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THE

WORKS

OF

THE HONOURABLE

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PUBLISHED UNDER THE DIRECTION

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CIC.

VOL. I.

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DISTRICT OF PENNSYLVANIA:--TO WIT.

(L. S.) **B**E IT REMEMBERED, That on the fifth day of July, in the twenty ninth year of the independence of the United States of America, BIRD WILSON, Esquire, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

“The Works of the Honourable James Wilson, L. L. D.
“late one of the Associate Justices of the Supreme Court of
“the United States, and Professor of Law in the College of
“Philadelphia. Published under the direction of Bird Wilson,
“Esquire. Lex fundamentum est libertatis, qua fruimur.
“Legum omnes servi sumus, ut liberi esse possimus.”—
Cic.

In conformity to the act of the Congress of the United States entitled “An act for the encouragement of learning by securing the copies of maps, charts and books to the authors and proprietors of such copies during the times therein mentioned; and also to the act entitled “An act supplementary to an act entitled “An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned,” and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

D. CALDWELL, Clerk of the
District of Pennsylvania.

Rec. May 6, 1875

PREFACE.

THE incomplete state of the lectures on law, notwithstanding the lapse of several years between the time at which those now published were delivered and the death of the Author, is a circumstance of which the publick will naturally inquire the cause. The circumstance itself is certainly much to be lamented; but its cause presents a subject of still deeper regret.

The law professorship, in the college of Philadelphia, was established in the year 1790; and the Author was appointed the first professor. The extent of his plan of lectures rendered it impossible for him to go through his whole subject in one season: three courses were necessary for the purpose. The first course, which was delivered in the winter of 1790-91, consisted of those lectures contained in what the Editor has entitled the *first part*. The second course, which was, in a great measure, delivered in the following winter, would have consisted of the remaining two parts now published. In April, 1792,

the college of Philadelphia and the university of Pennsylvania were, by an act of assembly, united into one seminary, under the latter title. A law professorship was erected in the new seminary, and the Author again appointed to fill the chair; but no lectures were delivered after the union. The preceding course had been interrupted and was not completed. The causes of these circumstances are not within the Editor's knowledge. He knows, however, that, though the delivery of the lectures was discontinued, the Author designed to complete his plan for publication. From this design his attention was drawn by another object of more importance, in which he was engaged.

In March, 1791, the house of representatives in the general assembly of Pennsylvania, resolved to appoint a person to revise and digest the laws of the commonwealth; to ascertain and determine how far any British statutes extended to it; and to prepare bills, containing such alterations, additions, and improvements as the code of laws, and the principles and forms of the constitution then lately adopted might require. The Author was unanimously appointed for that purpose. The nature of the plan which he formed in consequence of this resolution, will appear from the following letter on the subject, delivered to the speaker of the house of representatives on 24th August, 1791.

SIR,

WHILE I am employed in executing the trust committed to me by the house of representatives, it is, I conceive, my duty, from time to time, to inform them, through you, of the steps which I have taken, and of those which I mean to take, in order to accomplish the great end which is in contemplation.

From the records deposited in the rolls office, I have taken an account of all the laws made in Pennsylvania from its first settlement till the beginning of the last session of the legislature. They are in number one thousand seven hundred and two. Their titles I have entered into a book, in the order, usually chronological, in which they are recorded. On some of them, especially those of an early date, I have made and minuted remarks: and have left ample room for more, in the course of my further investigations. I have also reduced their several subjects into an alphabetical order, by entering them regularly in a common place book. This process required time, and care, and a degree of minute drudgery; but it was absolutely requisite to the correct execution of the design. How can I make a digest of the laws, without having all the laws upon each head in my view? This view can in the first instance be obtained only by ranging them in an exact common place.

But something more must still be done. To rank, in a correct edition, the several laws according to their seniority or to the order of the alphabet would, by no means, be correspondent to the enlarged plan signified by the resolutions of the house. It is obvious, and it was certainly expected, that, under each head, the different regulations, however dispersed, at present, among numerous laws, should, in the digest, be collected in a natural series, and reduced to a just form. This I deem an indispensable part of my business.

But the performance of this indispensable part gives rise to a new question. In what order should the methodised collections be arranged?

A chronological order would, from the nature of those collections, be impracticable: an alphabetical order would be unnatural and unsatisfactory. The order of legitimate system is the only one, which remains. This order, therefore, is necessarily brought into my contemplation. My contemplation of it has been attended with the just degree of diffidence and solicitude. To form the mass of our laws into a body compacted and well proportioned, is a task of no common magnitude. Arduous as it is, the enlarged views of the house of representatives stimulate me to attempt it. In such an attempt it will not be dishonourable—even to fail.

Of this system, I have begun to sketch the rough outlines. In finishing them, and in filling them up, I mean to avail myself of all the assistance, which can possibly be derived from every example set before me. But, at the same time, I mean to pay implicit deference to none.

The acts of the legislature of Pennsylvania, though very numerous, compose but a small proportion of her laws. The common law is a part, and, by far, the most important part of her system of jurisprudence. Statute regulations are intended only for those cases, comparatively few, in which the common law is defective, or to which it is inapplicable: to that law, those regulations are properly to be considered as a supplement. A knowledge of that law should, for this reason, precede, or, at least, accompany the study of those regulations.

“To know what the common law was before the making of any statute,” says my Lord Coke, in his familiar but expressive manner, “is the very lock and key

to set open the windows of the statute.”^a To lay the statute laws before one who knows nothing of the common law, amounts, frequently, to much the same thing as laying every third or fourth line of a deed before one who has never seen the residue of it. It would, therefore, be highly eligible, that, under each head of the statute law, the common law, relating to it, should be introduced and explained. This would be a useful commentary on the text of the statute law, and would, at the same time, form a body of the common law reduced into a just and regular system.

With such a commentary, the digest which I shall have the honour of reporting to the house will be accompanied. The constitution of the United States and that of Pennsylvania, compose the supreme law of the land: they contain and they suggest many of the fundamental principles of jurisprudence, and must have a governing and an extensive influence over almost every other part of our legal system. They should, therefore, be explained and understood in the clearest and most distinct manner, and they should be pursued through their numerous and important, though remote and widely ramified effects. Hence it is proper, that they also should be attended with a commentary. These commentaries will not, however, form a part of my report: they must stand or fall by their own merit or insignificance.

Another question, of very considerable importance, has occurred to me: the result of my reflections upon it, I beg leave to lay before the house.

^a 3. Ins. 308.

In what manner should the digest of the laws of Pennsylvania be composed? Should it imitate the style of the British acts of parliament and those statutes, which have been framed upon their model—or should it be written in the usual forms of composition?

To professional gentlemen it is well known, that, in England, all bills were anciently drawn in the form of petitions; that these petitions, with the king's answer, were entered upon the parliament rolls; and that, at the end of each parliament, they were reduced into statutes by the judges. Hence the form, "may it please your majesty, that it may be enacted" and "be it enacted, &c." This form, like many others, has been continued in England long after the reason of it has ceased. This form, like many others, has been introduced into the colonies; and, among the rest, into Pennsylvania, where the reason of it never existed. Thus almost every sentence in our acts of assembly begins with a "be it enacted."

This form, though without foundation in Pennsylvania, is not, however, without its inconveniences. To introduce every sentence under the government of a verb, gives a stiffness—to introduce every sentence under the government of the same verb, gives a monotony as well as stiffness, to the composition. To avoid the frequent reiteration of those blemishes, the sentences are lengthened. By being lengthened, they are crowded with multifarious, sometimes with heterogeneous and disjointed, circumstances and materials. Hence the obscure, and confused, and embarrassed periods of a mile, with which the statute books are loaded and disgraced.

But simplicity and plainness and precision should mark the texture of a law. It claims the *obedience*—it should be level to the *understanding* of all.

By the first assembly of Pennsylvania an act was made “for teaching the laws in the schools.”^b This noble regulation is countenanced by the authority and example of the most enlightened nations and men. Cicero^c informs us, that when he was a boy, the laws of the twelve tables were learned “*ut necessarium carmen,*” as a piece of composition at once necessary and entertaining. The celebrated legislator of the Cretans used all the precautions, which human prudence could suggest, to inspire the youth with the greatest respect and attachment to the maxims and customs of the state. This was what Plato found most admirable in the laws of Minos.

If youth should be educated in the knowledge and love of the laws: it follows, that the laws should be proper objects of their attachment, and proper subjects of their study. Can this be said concerning a statute book drawn up in the usual style and form? Would any one select such a composition to form the taste of his son, or to inspire him with a relish for literary accomplishments? It has been remarked, with truth as well as wit, that one of the most irksome penalties, which could be inflicted by an act of parliament, would be, to compel the culprit to read the statutes at large from the beginning to the end.

But the knowledge of the laws, useful to youth, is incumbent on those of riper years.

^b R. O. book. A. p. 22.

^c De leg. l. 2. c. 23.

From the manner, in which other law books, as well as statute laws, are usually written, it may be supposed that law is, in its nature, unsusceptible of the same simplicity and clearness as the other sciences. It is high time that law should be rescued from this injurious imputation. Like the other sciences, it should now enjoy the advantages of light, which have resulted from the resurrection of letters; for, like the other sciences, it has suffered extremely from the thick veil of mystery spread over it in the dark and scholastick ages.

Both the divinity and law of those times, says Sir William Blackstone,^a were frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial. Law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new and oppressive refinements ingrafted upon feudal property: which refinements were, from time to time, gradually introduced by the Norman practitioners, with a view to supersede (as they did in a great measure) the more homely, but the more free and intelligible, maxims of distributive justice among the Saxons.

As were the divinity and the law, such likewise was the philosophy of the schools during many ages of darkness and barbarism. It was fruitful of words, but barren of works, and admirably contrived for drawing a veil over human ignorance, and putting a stop to the progress of knowledge.^c But at last the light began to dawn. It has dawned, however, much slower upon the law,

Bl. Com. 410. 2. Id. 58.

^c Reid. Ess. Int. 127.

than upon religion and philosophy. "The laws," says the celebrated Beccaria,^f "are always several ages behind the actual improvement of the nation which they govern." If this observation is true, and I believe it to be true, with regard to law in general; it is peculiarly true, and its truth is of peculiar importance, with regard to criminal law in particular. It is the observation of Sir William Blackstone, that, in every country of Europe, the criminal is more rude and imperfect than the civil law. Unfortunate it is that this should be the case. For on the excellence of the criminal law the liberty and happiness of the citizens chiefly depend.

We are told by Montesquieu, that the knowledge, with regard to the surest rules, observed in criminal judgments, is more interesting to mankind than any other thing in the universe. We are told by him further, that liberty can be founded only on the practice of this knowledge. But how can this knowledge be acquired—how can it become the foundation of practice, if the laws, and particularly the criminal laws, are written in a manner in which they cannot be clearly known or understood.

Deeply penetrated with the truth and the force of these remarks, which are supported by the most respectable authorities, I shall not justly incur the censure of innovation, if I express my opinion, that the law should be written in the same manner, which we use when we write on other subjects, or other sciences. This manner has been already adopted, with success, in the Constitution of the United States, and in that of Pennsylvania.

^f C. 29.

As, however, the observations, which I have made and quoted, bear particularly upon the criminal code; I propose to make, in that code, the first experiment of their justness and efficacy.

The criminal law, though the most important, is by far the least voluminous part of the system; and it can be easily formed into a separate report. This I mean to do. By doing so, I shall have a fair opportunity of exhibiting a specimen of the manner and the merits both of my plan and of its execution.

To the Speaker of the House of
Representatives.

In the execution of this plan, the Author made very considerable progress. It had been undertaken, however, under the authority of only one of the houses of the assembly, without the sanction of the other; and, in the course of its execution, it was found, that the want of legislative sanction, and of a provision for making pecuniary compensation to persons necessarily employed as assistants in a work of so much labour and importance, joined with the difficulty of obtaining many useful and necessary books connected with the subject of the work, had retarded its progress, and thrown considerable impediments in the way of its completion. An attempt was made to remove these obstacles; and a bill was passed for that purpose by the house of representatives; but it was unfortunately negatived by the senate. The design of framing a digest under the authority of the legislature was, of course, relinquished. But the Author still contemplated the execution of a similar design, as a private work; supported only by his own name; and it occupied, for a long time, his assiduous attention. He had, in a

great degree, prepared the materials; but did not live to arrange them, and compose the contemplated digest.

From these causes, the lectures continued in the state, in which they now appear. The Editor has not thought himself at liberty to make any alterations in the language of the Author: the lecturing style is, therefore, retained. He has, however, been obliged to adopt a division not, perhaps, strictly in unison with that style, but the only one which was in his power—that into parts and chapters, according to the subjects. They were never divided by the Author into distinct lectures; as, according to his mode of delivering them, they were frequently attended with recapitulations, and often embraced parts of his observations on different subjects.

Of the other parts of the contents of these volumes, the tracts on the legislative authority of parliament over the colonies, and on the Bank of North America, were before published; as were also the speech in convention on 26th November, 1787, and the oration on 4th July, 1788. These, with the other speeches now published, appear to have been selected for publication by the Author himself. His charges to grand juries in the federal courts, the Editor has not thought it proper to insert; because, as they related generally to the history, powers, and duties of juries, the contents of them are to be found in the lectures. One, however, he has selected and inserted, because it contains a concise and handsome view of the criminal law of the United States, nearly as it stands at present, and many important observations not to be found in the other works.

Of the value and merit of these volumes, the Editor will say nothing. He leaves that subject to the judgment

of those who can estimate them with greater impartiality. In some parts, perhaps, they want that degree of polish, which the farther attention and corrections of the Author might have bestowed on them; and repetitions, which sometimes occur, and which, in lectures delivered, are not only excusable but proper, would probably not have been met with, had they been corrected by himself for the press. On the whole, however, the Editor trusts, that they will not be thought unworthy, either in style or sentiment, of the reputation of their Author.

CHAPTER II.

OF THE GENERAL PRINCIPLES 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,^c “is the bosom 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.

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

^c Hooker 34.

—ambiguities in expression, and different meanings of the same term, the 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.^u 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.”^v

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.

^u 1. Gill. (4to.) 690.

^v Reid's Ess. Int. 10. 11.

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

Again: expressions, which signify things simple, and 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 precisio. 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.

Errours 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 excellencies, 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 laboured have been the efforts to infold law within this scientifick circle; but little satisfaction—little instruction has been the result. Almost every writer, sensible of the defects, the inaccuracies, or the improprieties of the definitions that have gone before him has endeavoured 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 longuid 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.

“Law,” says he, “in its most general and comprehensive sense, signifies a rule of action.”^w In its proper

1. Bl. Com. 38.

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 denotes 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* 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 connexion between actions and their effects; and our actions are nothing else but the steps

* 1. Bl. Com. 44.

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."⁷ Not the direction merely, but the kind also, the energy, and the proportion of actions is suggested in this description.

Some are of opinion, that law should be defined² "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 term right."⁴

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.

⁷ Hooker 2.

² Daws. Orig. Laws, 4. 14.

⁴ Hooker 11.

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 warming 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 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 publick 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 suffrage, or by their conduct? This kind of law is said to be established by ^bmanners.”^c

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 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.

^b D. l. 1. t. 3. 32. p. 1.

^c The first written laws in Greece were given only six centuries before the christian era.—1. Gill. 7. (4to.)

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.

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.”^d

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 in this manner. “ Law is that rule of action, which is prescribed by some superiour, and which the inferiour is bound to obey.” A superiour ! Let us make a solemn pause—Can there be *no* law without a superiour ? Is it *essential* to law, that inferiority should be involved in

^dWhitlocke 230.

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 superiour? 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 superiour, 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*^c supposes some superiour, 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.

^c 1. Bl. Com. 43.

Despotism, by an artful use of “superiority” in politics; and scepticism, by an artful use of “ideas” in metaphysics, have endeavoured—and their endeavours 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.

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 despotick 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 splendour, 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, 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 inferiour 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.

This subject is of such radical importance, that it will be well worth while to trace it as far as our materials can 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 politicks 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 superiour."^f "A law," says Sir William Blackstone, "always supposes some superiour, who is to make it."^g

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,^g that have the sovereign power, given to those that be his or their subjects."^h 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."ⁱ

^f Puff. B. 1. c. 2. s. 6. p. 16. B. 1. c. 6. s. 1. 2. p. 56. 57.

^g 1. Bl. Com. 43.
cites Saund. Præf. s. s. 3.

^h 3. Dagge 95. 96.

ⁱ Daws. Orig. L. 3.

Let us now inquire what is meant by superiority, that we may be able to ascertain and recognise 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, "whose power is irresistible, the dominion of all men adhereth naturally, by their excellence of power."^k

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."^l

Brennus, at the head of his victorious and ferocious Gauls, with more conciseness, and with a less striking

^k De Cive 187. (Puff. 64.)
l. Anac. 351.

^l Puff. 65. (Thucyd. l. 5. c. 105)

inconsistency of character, tells the vanquished Romans "omnia fortium esse."^m Every thing 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."ⁿ

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, have to this quality superadded preeminence or superior excellence of nature.

Let it be remembered all along, that I am examining the doctrine of superiority, as applied to human laws, 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

^m Puff. 65. (Livy.)

ⁿ Puff. 65. (Plut. in Pelop.)

strength and *excellence*, shall bear rule over those, who have less.^o The favourers 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 favour 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 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

^o Puff. 65. (Dion. Hal. b. 1. c. 5.)

favourable 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 candour 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 superiour 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 superiority in one, and from every kind and every

¹ Gro. Prel. 28.

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 superiours from those placed under them, as those which distinguish men from the brutes. The remark of Rumbald, in the nonresistance time of Charles the second, evinced propriety as well as 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.⁹ 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 kings with combs on their heads, like cocks; from which striking marks it might indeed be collected, that the former were designed to labour and to suffer, and the latter, to strut and to crow.^r

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 superiour species among men, in the same manner as men are a distinct and superiour 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

⁹ 1. Burgh. Pol. Dis. 3.

^r Boling. Rem. 209.

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'etat," 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 word "l'etat," and complained of it as an indecency offered to his person and character.

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 favoured principles, which necessarily lead to the same conclusions.

Barbeyrac, whose commentaries enrich the performances of the most distinguished philosophers, at one time, taught and favoured 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 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 observe fidelity and allegiance to the sovereign. From this last convention, the state is supposed to receive its final completion and perfection.

This account of the origin of society and government will be fully considered afterwards. I introduce it now, in order to show 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 honour of Barbeyrac, however, let not this account be concluded, till it be told, that this did not

² Puff. 641. note to b. 7. c. 2. s. 8.

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^t 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.

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 the 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.”

^t Grotius 68—71.

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 publick; 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 publick; to mention "l'etat" 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," which makes the people superiour 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,

^u 2. Hein. 120. 121.

and others. Since a people, when they unite into a republick, renounce their own will, and subject themselves to the will of another, with what front can they call themselves superiour to their sovereign ?”

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 governours 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 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.””

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 favour 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.

▼ I. Domat XXII.

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 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 superiour power, was the political weapon used, with the greatest force and the greatest skill, in favour of the despotick 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 despotick power rise up against my principles; I shall have, on my side, the friend of laws, the true citizen, and the virtuous man." ^w

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 superiour talents, superiour virtue, or a superiour 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

^w Vattel Pref. 14.

office of legislation, the superiour, whose interposition is considered as essential to a law. We have weighed—them in the balance, and we have found them wanting.

If this superiour 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, or from a source that is divine. “Over a whole grand multitude,” says the judicious * 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 superiour 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 superiour 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 superiour 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”—I use the words † of the Commentary—“as necessary to preserve and to keep that society in order. Unless some superiour be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state

* Hooker, b. 1. s. 10. p. 18.

† 1. Bl. Com. 48.

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 superiour, without whom there can be no law, without whom there can be no judge upon earth—how is this superiour 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 superiour: 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 trusted?"

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 superiour. Locke somewhere says that "no one can confer more power on another, than he possesses himself."^a

If the information, how a superiour 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 successour in the chair of law, that Sir William Blackstone "declines speaking of the origin of government."^a

^a Lock. Gov. p. 2. s. 6.

^a El. Jur. 23.

The question recurs—how is this superiour constituted by human authority? Is he constituted by a law? If he is, that law, at least, must be made without a superiour; for by that law the superiour is constituted. If there can be no law without a superiour, then the institution of a superiour, 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 superiour?

If he is now entitled to that appellation, he must be so by virtue of some thing, 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 superiour to that authority, from which the derivation is made.

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

Is there any other human source, from which superiority can spring? 'Tis thought there is: 'tis thought that 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 publick 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 nonresistance, or to obey him in all his desires and endeavours of applying their strength and wealth to the good of the publick; it appears that he, who holds the sovereign rule, is 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 any thing 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*,^b is but a piece of trifling ignorance.”^c

^b Puff. b. 7. c. 3. s. 1. p. 654. 655.

^c 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

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 superiour, of such absolute necessity to a law, is constituted, according to the hypothesis, 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 superiour? 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

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.

possess?^d The arguments, therefore, which we used with regard to the appointment of a superiour 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 extrinsick 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 therefore he who affirms sovereignty to result immediately from compact, doth not, in the least, detract from the *sacred* character of civil government; or maintain that princes bear rule, by human right *only*, and not by divine."^e

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.

^d 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 politick. Such a superiour, 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.

^e Puff. 655. b. 7. c. S. s. 1. & 2. Burl. 39.

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,"^f 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 man, 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, 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 to 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.

^f Puff. 655. b. 7. c. 3. s. 1.

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 favourite 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."*

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 over-charged 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 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.

* Puff. 656. note to b. 7. c. 3. s. 3.

The consequence is, that, as this superiority is admitted to exist, and 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."^h

In the same train of sentiment, Bishop Taylorⁱ 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."^j

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

^h 2. Domat 298, 299.

ⁱ Rule of Conscience 429.

^j Rous. Or. Com 6.

opinions of Puffendorf. "This argument," says he, "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."^k

The metaphors from vegetation and musick 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.

^k 2. Burl. 41, 42.

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.

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, nonresistance, 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 empoisonnée*—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 repre-

sent 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 restless 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 reflect, 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.”^m

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 honour of human nature, to believe, that all this doctrine concerning

¹ K. Prus. works. v. 6. p. 48. 50.

^m Id. p. 83. 84.

the divine right of kings was, at first, encouraged and cherished by us, from motives, mistaken certainly, but pardonable, and ever 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.

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 every thing 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 hereticks. ^a

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 a superiour 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 mis-

^a Puff. 656. n.

taken, 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 superiour is a notion unnecessary, unfounded, and dangerous; a notion inconsistent with the genuine system of human authority.

Now that the will of a superiour 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^o 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, intrinsick evidence of consent. How was a custom introduced? By voluntary adoption. How did it become general? By the instances of voluntary adoption being increased. How did it become lasting? By voluntary and satisfactory ex-

^o 1. Gog. Or. Laws. 8.

perience, which ratified and confirmed what custom by adoption had introduced. In the introduction, in the extension, in the continuance of customary law, and in the operations of consent universally predominant.

“Customs,” in the striking and picturesque language of my Lord Bacon, “are laws written in living tables.”^p 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, every thing 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 favour of this species of law.

Let us consult the sentiments^q 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*.”^r This, it is acknowledged, they do almost every where in their wri-

^p 4. *Ld. Bac.* 5.

^q *Mens, et animus, et consilia, 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.*

^r *Puff.* 59. b. 1. c. 6. s. 7.

tings. 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 Puffendorf was entitled to be a teacher in this 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 politick speeches, so in this too, had an eye to their own democratical governments; in which, because the laws were made upon the proposal of the magistrate, with the knowledge, and by the command, of the people, and so, as it were, in the way of bargain 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 any thing similar to any of those, still I am satisfied; for still every thing mentioned, and every thing similar to every thing 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."^b

Let us listen to the judicious and excellent Hooker: what he says always conveys instruction. "The lawful power of making laws to command whole politick societies of men, belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon 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 publickly approbation hath not made so."^c "Laws human, of what kind soever, are available by consent."^d

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."^e

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 much greater propriety and force.

^b Sulliv. Pref. 18.

^c Hooker. b. 1. s. 10. p. 19.

^d Id. p. 20.

^e 3. Shaft. 312.

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; 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 in order, 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 physick.

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 connexi-

on 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 publick law, I shall be more particular and minute.

CHAPTER III.

OF THE LAW OF NATURE.

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IN every period of our existence, in every situation, in which we can be placed, much is to be known, much is to be done, much is to be enjoyed. But all that is to be known, all that is to be done, all that is to be enjoyed, depends upon the proper exertion and direction of our numerous powers. In this immense ocean of intelligence and action, are we left without a compass and without a chart? Is there no pole star, by which we may regulate our course? Has the all-gracious and all-wise Author of our existence formed us for such great and such good ends; and has he left us without a conductor to lead us in the way, by which those ends may be attained? Has he made us capable of observing a rule, and has he furnished us with no rule, which we ought to observe? Let us examine these questions—for they are important ones—with patience and with attention. Our labours will, in all probability, be amply repaid. We shall probably find that, to direct the more important parts of our conduct, the bountiful Governour of the universe has been graciously pleased to provide us with a law; and that, to direct

the less important parts of it, he has made us capable of providing a law for ourselves.

That our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles.

In the course of our remarks on that part of Sir William Blackstone's definition of law, which includes the idea of a superiour as essential to it, we remarked, with particular care, that it was only with regard to human laws that we controverted the justness or propriety of that idea. It was incumbent on us to mark this distinction particularly; for with regard to laws which are divine, they truly come from a superiour—from Him who is supreme.

Between beings, who, in their nature, powers, and situation, are so perfectly equal, that nothing can be ascribed to one, which is not applicable to the other, there can be neither superiority nor dependence. With regard to such beings, no reason can be assigned, why any one should assume authority over others, which may not, with equal propriety, be assigned, why each of those others should assume authority over that one. To constitute superiority and dependence, there must be an essential difference of qualities, on which those relations may be founded. ^a

Some allege, that the sole superiority of strength, or, as they express it, an irresistible power, is the true foundation of the right of prescribing laws. "This superi-

^a 1. Burl. 82.

ority of power gives," say they, "a right of reigning, by the impossibility, in which it places others, of resisting him, who has so great an advantage over them."^b

Others derive the right of prescribing laws and imposing obligations from superiour excellence of nature. "This," say they, "not only renders a being independent of those, who are of a nature inferiour to it; but leads us to believe, that the latter were made for the sake of the former." For a proof of this, they appeal to the constitution of men. "Here," they tell us, "the soul governs, as being the noblest part." "On the same foundation," they add, "the empire of man over the brute creation is built."^c

Others, again, say, that "properly speaking, there is only one general source of superiority and obligation. God is our creator: in him we live; and move, and have our being: from him we have received our intellectual and our moral powers: he, as master of his own work, can prescribe to it whatever rules to him shall seem meet. Hence our dependence on our Creator: hence his absolute power over us. This is the true source of all authority."^d

With regard to the first hypothesis, it is totally insufficient; nay, it is absolutely false. Because I cannot resist, am I obliged to obey? Because another is possessed of superiour force, am I bound to acknowledge his will as the rule of my conduct? Every obligation supposes motives that influence the conscience and determine the will, so that we should think it wrong not to obey, even if resistance was in our power. But a person, who

^b 1. Burl. 83.

^c Id. 83.

^d Id. 83. 87.

alleges only the law of the strongest, proposes no motive to influence the conscience, or to determine the will. Superiour force may reside with predominant malevolence. Has force, exerted for the purposes of malevolence, a right to command? Can it impose an obligation to obey? No. Resistance to such force is a right; and, if resistance can prove effectual, it is a duty also. On some occasions, all our efforts may, indeed, be useless; and an attempt to resist would frustrate its own aim: but, on such occasions, the exercise of resistance only is suspended; the right of resistance is not extinguished: we may continue, for a time, under a constraint; but we come not under an obligation: we may suffer all the external effects of superiour force; but we feel not the internal influence of superiour authority? ^c

The second hypothesis has in it something plausible; but, on examination, it will not be found to be accurate. Wherever a being of superiour excellence is found, his excellence, as well as every other truth, ought, on proper occasions, to be acknowledged; we will go farther; it ought, as every thing excellent ought, to be esteemed. But must we go farther still? Is obedience the necessary consequence of honest acknowledgment and just esteem? Here we must make a pause: we must make some inquiries before we go forward. In what manner is this being of superiour excellence connected with us? What are his dispositions with regard to us? By what effects, if by any, will his superiour excellence be displayed? Will it be exerted for our happiness; or, as to us, will it not be exerted at all? We acknowledge—we esteem excellence; but till these questions are answered, we

^c 1. Burl. 85. 86.

feel not ourselves under an obligation to obey it.^f If the opinion of Epicurus concerning his divinities—that they were absolutely indifferent to the happiness and interests of men—was admitted for a moment;^g the inference would unquestionably be—that they were not entitled to human obedience.

The third hypothesis contains a solemn truth, which ought to be examined with reverence and awe. It resolves the supreme right of prescribing laws for our conduct, and our indispensable duty of obeying those laws, into the omnipotence of the Divinity. This omnipotence let us humbly adore. Were we to suppose—but the supposition cannot be made—that infinite goodness could be disjoined from almighty power—but we cannot—must not proceed to the inference. No, it never can be drawn; for from almighty power infinite goodness can never be disjoined.

Let us join, in our weak conceptions, what are inseparable in their incomprehensible Archetype—infinite power—infinite wisdom—infinite goodness; and then we shall see, in its resplendent glory, the supreme right to rule: we shall feel the conscious sense of the perfect obligation to obey.

His infinite power enforces his laws, and carries them into full and effectual execution. His infinite wisdom knows and chooses the fittest means for accomplishing

^f 1. Burl. 86. 87.

^g Epicurus re tollit, oratione relinquit deos. Deinde, si maxime talis est deus, ut nulla gratia, nulla hominum caritate teneatur: valeat. Quid enim dicam, propitius sit? Cic. de Nat. Deo. l. 1. c. 44.

the ends which he proposes. His infinite goodness proposes such ends only as promote our felicity. By his power, he is able to remove whatever may possibly injure us, and to provide whatever is conducive to our happiness. By his wisdom, he knows our nature, our faculties, and our interests: he cannot be mistaken in the designs, which he proposes, nor in the means, which he employs to accomplish them. By his goodness, he proposes our happiness: and to that end directs the operations of his power and wisdom. Indeed, to his goodness alone we may trace the principle of his laws. Being infinitely and eternally happy in himself, his goodness alone could move him to create us, and give us the means of happiness. The same principle, that moved his creating, moves his governing power. The rule of his government we shall find to be reduced to this one paternal command—Let man pursue his own perfection and happiness.

What an enrapturing view of the moral government of the universe! Over all, goodness infinite reigns, guided by unerring wisdom, and supported by almighty power. What an instructive lesson to those who think, and are encouraged by their flatterers to think, that a portion of divine right is communicated to their rule. If this really was the case; their power ought to be subservient to their goodness, and their goodness should be employed in promoting the happiness of those, who are intrusted to their care. But princes, and the flatterers of princes, are guilty, in two respects, of the grossest error and presumption. They claim to govern by divine institution and right. The principles of their government are repugnant to the principles of that government, which is

divine. The principle of the divine government is goodness: they plume themselves with the gaudy insignia of power.

Well might nature's poet say—

————— Could great men thunder,
As Jove himself does, Jove would ne'er be quiet;
For every pelting, petty officer
Would use his heaven for thunder;
Nothing but thunder. Merciful heaven!
Thou rather with thy sharp and sulphurous bolt
Split'st the unwedgeable and gnarled oak,
Than the soft myrtle: O, but man, proud man,
Dressed in a little brief authority,
Most ignorant of what he's most assured,
His glassy substance; like an angry ape,
Plays such fantastick tricks before high heaven,
As make the angels weep.

Shak. Meas. for Meas. Act II.

Where a supreme right to give laws exists, on one side, and a perfect obligation to obey them exists, on the other side; this relation, of itself, suggests the probability that laws will be made.

When we view the inanimate and irrational creation around and above us, and contemplate the beautiful order observed in all its motions and appearances; is not the supposition unnatural and improbable—that the rational and moral world should be abandoned to the frolics of chance, or to the ravage of disorder? What would be the fate of man and of society, was every one at full liberty to do as he listed, without any fixed rule or principle of conduct, without a helm to steer him—a sport

of the fierce gusts of passion, and the fluctuating billows of caprice?

To be without law is not agreeable to our nature; because, if we were without law, we should find many of our talents and powers hanging upon us like useless incumbrances. Why should we be illuminated by reason, were we only made to obey the impulse of irrational instinct? Why should we have the power of deliberating, and of balancing our determinations, if we were made to yield implicitly and unavoidably to the influence of the first impressions? Of what service to us would reflection be, if, after reflection, we were to be carried away irresistibly by the force of blind and impetuous appetites?

Without laws, what would be the state of society? The more ingenious and artful the twolegged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life: he would become a prey to all the distractions of licentiousness and war.

Is it probable—we repeat the question—is it probable that the Creator, infinitely wise and good, would leave his moral world in this chaos and disorder?

If we enter into ourselves, and view with attention what passes in our own breasts, we shall find, that what, at first, appeared probable, is proved, on closer examination, to be certain; we shall find, that God has not left himself without a witness, nor us without a guide.

We have already observed, that, concerning the nature and cause of obligation, many different opinions have been entertained, and much ingenious disputation has been held, by philosophers and writers on jurisprudence. It will not be improper to take a summary view of those opinions.

Some philosophers maintain, that all obligation arises from the relations of things^h; from a certain proportion or disproportion, a certain fitness or unfitness, between objects and actions, which give a beauty to some, and a deformity to others. They say, that the rules of morality are founded on the nature of things; and are agreeable to the order necessary for the beauty of the universe.ⁱ

Others allege, that every rule whatever of human actions carries with it a moral necessity of conforming to it; and consequently produces a sort of obligation. Every rule, say they, implies a design, and the will of attaining a certain end. He, therefore, who proposes a particular end, and knows the rule by which alone he can accomplish it, finds himself under a moral necessity of observing that rule. If he did not observe it, he would act a contradictory part; he would propose the end, and neglect the only means, by which he could obtain it. There is a reasonable necessity, therefore, to prefer one manner of acting before another; and every reasonable man finds himself engaged to this, and prevented from acting in a contrary manner. In other words, he is obliged: for obligation is nothing more than a restriction of liberty produced by reason. Reason, then, independent of law, is sufficient to impose *some* obligation

^h 1. Ruth. 9. ⁱ Gro. 10.

on man, and to establish a system of morality and duty.^j

But, according to others, the idea of obligation necessarily implies a being, who obliges, and must be distinct from him, who is obliged. If the person, on whom the obligation is imposed, is the same as he who imposes it; he can disengage himself from it whenever he pleases: or, rather, there is no obligation. Obligation and duty depend on the intervention of a superiour, whose will is manifested by law. If we abstract from all law, and consequently from a legislator; we shall have no such thing as right, obligation, duty, or morality.^k

Others, again, think it necessary to join the last two principles together, in order to render the obligation perfect.^l Reason, say they, is the first rule of man, the first principle of morality, and the immediate cause of all primitive obligation. But man being necessarily dependent on his Creator, who has formed him with wisdom and design, and who, in creating him, has proposed some particular ends; the will of God is another rule of human actions, another principle of morality, obligation, and duty. On this distinction, the kinds of obligation, external and internal, are founded. These two principles must be united, in order to form a complete system of morality, really founded on the nature and state of man. As a rational being, he is subject to reason: as a creature of God, to his supreme will. Thus, reason and the divine will are perfectly reconciled,

^j Hein. 63. 1. Burl. 207. 210. 212. Puff. 17. b. 1. c. 2. s. 6.

^k 1. Burl. 210. 212. 202. Hein. 10.

^l 1. Ruth. 9.

are naturally connected, and are strengthened by their junction.^m

The cause of obligation is laid, by some philosophers, in utility.ⁿ Actions, they tell us, are to be estimated by their tendency to promote happiness. Whatever is expedient, is right. It is the utility, alone, of any moral rule, which constitutes its obligation.

Congenial with this principle, is another, which has received the sanction of some writers—that sociability, or the care of maintaining society properly, is the fountain of obligation and right: for to every right, there must be a corresponding obligation. From this principle the inference is drawn, that every one is born, not for himself alone, but for the whole human kind.^o

Further—many philosophers derive our obligation to observe the law of nature from instinctive affections, or an innate moral sense.^p This is the sense, they tell us, by which we perceive the qualities of right and wrong, and the other moral qualities in actions.

With regard, then, both to the meaning and the cause of obligation, much diversity of sentiment, much ambiguity, and much obscurity have, it appears, prevailed. It is a subject of inquiry, however, that well deserves to be investigated, explained, illustrated, and placed in its native splendour and dignity. In order to do this, it will be proper to ascertain the precise state of

^m 1. Burl. 214. 216. 219. 220.

ⁿ 1. Paley 82. Hein. 51.

^o Hein. 50. Gro. Prcl. 17. Puff. 139. b. 2. c. 3. s. 15.

^p 1. Ruth. 9.

the question before us. It is this—what is the efficient cause of moral obligation—of the eminent distinction between right and wrong? This has been often and injudiciously blended with another question, connected indeed with it, but from which it ought to be preserved separate and distinct. That other question is—how shall we, in particular instances, learn the dictates of our duty, and make, with accuracy, the eminent distinction, which we have just now mentioned? The first question points to the *principle* of obligation: the second points to the *means* by which our obligation to perform a specified action, or a series of specified actions, may be deduced. The first has been called by philosophers—*principium essendi*—the principle of existence; the principle which *constitutes* obligation. The second has been called by them—*principium cognoscendi*—the principle of knowing it; the principle by which it may be *proved* or *perceived*. In a commonwealth, the distinction between these two questions is familiar and easy. If the question is put—what is the efficient cause of the obligation upon the citizens to obey the laws of the state?—the answer is ready—the will of those, by whose authority the laws are made. If the other question is put—how shall we, in a particular instance, or in a series of particular instances, ascertain the laws, which the citizens ought to obey?—reference is immediately made to the code of laws.

Having thus stated the question—what is the efficient cause of moral obligation?—I give it this answer—the will of God. This is the supreme law.⁹ His just and full right of imposing laws, and our duty in obeying

⁹ Principem legem illam et ultimam, mentem esse dicebant, omnia ratione aut cogentis, aut vetantis dei. Cic. de leg. l. 2. c. 4.

(them, are the sources of our moral obligations. If I am asked—why do you obey the will of God? I answer—because it is my duty so to do. If I am asked again—how do you know this to be your duty? I answer again—because I am told so by my moral sense or conscience. If I am asked a third time—how do you know that you ought to do that, of which your conscience enjoins the performance? I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther. The science of morals, as well as other sciences, is founded on truths, that cannot be discovered or proved by reasoning. Reason is confined to the investigation of unknown truths by the means of such as are known. We cannot, therefore, begin to reason, till we are furnished, otherwise than by reason, with some truths, on which we can found our arguments. Even in mathematicks, we must be provided with axioms perceived intuitively to be true, before our demonstrations can commence. Morality, like mathematicks, has its intuitive truths, without which we cannot make a single step in our reasonings upon the subject. Such an intuitive truth is that, with which we just now closed our investigation. If a person was not possessed of the feeling before mentioned; it would not be in the power of arguments, to give him any conception of the distinction between right and wrong. These terms would be to him equally unintelligible, as the term *colour* to one who was born and has continued blind. But that there is, in human nature, such a moral principle, has been felt and acknowledged in all ages and nations.

*innate
truths*

^r Quæ est gens, aut quod genus hominum, quod non habeat sine doctrina anticipationem quandam, id est, anticeptam animo rei quandam informationem, sine qua nec intelligi quidquam, nec quæri, nec disputari potest. Cic. de nat. Deor. l. 1. c. 16.

Now that we have stated and answered the first question; let us proceed to the consideration of the second—how shall we, in particular instances, learn the dictates of our duty, and make, with accuracy, the proper distinction between right and wrong; in other words, how shall we, in particular cases, discover the will of God? We discover it by our conscience, by our reason, and by the Holy Scriptures. The law of nature and the law of revelation are both divine: they flow, though in different channels, from the same adorable source. It is, indeed, preposterous to separate them from each other. The object of both is—to discover the will of God—and both are necessary for the accomplishment of that end.

I. The power of moral perception is, indeed, a most important part of our constitution. It is an original power—a power of its own kind; and totally distinct from the ideas of utility and agreeableness. By that power, we have conceptions of merit and demerit, of duty and moral obligation. By that power, we perceive some things in human conduct to be right, and others to be wrong. We have the same reason to rely on the dictates of this faculty, as upon the determinations of our senses, or of our other natural powers. When an action is represented to us, flowing from love, humanity, gratitude, an ultimate desire of the good of others; though it happened in a country far distant, or in an age long past, we admire the lovely exhibition, and praise its author. The contrary conduct, when represented to us, raises our abhorrence and aversion. But whence this secret chain betwixt each person and mankind? If there is no moral sense, which makes benevolence appear

beautiful ; if all approbation be from the interest of the approver ;

“ What’s Hecuba to us, or we to Hecuba ? ”^a

The mind, which reflects on itself, and is a spectator of other minds, sees and feels the soft and the harsh, the agreeable and the disagreeable, the foul and the fair, the harmonious and the dissonant, as really and truly in the affections and actions, as in any musical numbers, or the outward forms or representations of sensible things. It cannot withhold its approbation or aversion in what relates to the former, any more than in what relates to the latter, of those subjects. To deny the sense of a sublime and beautiful and of their contraries in actions and things, will appear an affectation merely to one who duly considers and traces the subject. Even he who indulges this affectation cannot avoid the discovery of those very sentiments, which he pretends not to feel. A Lucretius or a Hobbes cannot discard the sentiments of praise and admiration respecting some moral forms, nor the sentiments of censure and detestation concerning others. Has a man gratitude, or resentment, or pride, or shame ? If he has and avows it ; he must have and acknowledge a sense of something benevolent, of something unjust, of something worthy, and of something mean. Thus, so long as we find men pleased or angry, proud or ashamed ; we may appeal to the reality of the moral sense. A right and a wrong, an honourable and a dishonourable is plainly conceived. About these there may be mistakes ; but this destroys not the inference, that the things are, and are universally acknowledged—

^a Hamlet.

that they are of nature's impression, and by no art can be obliterated.

This sense or apprehension of right and wrong appears early, and exists in different degrees. The qualities of love, gratitude, sympathy unfold themselves, in the first stages of life, and the approbation of those qualities accompanies the first dawn of reflection. Young people, who think the least about the distant influences of actions, are, more than others, moved with moral forms. Hence that strong inclination in children to hear such stories as paint the characters and fortunes of men. Hence that joy in the prosperity of the kind and faithful, and that sorrow upon the success of the treacherous and cruel, with which we often see infant minds strongly agitated.

There is a natural beauty in figures; and is there not a beauty as natural in actions? When the eye opens upon forms, and the ear to sounds; the beautiful is seen, and harmony is heard and acknowledged. When actions are viewed and affections are discerned, the inward eye distinguishes the beautiful, the amiable, the admirable, from the despicable, the odious, and the deformed. How is it possible not to own, that as these distinctions have their foundation in nature, so this power of discerning them is natural also?

The universality of an opinion or sentiment may be evinced by the structure of languages. Languages were not invented by philosophers, to countenance or support any artificial system. They were contrived by men in general, to express common sentiments and perceptions. The inference is satisfactory, that where all languages

make a distinction, there must be a similar distinction in universal opinion or sentiment. For language is the picture of human thoughts; and, from this faithful picture, we may draw certain conclusions concerning the original. Now, a universal effect must have a universal cause. No universal cause can, with propriety, be assigned for this universal opinion, except that intuitive perception of things, which is distinguished by the name of common sense.

All languages speak of a beautiful and a deformed, a right and a wrong, an agreeable and disagreeable, a good and ill, in actions, affections, and characters. All languages, therefore, suppose a moral sense, by which those qualities are perceived and distinguished.

The whole circle of the arts of imitation proves the reality of the moral sense. They suppose, in human conduct, a sublimity, a beauty, a greatness, an excellence, independent of advantage or disadvantage, profit or loss. On him, whose heart is indelicate or hard; on him, who has no admiration of what is truly noble; on him, who has no sympathetic sense of what is melting and tender, the highest beauty of the mimick arts must make, indeed, but a very faint and transient impression. If we were void of a relish for moral excellence, how frigid and uninteresting would the finest descriptions of life and manners appear! How indifferent are the finest strains — of harmony, to him who has not a musical ear!

The force of the moral sense is diffused through every part of life. The luxury of the table derives its principal charms from some mixture of moral enjoyments, from

communicating pleasures, and from sentiments honourable and just as well as elegant—

“The feast of reason, and the flow of soul.”

The chief pleasures of history, and poetry, and eloquence, and musick, and sculpture, and painting are derived from the same source. Beside the pleasures they afford by imitation, they receive a stronger charm from something moral insinuated into the performances. The principal beauties of behaviour, and even of countenance, arise from the indication of affections or qualities morally estimable.

Never was there any of the human species above the condition of an idiot, to whom all actions appeared indifferent. All feel that a certain temper, certain affections, and certain actions produce a sentiment of approbation; and that a sentiment of disapprobation is produced by the contrary temper, affections, and actions.

This power is capable of culture and improvement by habit, and by frequent and extensive exercise. A high sense of moral excellence is approved above all other intellectual talents. This high sense of excellence is accompanied with a strong desire after it, and a keen relish for it. This desire and this relish are approved as the most amiable affections, and the highest virtues.

This moral sense, from its very nature, is intended to regulate and control all our other powers. It governs our passions as well as our actions. Other principles may solicit and allure; but the conscience assumes authority, it must be obeyed. Of this dignity and commanding nature we are immediately conscious, as we are

of the power itself. It estimates what it enjoins, not merely as superiour in degree, but as superiour likewise in kind, to what is recommended by our other perceptive powers. Without this controlling faculty, endowed as we are with such a variety of senses and interfering desires, we should appear a fabrick destitute of order: but possessed of it, all our powers may be harmonious and consistent: they may all combine in one uniform and regular direction.

In short; if we had not the faculty of perceiving certain things in conduct to be right, and others to be wrong; and of perceiving our obligation to do what is right, and not to do what is wrong; we should not be moral and accountable beings.

If we be, as, I hope, I have shown we are, endowed with this faculty; there must be some things, which are immediately discerned by it to be right, and others to be wrong. There must, consequently, be in morals, as in other sciences, first principles, which derive not their evidence from any antecedent principles, but which may be said to be intuitively discerned.

Moral truths may be divided into two classes; such as are selfevident, and such as, from the selfevident ones, are deduced by reasoning. If the first be not discerned without reasoning, reasoning can never discern the last. The cases that require reasoning are few, compared with those that require none; and a man may be very honest and virtuous, who cannot reason, and who knows not what demonstration means.

If the rules of virtue were left to be discovered by reasoning, even by demonstrative reasoning, unhappy would be the condition of the far greater part of men, who have not the means of cultivating the power of reasoning to any high degree. As virtue is the business of all men, the first principles of it are written on their hearts, in characters so legible, that no man can pretend ignorance of them, or of his obligation to practise them. Reason, even with experience, is too often overpowered by passion; to restrain whose impetuosity, nothing less is requisite than the vigorous and commanding principle of duty.

II. The first principles of morals, into which all moral argumentation may be resolved, are discovered in a manner more analogous to the perceptions of sense than to the conclusions of reasoning. In morality, however, as well as in other sciences, reason is usefully introduced, and performs many important services. In many instances she regulates our belief; and in many instances she regulates our conduct. She determines the proper means to any end; and she decides the preference of one end over another. She may exhibit an object to the mind, though the perception which the mind has, when once the object is exhibited, may properly belong to a sense. She may be necessary to ascertain the circumstances and determine the motives to an action; though it be the moral sense that perceives the action to be either virtuous or vicious, after its motive and its circumstances have been discovered. She discerns the tendencies of the several senses, affections, and actions, and the comparative value of objects and gratifications. She judges concerning subordinate ends; but concerning ultimate ends she is not employed. These we prosecute by some

immediate determination of the mind, which, in the order of action, is prior to all reasoning; for no opinion or judgment can move to action, where there is not a previous desire of some end.—This power of comparing the several enjoyments, of which our nature is susceptible, in order to discover which are most important to our happiness, is of the highest consequence and necessity to corroborate our moral faculty, and to preserve our affections in just rank and regular order.

A magistrate knows that it is his duty to promote the good of the commonwealth, which has intrusted him with authority. But whether one particular plan or another particular plan of conduct in office, may best promote the good of the commonwealth, may, in many cases, be doubtful. His conscience or moral sense determines the end, which he ought to pursue; and he has intuitive evidence that his end is good: but the means of attaining this end must be determined by reason. To select and ascertain those means, is often a matter of very considerable difficulty. Doubts may arise; opposite interests may occur; and a preference must be given to one side from a small over-balance, and from very nice views. This is particularly the case in questions with regard to justice. If every single instance of justice, like every single instance of benevolence, were pleasing and useful to society, the case would be more simple, and would be seldom liable to great controversy. But as single instances of justice are often pernicious in their first and immediate tendency; and as the advantage to society results only from the observance of the general rule, and from the concurrence and combination of several persons in the same equitable conduct; the case here becomes more intricate and involved. The

various circumstances of society, the various consequences of any practice, the various interests which may be proposed, are all, on many occasions, doubtful, and subject to much discussion and inquiry. The design of municipal law (for let us still, from every direction, open a view to our principal object) the design of municipal law is to fix all the questions which regard justice. A very accurate reason or judgment is often requisite, to give the true determination amidst intricate doubts, arising from obscure or opposite utilities.

Thus, though good and ill, right and wrong are ultimately perceived by the moral sense, yet reason assists its operations, and, in many instances, strengthens and extends its influence. We may argue concerning propriety of conduct: just reasonings on the subject will establish principles for judging of what deserves praise: but, at the same time, these reasonings must always, in the last resort, appeal to the moral sense.

Farther; reason serves to illustrate, to prove, to extend, to apply what our moral sense has already suggested to us, concerning just and unjust, proper and improper, right and wrong. A father feels that paternal tenderness is refined and confirmed, by reflecting how consonant that feeling is to the relation between a parent and his child; how conducive it is to the happiness, not only of a single family, but, in its extension, to that of all mankind. We feel the beauty and excellence of virtue; but this sense is strengthened and improved by the lessons, which reason gives us concerning the foundations, the motives, the relations, the particular and the universal advantages flowing from this virtue, which, at first sight, appeared so beautiful.

Taste is a faculty, common, in some degree, to all men. But study, attention, comparison operate most powerfully towards its refinement. In the same manner, reason contributes to ascertain the exactness, and to discover and correct the mistakes, of the moral sense. A prejudice of education may be misapprehended for a determination of morality. 'Tis reason's province to compare and discriminate.

Reason performs an excellent service to the moral sense in another respect. It considers the relations of actions, and traces them to the remotest consequences. We often see men, with the most honest hearts and most pure intentions, embarrassed and puzzled, when a case, delicate and complicated, comes before them. They feel what is right; they are unshaken in their general principles; but they are unaccustomed to pursue them through their different ramifications, to make the necessary distinctions and exceptions, or to modify them according to the circumstances of time and place. 'Tis the business of reason to discharge this duty; and it will discharge it the better in proportion to the care which has been employed in exercising and improving it.

The existence of the moral sense has been denied by some philosophers of high fame: its authority has been attacked by others: the certainty and uniformity of its decisions have been arraigned by a third class.¹ We are told, that, without education, we should have been in a state of perfect indifference as to virtue and vice; that an education, opposite to that which we have received, would have taught us to regard as virtue that which we

¹ 1. Paley 12—24. Kaims Pr. Eq. 8.

now dislike as vice, and to despise as vice that which we now esteem as virtue. In support of these observations, it is farther said, that moral sentiment is different in different countries, in different ages, and under different forms of government and religion; in a word, that it is as much the effect of custom, fashion, and artifice, as our taste in dress, furniture, and the modes of conversation. Facts and narratives have been assembled and accumulated, to evince the great diversity and even contrariety that subsists concerning moral opinions. And it has been gravely asked, whether the wild boy, who was caught in the woods of Hanover, would feel a sentiment of disapprobation upon being told of the conduct of a parricide. An investigation of those facts and narratives cannot find a place in these lectures; though the time bestowed on it might be well employed. It may, however, be proper to observe, that it is but candid to consider human nature in her improved, and not in her most rude or depraved forms. "The good experienced man," says Aristotle, "is the last measure of all things."^u To ascertain moral principles, we appeal not to the common sense of savages, but of men in their most perfect state.

Epicurus, as well as some modern advocates of the same philosophy, seem to have taken their estimates of human nature from its meanest and most degrading exhibitions; but the noblest and most respectable philosophers of antiquity have chosen, for a much wiser and better purpose, to view it on the brightest and most advantageous side. "It is impossible," says the incomparable Addison,^v "to read a passage in Plato or Tully, and a thousand other ancient moralists, without being a

^u 1. Hutch. 237. 121.

^v Tatler No. 103.

greater and a better man for it. On the contrary, I could never read some modish modern authors, without being, for some time, out of humour with myself, and at every thing about me. Their business is to depreciate human nature, and consider it under its worst appearances. They give mean interpretation and base motives to the worthiest actions—in short, they endeavour to make no distinction between man and man, or between the species of men and that of brutes.” True it is, that some men and some nations are savage and brutish ; but is that a reason why their manners and their practices should be generally and reproachfully charged to the account of human nature ? It may, perhaps, be somewhat to our purpose to observe, that in many of these representations, the picture, if compared with the original, will be found to be overcharged. For, in truth, between mankind, considered even in their rudest state, and the *mutum et turpe pecus*, a very wide difference will be easily discovered. In the most uninformed savages, we find the *communes notitiæ*, the common notions and practical principles of virtæ, though the application of them is often extremely unnatural and absurd. These same savages have in them the seeds of the logician, the man of taste, the orator, the statesman, the man of virtue, and the saint. These seeds are planted in their minds by nature, though, for want of culture and exercise, they lie unnoticed, and are hardly perceived by themselves or by others. Besides, some nations that have been supposed stupid and barbarous by nature, have, upon fuller acquaintance with their history, been found to have been rendered barbarous and depraved by institution. When, by the power of some leading members, erroneous laws are once established, and it has become the interest of subordinate tyrants to support a corrupt system, error

and iniquity become sacred. Under such a system, the multitude are fettered by the prejudices of education, and awed by the dread of power, from the free exercise of their reason. These principles will account for the many absurd and execrable tenets and practices with regard to government, morals, and religion, which have been invented and established in opposition to the unbiassed sentiments, and in derogation of the natural rights of mankind. But, after making all the exceptions and abatements, of which these facts and narratives, if admitted in their fullest extent, would justify the claim, still it cannot be denied, but is even acknowledged, that some sorts of actions command and receive the esteem of mankind more than others; and that the approbation of them is general, though not universal. It will certainly be sufficient for our purpose to observe, that the dictates of reason are neither more general, nor more uniform, nor more certain, nor more commanding, than the dictates of the moral sense. Nay, farther; perhaps, upon inquiry, we shall find, that those obliquities, extravagancies, and inconsistencies of conduct, that are produced as proofs of the nonexistence or inutility of the moral sense, are, in fact, chargeable to that faculty, which is meant to be substituted in its place. We shall find that men always approve upon an opinion—true or false, but still an opinion—that the actions approved have the qualities and tendencies, which are the proper objects of approbation. They suppose that such actions will promote their own interest; or will be conducive to the publick good; or are required by the Deity; when, in truth, they have all the contrary properties—may be forbidden by the Deity, and may be detrimental both to publick and to private good. But when all this happens, to what cause is it to be traced? Does it prove the nonexistence of a moral

sense, or does it prove, in such instances, the weakness or perversion of reason? The just solution is, that, in such instances, it is our reason, which presents false appearances to our moral sense.

It is with much reluctance, that the power of our instinctive or intuitive faculties is acknowledged by some philosophers. That the brutes are governed by instinct, but that man is governed by reason, is their favourite position. But fortunately for man, this position is not founded on truth. Our instincts, as well as our rational powers, are far superiour, both in number and in dignity, to those, which the brutes enjoy; and it were well for us, on many occasions, if we laid our reasoning systems aside, and were more attentive in observing the genuine impulses of nature. In this enlarged and elevated meaning, the sentiment of Pope^w receives a double portion of force and sublimity.

“ And reason raise o’er instinct as you can,
In this, ’tis God directs, in that, ’tis man.”

This sentiment is not dictated merely in the fervid glow of enraptured poetry; it is affirmed by the deliberate judgment of calm, sedate philosophy. Our instincts are no other than the oracles of eternal wisdom; our conscience, in particular, is the voice of God within us: it teaches, it commands, it punishes, it rewards. The testimony of a good conscience is the purest and the noblest of human enjoyments.

It will be proper to examine a little more minutely the opinions of those, who allege reason to be the sole

^w Ess. on Man. Ep. 3. v. 99.

directress of human conduct. Reason may, indeed, instruct us in the pernicious or useful tendency of qualities and actions: but reason alone is not sufficient to produce any moral approbation or blame. Utility is only a tendency to a certain end; and if the end be totally indifferent to us, we shall feel the same indifference towards the means. It is requisite that *sentiment* should intervene, in order to give a preference to the useful above the pernicious tendencies.

Reason judges either of relations or of matters of fact. Let us consider some particular virtue or vice under both views. Let us take the instance of *ingratitude*. This has place, when good will is expressed and good offices are performed on one side, and ill will or indifference is shown on the other. The first question is—what is that matter of fact, which is here called a vice? Indifference or ill will. But ill will is not always, nor in all circumstances a crime: and indifference may, on some occasions, be the result of the most philosophick fortitude. The vice of ingratitude, then, consists not in matter of fact.

Let us next inquire into the relations, which reason can discover, among the materials, of which ingratitude is composed. She discovers good will and good offices on one side, and ill will or indifference on the other. This is the relation of *contrariety*. Does ingratitude consist in this? To which side of the contrary relation is it to be placed? For this relation of contrariety is formed as much by good will and good offices, as by ill will or indifference. And yet the former deserves praise as much as the latter deserves blame.

If it shall be said, that the morality of an action does not consist in the relation of its different parts to one another, but in the relation of the whole actions to the rule; and that actions are denominated good or ill, as they agree or disagree with that rule; another question occurs—What is this rule of right? by what is it discovered or determined? By reason, it is said. How does reason discover or determine this rule? It must be by examining facts or the relations of things. But by the analysis which has been given of the particular instance under our consideration, it has appeared that the vice of ingratitude consists neither in the matter of fact, nor in the relation of the parts, of which the fact is composed. Objects in the animal world, nay inanimate objects, may have to each other all the same relations, which we observe in moral agents; but such objects are never supposed to be susceptible of merit or demerit, of virtue or vice.

The *ultimate* ends of human actions, can never, in any case, be accounted for by reason. They recommend themselves entirely to the sentiments and affections of men, without dependence on the intellectual faculties. Why do you take exercise? Because you desire health. Why do you desire health? Because sickness is painful. Why do you hate pain? No answer is heard. Can one be given? No. This is an ultimate end, and is not referred to any farther object.

To the second question, you may, perhaps, answer, that you desire health, because it is necessary for your improvement in your profession. Why are you anxious to make this improvement? You may, perhaps, answer again, because you wish to get money by it. Why do

you wish to get money? Because, among other reasons, it is the instrument of pleasure. But why do you love pleasure? Can a reason be given for loving pleasure, any more than for hating pain? They are both ultimate objects. 'Tis impossible there can be a progress *in infinitum*; and that one thing can always be a reason, why another is hated or desired. Something must be hateful or desirable on its own account, and because of its immediate agreement or disagreement with human sentiment and affection.

Virtue and vice are ends; and are hateful or desirable on their own account. It is requisite, therefore, that there should be some sentiment, which they touch—some internal taste or sense, which distinguishes moral good and evil, and which embraces one, and rejects the other. Thus are the offices of reason and of the moral sense at last ascertained. The former conveys the knowledge of truth and falsehood: the latter, the sentiment of beauty and deformity, of vice and virtue. The standard of one, founded on the nature of things, is eternal and inflexible. The standard of the other is ultimately derived from that supreme will, which bestowed on us our peculiar nature, and arranged the several classes and orders of existence. In this manner, we return to the great principle, from which we set out. It is necessary that reason should be fortified by the moral sense: without the moral sense, a man may be prudent, but he cannot be virtuous.

Philosophers have degraded our senses below their real importance. They represent them as powers, by which we have sensations and ideas only. But this is not the whole of their office; they judge as well as in-

form. Not confined to the mere office of conveying impressions, they are exalted to the function of judging of the nature and evidence of the impressions they convey. If this be admitted, our moral faculty may, without impropriety, be called the *moral sense*. Its testimony, like that of the external senses, is the immediate testimony of nature, and on it we have the same reason to rely. In its dignity, it is, without doubt, far superiour to every other power of the mind.

The moral sense, like all our other powers, comes to maturity by insensible degrees. It is peculiar to human nature. It is both intellectual and active. It is evidently intended, by nature, to be the immediate guide and director of our conduct, after we arrive at the years of understanding.

III. Reason and conscience can do much; but still they stand in need of support and assistance. They are useful and excellent monitors; but, at some times, their admonitions are not sufficiently clear; at other times, they are not sufficiently powerful; at all times, their influence is not sufficiently extensive. Great and sublime truths, indeed, would appear to a few; but the world, at large, would be dark and ignorant. The mass of mankind would resemble a chaos, in which a few sparks, that would diffuse a glimmering light, would serve only to show, in a more striking manner, the thick darkness with which they are surrounded. Their weakness is strengthened, their darkness is illuminated, their influence is enlarged by that heaven-descended science, which has brought life and immortality to light. In compassion to the imperfection of our internal powers, our all-gracious Creator, Preserver, and Ruler has been

pleased to discover and enforce his laws, by a revelation given to us immediately and directly from himself. This revelation is contained in the holy scriptures. The moral precepts delivered in the sacred oracles form a part of the law of nature, are of the same origin, and of the same obligation, operating universally and perpetually.

On some important subjects, those in particular, which relate to the Deity, to Providence, and to a future state, our natural knowledge is greatly improved, refined, and exalted by that which is revealed. On these subjects, one who has had the advantage of a common education in a christian country, knows more, and with more certainty, than was known by the wisest of the ancient philosophers.

One superiour advantage the precepts delivered in the sacred oracles clearly possess. They are, of all, the most explicit and the most certain. A publick minister, judging from what he knows of the interests, views, and designs of the state, which he represents, may take his resolutions and measures, in many cases, with confidence and safety; and may presume, with great probability, how the state itself would act. But if, besides this general knowledge, and these presumptions highly probable, he was furnished also with particular instructions for the regulation of his conduct; would he not naturally observe and govern himself by both rules? In cases, where his instructions are clear and positive, there would be an end of all farther deliberation. In other cases, where his instructions are silent, he would supply them by his general knowledge, and by the information, which he could collect from other quarters, concerning

the counsels and systems of the commonwealth. Thus it is with regard to reason, conscience, and the holy scriptures. Where the latter give instructions, those instructions are supereminently authentick. But whoever expects to find, in them, particular directions for every moral doubt which arises, expects more than he will find. They generally presuppose a knowledge of the principles of morality; and are employed not so much in teaching new rules on this subject, as in enforcing the practice of those already known, by a greater certainty, and by new sanctions. They present the warmest recommendations and the strongest inducements in favour of virtue: they exhibit the most powerful dissuasives from vice. But the origin, the nature, and the extent of the several rights and duties they do not explain; nor do they specify in what instances one right or duty is entitled to preference over another. They are addressed to rational and moral agents, capable of previously knowing the rights of men, and the tendencies of actions; of approving what is good, and of disapproving what is evil.

These considerations show, that the scriptures support, confirm, and corroborate, but do not supercede the operations of reason and the moral sense. The information with regard to our duties and obligations, drawn from these different sources, ought not to run in unconnected and diminished channels: it should flow in one united stream, which, by its combined force and just direction, will impel us uniformly and effectually towards our greatest good.

We have traced, with some minuteness, the efficient principle of obligation, and the several means, by which

our duty may be known. It will be proper to turn our attention back to the opinions that have been held, in philosophy and jurisprudence, concerning this subject. On a review of them, we shall now find that, in general, they are defective rather than erroneous; that they have fallen short of the mark, rather than deviated from the proper course.

The fitness of things denotes their fitness to produce our happiness: their nature means that actual constitution of the world, by which some things produce happiness, and others misery. Reason is one of the means, by which we discern between those things, which produce the former, and those things, which produce the latter. The moral sense feels and operates to promote the same essential discriminations. Whatever promotes the greatest happiness of the whole, is congenial to the principles of utility and sociability: and whatever unites in it all the foregoing properties, must be agreeable to the will of God: for, as has been said once, and as ought to be said again, his will is graciously comprised in this one paternal precept—Let man pursue his happiness and perfection.

The law of nature is immutable; not by the effect of an arbitrary disposition, but because it has its foundation in the nature, constitution, and mutual relations of men and things. While these continue to be the same, it must continue to be the same also. This immutability of nature's laws has nothing in it repugnant to the supreme power of an all-perfect Being. Since he himself is the author of our constitution; he cannot but command or forbid such things as are necessarily agreeable or disagreeable to this very constitution. He is under the

glorious necessity of not contradicting himself. This necessity, far from limiting or diminishing his perfections, adds to their external character, and points out their excellency.

The law of nature is universal. For it is true, not only that all men are equally subject to the command of their Maker; but it is true also, that the law of nature, having its foundation in the constitution and state of man, has an essential fitness for all mankind, and binds them without distinction.

This law, or right reason, as Cicero^x calls it, is thus beautifully described by that eloquent philosopher. “It is, indeed,” says he, “a true law, conformable to nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty: by its prohibitions, it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt. Neither by the senate, nor by the people, can its powerful obligation be dissolved. It requires no interpreter or commentator. It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given at all times and to all nations: for God, who is its author and promulgator, is always the sole master and sovereign of mankind.”

“Man never *is*,” says the poet, in a seeming tone of complaint, “but always *to be* blest.” The sentiment would certainly be more consolatory, and, I think, it would be likewise more just, if we were to say—man ever *is*; *for* always to be blest. That we should have

^x De Rep. l. 3.

more and better things before us, than all that we have yet acquired or enjoyed, is unquestionably a most desirable state. The reflection on this circumstance, far from diminishing our sense or the importance of our present attainments and advantages, produces the contrary effects. The present is gilded by the prospect of the future. ✓

When Alexander had conquered a world, and had nothing left to conquer; what did he do? He sat down and wept. A well directed ambition that has conquered worlds, is exempted from the fate of that of Alexander the Great: it still sees before it more and better worlds as the objects of conquest.

It is the glorious destiny of man to be always progressive. Forgetting those things that are behind, it is his duty, and it is his happiness, to press on towards those that are before. In the order of Providence, as has been observed on another occasion, the progress of societies towards perfection resembles that of an individual. This progress has hitherto been but slow: by many unpropitious events, it has often been interrupted: but may we not indulge the pleasing expectation, that, in future, it will be accelerated; and will meet with fewer and less considerable interruptions.

Many circumstances seem—at least to a mind anxious to see it, and apt to believe what it is anxious to see—many circumstances seem to indicate the opening of such a glorious prospect. The principles and the practice of liberty are gaining ground, in more than one section of the world. Where liberty prevails, the arts and sciences lift up their heads and flourish. Where the arts and sciences flourish, political and moral improvements will

likewise be made. All will receive from each, and each will receive from all, mutual support and assistance: mutually supported and assisted, all may be carried to a degree of perfection hitherto unknown; perhaps, hitherto not believed.

“Men,” says the sagacious Hooker, “if we view them in their spring, are, at the first, without understanding or knowledge at all. Nevertheless, from this utter vacuity, they grow by degrees, till they become at length to be even as the angels themselves are. That which agreeth to the one now, the other shall attain to in the end: they are not so far disjoined and severed, but that they come at length to meet.”^y

Our progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression. In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the cotemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.

A delineation of the laws of nature, has been often attempted. Books, under the appellations of institutes and systems of that law, have been often published. From what has been said concerning it, the most finished

^y Hooker, b. 1. s. 6. p. 8.

performances executed by human hands cannot be perfect. But most of them have been rude and imperfect to a very unnecessary, some, to a shameful degree.

A more perfect work than has yet appeared upon this great subject, would be a most valuable present to mankind. Even the most general outlines of it cannot, at least in these lectures, be expected from me.