THE WORKS OF

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CHAPTER II.

OF THE GENERAL PRINCIPLE OF LAW AND OBLIGATION.

ORDER, proportion, and fitness, pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made.

On the inanimate part of the creation are impressed the continued energies of motion and of attraction, and other energies, varied and yet uniform, all designated and ascertained. Animated nature is under a government suited to every genus, to every species, and to every individual, of which it consists. Man, the *nexus utriusque mundi*, composed of a body and a soul, possessed of faculties intellectual and moral, finds or makes a system of regulations, by which his various and important nature, in every period of his existence, and in every situation, in which he can be placed, may be preserved, improved, and perfected. The celestial as well as the terrestrial world knows its exalted but prescribed course. This angels and the spirits of the just, made perfect, do "clearly behold, and without any swerving observe." Let humble reverence attend us as we proceed. The great and incomprehensible Author, and Preserver, and Ruler of all things —he himself works not without an eternal decree.

Such—and so universal is law. "Her seat," to use the sublime language of the excellent Hooker,[1] "is the bosom

[1] Hooker 34.

of God; her voice, the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power. Angels and men, creatures of every condition, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

Before we descend to the consideration of the several kinds and parts of this science, so dignified and so diversified, it will be proper, and it will be useful, to contemplate it in one general and comprehensive view; and to select some of its leading and luminous properties, which will serve to guide and enlighten us in that long and arduous journey, which we now undertake.[1]

It may, perhaps, be expected, that I should begin with a regular definition of law. I am not insensible of the use, but, at the same time, I am not insensible of the abuse of definitions. In their very nature, they are not calculated to extend the acquisition of knowledge, though they may be well fitted to ascertain and guard the limits of that knowledge, which is already acquired. By definitions, if made with accuracy—and consummate accuracy ought to be their indispensable characteristic—ambiguities in expression, and different meanings of the same term, the

[1 The author here takes the broadest view of law. Embracing several species of law distinguished from each other, either on account of the source or the object of the laws as follows: The law of Nature, which in some respects is universally observed, *e.g.* U. S. *v* Holmes, 1 Wall. Jr. 1. Again it sets limits upon the rules of Comity. Forbes *v.* Corcoran, 2 B. & C. 469. The Divine law is equivalent thereto. The law of Nations of which Maritime law is a part—the Law Merchant constitutes a branch of the latter. Municipal law, *i.e.*, the law of a State or Nation. Military law which governs those engaged in the military service in their intercourse with each other as to military matters, but which does not supersede the civil laws, and lastly, Martial Law, which as a last resort may be substituted in the place of the civil laws. See Ex parte Milligan, 4 Wall. U. S. 2.]

most plentiful sources of error and of fallacy in the reasoning art, may be prevented; or, if that cannot be done, may be detected. But, on the other hand, they may be carried too far, and, unless restrained by the severest discipline, they may produce much confusion and mischief in the very stations, which they are placed to defend.

You have heard much of the celebrated distribution of things into genera and species. On that distribution, Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths, than were before invented or perfected by any other philosopher. The axiom, from which he sets out, and in which the whole terminates, is, that whatever is predicated of a genus, may be predicated of every species contained under that genus, and of every individual contained under every such species.[1] On that distribution likewise, the very essence of scientific definition depends: for a definition, strictly and logically regular, "must express the genus of the thing defined, and the specific difference, by which that thing is distinguished from every other species belonging to that genus."[2]

From this definition of a definition—if I may be pardoned for the apparent play upon the word—it evidently appears that nothing can be defined, which does not denote a species; because that only, which denotes a species, can have a specific difference.

But further: a specific difference may, in fact, exist; and yet language may furnish us with no words to express it. Blue is a species of color; but how shall we express the specific difference, by which blue is distinguished from green?

Again: expressions, which signify things simple, and

[1] 1 Gill. (4to.) 660.

[2] Reid's Ess. Int. 10. 11.

void of all composition, are, from the very force of the terms, unsusceptible of definition. It was one of the capital defects of Aristotle's philosophy, that he attempted and pretended to define the simplest things.

Here it may be worth while to note a difference between our own abstract notions, and objects of nature. The former are the productions of our own minds; we can therefore define and divide them, and distinctly designate their limits. But the latter run so much into one another, and their essences, which discriminate them, are so subtile and latent, that it is always difficult, often impossible, to define or divide them with the necessary precision. We are in danger of circumscribing nature within the bounds of our own notions, formed, frequently, on a partial or defective view of the object before us. Fettered thus at our outset, we are restrained in our progress, and govern the course of our inquiries, not by the extent or variety of our subject, but by our own preconceived apprehensions concerning it.

This distinction between the objects of nature and our own abstract notions suggests a practical inference. Definitions and divisions in municipal law, the creature of man, may be more useful, because more adequate and more correct, than in natural objects.

By some philosophers, definition and division are considered as the two great nerves of science. But unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of a first principle, will spread confusion, distraction, and contradictions over the remotest parts of the most extended system.

Errors in science, as well as in life, proceed more frequently from wrong principles, than from ill-drawn consequences. *Prava regula prima* may be the parent of the most fatal enormities.

The higher an edifice is raised, the more compactly it is built, the more precisely it is carried up in a just direction —in proportion to all these excellences, a rent in the foundation will increase and become dangerous.

The case is the same with a radical error at the foundation of a system. The more accurately and the more ingeniously men reason, and the farther they pursue their reasonings, from false principles, the more numerous and the more inveterate will their inconsistencies, nay, their absurdities be. One advantage, however, will result—those absurdities and those inconsistencies will be more easily traced to their proper source. When the string of a musical instrument has a fault only in one place, you know immediately how and where to find and correct it.

Influenced by these admonitory truths, I hesitate, at present, to give a definition of law. My hesitation is increased by the fate of the far greatest number of those, who have hitherto attempted it. Many, as it is natural to suppose, and labored have been the efforts to infold law within this scientific circle; but little satisfaction—little instruction has been the result. Almost every writer, sensible of the defects, the inaccuracies, or the impropriéties of the definitions that have gone before him, has endeavored to supply their place with something, in his own opinion, more proper, more accurate, and more complete. He has been treated by his successors, as his predecessors have been treated by him: and his definition has had only the effect of adding one more to the lengthy languid list. This I know, because I have taken the trouble to read them in great numbers; but because I have taken the trouble to read them, I will spare you the

trouble of hearing them—at least, the greatest part of them.

Some of them, indeed, have a claim to attention: one, in particular, will demand it, for reasons striking and powerful—I mean that given by the Commentator on the laws of England.

Let us proceed carefully, patiently, and minutely to examine it. If I am not deceived, the examination will richly compensate all the time, and trouble, and investigation, that will be allotted to it; for it will be uncommonly fruitful in the principles, and in the consequences of the great truths and important disquisitions, which it will lead in review before us.[1]

"Law," says he, "in its most general and comprehensive sense, signifies a rule of action."[2] In its proper signification, a rule is an instrument, by which a right line—the shortest and truest of all—may be drawn from one point to another. In its moral or figurative sense, it de-

[1 This examination of Blackstone's definition of law leaves nothing to be said, and has been universally approved. Dr. Hammond says it is hardly creditable to the bar, and still less so to the law schools of the country, that Blackstone's definitions should have received so little criticism and so much notice, and this examination of the definition remain unnoticed. Hammond's Blackstone, 113.

Wilson shows very clearly that Blackstone found no authority in English law for such a definition, and that the definition ranked him as a supporter of despotism and absolutism in spite of his contrary contention. See Chisholm v. Ga. 2 Dall. 416.

The definition, with most of Blackstone's political dogmas, never had any foundation in fact in the English law, and, while they have confused and misled American students, they have not had the same approbation in England. See Austin's Jurisprudence, p. 220. Dicey on the Constitution, pp. 13-15. Stockdale v. Hansard, 9 Ad. and Ed. 1; 1 Stephen Comm. 1. There is good ground for believing that the views of Blackstone were but an echo of those of Mansfield, who was his patron, and who was aiding in Parliament to carry out these views in reference to the American colonies.]

[2] 1 Bl. Com. 38.

notes a principle or power, that directs a man surely and concisely to attain the end, which he proposes.

Law is called a rule, in order to distinguish it from a[1] sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law.

Again; law is called a rule, to denote that it carries along with it a power and principle of obligation. Concerning the nature and the cause of obligation, much ingenious disputation has been held by philosophers and writers on jurisprudence. Indeed the sentiments entertained concerning it have been so various, that an account of them would, in the estimation of my Lord Kaims, be a "delicate historical morsel."

This interesting subject will claim and obtain our attention, next after what we have to say concerning law in general.

When we speak of a rule with regard to human conduct, we imply two things. 1. That we are susceptible of direction. 2. That, in our conduct, we propose an end. The brute creation act not from design. They eat, they drink, they retreat from the inclemencies of the weather, without considering what their actions will ultimately produce. But we have faculties, which enable us to trace the connection between actions and their effects; and our actions are nothing else but the steps which we take, or the means, which we employ, to carry into execution the effects which we intend.

Hooker, I think, conveys a fuller and stronger conception of law, when he tells us, that "it assigns unto each thing the kind, that it moderates the force and power, that it appoints the form and measure of working."[2] Not the direction merely, but the kind also, the energy, and the proportion of actions is suggested in this description.

[1] 1 Bl. Com. 44.

[2] Hooker 2.

Some are of opinion, that law should be defined [1] "a rule of acting or not acting;" because actions may be forbidden as well as commanded. But the same excellent writer, whom I have just now cited, gives a very proper answer to this opinion, and shows the addition to be unnecessary, by finely pursuing the metaphor, which we have already mentioned. "We must not suppose that there needeth one rule to know the good, and another to know the evil by. For he that knoweth what is straight, doth even thereby discern what is crooked. Goodness in actions is like unto straightness; wherefore that which is well done, we might term right." [2]

After this dry description of the literal and metaphorical meaning of a rule, permit me to relax your strained attention by a critical remark. In the philosophy of the human mind, it is impossible altogether to avoid metaphorical expressions. Our first and most familiar notions are suggested by material objects; and we cannot speak intelligibly of those that are immaterial, without continual allusions to matter and the qualities of matter.

Besides, in teaching moral science, the use of metaphors is not only necessary, but, if prudent, and honest, and guarded, it is highly advantageous. Nature has endowed us with the faculty of imagination, that we may be enabled to throw warning as well as enlightening rays upon truth—to embellish, to recommend, and to enforce it. Truth may, indeed, by reasoning, be rendered evident to the understanding; but it cannot reach the heart, unless by means of the imagination. To the imagination metaphors are addressed.

From this short excursion into the field of criticism, let us return to our legal tract. Law is a rule "prescribed." A simple resolution, confined within the bosom of the legislator, without being notified, in some fit manner, to

[1] Daws. Orig. Laws, 4. 14.

[2] Hooker 11.

those for whose conduct it is to form a rule, can never, with propriety, be termed a law.

There are many ways by which laws may be made sufficiently known. They may be printed and published. Written copies of them may be deposited in public libraries, or other places, where every one interested may have an opportunity of perusing them. They may be proclaimed in general meetings of the people. The knowledge of them may be disseminated by long and universal practice. "Confirmed custom," says a writer on Roman jurisprudence, "is deservedly considered as a law. For since written laws bind us for no other reason than because they are received by the judgment of the people; those laws, which the people have approved, without writing, are also justly obligatory on all. For where is the difference, whether the people declare their will by their sufferage, or by their conduct? This kind of law is said to be established by [1] manners." [2]

Of all yet suggested, the mode for the promulgation of human laws by custom seems the most significant, and the most effectual. It involves in it internal evidence, of the strongest kind, that the law has been introduced by common *consent*; and that this consent rests upon the most solid basis—experience as well as opinion. This mode of promulgation points to the strongest characteristic of liberty, as well as of law. For a consent thus practically given, must have been given in the freest and most unbiassed manner.

With pleasure you anticipate the prospect of a species of law, to which these remarks have already directed your attention. If it were asked—and it would be no improper question—who of all the makers and teachers of law have

[1] D. 1. 1. t. 3, 32, p. 1.

[2] "The first written laws in Greece were given only six centuries before the Christian era.—1. Gill. 7. (4to.)

formed and drawn after them the most, the best, and the most willing disciples; it might be not untruly answered —custom.

Laws may be promulgated by reason and conscience, the divine monitors within us. They are thus known as effectually, as by words or by writing: indeed they are thus known in a manner more noble and exalted. For, in this manner, they may be said to be engraven by God on the hearts of men: in this manner, he is the promulgator as well as the author of natural law.

If a simple resolution cannot have the force of a law before it be promulgated: we may certainly hazard the position—that it cannot have the force of a law, before it be made; in other words, that *ex post facto* instruments, claiming the title and character of laws, are impostors.[1]

Peculiarly striking, upon this subject, are the sentiments of the criminal and unfortunate Strafford. I call him criminal, because he acted; I call him unfortunate, because he suffered, against the laws of his country. His sentiments must make a deep impression upon others; because, when he spoke them, he must have been deeply impressed with them himself. When he spoke them, he stood under a bill of attainder, suspended only by the slender thread of political justice, and ready, like the sword of Damocles, to fall on his devoted head. "Do we not live by laws? And must we be punished by laws before they are made? Far better were it to live by no laws at all, than to put this necessity of divination upon a man, and to accuse him of the breach of a law, before it be a law at all."[2]

In criminal jurisprudence, a Janus statute, with one face looking backward, and another looking forward, is a monster indeed.

The definition of law in the Commentaries proceeds

[1] See Calder v. Bull, 3 Dall., U. S. 386.

[2] Whitlocke 230.

in this manner. "Law is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey." A superior! Let us make a solemn pause—Can there be *no* law without a superior? Is it *essential* to law, that inferiority should be involved in the obligation to obey it? Are these distinctions at the root of *all* legislation?

There is a law, indeed, which flows from the Supreme of being—a law, more distinguished by the goodness, than by the power of its allgracious Author. But there are laws also that are human: and does it follow, that, in these, a character of superiority is inseparably attached to him, who makes them: and that a character of inferiority is, in the same manner, inseparably attached to him, for whom they are made? What is this superiority? Who is this superior? By whom is he constituted? Whence is his superiority derived? Does it flow from a source that is human? Or does it flow from a source that is divine?

From a human source it cannot flow: for no stream issuing from thence can rise higher than the fountain.

If the prince, who makes laws for a people, is superior, in the terms of the definition, to the people, who are to obey; how comes he to be vested with the superiority over them.

If I mistake not, this notion of superiority, which is introduced as an *essential* part in the definition of a law—for we are told that a law *always*[1] supposes some superior who is to make it—this notion of superiority contains the germ of the divine right—a prerogative impiously attempted to be established—of princes, arbitrarily to rule; and of the corresponding obligation—a servitude tyrannically attempted to be imposed—on the people, implicitly to obey.

[1] Bl. Com. 53.

Despotism, by an artful use of "superiority" in politics; and scepticism, by an artful use of "ideas" in metaphysics, have endeavored—and their endeavors have frequently been attended with too much success—to destroy all true liberty and sound philosophy. By their baneful effects, the science of man and the science of government have been poisoned to their very fountains. But those destroyers of others have met, or must meet, with their own destruction. [1]

We now see how necessary it is to lay the foundations of knowledge deep and solid. If we wish to build upon the foundations laid by another, we see how necessary it is cautiously and minutely to examine them. If they are unsound, we see how necessary it is to remove them, however venerable they may have become by reputation: whatever regard may have been diffused over them by those who laid them, by those who built on them, and by those who have supported them.

But was Sir William Blackstone a votary of despotic power? I am far from asserting that he was. I am equally far from believing that Mr. Locke was a friend to infidelity. But yet it is unquestionable, that the writings of Mr. Locke have facilitated the progress, and have given strength to the effects of scepticism.

The high reputation, which he deservedly acquired for his enlightened attachment to the mild and tolerating doctrines of Christianity, secured to him the esteem and confidence of those, who were its friends. The same high and deserved reputation inspired others of very different views and characters, with a design to avail themselves of its splendor, and, by that means, to diffuse a fascinating kind of lustre over their own tenets of a dark and sable hue. The consequence has been, that the writings of Mr. Locke, one of the most able, most sincere,

[1 He repeated this in Chisholm v. Georgia, 2 Dall. 419.]

and most amiable assertors of Christianity and true philosophy, have been perverted to purposes, which he would have deprecated and prevented, had he discovered or foreseen them.

Berkeley, the celebrated bishop of Cloyne, wrote his Principles of Human Knowledge—a book intended to disprove the existence of matter—with the express view of banishing scepticism both from science and from religion. He was even sanguine in his expectations of success. But the event has proved that he was egregiously mistaken; for it is evident, from the use to which later authors have applied it, that his system leads directly to universal scepticism.

Similar, though in an inferior degree, have been, and may be, the fate and the influence of the writings and character of Sir William Blackstone, even admitting that he was as much a friend to liberty, as Locke and Berkeley were friends to religion.

But in prosecuting the study of law on liberal principles and with generous views, our business is much less with the character of the Commentaries or of their author, than with the doctrines which they contain. If the doctrines, insinuated in the definition of law, can be supported on the principles of reason and science; the defence of other principles, which I have thought to be those of liberty and just government, becomes—I am sorry to say it—a fruitless attempt.

Sir William Blackstone, however, was not the first, nor has he been the last, who has defined law upon the same principles, or upon principles similar and equally dangerous.[1]

This subject is of such radical importance, that it will be well worth while to trace it as far as our materials can

[[1] He points out elsewhere that Blackstone was the first to so define English law.]

carry us; for error as well as truth should be examined historically, and pursued back to its original springs.

By comparing what is said in the Commentaries on this subject, with what is mentioned concerning it in the system of morality, jurisprudence, and politics written by Baron Puffendorff, we shall be satisfied that, from the sentiments and opinions delivered in the last mentioned performance, those in the first mentioned one have been taken and adopted. "A law," says Puffendorff, "is the command of a superior."[1] "A law," says Sir William Blackstone, always supposes some superior, who is to make it."[2]

The introduction of superiority, as a necessary part of the definition of law, is traced from Sir William Blackstone to Puffendorff. This definition of Puffendorff is substantially the same with that of Hobbes. "A law is the command of him or them, that have the sovereign power, given to those that be his or their subjects."[3] It is substantially the same also with that of Bishop Saunderson. "Law is a rule of action, imposed on a subject, by one who has power over him."[4]

Let us now inquire what is meant by superiority, that we may be able to ascertain and recognize those qualities, inherent or derivative, which entitle the superior or sovereign to the transcendent power of imposing laws.

We can distinguish two kinds of superiority. 1. A superiority merely of power. 2. A superiority of power, accompanied with a right to exercise that power. Is the first sufficient to entitle its possessor to the character and office of a legislator? If we subscribe to the doctrines of Mr. Hobbes, we shall say, that it is. "To those," says he,

[1] Puff. B. 1, c. 2, s. 6, p. 16. B. 1, c. 6, s. 1, 2, p. 56, 57.
[2] 1. Bl. Com. 43.
[3] 3. Dagge 95, 96.
[4] Daws. Orig. L. 3, cites Saund. Præl. 5, s. 3.

"whose power is irresistible, the dominion of all men adhereth naturally, by their excellence of power."[1]

This position, strange as it is, has had its advocates in ancient as well as in modern times. Even the accomplished Athenians, who excluded it from their municipal code, seem to have considered it as part of the received law of nations. "We follow," says their ambassador in the name of his commonwealth, "the common nature and genius of mankind, which appoints those to be masters, who are superior in strength. We have not made this law; nor are we the first, who have appealed to it. We received it from antiquity: we are determined to transmit it to the most distant futurity: and we claim and use it in our own case."[2]

Brennus, at the head of his victorious and ferocious Gauls, with more conciseness, and with a less striking inconsistency of character, tells the vanquished Romans "omnia fortium esse."[3] Everything belongs to the bold and the strong.

The prudent Plutarch thinks it "the first and principal law of nature, that he whose circumstances require protection and deliverance, should admit him for his ruler, who is able to protect and deliver him."[4]

For us it is sufficient, as men, as citizens, and as states, to say, that power is nothing more than the right of the strongest, and may be opposed by the same right, by the same means, and by the same principles, which are employed to establish it. Bare force, far from producing an obligation to obey, produces an obligation to resist.

Others, unwilling to rest the office of legislation and the right of sovereignty simply on superiority of power,

[1] De Cive 187. (Puff. 64.)
[2] Puff. 65. (Thucyd. l. 5, c. 105) l. Anac. 351.
[3] Puff. 65. (Livy.)
[4] Puff. 65. (Plut. in Pelop.)

have to this quality superadded pre-eminence or superior excellence of nature.

Let it be remembered all along, that I am examining the doctrine of superiority, as applied to human laws,[1] the proper and immediate object of investigation in these lectures. Of the law that is divine, we shall have occasion, at another time, to speak, with the reverence and gratitude which become us.

"It is a law of nature," says Dionysius of Halicarnassus, "common to all men, and which no time shall disannul or destroy, that those, who have more strength and *excellence*, shall bear rule over those, who have less."[2] The favorers of this opinion are unfortunate, both in the illustrations, by which they attempt to evince it; and in the inferences, to which they contend it gives rise.

Because Cicero, by a beautiful metaphor, describes the government of the other powers of the mind as assigned, by nature, to the understanding; does it follow that, in strict propriety of reasoning, the right of legislation is annexed, without any assignment, to superior excellence?

Aristotle, it seems, has said, that if a man *could* be found, excelling in *all* virtues, such an one would have a *fair title* to be king. These words may well be understood as conveying, and probably were intended to convey, only this unquestionable truth—that excellence in every virtue furnished the strongest recommendation, in favor of its happy possessor, *to be elected* for the exercise of authority. If so, the opinion of Aristotle is urged without a foundation properly laid in the fact.

But let us suppose the contrary: let us suppose it to be the judgment of Aristotle, that the person, whom he characterizes, derived his right to the exercise of power, not

[1 Blackstone's definition was but the Roman definition of national law applied to municipal law.]

2 Puff. 65. (Dion. Hall. b. 1, c. 5.)

from the donation made to him by a voluntary election, but solely from his superior talents and excellence; shall the judgment of Aristotle supersede inquiry into its reasonableness? Shall the judgment of Aristotle, if found, on inquiry, to be unreasonable, silence all reprehension or confutation? Decent respect for authority is favorable to science. Implicit confidence is its bane. Let us adopt—for it is necessary, in the cause of truth and freedom, that we should adopt—the manly expostulation, which the ardent pursuit of knowledge drew from the great Bacon —"Why should a few received authors stand up like Hercules's columns, beyond which there should be no sailing or discovery?"

To Aristotle, more than to any other writer, either ancient or modern, this expostulation is strictly applicable. Hear what the learned Grotius says on this subject. "Among philosophers, Aristotle deservedly holds the chief place, whether you consider his method of treating subjects, or the acuteness of his distinctions, or the weight of his reasons. I could only wish that the authority of this great man had not, for some ages past, degenerated into tyranny; so that truth, for the discovery of which Aristotle took so great pains, is now oppressed by nothing more than by the very name of Aristotle."[1]

Guided and supported by the sentiments and by the conduct of Grotius and Bacon, let us proceed, with freedom and candor combined, to examine the judgment—though I am very doubtful whether it was the judgment —of Aristotle that the right of sovereignty is founded on superior excellence.

To that superiority, which attaches the right to command, there must be a corresponding inferiority, which imposes the obligation to obey. Does this right and this obligation result from every kind and every degree of

[1] Gro. Prel. 28.

superiority in one, and from every kind and every degree of inferiority in another? How is excellence to be rated or ascertained?

Let us suppose three persons in three different grades of excellence. Is he in the lowest to receive the law immediately from him in the highest? Is he in the highest to give the law immediately to him in the lowest grade? Or is there to be a gradation of law as well as of excellence? Is the command of the first to the third to be conveyed through the medium of the second? Is the obedience of the third to be paid, through the same medium, to the first? Augment the number of grades, and you multiply the confusion of their intricate and endless consequences.

Is this a foundation sufficient for supporting the solid and durable superstructure of law? Shall this foundation, insufficient as it is, be laid in the contingency—allowed to be improbable, not asserted to be even possible—"if a man can be found, excelling in *all* virtues?"

Had it been the intention of Providence, that some men should govern the rest, without their consent, we should have seen as indisputable marks distinguishing these superiors from those placed under them, as those which distinguish men from the brutes. The remark of Rumbald, in the non-resistance time of Charles the Second, evidenced propriety as well has wit. He could not conceive that the Almighty intended, that the greatest part of mankind should come into the world with saddles on their backs and bridles in their mouths, and that a few should come ready booted and spurred to ride the rest to death.[1] Still more apposite to our purpose is the saying of him, who declared that he would never subscribe the doctrine of the divine right of princes, till he beheld subjects born with bunches on their backs, like camels, and

[1] 1. Burgh. Pol. Dis. 3.

kings with combs on their heads, like cocks; from which striking marks it might indeed be collected, that the former were designed to labor and to suffer, and the latter, to strut and to crow.[1]

These pretensions to superiority, when viewed from the proper point of sight, appear, indeed, absurd and ridiculous. But these pretensions, absurd and ridiculous as they are, when rounded and gilded by flattery, and swallowed by pride, have become, in the breasts of princes, a deadly poison to their own virtues, and to the happiness of their unfortunate subjects. Those, who have been bred to be kings, have generally, by the prostituted views of their courtiers and instructors, been taught to esteem themselves a distinct and superior species among men, in the same manner as men are a distinct and superior species among animals.

Lewis the Fourteenth was a strong instance of the effect of that inverted manner of teaching and thinking, which forms kings to be tyrants, without knowing or even suspecting that they are so. That oppression, under which he held his subjects, during the whole course of his long reign, proceeded chiefly from the principles and habits of his erroneous education. By this, he had been accustomed to consider his kingdom as his patrimony, and his power over his subjects as his rightful and undelegated inheritance. These sentiments were so deeply and strongly imprinted on his mind, that when one of his ministers represented to him the miserable condition to which those subjects were reduced, and, in the course of his representation, frequently used the word "l'état," the state; the king, though he felt the truth, and approved the substance of all that was said, yet was shocked at the frequent repetition of the world "l'état," and complained of it as an indecency offered to his person and character.

[1] Boling, Rem. 209.

And, indeed, that kings should imagine themselves the final causes, for which men were made, and societies were formed, and governments were instituted, will cease to be a matter of wonder or surprise, when we find that lawyers, and statesmen, and philosophers have taught or favored principles, which necessarily lead to the same conclusions.

Barbeyrac, whose commentaries enrich the performances of the most distinguished philosophers, at one time, taught and favored principles, which necessarily led to the conclusions, so degrading and so destructive to the human race. On this subject, it will be worth while to pursue his train of thought.

In the formation of societies and civil governments, three different conventions or agreements are supposed, by Puffendorff and many other writers, to have taken place. The first convention [1] is an engagement, by those who compose the society or state, to associate together in one body; and to regulate, with one common consent, whatever regards their preservation, their security, their improvement, and their happiness. The second convention is, to specify the form of government, that shall be established among them. The third convention is an engagement between the following parties; that is to say, the person or persons, on whom the sovereignty, or superiority, or majesty—for it is called by all these names—is conferred, on one hand; and, on the other hand, those who have conferred this sovereignty, this superiority, this majesty; and are now, by that step, as it seems, become subjects. By this third convention, the sovereign engages to consult the common security and advantage of the subjects; and the subjects engage to

[1 This word convention is not used here in the sense of an assemblage of persons, but as an agreement, a meeting of minds, which evidences consent. See Blair *v.* Ridgway, 41 Mo. 63; State *v.* McCready, 2 Hill S.C. 1.]

observe fidelity and allegiance to the sovereign. From this last convention, the state is supposed to receive its final completion and perfection.[1]

This account of the origin of society and government will be fully considered afterwards. I introduce it now, in order to show of the force and import of Barbeyrac's observation concerning it. "The first convention," says he, "is only, with regard to the second, what scaffolding is with regard to the building, for whose construction it was erected."[2]

And is it so? Is society nothing more than a scaffolding, by the means of which government may be erected; and which, consequently, may be prostrated, as soon as the edifice of civil government is built? If this is so, it must have required but a small portion of courtly ingenuity to persuade Lewis the Fourteenth, that, in a monarchy, government was nothing but a scaffolding for the king.

For the honor of Barbeyrac, however, let not this account be concluded, till it be told, that this did not continue to be always his sentiment; that, on consideration and reflection, this sentiment was changed; and that, when it was changed, he, as every other great and good man will do on similar occasions, freely and nobly retracted it. But although it has been retracted by Barbeyrac, it has neither been retracted nor abandoned by some others.

To evince that I speak not without foundation, and to show, what will not be suspected till they are shown, the extravagant notions which have been entertained on this head, I will adduce a number of sentences and quotations, which Grotius[3] has collected together, in order to combat the sentiments of those, who hold that the supreme power is, always and without exception, in the people.

[1] See 1 Sharswood's Blackstone, 47, Note.
[2] Puff. 641. note to b. 7, c. 2, s. 8.
[3] Grotius 68–71.

Historians and philosophers, poets and princes, bishops and fathers, are all summoned to oppose the dangerous doctrine.

When Tacitus says, "that, as we must bear with storms, barrenness, and inconveniences of nature, so we must bear with the luxury or avarice of princes;" Grotius tells us, "'tis admirably said." Marcus Antoninus, the philosopher, is produced as an authority, "that magistrates are to judge of private persons, princes of magistrates, but God alone of princes." King Vitigis declares, that "what regards the royal power is to be judged by the powers above; because it is derived from heaven, and is accountable to heaven alone." Ireneus, we are informed, says excellently, "by whose orders men are born, by his command kings are ordained." The same doctrine is contained in the constitutions of Clement. "You shall fear the king, knowing that he is chosen of God."

In a tragedy of Æschylus, the suppliants use this language to the king. "Sir, you are the city and the public; you are an independent judge. Seated upon your throne as upon an altar, you alone govern all by your absolute commands."

Here we have the very archetype of the idea of Lewis the Fourteenth, sanctioned by the name of Grotius. If the king was the city and the public; to mention "l'état" in his presence, as something separate and distinct, was certainly an indecency; because it contained an implied though distant limitation of his power.

The reverend bishop of Tours addresses the king of France in this very remarkable manner: "If any of us, O king! should transgress the bounds of justice, he may be punished by you: but if you yourself should offend, who shall call you to account? When we make representations to you, if you please, you hear us: but if you will not, who shall condemn you? There is

none but he, who has declared himself to be justice itself."

Let me also mention what Heineccius says, in much more recent times, in his System of Universal Law. "The doctrine,[1] which makes the people superior to the king or prince, and places in the former the real, and in the latter only personal majesty, is a most petulant one. It is the doctrine of Hottoman, Sidney, Milton, and others. Since a people, when they unite into a republic, renounce their own will, and subject themselves to the will of another, with what front can they call themselves superior to their sovereign?"[2]

And yet Heineccius himself allows, that "Grotius (1, 3–8.) is thought by not a few, to have given some handle to the doctrine of passive obedience and non-resistance."

Indeed, the lawyers of almost all the states of Europe represent kings as legislators: and we know, that, in the dictionaries of many, legislative and unlimited power are synonymous terms. To unlimited power, the correlative is passive obedience.

Even Baron de Wolfius, the late celebrated philosopher of Hall, lays down propositions concerning patrimonial kingdoms, without rejecting or contradicting a distinction, so injurious to the freedom and the rights of men.

Domat, in his book on the civil law, derives the power of governors from *divine* authority. "It is always he (God) who places them in the seat of authority: it is from him alone that they derive all the power and authority that they have; and it is the ministry of his justice that is committed to them. And seeing it is God himself whom they represent, in the rank which raises them above

[1] 2 Hein. 120, 121.

[2] So Justinian says that by the *lex regia* the people *make over* to the emperor all their power. Inst. 1, 2–6.]

others; he will have them to be considered as holding his place in their functions. And it is for this reason, that he himself gives the name of gods to those, to whom he communicates the right of governing and judging men." [1]

To diminish the force of the foregoing citations, it may be said, that, in all probability, Lewis the Fourteenth—and the same may be said of other princes equally ignorant—never read the tragedies of Æschylus, nor the history of Gregory of Tours. It is highly probable that he never did: but it is equally probable, that their sentiments were known in his court, and found the way, through the channels of flattery, to the royal ear. But the writings of Grotius must have been well known in France, and probably to Lewis the Fourteenth himself. This very book of the Rights of War and Peace was dedicated to his father, Lewis the Thirteenth: and its author, we are told, had credit with some of the ministers of that prince.

Every plausible notion in favor of arbitrary power, appearing in a respectable dress, and introduced by an influential patron, is received with eagerness, protected with vigilance, and diffused with solicitude, by an arbitrary government. The consequence is, that, in such a government, political prejudices are last of all, if ever, overcome or eradicated.

But these doctrines, it may be replied, are not now believed, even in France. But they have been believed—they have been believed, even in France, to the slavery and misery of millions. And if, happily, they are not still believed there; unfortunately, they are still believed in other countries.

But I ask—why should they be believed at all? I ask further: if they are not, and ought not to be believed; why is their principle suffered to lie latent and lurking at

[1] 1 Domat XXII.

the root of the science of law? Why is that principle continued a part of the very definition of law?

The pestilent seed may seem, at present, to have lost its vegetating power: but an unfriendly season and a rank soil may still revive it. It ought to be finally extirpated. It has, even within our own remembrance, done much real mischief. The position, that law is inseparably attached to superior power, was the political weapon used, with the greatest force and the greatest skill, in favor of the despotic claims of Great Britain over the American colonies. Of this, the most striking proofs will appear hereafter. Let me, at present, adopt the sentiments expressed, on a similar subject, by Vattel. "If the base flatterers of despotic power rise up against my principles; I shall have, on my side, the friend of laws, the true citizen, and the virtuous man." [1]

Let us conclude our observations upon this hypothesis concerning the origin of sovereignty, by suggesting, that were it as solid as it is unsound in speculation, it would be wholly visionary and useless in practice. Where would minions and courtly flatterers find the objects, to which they could, even with courtly decency, ascribe superior talents, superior virtue, or a superior nature, so as to entitle them, even on their own principles, to legislation and government?

We have now examined the inherent qualities, which have been alleged as sufficient to entitle, to the right and office of legislation, the superior, whose interposition is considered as essential to a law. We have weighed them in the balance, and we have found them wanting.

If this superior cannot rest a title on any inherent qualities; the qualities, which constitute his title, if any title he has, must be such as are derivative. If derivative; they must be derived either from a source that is human,

[1] Vattel Pref. 14.

or from a source that is divine. "Over a whole grand multitude," says the judicious[1] Hooker, "consisting of many families, impossible it is, that any should have complete lawful power, but by consent of men, or by immediate appointment of God." We will consider those sources separately.

How is this superior constituted by *human* authority? How far does his superiority extend? Over whom is it exercised? Can any person or power, appointed by human authority, be superior to those by whom he is appointed, and so form a necessary and essential part in the definition of a law?

On these questions, a profound, I will not say a suspicious silence is observed. By the Author of the Commentaries, this superior is announced in a very questionable shape. We can neither tell who he is, nor whence he comes. "When society is once formed, government results of course,"[2]—I use the words of the Commentary—"as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But as all the members of the society are naturally equal, it may be asked"—what question may be asked? The most natural question, that occurs to me, is—how is this superior, without whom there can be

[1] Hooker, b. 1, s. 10, p. 18.

[2] Government is of society and but an instrument for executing its laws. Texas *v.* White, 7 Wall. 721.

The shifting of government from one instrument does not disturb the society nor the general law thereof; *e. g.* when the Government was taken from the King by the declaration of July 4, 1776, and the new government established, that did not destroy society and reduce the individuals to a state of nature, as supposed by Blackstone. 1 Bl. Com. 48. American Ins. Co. *v.* Bales of Cotton, 1 Pet. 540.]

no law, without whom there can be no judge upon earth—how is this superior to be constituted? This is the question, which, on this occasion, I would expect to see proposed: this is the question, to which I would expect to hear an answer. But how suddenly is the scene shifted! Instead of the awful insignia of superiority, to which our view was just now directed, the mild emblems of confidence make their appearance. The person announced was a dread superior: but the person introduced is a humble trustee. For, to proceed, "it may be asked, in whose hands are the reins of government to be *intrusted?*"

I very well know how "A society once formed" constitute a trustee: but I am yet to learn, and the Commentator has not yet informed me, how this society can constitute their superior. Locke somewhere says that "no one can confer more power on another, than he possesses himself."[1] [2]

If the information, how a superior is appointed, be given in any other part of the valuable Commentaries; it has escaped my notice, or my memory. Indeed it has been remarked by his successor in the chair of law, that Sir William Blackstone "declines speaking of the origin of government."[3]

The question recurs—how is this superior constituted by human authority? Is he constituted by a law? If he is, that law, at least, must be made without a superior; for

[1] Lock. Gov. p. 2. s. 6.

[2] The theory of consent was strictly adhered to in the formation of the governments of the states after the Declaration of Independence. All who did not desire to adhere to the cause of the people had a reasonable time to withdraw themselves and their property from the territory. Talbot *v.* Jansan, 3 Dall. 133.

The consent to the present Constitution. The consent was not merely individual nor by majorities of individuals. 1 Von Holst's Constitutional Law, 47–89. Jameson, Constitutional Conventions, 19–20 Texas *v.* White, *ante.*]

[3] El. Jur. 23.

by that law the superior is constituted. If there can be no law without a superior, then the institution of a superior, by human authority, must be made in some other manner than by a law. In what other manner can human authority be exerted? Shall we say, that it may be exerted in a covenant or an engagement? Let us say, for we may say justly, that it may. Let us suppose the authority to be exerted, and the covenant or engagement to be made. Still the question recurs, can this authority so exerted, can this covenant or engagement so made, produce a superior?

If he is now entitled to that appellation, he must be so by virtue of some things, which he has received. But has he received more than was given? Could more be given than those, who gave it, possessed?

We can form clear conceptions of authority, original and derived, entire and divided into parts; but we have no clear conceptions how the parts can become greater than the whole; nor how authority, that is derived, can become superior to that authority, from which the derivation is made.[1]

If these observations are well founded; it will be difficult—perhaps we r .y say, impossible—to account for the institution of a superior by human *authority*.

Is there any other human source, from which superiority can spring? 'Tis thought there is: 'tis thought that

[[1] The Government is not the state but an agency. 3 Dall. 93; 7 Wall. 721; Young *v.* State, 29 Minn. 536.

The electors are not sovereigns but only representatives. Jameson on Constitutional Conventions, §§ 24 and 354.

Judge Cooley upon the supposed authority of Blair *v.* Ridgeley, 41 Mo. 173-5, states that as a practical fact the people are sovereigns, but this is not warranted by the case, and is a dicta as dangerous as to call a Parliament sovereign. Suffrage is not a right, it is a mere office—an agency. Pomeroy, Constitutional Law, pp. 5-28. Jameson on Constitutional Conventions, 4th Ed. §§ 331, 335, 352.]

human *submission* can effectuate a purpose, for the accomplishment of which human authority has been found to be unavailing.

And is it come to this! Must submission to an equal be the yoke, under which we must pass, before we can diffuse the mild power, or participate in the benign influence of law? If such is, indeed, our fate, let resignation be our aim: but before we resign ourselves, let us examine whether our fate be so hard.

That I may be able to convey a just and full representation of opinions, which have been entertained on this subject, I shall give an abstract of the manner, in which Puffendorff has reasoned concerning it, in his chapter on the generation of civil sovereignty.

His object is, "to examine whence that sovereignty or supreme command, which appears in every state, and which, as a kind of soul, informs, enlivens, and moves the public body, is immediately produced."

In this inquiry, he supposes that civil authority requires natural strength and a title. "Both these requisites," says he, "immediately flow from those pacts, by which the state is united and subsists." With regard to the former —natural strength—he observes, "that since all the members of the state, in submitting their wills to the will of a single director, did, at the same time, thereby oblige themselves to non-resistance, or to obey him in all his desires and endeavors of applying their strength and wealth to the good of the public; it appears that he, who holds the sovereign rule, is possessed of sufficient force to compel the discharge of the injunctions, which he lays."

"So, likewise," adds he, "the same covenant affords a full and easy title, by which the sovereignty appears to be established, not upon violence, but in a lawful manner, upon the voluntary consent and *subjection* of the respective members."

"This, then," continues he, "is the nearest and immediate cause, from which sovereign authority, as a moral quality, doth result. For if we suppose *submission* in one party, and, in another, the *acceptance* of that submission; there accrues, presently, to the latter, a right of imposing commands on the former; which is what we term sovereignty or rule. And as, by private contract, the right of anything which we possess, so, by *submission*, the right to dispose of our strength and our liberty of acting, may be conveyed to another."

He illustrates this immediate cause of sovereign authority, by the following instance. "If any person should voluntarily and upon covenant deliver himself to me in servitude, he thereby really confers on me the power of a master." "Against which way of arguing, to object the vulgar maxim, *quod quis non habet, non potest in alterum transferre*,[1] is but a piece of trifling ignorance."[2]

Shall we, for a moment, suppose all this to be done? What is left to the people? Nothing. What are they? Slaves. What will be their portion? That of the beasts —instinct, compliance, and punishment. So true it is, that in the attempt to make one person more than man, millions must be made less.

We now see the price, at which law must be purchased; for we see the terms, on which a superior, of such absolute necessity to a law, is constituted, according to the hy-

[1] Puff. b. 7, c. 3, s. 1, p. 654, 655.

[2] All this, it is true, has been done, in fact. This act of legal suicide has been often perpetrated; and, in the history of some periods, we find the prescribed form, by which liberty was extinguished—a form truly congenial with the transaction—a form expressed in terms the most disgraceful to the dignity of man. "Licentiam habeatis, mihi qualemcunque volueritis disciplinam ponere, vel venumdare, aut quod vobis placuerit de me facere." (6. Gibbon 361, cites Marculf. Formul.) But these periods were the periods which introduced and established the feudal law. "The majesty of the Roman law protected the liberty of the citizen against his own distress or despair." 6. Gibbon, 360.

pothesis, of which I have given an account. We see the covenants which must be entered into, the consent which must be given, the submission which must be made, the subjection which must be undergone, the state, analogous to servitude, which must be supposed, before this system of superiority can be completed. Has this been always done—must this be always done, in every state, where law is known or felt?

Without examining its incongruity with reason, with freedom, and with fact; without insisting on the incoherence of the parts, and the unsoundness of the whole, I shall, again, for a moment, take it all for granted: and, on that supposition, I shall put the question—Is even all this sufficient to constitute a superior? Is it in the power of the meanest to prostitute, any more than it is in the power of the greatest to delegate, what he does not possess?[1] The arguments, therefore, which are used with regard to the appointment of a superior by human authority, will equally apply to his appointment by human submission. The manner may be different: the result will be the same.

Indeed, the author of this system betrays a secret consciousness, that it is too weak and too disjointed to stand without an extrinsic support. "Yet still," says he, "to procure to the supreme command an especial efficacy, and a sacred respect, there is need of another additional principle, besides the submission of the subjects. And there-

[1] Let individuals, in any number whatever, become severally and successively subject to one man, they are all, in that case, nothing more than master and slaves; they are not a people governed by their chief; they are an aggregate, if you will; but they do not form an association: there subsists among them neither commonwealth nor body politic. Such a superior, though he should become master of half the world, would be still a private person, and his interest, separate and distinct from that of his people, would be still no more than a private interest. Rousseau's Orig. Comp. 17, 18.

fore he who affirms sovereignty to result immediately from compact, doth not, in the least, detract from the *sacred* character of civil government, or maintain that princes bear rule, by human right *only*, and not by divine." [1]

It deserves remark, that, in this passage, Puffendorff assumes the divine right of princes to bear rule, as an admitted principle; and seems only solicitous to show, that the account, which he has given, of the origin of sovereignty, is not inconsistent with their sacred character.

After some further observations with regard to the source of government and the cause of sovereignty, the author acknowledges, that there is very little difference between his sentiments on the subject, and those of Bœcler. What Bœcler's sentiments were, we learn from the account given of them by our author. "The supreme authority," [2] says Bœcler, "is not to be derived from the bare act of man, but from the command of God, and from the law of nature; or from such an act of men, by which the law of nature was followed and obeyed."

So far Puffendorff seems willing to go. He adopts a kind of compromising principle. He founds the right of the sovereign immediately upon the submission of the subjects; but, to complete the efficacy of supreme command, he calls in the aid of an additional principle, the sacred character of civil government, and the divine right of princes to bear rule. Further he was unwilling to proceed.

It has been often the fate of a compromise between two parties, that it has given entire satisfaction to neither. Such has been the fate of that adopted by Puffendorff. Some will certainly think, that he has given too much countenance to the claim, which princes have boldly made,

[1] Puff. 655, b. 7, c. 3, s. 1.—2. Burl. 39.
[2] Puff. 645, b. 7, c. 3, s. 1.

of a divine right to rule. Others have thought, that, into his composition of a sovereign, he has infused too great a proportion of human authority. They pursue the source of sovereignty further than he is willing accompany them, and maintain, that it is the Supreme Being, who confers immediately the supreme power on princes, without the intervention or concurrence of man.

This doctrine, in some countries, and at some periods, has been carried, and is still carried, to a very extravagant height, and has been supported and propagated, and still is supported and propagated, with uncommon zeal. It has been, and still is, a favorite at courts; and has been and still is, treated with every appearance of profound respect by courtiers, and, in too many instances, by philosophers and by statesmen, who have imitated, and still imitate courtiers in their practice of the slavish art. In the reign of James the Second "the immediate emanation of divine authority" was introduced on every occasion, and ingrafted, often with the strangest impropriety, on every subject. Even in the present century, a book has been burnt by the hangman, because its author maintained, "that God is not the immediate cause of sovereignty."[1]

It cannot escape observation, that, in one particular, those who carry this doctrine the furthest, seem to challenge, with some success, the palm of consistency from those, who refuse to accompany them. Both entertain the same sentiments—and they are certainly overcharged ones—concerning sovereignty and superiority. Thus far they march together. But here, one division halt. The other proceed, and, looking back on those behind them, demand, why, having gone so far, they refuse to accomplish the journey. They insist, that all human causes are inadequate to the production of that superiority or

[1] Puff. 656, note to b. 7, c. 3, s. 3.

sovereignty, about the august and sacred character of which they are both agreed. They say, that neither particular men, nor a multitude of men, are themselves possessed of this sovereignty or superiority: and, that, therefore, they cannot confer it on the prince. The consequence is, that, as this superiority is admitted to exist, and as it cannot be conferred by men, it must derive its origin from a higher source.

It is in this manner that Domat reasons concerning the origin of sovereignty and government. "As there is none but God alone who is the natural sovereign of man; so it is likewise from him that they who govern derive all their power and authority. It is one of the ceremonies in the coronation of the kings of France, for them to take the sword from the altar; thereby to denote, that it is immediately from the hand of God that they derive the sovereign power, of which the sword is the principal emblem."[1]

In the same train of sentiment, Bishop Taylor[2] observes, "that the legislative or supreme power is not the servant of the people, but the minister, the trustee, and the representative of God: that all just human power is given from above, not from beneath; from God, not from the people."

Indeed, on the principle of superiority, Caligula's reasoning was concise and conclusive. "If I am only a man, my subjects are something less: if they are men, I am something more."[3]

The answer to the foregoing reasoning appears to me to be more ingenious than solid, and to be productive of amusement, rather than of conviction. I shall deliver it from Burlamaqui, who, on this subject, has followed the opinions of Puffendorff. "This argument," says he,

[1] 2. Domat 298, 299.
[2] Rule of Conscience, 429.
[3] Rous. Or. Com, 6.

"proves nothing. It is true, that neither each member of the society, nor the whole multitude collected, are formally invested with the supreme authority; but it is sufficient that they possess it virtually; that is, that they have within themselves all that is necessary to enable them, by the concurrence of their free will and consent, to produce it in the sovereign. Since every individual has a natural right of disposing of his own natural freedom, according as he thinks proper; why should he not have a power of transferring to another, that right which he has of directing himself? Now is it not manifest, that, if all the members of the society agree to transfer this right to one of their fellow-members, this cession will be the nearest and immediate cause of sovereignty? It is, therefore, evident, that there are, in each individual, the seeds, as it were, of the supreme power. The case is here very near the same, as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each."[1]

The metaphors from vegetation and music may illustrate and please; but they cannot prove nor convince. The notion of virtual sovereignty is as unsatisfactory to me, on this occasion, as that of virtual representation has been, on many others. Indeed, I see but little difference between a claim to derive from another that, which he is willing to give, but of which he is not possessed, and a claim to derive from him that, which he possesses, but which he has not given, and will not give.

Besides; let me repeat the questions, which I formerly put.—Have these degrading steps been always taken? must they be always taken, in every state, where law is known or felt? For let it not be forgotten, that superiority is introduced as a *necessary* part of the definition of law.

[1] 2. Burl. 41, 42

I will not attempt to paint the hideous consequences that have been drawn, nor the still more hideous practices that have claimed impunity, indulgence, and even sanction, from the pretended principle of the divine right of princes. Absolute, unlimited, and indefeasible power, non-resistance, passive obedience, tyranny, slavery, and misery walk in its train.

On this subject—its importance cannot be overrated—let us receive instruction from a well-informed and a well-experienced master—from one, who, probably, in some periods of his life, had felt what he so feelingly describes—from one, who had been bred to the trade of a prince, and who had been perfectly initiated in all the mysteries of the profession—from the late Frederick of Prussia.

"If my reflections," says he, "shall be fortunate enough to reach the ears of some princes, they will find among them certain truths, which they never would have heard from the lips of their courtiers and flatterers. Perhaps they will be struck with astonishment, to see such truths placed, by their side, on the throne. But it is time, that, at last, they should learn, that their false principles are the most empoisoned source—*la source la plus empoisonée*—of the calamities of Europe.

"Here is the error of the greatest part of princes. They believe that God has expressly, and from a particular attention to their grandeur, their happiness, and their pride, formed their subjects for no other purpose, than to be the ministers and instruments of their unbridled passions. As the principle, from which they set out, is false; the consequences cannot be otherwise than infinitely pernicious. Hence the unregulated passion for false glory—hence the inflamed desire of conquest—hence the oppressions laid upon the people—hence the indolence and dissipation of princes—hence their ambition, their injustice

their inhumanity, their tyranny—hence, in short, all those vices, which degrade the nature of man.

"If they would disrobe themselves of these erroneous opinions; if they would ascend to the true origin of their appointment; they would see, that their elevation and rank, of which they are so jealous, are, indeed, nothing else than the work of the people; they would see, that the myriads of men, placed under their care, have not made themselves the slaves of one single man, with a view to render him more powerful and more formidable; have not submitted themselves to a fellow-citizen, in order to become the sport of his fancies, and the martyrs of his caprice; but have chosen, from among themselves, the man, whom they believed to be the most just, that he might govern them; the best, that he might supply the place of a father; the most humane, that he might compassionate and relieve their misfortunes; the most valiant, that he might defend them against their enemies; the most wise, that he might not engage them inconsiderately in ruinous and destructive wars; in one word, the man the most proper to represent the body of the state, and in whom the sovereign power might become a bulwark to justice and to the laws, and not an engine, by the force of which tyranny might be exercised, and crimes might be committed with impunity.

"This principle being once established, princes would avoid the two rocks, which, in all ages, have produced the ruin of empires, and distraction in the political world—ungoverned ambition, and a listless inattention to affairs."[1] "They would often reflect that they are men, as well as the least of their subjects—that if they are the first judges, the first generals, the first financiers, the first ministers of society; they are so, for the purpose of fulfilling the duties, which those names import. They will re-

[1] K. Prus. works, v. 6, pp. 48, 50.

fect, that they are only the first servants of the state, bound to act with the same integrity, the same caution, and the same entire disinterestedness, as if, at every moment, they were to render an account of their administration to the citizens."[1]

I will not charge to the authors, whose opinions I have examined, all the consequences that have been drawn, practically as well as theoretically, from their principles. From their principles, however, admitted by themselves without due caution and scrutiny, those consequences have been drawn by others, and drawn too accurately and too successfully for the peace, liberty, and happiness of men.

After all, I am much inclined, for the honor of human nature, to believe, that all this doctrine concerning the divine right of kings was, at first, encouraged and cherished by many, from motives, mistaken certainly, but pardonable, and even laudable; and that it was intended not so much to introduce the tyranny of princes, as to form a barrier against the tyranny of priests.

One of them, at the head of a numerous, a formidable, and a well disciplined phalanx, claimed to be the Almighty's vicegerent upon earth; claimed the power of deposing kings, disposing crowns, releasing subjects from their allegiance, and overruling the whole transactions of the Christian world. Superstition and ignorance dreaded, but could not oppose, the presumptuous claim. The Pope had obtained, what Archimedes wanted, *another* world, on which he placed his ecclesiastical machinery; and it was no wonder that he moved *this* according to his will and pleasure. Princes and potentates, states and kingdoms were prostrate before him. Every thing human was obliged to bend under the incumbent pressure of divine control.

[1] K. Prus. works, v. 6, pp. 83-84.

It is not improbable, that, in this disagreeable predicament, the divine right of kings was considered as the only principle, which could be opposed to the claims of the papal throne; and as the only means, which could preserve the civil, from being swallowed by the ecclesiastical powers.

This conjecture receives a degree of probability from a fact, which is mentioned in the history of France.

In a general assembly of the states of the kingdom, it was proposed to canonize this position — "that kings derive their authority immediately from God." That such a proposition was made in an assembly of the states, the most popular body known in the kingdom, will, no doubt, occasion surprise. This surprise will be increased, when it is mentioned, that the proposition was patronized by the most popular part of that assembly: it was the third estate, which wished to pass it into a law. But everything is naturally and easily accounted for, when it is mentioned further, that the principal object, which the third estate had in view by this measure, was to secure the sovereign authority from the detestable maxims of those, who made it depend upon the pope, by giving him a power of absolving subjects from their oath of allegiance, and authorizing those who assassinated their princes as heretics.[1]

The proposal did not pass into a law; because, among other reasons, the question was thought proper for the determination of the schools. But this much may safely be inferred, that what was thought proper by the third estate to be passed into a law, would be generally received through the kingdom, as popular and wholesome doctrine.

I confess myself pleased with indulging the conjecture I have mentioned.

When I entered upon the disquisition of the doctrine of

[1] Puff. 656, n.

a superior as necessary to the very definition of law; I said, that, if I was not mistaken, this notion of superiority contained the germ of the divine right of .princes to rule, and of the corresponding obligation on the people implicitly to obey. It may now be seen whether or not I have been mistaken; and, if I have not been mistaken, it appears, how important it is, carefully and patiently to examine a first principle; to trace it, with attention, to its highest origin; and to pursue it, with perseverance, to its most remote consequences. I have observed this conduct with regard to the principle in question. The result, I think, has been, that, as to human laws, the notion of a superior is a notion unnecessary, unfounded, and dangerous; a notion inconsistent with the genuine system of human authority.

Now that the will of a superior is discarded, as an improper principle of obligation in human laws, it is natural to ask—What principle shall be introduced in its place? In its place I introduce—the consent of those whose obedience the law requires. This I conceive to be the true origin of the obligation of human laws. This principle I shall view on all its sides; I shall examine it historically and legally; I shall consider it as a question of theory, and as a question of fact.

Let us ascend to the first ages of societies. Customs, for a long time, were the only laws known among them. The Lycians[1] had no written laws; they were governed entirely by customs. Among the ancient Britons also, no written laws were known: they were ruled by the traditionary—and if traditionary, probably, the customary—laws of the Druids.

Now custom is, of itself, intrinsic evidence of consent. How was a custom introduced? By voluntary adoption. How did it become general? By the instances of volun-

[1] 1. Gog. Or. Laws, 8.

tary adoption being increased. How did it become lasting? By voluntary and satisfactory experience, which ratified and confirmed what voluntary adoption had introduced. In the introduction, in the extension, in the continuance of customary law, we find the operations of consent universally predominant.

"Customs," in the striking and picturesque language of my Lord Bacon, "are laws written in living tables."[1] In regulations of justice and of government, they have been more effectual than the best written laws. The Romans, in their happy periods of liberty, paid great regard to customary law. Let me mention, in one word, everything that can enforce my sentiments: the common law of England is a customary law.

Among the earliest, among the freest, among the most improved nations of the world, we find a species of law prevailing, which carried, in its bosom, internal evidence of consent. History, therefore, bears a strong and a uniform testimony in favor of this species of law.

Let us consult the sentiments[2] as well as the history of the ancients. I find a charge against them on this subject —"that they were not accurate enough in their expressions; because they frequently applied to laws the name of *common agreements*."[3] This, it is acknowledged, they do almost everywhere in their writings. He, however, who accuses the ancient writers of inaccuracy in expression, ought himself to be consummately accurate. "Let those teach others, who themselves excel." Whether the Baron Puffendorff was entitled to be a teacher in this

[1] 4. Ld. Bac. 5.

[2] Mens, et animus, et consilium, et sententia civitatis posita est in legibus. Ut corpora nostra sine mente; sic civitas sine lege, suis partibus, ut nervis, ac sanguine, et membris, uti non potest. Legum ministri, magistratus; legum interpretes, judices: legum denique idcirco omnes servi sumus, ut liberi esse possimus. Cicero pro Cluen. c. 53.

[3] Puff. 59, b. 1, c. 6, s. 7.

particular, we stay not to examine. It is of more consequence to attend to the ground of his accusation.

One reason, why he urges their expressions to be inaccurate, is, that "neither the divine positive laws, nor the laws of nature had their rise from the agreement of men." All this is, at once, admitted; but the present disquisition relates only to laws that are human. What is said with regard to them? With regard to them it is said, that "the Grecians, as in their other politic speeches, so in this too, had an eye to their own democratical governments; in which, because the laws were made upon the proposal of the magistrate, with the knowledge, and by the command, of the people, and so, as it were, in the way of bargain and stipulation; they gave them the name of covenants and agreements."

I am now unsolicitous to repel the accusation: it seems, it was conceived to arise from a reference, by the ancients, to their democratical governments. Let them be called covenants, or agreements, or bargains, or stipulations, or anything similar to any of those, still I am satisfied; for still everything mentioned, and everything similar to everything mentioned, imports consent. Here history and law combine their evidence in support of consent.

Law has been denominated "a general convention of the citizens:" such is the definition of it in the Digest: for the Roman law was not, in every age of Rome, the law of slavery. A similar mode of expression has been long used in England. Magna Charta was made "by the common assent of all the realm."[1]

Let us listen to the judicious and excellent Hooker: what he says always conveys instruction. "The lawful power of making laws to command whole politic societies of men, belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon

[1] Sulliv. Prel. 18.

earth, to exercise the same of himself, and not either by express commission immediately and personally received from God, or else by authority derived, at the first, from their consent, upon whose persons they impose laws, it is no better than mere tyranny. Laws they are not, therefore, which public approbation hath not made so." [1] "Laws human, of what kind soever, are available by consent." [2]

My Lord Shaftesbury, who formed his taste and judgment upon ancient writers and ancient opinions, delivers it as his sentiment, "that no people in a civil state can possibly be free, when they are otherwise governed, than by such laws as they themselves have constituted, or to which they have freely given consent." [3]

This subject will receive peculiar illustration and importance, when we come to consider the description and characters of municipal law. I will not anticipate here what will be introduced there with muchgreater propriety and force.

Of law there are different kinds. All, however, may be arranged in two different classes. 1. Divine. 2. Human laws. The descriptive epithets employed denote, that the former have God, the latter, man, for their author.

The laws of God may be divided into the following species:

I. That law, the book of which we are neither able nor worthy to open. Of this law, the author and observer is God. He is a law to himself, as well as to all created things. This law we may name the "law eternal."

II. That law, which is made for angels and the spirits of the just made perfect. This may be called the "law celestial." This law, and the glorious state for which it is adapted, we see, at present, but darkly and as through a glass: but hereafter we shall see even as we are seen;

[1] Hooker b. 1, s. 10, p. 19. [2] Id. p. 20. [3] 3 Shaft. 212.

and shall know even as we are known. From the wisdom and the goodness of the adorable Author and Preserver of the universe, we are justified in concluding, that the celestial and perfect state is governed, as all other things are, by his established laws. What those laws are, it is not yet given us to know; but on one truth we may rely with sure and certain confidence—those laws are wise and good. For another truth we have infallible authority—those laws are strictly obeyed: "In heaven his will is done."

III. That law, by which the irrational and inanimate parts of the creation are governed. The great Creator of all things has established general and fixed rules, according to which all the phenomena of the material universe are produced and regulated. These rules are usually denominated laws of nature. The science, which has those laws for its object, is distinguished by the name of natural philosophy. It is sometimes called, the philosophy of body. Of this science, there are numerous branches.

IV. That law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine monitors within us, and by the sacred oracles, the divine monitors without us. This law has undergone several subdivisions, and has been known by distinct appellations, according to the different ways in which it has been promulgated, and the different objects which it respects.

As promulgated by reason and the moral sense, it has been called natural; as promulgated by the holy scriptures, it has been called revealed law.

As addressed to men, it has been denominated the law of nature; as addressed to political societies, it has been denominated the law of nations.

But it should always be remembered. that this law,

natural or revealed, made for men or for nations, flows from the same divine source: it is the law of God.

Nature, or, to speak more properly, the Author of nature, has done much for us; but it is his gracious appointment and will, that we should also do much for ourselves. What we do, indeed, must be founded on what he has done; and the deficiencies of our laws must be supplied by the perfections of his. Human law must rest its authority, ultimately, upon the authority of that law, which is divine.

Of that law, the following are maxims—that no injury should be done—that a lawful engagement, voluntarily made, should be faithfully fulfilled. We now see the deep and the solid foundations of human law.

It is of two species. 1. That which a political society makes for itself. This is municipal law. 2. That which two or more political societies make for themselves. This is the voluntary law of nations.

In all these species of law—the law eternal—the law celestial—the law natural—the divine law, as it respects men and nations—the human law, as it also respects men and nations—man is deeply and intimately concerned. Of all these species of law, therefore, the knowledge must be most important to man.

Those parts of natural philosophy, which more immediately relate to the human body, are appropriated to the profession of physic.

The law eternal, the law celestial, and the law divine, as they are disclosed by that revelation, which has brought life and immortality to light, are the more peculiar objects of the profession of divinity.

The law of nature, the law of nations, and the municipal law form the objects of the profession of law.

From this short, but plain and, I hope, just statement of things, we perceive a principle of connection between

all the learned professions; but especially between the two last mentioned. Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both.

From this statement of things, we also perceive how important and dignified the profession of the law is, when traced to its sources, and viewed in its just extent.

The immediate objects of our attention are, the law of nature, the law of nations and the municipal law of the United States, and of the several states which compose the Union. It will not be forgotten, that the constitutions of the United States, and of the individual states, form a capital part of their municipal law. On the two first of these three great heads, I shall be very general. On the last, especially on those parts of it, which comprehend the constitutions and public law, I shall be more particular and minute.