Labeo on the xii. tables.]

The execution of the Alban dictator, who was dismembered by eight horses, is represented by Livy as the first and the fast instance of Roman cruelty in the punishment of the most atrocious crimes. [171] But this act of justice, or revenge, was inflicted on a foreign enemy in the heat of victory, and at the command of a single man. The twelve tables afford a more decisive proof of the national spirit, since they were framed by the wisest of the senate, and accepted by the free voices of the people; yet these laws, like the statutes of Draco, [172] are written in characters of blood. [173] They approve the inhuman and unequal principle of retaliation; and the forfeit of an eye for an eye, a tooth for a tooth, a limb for a limb, is rigorously exacted, unless the offender can redeem his pardon by a fine of three hundred pounds of copper. The decemvirs distributed with much liberality the slighter chastisements of flagellation and servitude; and nine crimes of a very different complexion are adjudged worthy of death.

1. Any act of treason against the state, or of correspondence with the public enemy. The mode of execution was painful and ignominious: the head of the degenerate Roman was shrouded in a veil, his hands were tied behind his back, and after he had been scourged by the lictor, he was suspended in the midst of the forum on a cross, or inauspicious tree.

2. Nocturnal meetings in the city; whatever might be the pretence, of pleasure, or religion, or the public good.

3. The murder of a citizen; for which the common feelings of mankind demand the blood of the murderer. Poison is still more odious than the sword or dagger; and we are surprised to discover, in two flagitious events, how early such subtle wickedness had infected the simplicity of the republic, and the chaste virtues of the Roman matrons. [174] The parricide, who violated the duties of nature and gratitude, was cast into the river or the sea, enclosed in a sack; and a cock, a viper, a dog, and a monkey, were successively added, as the most suitable companions. [175] Italy produces no monkeys; but the want could never be felt, till the middle of the sixth century first revealed the guilt of a parricide. [176]

4. The malice of an incendiary. After the previous ceremony of whipping, he himself was delivered to the flames; and in this example alone our reason is tempted to applaud the justice of retaliation.

5. Judicial perjury. The corrupt or malicious witness was thrown headlong from the Tarpeian rock, to expiate his falsehood, which was rendered still more fatal by the severity of the penal laws, and the deficiency of written evidence.

6. The corruption of a judge, who accepted bribes to pronounce an iniquitous sentence.

7. Libels and satires, whose rude strains sometimes disturbed the

peace of an illiterate city. The author was beaten with clubs, a worthy chastisement, but it is not certain that he was left to expire under the blows of the executioner. [177]

8. The nocturnal mischief of damaging or destroying a neighbor's corn. The criminal was suspended as a grateful victim to Ceres. But the sylvan deities were less implacable, and the extirpation of a more valuable tree was compensated by the moderate fine of twenty-five pounds of copper.

9. Magical incantations; which had power, in the opinion of the Latin shepherds, to exhaust the strength of an enemy, to extinguish his life, and to remove from their seats his deep-rooted plantations.

The cruelty of the twelve tables against insolvent debtors still remains to be told; and I shall dare to prefer the literal sense of antiquity to the specious refinements of modern criticism. [178] [1781] After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow-citizen. In this private prison, twelve ounces of rice were his daily food; he might be bound with a chain of fifteen pounds weight; and his misery was thrice exposed in the market place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tyber: but, if several creditors were alike obstinate and

unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from contracting debts which they were unable to discharge; but experience would dissipate this salutary terror, by proving that no creditor could be found to exact this unprofitable penalty of life or limb. As the manners of Rome were insensibly polished, the criminal code of the decemvirs was abolished by the humanity of accusers, witnesses, and judges; and impunity became the consequence of immoderate rigor. The Porcian and Valerian laws prohibited the magistrates from inflicting on a free citizen any capital, or even corporal, punishment; and the obsolete statutes of blood were artfully, and perhaps truly, ascribed to the spirit, not of patrician, but of regal, tyranny.

[Footnote 171: The narrative of Livy (i. 28) is weighty and solemn. At tu, Albane, maneres, is a harsh reflection, unworthy of Virgil's humanity, (Aeneid, viii. 643.) Heyne, with his usual good taste, observes that the subject was too horrid for the shield of Aencas, (tom. iii. p. 229.)]

[Footnote 172: The age of Draco (Olympiad xxxix. l) is fixed by Sir John Marsham (Canon Chronicus, p. 593--596) and Corsini, (Fasti Attici, tom. iii. p. 62.) For his laws, see the writers on the government of Athens, Sigonius, Meursius, Potter, &c.]

[Footnote 173: The viith, de delictis, of the xii. tables is delineated

by Gravina, (Opp. p. 292, 293, with a commentary, p. 214--230.) Aulus Gellius (xx. 1) and the Collatio Legum Mosaicarum et Romanarum afford much original information.]

[Footnote 174: Livy mentions two remarkable and flagitious aeras, of 3000 persons accused, and of 190 noble matrons convicted, of the crime of poisoning, (xl. 43, viii. 18.) Mr. Hume discriminates the ages of private and public virtue, (Essays, vol. i. p. 22, 23.) I would rather say that such ebullitions of mischief (as in France in the year 1680) are accidents and prodigies which leave no marks on the manners of a nation.]

[Footnote 175: The xii. tables and Cicero (pro Roscio Amerino, c. 25, 26) are content with the sack; Seneca (Excerpt. Controvers. v 4) adorns it with serpents; Juvenal pities the guiltless monkey (innoxia simia--156.) Adrian (apud Dositheum Magistrum, l. iii. c. p. 874--876, with Schulting's Note,) Modestinus, (Pandect. xlviii. tit. ix. leg. 9,) Constantine, (Cod. l. ix. tit. xvii.,) and Justinian, (Institut. l. iv. tit. xviii.,) enumerate all the companions of the parricide. But this fanciful execution was simplified in practice. Hodie tamen viv exuruntur vel ad bestias dantur, (Paul. Sentent. Recept. l. v. tit. xxiv p. 512, edit. Schulting.)]

[Footnote 176: The first parricide at Rome was L. Ostius, after the second Punic war, (Plutarch, in Romulo, tom. i. p. 54.) During the Cimbric, P. Malleolus was guilty of the first matricide, (Liv. Epitom.

l. lxviii.)]

[Footnote 177: Horace talks of the formidine fustis, (l. ii. epist. ii. 154,) but Cicero (de Republica, l. iv. apud Augustin. de Civitat. Dei, ix. 6, in Fragment. Philosoph. tom. iii. p. 393, edit. Olivet) affirms that the decemvirs made libels a capital offence: cum perpaucas res capite sanxisent--perpaucus!]

[Footnote 178: Bynkershoek (Observat. Juris Rom. l. i. c. 1, in Opp. tom. i. p. 9, 10, 11) labors to prove that the creditors divided not the body, but the price, of the insolvent debtor. Yet his interpretation is one perpetual harsh metaphor; nor can he surmount the Roman authorities of Quintilian, Caecilius, Favonius, and Tertullian. See Aulus Gellius, Noct. Attic. xxi.]

[Footnote 1781: Hugo (Histoire du Droit Romain, tom. i. p. 234) concurs with Gibbon See Niebuhr, vol. ii. p. 313.--M.]

In the absence of penal laws, and the insufficiency of civil actions, the peace and justice of the city were imperfectly maintained by the private jurisdiction of the citizens. The malefactors who replenish our jails are the outcasts of society, and the crimes for which they suffer may be commonly ascribed to ignorance, poverty, and brutal appetite. For the perpetration of similar enormities, a vile plebeian might claim and abuse the sacred character of a member of the republic: but, on the proof or suspicion of guilt, the slave, or the stranger, was nailed to

a cross; and this strict and summary justice might be exercised without restraint over the greatest part of the populace of Rome.

Each family contained a domestic tribunal, which was not confined, like that of the praetor, to the cognizance of external actions: virtuous principles and habits were inculcated by the discipline of education; and the Roman father was accountable to the state for the manners of his children, since he disposed, without appeal, of their life, their liberty, and their inheritance. In some pressing emergencies, the citizen was authorized to avenge his private or public wrongs. The consent of the Jewish, the Athenian, and the Roman laws approved the slaughter of the nocturnal thief; though in open daylight a robber could not be slain without some previous evidence of danger and complaint. Whoever surprised an adulterer in his nuptial bed might freely exercise his revenge; [179] the most bloody and wanton outrage was excused by the provocation; [180] nor was it before the reign of Augustus that the husband was reduced to weigh the rank of the offender, or that the parent was condemned to sacrifice his daughter with her guilty seducer. After the expulsion of the kings, the ambitious Roman, who should dare to assume their title or imitate their tyranny, was devoted to the infernal gods: each of his fellow-citizens was armed with the sword of justice; and the act of Brutus, however repugnant to gratitude or prudence, had been already sanctified by the judgment of his country. [181] The barbarous practice of wearing arms in the midst of peace, [182] and the bloody maxims of honor, were unknown to the Romans; and, during the two purest ages, from the establishment of equal freedom to

the end of the Punic wars, the city was never disturbed by sedition, and rarely polluted with atrocious crimes. The failure of penal laws was more sensibly felt, when every vice was inflamed by faction at home and dominion abroad. In the time of Cicero, each private citizen enjoyed the privilege of anarchy; each minister of the republic was exalted to the temptations of regal power, and their virtues are entitled to the warmest praise, as the spontaneous fruits of nature or philosophy. After a triennial indulgence of lust, rapine, and cruelty, Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling; and such was the temper of the laws, the judges, and perhaps the accuser himself, [183] that, on refunding a thirteenth part of his plunder, Verres could retire to an easy and luxurious exile. [184]

[Footnote 179: The first speech of Lysias (Reiske, Orator. Graec. tom. v. p. 2--48) is in defence of a husband who had killed the adulterer. The rights of husbands and fathers at Rome and Athens are discussed with much learning by Dr. Taylor, (Lectiones Lysiacae, c. xi. in Reiske, tom. vi. p. 301--308.)]

[Footnote 180: See Casaubon ad Athenaeum, l. i. c. 5, p. 19. Percurrent raphanique mugilesque, (Catull. p. 41, 42, edit. Vossian.) Hunc mugilis intrat, (Juvenal. Satir. x. 317.) Hunc perminxere calones, (Horat l. i. Satir. ii. 44.) Familiae stuprandum dedit.. fraudi non fuit, (Val. Maxim. l. vi. c. l, No. 13.)]

[Footnote 181: This law is noticed by Livy (ii. 8) and Plutarch, (in Publiccla, tom. i. p. 187,) and it fully justifies the public opinion on the death of Caesar which Suetonius could publish under the Imperial government. Jure caesus existimatur, (in Julio, c. 76.) Read the letters that passed between Cicero and Matius a few months after the ides of March (ad Fam. xi. 27, 28.)]

[Footnote 182: Thucydid. l. i. c. 6 The historian who considers this circumstance as the test of civilization, would disdain the barbarism of a European court]

[Footnote 183: He first rated at millies (800,000 L.) the damages of Sicily, (Divinatio in Caecilium, c. 5,) which he afterwards reduced to quadringenties, (320,000 L.--1 Actio in Verrem, c. 18,) and was finally content with tricies, (24,000l L.) Plutarch (in Ciceron. tom. iii. p. 1584) has not dissembled the popular suspicion and report.]

[Footnote 184: Verres lived near thirty years after his trial, till the second triumvirate, when he was proscribed by the taste of Mark Antony for the sake of his Corinthian plate, (Plin. Hist. Natur. xxxiv. 3.)]

The first imperfect attempt to restore the proportion of crimes and punishments was made by the dictator Sylla, who, in the midst of his sanguinary triumph, aspired to restrain the license, rather than to oppress the liberty, of the Romans. He gloried in the arbitrary proscription of four thousand seven hundred citizens. [185] But, in the

character of a legislator, he respected the prejudices of the times; and, instead of pronouncing a sentence of death against the robber or assassin, the general who betrayed an army, or the magistrate who ruined a province, Sylla was content to aggravate the pecuniary damages by the penalty of exile, or, in more constitutional language, by the interdiction of fire and water. The Cornelian, and afterwards the Pompeian and Julian, laws introduced a new system of criminal jurisprudence; [186] and the emperors, from Augustus to Justinian, disguised their increasing rigor under the names of the original authors. But the invention and frequent use of extraordinary pains proceeded from the desire to extend and conceal the progress of despotism. In the condemnation of illustrious Romans, the senate was always prepared to confound, at the will of their masters, the judicial and legislative powers. It was the duty of the governors to maintain the peace of their province, by the arbitrary and rigid administration of justice; the freedom of the city evaporated in the extent of empire, and the Spanish malefactor, who claimed the privilege of a Roman, was elevated by the command of Galba on a fairer and more lofty cross. [187] Occasional rescripts issued from the throne to decide the questions which, by their novelty or importance, appeared to surpass the authority and discernment of a proconsul. Transportation and beheading were reserved for honorable persons; meaner criminals were either hanged, or burnt, or buried in the mines, or exposed to the wild beasts of the amphitheatre. Armed robbers were pursued and extirpated as the enemies of society; the driving away horses or cattle was made a capital offence; [188] but simple theft was uniformly considered as a mere civil

and private injury. The degrees of guilt, and the modes of punishment, were too often determined by the discretion of the rulers, and the subject was left in ignorance of the legal danger which he might incur by every action of his life.

[Footnote 185: Such is the number assigned by Valer'us Maximus, (l. ix. c. 2, No. 1,) Florus (iv. 21) distinguishes 2000 senators and knights. Appian (de Bell. Civil. l. i. c. 95, tom. ii. p. 133, edit. Schweighauser) more accurately computes forty victims of the senatorian rank, and 1600 of the equestrian census or order.]

[Footnote 186: For the penal laws (Leges Corneliae, Pompeiae, Julae, of Sylla, Pompey, and the Caesars) see the sentences of Paulus, (l. iv. tit. xviii.--xxx. p. 497--528, edit. Schulting,) the Gregorian Code, (Fragment. l. xix. p. 705, 706, in Schulting,) the Collatio Legum Mosaicarum et Romanarum, (tit. i.--xv.,) the Theodosian Code, (l. ix.,) the Code of Justinian, (l. ix.,) the Pandects, (xlviii.,) the Institutes, (l. iv. tit. xviii.,) and the Greek version of Theophilus, (p. 917--926.)]

[Footnote 187: It was a guardian who had poisoned his ward. The crime was atrocious: yet the punishment is reckoned by Suetonius (c. 9) among the acts in which Galba showed himself acer, vehemens, et in delictis coercendis immodicus.]

[Footnote 188: The abactores or abigeatores, who drove one horse, or

two mares or oxen, or five hogs, or ten goats, were subject to capital punishment, (Paul, Sentent. Recept. l. iv. tit. xviii. p. 497, 498.) Hadrian, (ad Concil. Baeticae,) most severe where the offence was most frequent, condemns the criminals, ad gladium, ludi damnationem, (Ulpian, de Officio Proconsulis, l. viii. in Collatione Legum Mosaic. et Rom. tit. xi p. 235.)]

A sin, a vice, a crime, are the objects of theology, ethics, and jurisprudence. Whenever their judgments agree, they corroborate each other; but, as often as they differ, a prudent legislator appreciates the guilt and punishment according to the measure of social injury. On this principle, the most daring attack on the life and property of a private citizen is judged less atrocious than the crime of treason or rebellion, which invades the majesty of the republic: the obsequious civilians unanimously pronounced, that the republic is contained in the person of its chief; and the edge of the Julian law was sharpened by the incessant diligence of the emperors. The licentious commerce of the sexes may be tolerated as an impulse of nature, or forbidden as a source of disorder and corruption; but the fame, the fortunes, the family of the husband, are seriously injured by the adultery of the wife. The wisdom of Augustus, after curbing the freedom of revenge, applied to this domestic offence the animadversion of the laws: and the guilty parties, after the payment of heavy forfeitures and fines, were condemned to long or perpetual exile in two separate islands. [189] Religion pronounces an equal censure against the infidelity of the husband; but, as it is not accompanied by the same civil effects,

the wife was never permitted to vindicate her wrongs; [190] and the distinction of simple or double adultery, so familiar and so important in the canon law, is unknown to the jurisprudence of the Code and the Pandects. I touch with reluctance, and despatch with impatience, a more odious vice, of which modesty rejects the name, and nature abominates the idea. The primitive Romans were infected by the example of the Etruscans [191] and Greeks: [192] and in the mad abuse of prosperity and power, every pleasure that is innocent was deemed insipid; and the Scatinian law, [193] which had been extorted by an act of violence, was insensibly abolished by the lapse of time and the multitude of criminals. By this law, the rape, perhaps the seduction, of an ingenuous youth, was compensated, as a personal injury, by the poor damages of ten thousand sesterces, or fourscore pounds; the ravisher might be slain by the resistance or revenge of chastity; and I wish to believe, that at Rome, as in Athens, the voluntary and effeminate deserter of his sex was degraded from the honors and the rights of a citizen. [194] But the practice of vice was not discouraged by the severity of opinion: the indelible stain of manhood was confounded with the more venial transgressions of fornication and adultery, nor was the licentious lover exposed to the same dishonor which he impressed on the male or female partner of his guilt. From Catullus to Juvenal, [195] the poets accuse and celebrate the degeneracy of the times; and the reformation of manners was feebly attempted by the reason and authority of the civilians till the most virtuous of the Caesars proscribed the sin against nature as a crime against society. [196]

[Footnote 189: Till the publication of the Julius Paulus of Schulting, (l. ii. tit. xxvi. p. 317--323,) it was affirmed and believed that the Julian laws punished adultery with death; and the mistake arose from the fraud or error of Tribonian. Yet Lipsius had suspected the truth from the narratives of Tacitus, (Annal. ii. 50, iii. 24, iv. 42,) and even from the practice of Augustus, who distinguished the treasonable frailties of his female kindred.]

[Footnote 190: In cases of adultery, Severus confined to the husband the right of public accusation, (Cod. Justinian, l. ix. tit. ix. leg. 1.) Nor is this privilege unjust--so different are the effects of male or female infidelity.]

[Footnote 191: Timon (l. i.) and Theopompus (l. xliii. apud Athenaeum, l. xii. p. 517) describe the luxury and lust of the Etruscans. About the same period (A. U. C. 445) the Roman youth studied in Etruria, (liv. ix. 36.)]

[Footnote 192: The Persians had been corrupted in the same school, (Herodot. l. i. c. 135.) A curious dissertation might be formed on the introduction of paederasty after the time of Homer, its progress among the Greeks of Asia and Europe, the vehemence of their passions, and the thin device of virtue and friendship which amused the philosophers of Athens. But scelera ostendi oportet dum puniuntur, abscondi flagitia.]

[Footnote 193: The name, the date, and the provisions of this law are

equally doubtful, (Gravina, Opp. p. 432, 433. Heineccius, Hist. Jur. Rom. No. 108. Ernesti, Clav. Ciceron. in Indice Legum.) But I will observe that the nefanda Venus of the honest German is styled aversa by the more polite Italian.]

[Footnote 194: See the oration of Aeschines against the catamite Timarchus, (in Reiske, Orator. Graec. tom. iii. p. 21--184.)]

[Footnote 195: A crowd of disgraceful passages will force themselves on the memory of the classic reader: I will only remind him of the cool declaration of Ovid:-- Odi concubitus qui non utrumque resolvant. Hoc est quod puerum tangar amore minus.]

[Footnote 196: Aelius Lampridius, in Vit. Heliogabal. in Hist. August p. 112 Aurelius Victor, in Philippo, Codex Theodos. l. ix. tit. vii. leg. 7, and Godefroy's Commentary, tom. iii. p. 63. Theodosius abolished the subterraneous brothels of Rome, in which the prostitution of both sexes was acted with impunity.]