THE WORKS OF

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BEING HIS PUBLIC DISCOURSES UPON

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OF THE NATURAL RIGHTS OF INDIVIDUALS.

WE have now viewed the whole structure of government; we have now ranged over its numerous apartments and divisions; and we have examined the materials of which it is formed. For what purpose has this magnificent palace been erected? For the residence and accommodation of the sovereign, man.

Does man exist for the sake of government? Or is government instituted for the sake of man?

Is it possible, that these questions were ever seriously proposed? Is it possible, that they have been long seriously debated? Is it possible, that a resolution diametrically opposite to principle, has been frequently and generally given of them in theory? Is it possible that a decision, diametrically opposite to justice, has been still more frequently and still more generally given concerning them in practice? All this is possible: and I must add, all this is true. It is true in the dark; it is true even in the enlightened portions of the globe.

At, and nearly at the commencement of these lectures, a sense of duty obliged me to enter into a controversial discussion concerning the rights of society: the same sense of duty now obliges me to enter into a similar discussion concerning the rights of the constituent parts of society—concerning the rights of men. To enter upon a discussion of this nature, is neither the most pleasant nor the most

easy part of my business. But when the voice of obligation is heard, ease and pleasure must preserve the respectful silence, and show the cheerful acquiescence, which become them.

What was the primary and the principal object in the institution of government? Was it—I speak of the primary and principal object—was it to acquire new rights by a human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of those rights, to the enjoyment or acquisition of which we were previously entitled by the immediate gift, c by the unerring law, of our all-wise and all-beneficent Creator?

The latter, I presume, was the case: and yet we are told, that, in order to acquire the latter, we must surrender the former; in other words, in order to acquire the security, we must surrender the great objects to be secured. That man "may secure *some* liberty, he makes a surrender in trust of the *whole* of it."—These expressions are copied literally from the late publication of Mr. Burke.[1]

Tyranny, at some times, is uniform in her principles. The feudal system was introduced by a specious and successful maxim, the exact counterpart of that, which has been advanced by Mr. Burke—exact in every particular but one; and, in that one, it was more generous. The free and allodial proprietors of land were told that they must surrender it to the king, and take back—not merely "some," but—the whole of it, under some certain provisions, which, it was said, would procure a valuable object—the very object was security—security for their property. What was the result? They received their land back again, indeed; but they received it, loaded with all the oppressive burdens of the feudal servitude—

[1] Refl. on Fr. Rev. 47.

cruel, indeed; so far as the epithet cruel can be applied to matters merely of property.

But all the other rights of men are in question here. For liberty is frequently used to denote all the absolute rights of men. "The absolute rights of every Englishman," says Sir William Blackstone, "are, in a political and extensive sense, usually called their liberties."[1]

And must we surrender to government the *whole* of those absolute rights? But we are to surrender them only —in *trust*:—another brat of dishonest parentage is now attempted to be imposed upon us: but for what purpose? Has government provided for us a superintending court of equity to compel a faithful performance of the trust? If it had; why should we part with the legal title to our rights?

After all; what is the mighty boon, which is to allure us into this surrender? We are to surrender all that we may secure "some:" and this "some," both as to its quantity and its certainty, is to depend on the pleasure of that power, to which the surrender is made. Is this a bargain to be proposed to those, who are both intelligent and free? No. Freemen, who know and love their rights, will not exchange their armor of pure and massy gold, for one of a baser and lighter metal, however finely it may be blazoned with tinsel: but they will not refuse to make an exchange upon terms, which are honest and honorable—terms, which may be advantageous to all, and injurious to none.

The opinion has been very general, that, in order to obtain the blessings of a good government, a sacrifice must be made of a part of our natural liberty. I am much inclined to believe, that, upon examination, this opinion will prove to be fallacious. It will, I think, be found, that wise and good government—I speak, at present, of no other

[1] 1 Bl. Com. 127.

—instead of contracting, enlarges as well as secures the exercise of the natural liberty of man: and what I say of his natural liberty, I mean to extend, and wish to be understood, through all this argument, as extended, to all his other natural rights.

This investigation will open to our prospect, from a new and striking point of view, the very close and interesting connection, which subsists between the law of nature and municipal law. This investigation, therefore, will richly repay us for all the pains we may employ, and all the attention we may bestow, in making it.

"The law," says Sir William Blackstone, "which restrains a man from doing mischief to his fellow citizens, though it diminish the natural, increases the civil liberty of mankind."[1] Is it a part of natural liberty to do mischief to any one?

In a former part of these lectures, I had occasion to describe what natural liberty is: let us recur to the description, which was then given.[2] "Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some public interests do not demand his labors. This right is natural liberty."

If this description of natural liberty is a just one, it will teach us, that selfishness and injury are as little counten-

[1] 1 Bl. Com. 125, 126.

[2] Ante, vol. 1, p. 276.

anced by the law of nature as by the law of man. Positive penalties, indeed, may, by human laws, be annexed to both. But these penalties are a restraint only upon injustice and overweening self-love, not upon the exercise of natural liberty.

In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature: in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress not those limits, which are assigned to him by the municipal law. True it is, that, by the municipal law some things may be prohibited, which are not prohibited by the law of nature: but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom, than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances, than he can lose by the restriction of it in a few.

Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise. As it is with regard to his natural liberty, so it is with regard to his other natural rights.[1]

[1 The idea that the individual surrendered his natural liberty upon entering society was well suited to the facts as they existed in a monarchy of the eighteenth century, for there then existed a person to whom submission might be made, but where all persons are considered equal there exists no one to whom rights can be surrendered. The notion resulted naturally from the ancient idea of society, wherein the individual man was lost sight of, and contrasts strikingly with the modern conception of society, which dignifies the individual so that individual right and individual obligation are the props of modern society. The state (society) is but an aggregation of individuals. The government is not the state, but is

But even if a part was to be given up, does it follow that *all* must be surrendered? "Man," says Mr. Burke,[1] "cannot enjoy the rights of an uncivil and of a civil state together." By an "uncivil" contradistinguished from a "civil" state, he must here mean a state of nature: by the rights of this uncivil state, he must mean the rights of nature: and is it possible that natural and civil rights cannot be enjoyed together? Are they really incompatible? Must our rights be removed from the stable foundation of nature, and placed on the precarious and fluctuating basis of human institution? Such seems to be the sentiment of Mr. Burke: and such too seems to have been the sentiment of a much higher authority than Mr. Burke—Sir William Blackstone.

In the Analysis of his Commentaries,[2] he mentions "the right of personal security, of personal liberty, and of private property"—not as the natural rights, which, I confess, I should have expected, but—as the "civil liberties" of Englishmen. In his Commentaries, speaking of the same three rights, he admits that they are founded on nature

merely an agency created in order to establish and protect individual liberty. Modern thought rejects the idea of a state of Nature antedating society, but regards man as by nature a member of society; being such how can he surrender his liberty and be free. Judge Cooley, in the third of his Editions of Blackstone's Commentaries, very fully and clearly repudiates the notion of the existence of mankind out of society. So far as I have observed Judge Wilson has the honor of first stating and explaining the modern notion of the relations between individual liberty and government.

The distinction between the position of Blackstone and other transatlantic writers and that assumed by Wilson and the other revolutionary fathers may be concisely put thus; by the former Civil liberty consists of natural liberty restrained by law—by the latter civil liberty is natural liberty secured by law. Government is by the latter held to be but the means of enforcing the safeguards provided by the social compact, which is called the Constitution. The Constitution does not create society but is created thereby. It may create or change the government.]

[1] Refl. on Fr. Rev. 47.

[2] B. 1 c. 1, s. 8.

and reason; but adds [1] "their establishment, excellent as it is, is still human." Each of these rights he traces severally and particularly to Magna Charta, which he justly considers as for the most part declaratory of the principal grounds of the fundamental laws of England.[2] He says indeed, [3] that they are "either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society has engaged to provide, in lieu of the natural liberties so given up by individuals." He makes no explicit declaration which of the two, in his opinion, they are; but since he traces them to Magna Charta and the fundamental laws of England; since he calls them "civil liberties;" and since he says expressly, that their establishment is human; we have reason to think, that he viewed them as coming under the latter part of his description—as civil privileges, provided by society, in lieu of the natural liberties given up by individuals. Considered in this view, there is no material difference between the doctrine of Sir William Blackstone, and that delivered by Mr. Burke.

If this view be a just view of things, the consequence, undeniable and unavoidable, is, that, under civil government, individuals have "given up" or "surrendered" their rights, to which they were entitled by nature and by nature's law; and have received, in lieu of them, those "civil privileges, which society has engaged to provide."

If this view be a just view of things, then the consequence, undeniable and unavoidable, is, that, under civil government, the right of individuals to their private property, to their personal liberty, to their health, to their reputation, and to their life, flow from a human establishment, and can be traced to no higher source. The con-

[1] 1 Bl. Com. 127. [2] Id. 128. [3] Id. 129.

nection between man and his natural rights is intercepted by the institution of civil society.

If this view be a just view of things, then, under civil society, man is not only made *for*, but made *by* the government: he is nothing but what the society frames: he can claim nothing but what the society provides. His natural state and his natural rights are withdrawn altogether from notice: "It is the *civil social* man," says Mr. Burke,[1] "and *no other*, whom I have in my contemplation."

If this view be a just view of things, why should we not subscribe the following articles of a political creed, proposed by Mr. Burke.

"We wished, at the period of the revolution, and we now wish to derive all we possess, *as an inheritance from our forefathers*. Upon that body and stock of inheritance, we have taken care not to inoculate any cyon alien to the nature of the original plant. All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope, nay, I am persuaded, that all those, which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example."

"Our oldest reformation is that of Magna Charta. You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties."

Let us observe, by the way, that the only position, relating to this subject, for which I find the authority of my Lord Coke quoted,[2] is a position, to which every one, who knows the history of the common law, will give his immediate and most unreserved assent: the position is—"that Magna Charta was, for the most part, declaratory of

[1] Refl. on Fr. Rev. 47.

[2] 1 Bl Com. 127, 128.

the principal grounds of the fundamental laws of England." But Mr. Burke proceeds.

"They endeavor to prove, that the ancient charter, the Magna Charta of King John, was connected with another positive charter from Henry the First; and that both the one and the other were nothing more than a re-affirmance of the still more ancient standing law of the kingdom. In the matter of fact, for the greater part, these authors appear to be in the right; perhaps not always; but if the lawyers mistake in some particulars, it proves my position still the more strongly; because it demonstrates the powerful prepossession towards antiquity, with which the minds of all our lawyers and legislators, and of all the people whom they wish to influence, have been always filled; and the stationary policy of this kingdom in considering their most sacred rights and franchises as an *inheritance*." [1]

It is proper to pause here a little.—If, in tracing the pedigree of our "most sacred rights," one was permitted to indulge the same train of argument and reflection, which would be just and natural in the investigation of inferior titles, we should be prompted to inquire, how it happens, that "mistakes in some particulars" would prove more strongly the general point to be established. Would mistakes in some particulars respecting a title to land, or the genealogy of a family, prove more strongly the validity of one, or the antiquity of the other?

But I must do Mr. Burke justice. The reason, which he assigns, why the making of those mistakes proves his position the more strongly, is, because it proves the "powerful *prepossession* towards antiquity." Of this prepossession I will controvert neither the existence nor the strength; but I will ask—does it prove the point in question?—Does it prove the truth and correctness of

[1] Refl. on Fr. Rev. 24.

even the *civil* pedigree of the liberties of England? Is predilection an evidence of right? Is property or anything else, which is in litigation, decided to belong to him, who shows the strongest affection for it? If, in a controversy concerning an inferior object, the person, who claims it, and who undertakes to substantiate his claim, should own, that, in deducing his chain of title, some mistakes were made; but should urge even those mistakes as an argument in his behalf, because his perseverance in his suit, notwithstanding those mistakes, demonstrates his powerful attachment for the thing in dispute; what would a discerning court—what would an unbiassed jury think of his conduct? I believe they would not think that it paid any extraordinary compliment, either to their impartiality or to their understanding.

I begin now to hesitate, whether we should subscribe the political creed of Mr. Burke. Let us, however, proceed and examine some of its other articles.

Some one, it seems, had been so hardy as to allege, that the king of Great Britain owes his crown to "the choice of his people." This doctrine, says Mr. Burke "affirms a most unfounded, dangerous, illegal, and unconstitutional position." "Nothing can be more untrue, than that the crown of this kingdom is so held by his majesty."[1] To disprove the assertion, "that the king of Great Britain owes his crown to the choice of his people," Mr. Burke has recourse to the declaration of rights, which was made at the accession of King William and Queen Mary. "This declaration of right," says he, "is the corner stone of our constitution, as *re-enforced*, explained, improved, and in its fundamental principles *for ever* settled. It is called an 'act for declaring the rights and liberties of the subject, and for *settling* the succession of the crown.' These rights and this succession are declared in one body,

[1] Refl. on Fr. Rev. 9.

and bound indissolubly together." [1] "It is curious," adds he, "with what address the *temporary* solution of continuity in the line of succession"—for it was impossible for Mr. Burke not to admit that from this line a temporary deviation was made—"it is curious with what address this *temporary* solution is kept from the eye; whilst all that could be found in this act of necessity, to countenance the idea of an *hereditary succession* is brought forward, and fostered, and made the most of by the legislature." "The legislature," he proceeds, "had plainly in view the act of recognition of the first of Queen Elizabeth, and that of James the first, both acts strongly declaratory of the inheritable nature of the crown; and, in many parts, they follow, with a nearly literal precision, the words and even the form which is found in these old declaratory statutes." [2] "They give the most solemn pledge, taken from the act of Queen Elizabeth, as solemn a pledge as ever was or can be given in favor of an hereditary succession. 'The lords spiritual and temporal, and commons, do, in the name of all the people aforesaid, most humbly and faithfully submit *themselves, their heirs and posterities for ever;* and do faithfully promise, that they will stand to, maintain, and defend their said majesties, and also the *limitation of the crown, herein* specified and contained, to the utmost of their power.'" [3]

I have mentioned above, that tyranny, at some times, is uniform in her principles: I have done her full justice: she is not so at all times. Of truth, liberty, and virtue, it is the exclusive prerogative to be always consistent.

Let us, for a moment, adopt the statement, which Mr. Burke has given us. Upon that statement I ask—if the humble and faithful submission of the parliament, in the name of all the people, was sufficient, in the time of Elizabeth, to bind themselves, their heirs and posterity

[1] Refl. on Fr. Rev. 12. [2] Id. 18. [3] Id. 14.

forever, to the line of hereditary succession; how came it to pass, that, in the time of William and Mary, the parliament, in the name of all the people, was justified in deviating, even for an instant, from the succession in that hereditary line? I ask again—if the humble and faithful submission of the parliament, in the name of all the people, was, in the sixteenth century, insufficient to bind their heirs and posterity in the seventeenth century; how comes it to pass that, in the seventeenth century, the humble and faithful submission of the parliament, in the name of all the people, could bind their heirs and posterity in the eighteenth century? Such a submission was either sufficient or it was not sufficient for that binding purpose: let the disciples of the doctrine, which rests on this dilemma, choose between the alternatives.

I have now no hesitation whether we should or should not subscribe the creed of Mr. Burke: that creed, which is contradictory to itself, cannot, in every part, be sound and orthodox.

But, to say the truth, I should not have given myself the trouble of delivering, nor you, of hearing these annotations upon it; unless it had derived the support, which it claims, from the Commentaries on the laws of England. The principles delivered in those Commentaries are never matters of indifference: I have already mentioned,[1] "that when they are not proper objects of imitation, they furnish excellent materials of contrast."

Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.[2]

Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil

[1] Ante, vol. 1, p. 20. [2] See Ante, p. 300. Note.]

government was instituted. In such a situation, a man finds himself, in some respects, unrelated to others; in other respects, peculiarly related to some; in still other respects, bearing a general relation to all. From his unrelated state, one class of rights arises: from his peculiar relations, another class of rights arises: from his general relations, a third class of rights arises. To each class of rights, a class of duties is correspondent; as we had occasion to observe and illustrate, when we treated concerning the general principles of natural law.

In his unrelated state, man has a natural right to his property, to his character, to liberty, and to safety. From his peculiar relations, as a husband, as a father, as a son, he is entitled to the enjoyment of peculiar rights, and obliged to the performance of peculiar duties. These will be specified in their due course. From his general relations, he is entitled to other rights, simple in their principle, but, in their operation, fruitful and extensive. His duties, in their principle and in their operation, may be characterized in the same manner as his rights. In these general relations, his rights are, to be free from injury, and to receive the fulfilment of the engagements, which are made to him; his duties are, to do no injury, and to fulfil the engagements, which he has made. On these two pillars principally and respectively rest the criminal and the civil codes of the municipal law. These are the pillars of justice.

Of municipal law, the rights and the duties of benevolence are sometimes, though rarely, the objects. When they are so, they will receive the pleasing and the merited attention.

You now see the distribution, short, and simple, and plain, which will govern the subsequent part of my system of lectures. From this distribution, short, and simple, and plain as it is, you see the close and very in-

teresting connection between natural and municipal law. You see, to use again my Lord Bacon's language, how the streams of civil institutions flow from the fountain of justice.

I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety.[1]

[1 Blackstone classifies rights as the rights of persons and rights of (concerning) things, and again classifies the rights of persons as absolute and relative.—The relative, he says, are those in relation to each other in society, as magistrate and people, husband and wife, etc. He enumerates among the rights of persons, personal liberty, personal security and private property. Thus he enumerates among the so-called absolute rights the right of property, including it among the rights of persons, *i. e.*, as one of the absolute rights of persons. He treats, however, the law relating to ownership under the rights of things. This has occasioned some confusion of thought. This treatment is peculiar to Blackstone, but it will be seen that in Book I. he treats merely the abstract right to acquire and possess property, and not the nature and incidents of ownership and transfer of things. See Hammond's Introduction to Sanders Justinian, p. lii. The very nomenclature of Blackstone is in this respect confusing, and while apparently based upon the treatment of Hale is a very material departure therefrom.

Blackstone terms these rights absolute, and makes no distinction between the use of that word in this connection and the use of the same word in describing the powers of Parliament as absolute and uncontrolled by human laws. Hale treats the matter differently. Persons, says Hale, "are considered in two ways—*absolutely* and *simply in themselves*, or under some degree or respect of relation." Blackstone applies the same terms to the rights of persons, using the word absolutely not as equal to abstractly, as Hale uses it, but in a far different sense.

Our law recognizes no such thing as absolute power or absolute rights, but does recognize the distinction between the abstract right to acquire property as one of the civil rights of persons and the right of property as applied to things. So Justice Patterson of the United States Court says, The right of acquiring and possessing property and having it protected is one of the natural inherent inalienable rights of man.

Vanhorne's Lessee *v.* Dorrence, 2 Dall. U. S. Rep. 310.

By keeping in view the distinction pointed out the seeming conflict between the expressions of Judge Patterson and the language used by Marshall in arguing the case of Ware *v.* Hylton, viz.: "Property is the creature of civil society and subject in all respects to the disposition and control of civil institutions: 3 Dall. 211, is avoided. Keeping in mind the

His natural right to his property, you will permit me, at present, to assume as a principle granted. I assume it for this reason; because I wish not to anticipate now what will be introduced, with much greater propriety and advantage, when I come to the second great division of my lectures, in which I am to treat concerning things.

To his character, every one has a natural right. A man's character may, I think, be described as the just result of those opinions, which ought to be formed concerning his talents, his sentiments, and his conduct. Opinions, upon this as upon every other subject, ought to be founded in truth. Justice, as well as truth, requires, concerning characters, accuracy, and impartiality of opinion.

Under some aspects, character may be considered as a species of property; but, of all, the nearest, the dearest, and the most interesting. In this light it is viewed by the Poet of nature—

> **The purest treasure mortal times afford**
> **Is spotless reputation.**
> **Who steals my purse, steals trash,**
> **'Twas mine; 'tis his; and has been slave to thousands;**
> **But he who filches from me my good name,**
> **Takes from me that, which not enriches him,**
> **But makes me poor indeed.**

By the exertion of the same talents and virtues, property and character both are often acquired: by vice and indolence, both are often lost or destroyed.

The love of reputation and the fear of dishonor are, by the all-gracious Author of our existence, implanted in our breasts, for purposes the most beneficent and wise. Let not these principles be deemed the growth of dis-

nature of property will still further elucidate the subject. Property is the right in or to a thing, and not the thing itself.]

positions only which are weak or vain; they flourish most luxuriantly in minds, the strongest and, let me add, the most humble. Of the happiness of heaven, a part of the unerring description is—that it is "full of glory."

Well may character, then, be considered as one of the natural rights of man: well may it be classed among those rights, the enjoyment of which it is the design of good government and laws to secure and enlarge: well does it deserve their encouragement and protection; for, in its turn, it assists their operations, and supplies their deficiencies.

I remarked a little while ago, that the rights and the duties of benevolence are but rarely, though they are at some times, the objects of municipal law. The remark may be extended to rights and duties of many other kinds. To many virtues, legal rewards are not, nor can they be, assigned: with legal impunity, many vices are, and must be, suffered to escape. But before a court of honor those qualities and sentiments and actions are amenable, which despise the subtlest process of the tribunals of law, and elude the keenest vigilance of the ministers of justice. This court, powerful in its sentences as well as extensive in its jurisdiction, decrees to virtue, and to the virtuous exertion of talents, a crown of fame, pure and splendid: vice, and idleness, less odious only than vice, it dooms to wear the badges of infamy, dirty and discolored. This court therefore, in a government of which virtue is the principle and vice is the bane, ought to receive, from all its institutions, the just degree of favor and regard.

Honor's a sacred tie—
The noble mind's distinguishing perfection,
That aids and strengthens virtue, where it meets her.

The Poet adds—

And imitates her actions, where she is not.

The moral descriptions of Mr. Addison are seldom inaccurate. On this occasion, however, I must declare that I think him liable to the charge of inaccuracy. The counterfeit of virtue should not be dignified with the appellation of honor.

It is the sentiment of some writers, highly distinguished too by their liberal and manly principles, that honor is peculiar to governments which are monarchical. "In extreme political liberty," says the Marquis of Beccaria, "and in absolute despotism, all ideas of honor disappear, or are confounded with others. In the first case, reputation becomes useless from the despotism of the laws; and, in the second, the despotism of one man, annulling all civil existence, reduces the rest to a precarious temporary personality. Honor, then, is one of the fundamental principles of those monarchies, which are a limited despotism; and in these, like revolutions in despotic states, it is a momentary return to a state of nature and original equality."[1]

How prevalent even among enlightened writers, is the mistaken opinion that government is subversive of equality and nature! Is it necessarily so? By no means. When I speak thus, I speak confidently, because I speak from principle fortified by fact. Let the constitution of the United States—let that of Pennsylvania be examined from the beginning to the end. No right is conferred, no obligation is laid on any, which is not laid or conferred on every citizen of the commonwealth or Union—I think I may defy the world to produce a single exception to the truth of this remark. Now, as I showed at large in a former part of my lectures,[2] the original equality of mankind consists in an equality of their duties and rights.

That honor is the principal of monarchical governments, is the well-known doctrine of the celebrated Montesquieu.

[1] Bec. c. 9.

[2] Ante, vol. 1, pp. 279–375.

But let us examine the nature and qualities of that honor which he describes. It is that honor which can subsist without honesty; for he says expressly,[1] that, in well polcied monarchies, there are very few honest men. It is that honor which forbids not adulation, nor cunning, nor craft. It is that honor which judges of actions not as they are good, but as they are showy; not as they are just, but as they are grand; not as they are reasonable, but as they are extraordinary. It is in one word, that honor, which fashions the virtues just as it pleases, and extends or limits our duties by its own whimsical taste. To this honor, indeed, truth in conversation is a necessary point: but is this for the sake of truth? By no means.

For the possession of this honor—vicious in its practice, and, even when right in its practice, vicious in its principle—a republican government will not, I presume, contend. But to that honor, whose connection with virtue is indissoluble, a republican government produces the most unquestionable title. The principle of virtue is allowed to be hers: if she possesses virtue, she also possesses honor. I admire the fine moral and political instruction, as well as the elegant architectural taste, exhibited by the justly framed structure, in which the temple of honor was accessible only through the temple of virtue.

Viewed in this light, the honor of character is a property, which is, indeed precious. But let it be remembered, that, in this view, it is a property, which must be purchased. To claim that reputation which we do not deserve, is as absurd, though it is not as barefaced, as to claim that property which is not ours. The only difference is, that, in the former case, we claim generally that which belongs to another, while, in the latter case, we claim that which only does not belong to ourselves. In both cases, the claim is equally unfounded.

[1] Sp. L. b. 3, c. 6.

To bestow on another that reputation which he does not deserve, is equally profuse, and, in many instances, is more unjust than to bestow on him that property, to which he is not, on the principles either of justice, or charity, or benevolence, entitled. As it is equally profuse, it is more to be guarded against. In the latter case, we bestow what is our own, and, therefore, are inclined to be cautious: in the former case, we are apt to be inconsiderate, because what we bestow is not ours. Indiscriminate praise is not so odious, but it is as useless and it is as heedless as indiscriminate censure. In one important particular they precisely coincide. They have an equal tendency to destroy and to render inefficacious the great distinction between right and wrong, approbation and disapprobation, virtue and vice.

If it is unwarrantable to bestow reputation where it is not due; what epithet shall we assign to that conduct, which plucks the wreath of honor from those temples, around which it has been meritoriously placed? Robbery itself flows not from a fountain so rankly poisoned as that, which throws out the waters of malicious defamation.

The subject of reputation will again come under your view, when I treat concerning prosecutions for libels and actions of slander: both of which suppose an unjustifiable aggression of character. What I have now said will suffice to point to the general principles, on which those actions and prosecutions should be defended, supported, and determined.

Property must often—reputation must always be purchased: liberty and life are the gratuitous gifts of heaven.

That man is naturally free, was evinced in a former lecture:[1] I will not reiterate what has been advanced.

I shall certainly be excused from adducing any formal

[1] Vol. 1, p. 275.

arguments to evince, that life, and whatever is necessary for the safety of life, are the natural rights of man. Some things are so difficult; others are so plain, that they cannot be proved. It will be more to our purpose to show the anxiety, with which some legal systems spare and preserve human life; the levity and the cruelty which others discover in destroying or sporting with it; and the inconsistency, with which, in others, it is, at some times, wantonly sacrificed, and, at other times, religiously guarded.

In Sparta, nothing was deemed so precious as the life of a citizen. And yet in Sparta, if an infant, newly born, appeared, to those who were appointed to examine him, ill formed or unhealthy, he was, without any further ceremony, thrown into a gulf near Mount Taygetus.[1] Fortunate it was for Mr. Pope—fortunate it was for England, which boasts Mr. Pope—that he was not born in the neighborhood of Mount Taygetus.

At Athens,[2] the parent was empowered, when a child was born, to pronounce on its life or its death. At his feet it was laid: if he took it in his arms, this was received as the gracious signal for its preservation: if he deigned not a look of compassion on the fruit of his loins, it was removed and exposed. Over almost all the rest of Greece,[3] this barbarity was permitted or authorized.

In China, the practice of exposing new born children is said to have prevailed immemorially, and to prevail still. As the institutions of that empire are never changed, its situation is never improved.

Tacitus records it to the honor of the Germans, that, among them, to kill infants newly born was deemed a most flagitious crime. Over them, adds he, good manners have more power, than good laws have over other nations. This shows, that, in his time, the restraints of law began to be

[1] 4 Anac. 161, 162. [2] 3 Anac. 4. [3] Id. ibid.

imposed on this unnatural practice; but that its inveteracy had rendered them still inefficacious.

Under the Roman commonwealth, no citizen of Rome was liable to suffer a capital punishment by the sentence of the law. But at Rome, the son held his life by the tenure of his father's pleasure. In the forum, the senate, or the camp, the adult son of a Roman citizen enjoyed the public and private rights of a *person*: in his father's house, he was a mere *thing*;[1] confounded, by the laws, with the cattle, whom the capricious master might alienate or destroy, without being responsible to any tribunal on earth.

The gentle Hindoo is laudably averse to the shedding of blood; but he carries his worn out friend or benefactor to perish on the banks of the Ganges.

With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb.[2] By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.

The grades of solicitude, discovered, by the law, on the subject of life, are marked, in the clearest manner, by the long and regular series of the different degrees of aggression, which it enumerates and describes—threatening, assault, battery, wounding, mayhem, homicide. How those different degrees may be justified, excused, alleviated, aggravated, redressed, or punished, will appear both in the criminal and in the civil code of our municipal law.

Thus much concerning the natural rights of man in what has been termed his unrelated state. I come now to specify and to consider those peculiar relations, by virtue of which

[1] 3 Gibbon, 52.

[2] 1 Bl. Com. 129.

a man is entitled to the enjoyment of peculiar rights, and obliged to the performance of peculiar duties.

I begin with marriage, which forms the near relation between husband and wife.

Whether we consult the soundest deductions of reason, or resort to the best information conveyed to us by history, or listen to the undoubted intelligence communicated in holy writ, we shall find, that to the institution of marriage the true origin of society must be traced.[1] By that insti-

[1 Judge Story in his Conflict of Laws, § 109, says: "There are some remarks on this subject, made by a distinguished Scottish judge, so striking that they deserve to be quoted at large. Marriage being entirely a personal, consensual contract, it may be thought that the *lex loci* must be resorted to in expounding every question that arises relative to it. But it will be observed that marriage is a contract *sui generis*, and differing in some respects from all other contracts; so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract."

The Supreme Court has reiterated the language in Randall v. Kreiger, 23 Wall. 147–190, U. S. Supreme Court Reports.

The influence of religion upon the institutions and laws of a country are powerfully illustrated by the subject of Marriage.

The rule is that a marriage is a contract, and is recognized as valid everywhere if valid when made, but the exception is made against polygamy, and the ground therefor. Christianity is understood to prohibit polygamy * * * and therefore no Christian country would recognize poly-

tution the felicity of Paradise was consummated; and since the unhappy expulsion from thence, to that institution, more than to any other, have mankind been indebted for the share of peace and harmony which has been distributed among them. "Prima societas in ipso conjugio est," says Cicero in his book of offices;[1] a work which does honor to the human understanding and the human heart.

The most ancient traditions of every country ascribe to its first legislators and founders, the regulations concerning the union between the sexes. The honor of instituting marriage among the Chinese, is assigned to their first sovereign,[2] Fo-hi. In order to render this great foundation of society respectable, he adjusted, as we are told,[3] the ceremonies, with which the contracts of marriage were accompanied.

Among the Egyptians, the law of marriage is said to have been established by Menes,[4] whose name is transmitted to us as that of their first king. The history of Abraham[5] affords a striking instance of the profound respect, which in his day was paid, in Egypt, to the conjugal union.

Cecrops has been already mentioned as the first great legislator of the Athenians, and as borrowing his institutions from those of the Egyptians. Accordingly we are informed, that he established, at Athens, the laws and ceremonies of marriage, in the same manner as they were observed and practised in Egypt. Polygamy was not permitted.[6] These regulations are described as the sources of virtues and enjoyments. They evinced the advantages of decency, the attractions of modesty, the

gamy." Story Conf. Law, § 114. This doctrine is assented to in England, the deduction is simple civilized society is based upon marriage, marriage must conform to the Christian religion; the intimate association between public opinion, religion and law is shown, the institution of slavery yielded to the same influence.]

[1] L. 1, c. 17. [2] 1 Gog. Or. L. 22. [3] 3 Gog. Or. L. 313.
[4] Gog. Or. L. 22. [5] Gen. xii. 19. [6] 2 Gog. Or. L. 19.

happiness of loving, and the necessity of constancy in love.[1]

The founder of Rome made, concerning marriages, a law, which, on many accounts, will deserve our particular attention. It was expressed in these words: "Let every wife, who by the holy laws of marriage falls into the power of a husband, enter with him into a community of goods and sacrifices."[2]

As marriage has been instituted by the first, it has always been encouraged by the wisest legislators. By the law of Moses,[3] a man, during one year after his marriage, was exempted from public burdens, and from going to war. A regulation nearly similar, as we are told, was established by the Incas of Peru.[4] The *jus trium liberorum*, introduced by the prudent policy of Augustus, was a permanent inducement to matrimony at Rome.[5]

Legislators have, with great propriety, carried their views still farther; they have provided, as far as municipal laws can provide, against the violation of rights, indispensably essential to the purity and harmony of the matrimonial union. Treachery, upon any occasion, is sufficient to stain a page in the annals of life; but perfidy against the solemn engagements of marriage obliterates the impression of happiness from every subsequent part of the conjugal history. Upon this subject, however, so interesting to the finest sentiments and emotions of the heart, everything, that might be wished, cannot, we fear, be expected from the operation of human laws. Much must be left to the influence of that legitimate honor, which we have described as the inseparable friend and companion of virtue. From the bastard honor, which we likewise described, it would be ridi-

[1] 1 Anac. 7.
[2] 1 Rol. R. H. 32.
[3] Deuter. xxiv. 5.
[4] 1 Gog. Or. L. 23.
[5] Mont. Sp. L. b. 23, c. 21.

culous, in this case, to hope for any assistance. In this case, as in many others, that honor glories in its shame.

Concerning the ancient Germans, Tacitus, in his short but masterly account of their manners,[1] informs us that among them the laws of marriage were rigidly observed; and that no part of their conduct was more exemplary.

We have seen the first institution of marriage among the Athenians and the Romans: a concise view of its history will be instructive and interesting.

In the heroic ages of Greece, we are told,[2] the rights of beauty and feminine weakness were highly respected and tenderly observed. The simplicity of those ages was equally remote from the cruel tyranny of savages, which condemns the fair sex to servitude, and the sordid selfishness of luxury, which considers them solely as instruments of pleasure. Hence those affecting scenes so exquisitely described by Homer, which, in the interviews of Hector and Andromache, exhibit the most striking image of nuptial felicity and love. But this beautiful picture of ancient manners was soon miserably defaced; and, in the degenerate periods of Greece, the fair sex were as much neglected and despised, as they had been loved and admired in the heroic ages.

In those degraded times, of which I am now obliged to speak, no pains were employed to render the Grecian females agreeable members of society, in any one part of their lives. Education was either entirely withheld from them; or it was directed to such objects as were fitted to contract and debase, instead of elevating and enlarging the mind. When they were grown up, they were thrown away in marriage, without being consulted in the choice; and by entering into this new state, they found the severe

[1] C. 18. [2] 1 Gill. 52, 56.

guardianship of a father succeeded by the absolute dominion of a husband. At this period, even the laws of Athens countenanced this unworthy tenor of conduct: to secure the fortune of the husband was deemed an object of greater importance, than to protect the person and honor of the wife from the outrage so peculiarly dreaded by female virtue.[1]

Let us now turn our attention to Rome. You recollect, that, by a law of Romulus, "the wife fell into the power of the husband." The law, which, on the whole, was very susceptible of a construction mild and generous, received from this part of it an interpretation most unwarrantable and severe. By this interpretation, colored with the unnatural fiction, that, on a solemn marriage, the wife was adopted by the husband, he acquired over her all the tremendous plenitude of Roman paternal power. This extreme, as is usual, soon produced its opposite; and female servitude was exchanged for female licentiousness. The solemnities of the ancient nuptials were declined, in order to avoid the odious consequences superinduced upon them by the construction and fiction of law; and the parties, without losing, on either side, their independence or their name, subscribed definite and stipulated articles of a marriage contract. Their cohabitation, and the appearances of a common interest which they exhibited, were received, without investigation, as sufficient evidence of a regular and solemn marriage. Hence that detestable train of conjugal vice, infidelity, rage, rancor, and revenge, with which so many volumes of the Roman story are crowded and disgraced.

By the precepts of Christianity, and the practice of the Christians, the dignity of marriage was, however, restored.

In the eye of the common law, marriage appears in no

[1] Gill. Lys. and Isoc. Int. c.

other light than that of a civil contract:[1] and to this contract the agreement of the parties, the essence of every rational contract, is indispensably required. If, therefore, either of the parties is incapable of agreeing, is unwilling to agree, or has not, in fact, as well as in ability and will, concluded the agreement; the marriage cannot be established by the principles of the common law.

Disability to contract marriage may arise from immature age. A man, as we have seen before,[2] may consent to marriage at fourteen; a woman at twelve years of age. If, before those respective ages, a marriage take place, either party may, at the age of consent, but not before or after that age, disagree, declare the marriage void, and

[1 This language is repeated in Story's treatise upon the Conflict of Law, § 108. The relation of the sexes which is called matrimony and which results from the act of marriage is not fully described by calling it a contract. It has attributes not possessed by the ordinary contract and it does not present all the incidents thereof. Its nature as a sacrament, while it enters very largely into the nature of the relation from the standpoint of society and religion, is not recognized and given any weight in the eye of the law. It is in this sense that the writers of the last century say marriage, in the eye of the common law, is a mere contract. Marriage is a legal state, relation, or status resulting from the conduct of the parties and accompanied by the matrimonial intention.

When certain ceremonies take place with the consent of both parties the legal relation follows. Where no ceremony is observed it is necessary to ascertain the intent which accompanies the acts of the parties; this may be done by considering their declaration and their conduct. The mere proof of cohabitation and the declaration of the parties that they were married might or might not engender belief sufficient to constitute proof.

The test in such cases is whether the conduct of the parties was intended as meretricious, or indicated that constancy and devotion to each other was intended. Cases have been held to be cases of marriage where the relation began while one of the parties was already married and this was known to both, but the parties continued to live lives of constancy and devotion after the disability was removed, although no new promise, intention, or ceremony was proved, in such a case, the Lords said: "Marriage is a status that arises from the conduct of cohabiting parties." Law Reports, 1 H. L. Cas. 182.]

[2] Ante p. 24.

marry again: but if, at the age of consent, they agree to continue together, there is no occasion for another marriage between them; that which has taken place being deemed a marriage, though only an inchoate and imperfect one. If, at the time of the inchoate marriage, one of the parties is, and the other is not of the age of consent, when the last arrives at that age, the first as well as the last may disagree; for in a contract of marriage, both or neither must be bound.[1]

Disability to contract marriage may arise from the want of reason. Consent, as has been already observed, is essential to this, as to every other contract; but those who enjoy not a competent share of reason, are incapable of giving consent.[2]

By a law of Pennsylvania, certain degrees of consanguinity and affinity, specified in a table subjoined to the law, are disabiliti to contract matrimony: and all marriages within tho egrees are declared to be void. I refer you to the ta specifying the degrees.[3]

One ndissolved, forms a disability to contract another: in such a case the second marriage is void as well a criminal.[4]

"Consensus non concubitus facit matrimonium," is a maxim of our law; marriage, therefore, must be the effect of willingness as well as of capacity to contract it.[5]

When to the ability and will to contract, an actual contract is added; then the marriage is complete.

Before the time of Pope Innocent the Third, there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house; which was all the ceremony then used.[6]

[1] 2 Ins. 79, a, b.
[2] 1 Bl. Com. 438.
[3] 1 Laws Penn. 46.
[4] 1 Bl. Com. 436.
[5] 1 Ins. 33.
[6] 3 Bac. 575.

By an act of the legislature of Pennsylvania, all marriages not forbidden by the law of God, shall be encouraged.[1] In the construction of legacies, it is a general rule that all conditions are unlawful, which would operate against the liberty of marriage.[2]

It will be proper, in the next place, to consider the consequences of marriage.

The most important consequence of marriage is, that the husband and the wife become, in law, only one person: the legal existence of the wife is consolidated into that of the husband. Upon this principle of union, almost all the other legal consequences of marriage depend. This principle, sublime and refined, deserves to be viewed and examined on every side. Among human institutions, it seems to be peculiar to the common law. Peculiar as it is, however, among human institutions, it seems not uncongenial to the spirit of a declaration from a source higher than human—"They twain shall be one flesh."

Even of the common law, this was not always a principle. We are told by the learned Selden, that the Saxon wives were never one with their husbands; nor were they, as wives, under the view of the frank-pledge: a Saxon wife was obliged to give pledge by their friends, that she would do no wrong. She passed as an appurtenant to her husband, rather than one in unity with him: and her estate was rather appurtenant to her than to him: for if she failed in her good carriage to her husband, she was to make him amends out of her own estate; and if that was insufficient, then her pledges were to make satisfaction for her.[3] This interposition of friends between husband and wife, in matters respecting either their conduct or their claims, seems alien to the delicacy and nearness of the matrimonial connection. On very pressing emergencies, indeed, it is necessary that the law should interfere,

[1] 1 Laws Penn. 36. [2] Swin. 266. [3] Bac. on Gov. 65.

and on such emergencies we shall see that it does interfere; but the general presumption and the universal wish ought to be, that, between husband and wife, there subsist or may subsist no difference of will or of interest. Such accordingly, during many centuries past, has been the language of the law. Bracton, in the reign of Henry the Third, informs us, that "husband and wife are as one person, because they are one flesh and blood."[1] Littleton, whose sayings are of such high authority, tells us repeatedly, "that the husband and the wife are but one person in the law."[2]

In pursuance of this principle, a crime, except treason and murder,[3] committed by the husband and wife, shall be charged against him solely; because the law will suppose that she acted under his influence or coercion. In pursuance of the same principle, a husband and wife cannot be witnesses for or against one another: if they were permitted to give testimony for one another, one maxim of the law would be violated—No one can be a witness in his own cause: if they were permitted to give testimony against one another, another maxim of the law would be violated—No one is obliged to accuse himself.

But, as has before been intimated, whenever urgent emergencies arise; whenever any outrage is threatened or committed against the peace or safety of society, as well as against the refined rules of the conjugal union; the law will interpose its authority, and, though it will not order, because it cannot enforce its orders for observing the latter, it will order, because it can enforce its orders for preserving the former.

The refined delicacy of the maxim—that husband and wife are considered as one person by our law—appears now in a beautiful and striking point of view. The rights, the enjoyments, the obligations, and the felicities of the

[1] 1 Ins. 187, b. [2] S. 168, 291. [3] 1 Bl. Com. 444.

matrimonial state are so far removed from her protection or redress, that she will not appear as an arbitress; but, like a candid and benevolent neighbor, will presume, for she wishes, all to be well.

To the other rights and to the other duties of a marriage life, we must extend the observations which we have already applied to one of them. Reliance must be placed on that honor, which is the inseparable friend and companion of virtue.

I have spoken concerning those consequences of marriage, which relate to the persons of the husband and wife: the consequences which relate to their property, will be fully considered under the second great division of my system: you observe, that I carefully avoid the blending of the two divisions.

By that event which closes the scene of all sublunary enjoyments, marriage is dissolved: it may be dissolved sooner—by divorce.

To the law of England, two kinds of divorce are known —a divorce from the bed and the table—and a divorce from the chains—the metaphor is proper on this occasion —a divorce from the chains of matrimony. The propriety of the first kind, I am, I confess, at a loss to explain: that of the second kind is frequently obvious. When, as we have seen, the impression of happiness must be obliterated from every succeeding part of the conjugal history, why should any more blackened pages be added to the inauspicious volume? But of causes which are slight or trivial, a divorce should, by no means, be permitted to be the effect. When divorces can be summoned to the aid of levity, or vanity, or of avarice, a state of marriage becomes frequently a state of war or stratagem; still more frequently, a state of premeditated and active preparation for successful stratagems and war. Such was the case in ancient Rome. "Passion, interest or caprice," says the His-

torian of her falling state, "suggested daily motives for the dissolution of marriage; a word, a sign, a message, the mandate of a freeman declared the separation; the most tender of human connections was degraded to a transient society of profit or pleasure." [1]

——Sic fiunt octo mariti
Quinque per autumnos.

Juv. Sat. VI. 20.

Non consulum numero, sed maritorum annos suos computant.

Sen. de. Benef. III. 16.

Both these remarks are levelled particularly at the female sex: but who drew the picture, in which the lion was injuriously represented?

Cicero, after having said, as we have seen, "prima societas in ipso conjugio est," adds, "proxima in liberis." I consider, in the next place, the relation of parent and child.

The transition is, indeed, a natural one. The sentiments of parental affection are generally warm and tender, in proportion to those of conjugal love. The sentiments of filial duty are generally sincere and respectful, in proportion to those of parental affection.

It is the duty of parents to maintain their children decently, and according to their circumstances; to protect them according to the dictates of prudence; and to educate them according to the suggestions of a judicious and zealous regard for their usefulness, their respectability, and their happiness.

The formidable power of a Roman father is unknown to the common law. But it vests in the parent such authority as is conducive to the advantage of the child. When it is necessary—and a real necessity exists much more rarely than is often imagined—a moderate chastening may

[1] 8 Gibbon, 62.

be administered; but every milder means should be previously used. Part of his authority he may delegate to the person intrusted with his child's education:[1] that person acts then in the place, and he ought to act with the disposition, of a parent. The legal power of a father ceases, when the child attains the age of twenty-one years.

But,—for we now turn to the duties of children—as obedience and subjection to their parents are due from them during their minority; honor and reverence are naturally and justly expected from them ever afterwards. If it become necessary, the child should, according to his circumstances, maintain the parent: 'tis but a natural and grateful return for the maintenance, which the parent has given to the child.

The decent reserve which the common law has shown, with regard to the relation between parent and child, should be admired, and may be accounted for on the same principles, which were observed under the relation of husband and wife. The civil law interposed in the nice feelings and tender transactions of both relations, with a rude and indelicate management. In that law, we find an enumeration of fourteen different reasons, for which a father may disinherit his child. Would it not have been much more natural, to have left, as the common law has left, this subject to the decision of that judge, which hold its tribunal in every parent's breast?

But, here as on former occasions, I refer the questions of property—and there are very important ones—arising from this relation, to the full discussion, which will be given under the second division of my system.

A bastard is one who is born out of lawful marriage. By law, he is considered *quasi nullius filius*. But surely it is the natural duty of his parents to maintain, to protect, and to educate him.

[1] 1 Bl. Com. 453.

The rules which govern the relation between a father and his child, govern, but in an inferior degree, and for a shorter time, that relation, which is substituted in the place of the other, between a guardian and his ward. On this subject, therefore, it will not be necessary to descend into particulars.

I come now to examine the relation between a master and his servants.

Slavery, or an absolute and unlimited power, in the master, over the life and fortune of the slave, is unauthorized by the common law. Indeed, it is repugnant to the principles of natural law, that such a state should subsist in any social system. The reasons, which we sometimes see assigned for the origin and the continuance of slavery, appear, when examined to the bottom, to be built upon a false foundation. In the enjoyment of their persons and of their property, the common law protects all. With regard, however, to any right, which one man may have acquired to the personal service of another, the case is very different. This right the common law will support.[1] He, to whose service this right is acquired, is only in the same state of subjection, to which every servant and apprentice is obliged, and finds it his interest, to submit.

The contract between a master and a servant arises upon the hiring. If a servant is retained generally, without expressing any limited time, the law will construe it to be for a year:[2] the reasonable foundation of this rule is, that, through the revolutions of the seasons, equality shall be preserved in the contract; that the master shall not have it in his power to dismiss the servant when there is little work to be done; nor the servant have it in his power to depart when there is much. The contract, however, may be made for any term longer or shorter than a

[1] 1 Bl. Com. 423, 425.

[2] 1 Ins. 42 b.

year.[1] If, during the term of the contract, the servant become sick, this is a condition incident to humanity. In his sickness, the master is bound to take care of him, and provide for him; nor can a deduction of wages be made for the time, during which he is detained from service.[2]

If a servant marry, the marriage dissolves not the contract to serve:[3] if, without any reasonable cause, he depart from his service, within the term, for which he is retained; he can recover no wages.[4] A contract for service is, on both sides, personal, and is discharged by the death of either of the parties.[5] This is the rule at the common law.

A master, we are told, may justify an assault in defence of his servant; and a servant, in defence of his master; the former, because he has an interest in the service of the latter; the latter, because the defence of the former is considered as part of the consideration, for which wages are stipulated and received.[6] The law is unquestionably so as is here stated: the reasons assigned for it, I am inclined to believe, are founded on principles much too narrow. The defence of one's own person is a part of the law of self-preservation. The defence of the person of another is, I think, a part of the law of humanity. This point, however, which is of a very general importance to the peace and security of society, will merit an investigation in another place.

The common law, retaining the refined delicacy which we have observed oftener than once, will not, without strong necessity, inspect or interpose in the interior government of a family. That sufficient authority, however, may exist to preserve order in the domestic department—a department of mighty moment to human happi-

[1] 1 Bl. Com. 425. [2] 2 Burr. 948. [3] F. N. B. 168.
[4] Wood, Ins. 51. [5] Str. 1267, Wood, Ins. 51. [6] 1 Bl. Com. 420.

ness—the law invests the master with a power to correct, but moderately, his servant or apprentice, for negligence or for other misbehavior. We have seen that "sine imperio, nulla domus stare potest."[1] Besides; in the regulation which the law has drawn concerning an atrocious outrage, in which she found it necessary to interpose, she has with a pencil exquisitely fine, but whose strokes can be traced by a discerning eye, marked a line of general direction for the relative rights and duties of a master and servant. From the latter to the former, she expressly requires a species, though an inferior species, of allegiance: from the former to the latter, she, by a necessary consequence, strongly inculcates a species, though an inferior species, of protection. These remarks will receive illustration, when the crime of petty treason shall come under our view.

Apprentices are a species of servants. They are usually bound for a term of years, to serve and to be instructed by their masters in their profession or trade.

Persons under the age of twenty-one years cannot, by the common law, bind themselves apprentices, in such a manner as to become liable to an action for departing from their service, or for other breaches of their indentures. For this reason, it is necessary that the parent, guardian, or some friend of the apprentice be bound for the faithful discharge of his duty.[2] But it is not every minor, who has such connections, willing to be bound for him.

By the custom of London, an infant, unmarried and above the age of fourteen years, may bind himself apprentice to a freeman of London; and the covenants in the indenture of apprenticeship shall be as valid, as if the apprentice had been of full age.[3] The spirit of this custom has been adopted and enlarged by the legislature of Pennsylvania. A minor, bound an apprentice with the assent

[1] Cic. de leg. 1, 3. [2] 3 Bac. 547. [3] Id. 347.

of the parent, the guardian, or the next friend, or with the assent of the overseers of the poor, and approbation of any two justices, is bound as fully as if of age at the time of making the indentures. But an apprenticeship under this very excellent law must expire, in the case of a male, at twenty-one, in the case of a female, at eighteen years of age.[1]

To qualify one for the skilful and successful exercise of a trade or profession, an apprenticeship is certainly useful; but, by the common law, it is not necessary. It was resolved, as we are informed in one of the reports of my Lord Coke, that, at the common law, no man can be prohibited from exercising his industry in any lawful occupation; for the law hates idleness, the mother of all evil, and especially in young men, who, in their youth, which is their seed time, ought to learn lawful trades and sciences, which are profitable to the commonwealth, and of which they themselves may reap the harvest in their future years. Besides; the common law abhors all monopolies, which forbid any from working in any lawful trade. If he who undertakes to work is unskilful, his ignorance is his sufficient punishment; for "quilibet quærit in qualibet arte peritos;" and if, in performing his work, he injures his employer, the law has provided an action to recover damages for the injury done.[2] To every monopoly, we are told by the same book in another place,[3] there are three inseparable incidents against the commonwealth. 1. The price of the commodity is raised. 2. The quality of the commodity is debased. 3. Those who formerly maintained themselves and their families by the same profession or trade, are impoverished, and reduced to a state of beggary and idleness.

Besides apprentices, and those to whom the name of servant is appropriated in the language of common life,

[1] 1 Laws Penn. 540, s. 1. [2] 1 Rep. 53 b., 54. [3] Id. 86 b.

the relation of servant is extended, by the language and by many of the rules of the law, to others in a superior ministerial capacity—to bailiffs, to stewards, to agents, to factors, to attorneys, and to the masters of vessels considered in their relation to the owners of them.[1]

Of many acts of the servant, the master is entitled to receive the advantage: of many others, he is obliged to suffer or to compensate for the injury. In each series of cases—it would be, here, improper to attempt an enumeration of particulars—In each series of cases, the principle is the same. Whatever is done by the servant, in the usual course of his business, is presumed, and fairly presumed, to be done by the command, or the authority, tacit or express, of the master; whatever is done by the master's command, is considered, and justly considered, as done by the master in person: "Qui facit per alium, facit per se."

Thus much concerning the relation between master and servant: and thus much concerning the component parts of that important and respectable, though small and sometimes neglected establishment, which is denominated a family. "Id autem est"—says Cicero,[2] in the fine and just passage already cited oftener than once—"id autem est principium urbis, et quasi seminarium reipublicæ." It is the principle of the community; it is that seminary, on which the commonwealth, for its manners as well as for its numbers, must ultimately depend. As its establishment is the source, so its happiness is the end, of every institution of government, which is wise and good.

In the introduction to my lectures[3] I told my hearers, that "public law and public government were not made for themselves;" but that "they were made for something better;" that "I meant society;" that "I meant particularly domestic society." Perhaps, it was then

[1] 3 Bac. 544. [2] De Off. l. 1, c. 17. [3] Vol 1, p. 30.

thought, by some, that all this was introduced merely for the sake of an encomium—but, by the way, an encomium severely just—with which it was accompanied. In the regular course of my system, the sentiment has now undergone a scrutinizing analysis in the most minute detail. I can appeal to such, if any such, who thought otherwise then—I can appeal to all, who have formed their opinion now, whether the sentiment, in all its parts, and in all its objects too, is not founded in sound politics and genuine philosophy.

In digesting a system of English law a little more than a century ago, it would have been necessary to notice and explain another domestic relation—not, indeed, founded in nature—that of lord and villain. Of the feudal city, however, we can still recollect the exterior battlements and towers, cumbrous, but disproportioned and insecure, and the interior buildings and halls, spacious, but comfortless and inconvenient. In ruins it now lies. With sentiments very different from those of regret, we can exclaim over it—*fuit servitus.*[1]

I have now done with considering the peculiar relations of man in a state of society, independent of civil government. But in that state, as he bears peculiar relations to some, so he bears a general relation to all. From that general relation, rights and duties result. His rights are, to receive the fulfilment of the engagements which are made to him, and to be free from injury to his peculiar relations, to his property, to his character, to his liberty, to his person. His duties are, to fulfil the engagements, which he has made; and to do no injury, in the same extensive meaning, in which he would wish and has a right to suffer none.

In a former lecture,[2] when I delineated at large the principles and the character of the social man, these rights

[1] Fuit Ilium. [2] Vol. 1, p. 261, 263.

and duties received their illustration, and were shown to be laid deeply in the human frame. To your recollection of what was then said, I beg leave to refer you. These rights and duties are indeed, as has been observed, great pillars on which chiefly rest the criminal and the civil codes of the municipal law. It would surely be preposterous to undermine their foundation, with a view to give strength or stability to what they support—to unfix what rests on the immovable basis of nature, and to place it on the tottering institutions of man.

I here close my examination into those natural rights, which, in my humble opinion, it is the business of civil government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain. I go farther; and now proceed to show, that in peculiar instances, in which those rights can receive neither protection nor reparation from civil government, they are, notwithstanding its institution, entitled still to that defence, and to those methods of recovery, which are justified and demanded in a state of nature.

The defence of one's self, justly called the primary law of nature,[1] is not, nor can it be abrogated by any regulation of municipal law.[2] This principle of defence is not confined merely to the person; it extends to the liberty and the property of a man: it is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation—of his wife, of his parent, of

[1] Est igitur, judices, hæc non scripta, sed nata lex; quam non didicimus, accepimus, legimus; verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus; ut si vita nostra in aliquas insidias, si in vim, si in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendæ salutis: silent enim leges inter arma; nec se expectari jubent, cum ei qui expectare velit, ante injusta pœna luenda sit, quam justa repetenda. Civ. pro Mil.

[2] 3 Bl. Com. 4.

his child, of his master, of his servant:[1] nay, it extends to the person of every one, who is in danger;[2] perhaps, to the liberty of every one, whose liberty is unjustly and forcibly attacked. It becomes humanity as well as justice.

The particular occasions on which the defensive principle may be exercised, and the degrees to which the exercise of it may be carried, will appear in subsequent parts of my lectures: for instead of being disavowed, it is expressly recognized by our municipal institutions.

As a man is justified in defending, so he is justified in retaking, his property, or his peculiar relations, when from him they are unjustly taken and detained. When and how this reception may be made, will also appear in the proper places. For this redress, dictated by nature, is also recognized by municipal law.

Under the same description, the right of abating or removing nuisances may, in many instances, be classed.

This long investigation concerning natural rights and natural remedies, I conclude by answering the question, with which I introduced it: man does not exist for the sake of government, but government is instituted for the sake of man. The course of it has naturally led me to consider a number of interesting subjects, in a view somewhat different, perhaps, from that, in which we see them considered in some of our law books; but in a view perfectly consonant to the soundest rules and principles of our law.

[1] Id. [2] 1 Haw. 131.