ELEMENTS

OF

JURISPRUDENCE.

BY

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"Jus Naturæ est dictatum rectæ rationis; indicans actui alicui, ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac sociali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore Naturæ Deo talem actum aut vetari aut præcipi." GROTIUS.

"Therefore, all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets. MATT. vii. 12.

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PREFACE.

Now that Law is at length assuming among us the rank of a science, the principles upon which it is to be founded ought to be well settled. In the discharge of my professorial duties, I have found increasing difficulty in accepting the currently-received basis either as right or as possible. In the following pages I have stated my objections to it. Believing, at the same time, that Law is capable of scientific reduction, I have also proposed the principles upon which, as I think, it must be so reduced.

The received formula, "Law is a species of Command," reduces the bulk of the internal law of every community—its customs and popular morality—to the abnormalism of *ex post facto* legislation, and excludes international law altogether from the domain of Jurisprudence. A custom or a recognized moral principle is Law, not by virtue of its general observance among the community; but only becomes so "when it is adopted

as such by the Courts of Justice, and when the judicial decisions fashioned upon it are enforced by the power of the State." As judicial decisions are of retrospective operation, the conclusion is inevitable, that a defendant may be cast in damages in a Court of Law, only because he has not complied with requisitions which, at the time they were made upon him, it was not legal to demand. In the same way, since, for want of a "determinate common superior," International Law is not Law at all, a ship, which has been captured in war and condemned by the Prize Courts of the captor's country, cannot be transferred to a neutral purchaser, so as to vest in him a legal title valid against recapture. These unsatisfactory logical consequences are avoided, if what is called the "absurd conceit" can be established, that these customs and recognized principles are not made law by being judicially adopted, but must be judicially adopted because they are law.

I cannot suppose that the consequences I have stated have escaped the notice of the eminent jurists whose authority has established the present basis of the Science; nor that they are insensible to the forced character of the constructions by means of which the fact of the undeniable influence of public morality upon Law, is bent to their formula. They must have accepted it as a choice of scientific evils; and, although there are other grounds assignable for their adhesion to the modern Epicurean philosophy, per-

haps I shall hardly err in attributing it chiefly to its apparent superiority to its rival in a fundamental point. "It is the most palpable defect of Butler's scheme, that it affords no answer to the question—what is the distinguishing quality common to all right actions?" It simply appoints Conscience high arbiter, without either assuming that he is necessarily right or providing a rule for his guidance. This is at once the frank confession of Mackintosh, the passionate complaint of Bentham, and the almost unmerciful taunt of Austin. On the other hand, whatever the defects of the system revived by Bentham and Paley, it has supplied an answer to this question (in the theories of Divine Command and Human Happiness), to which, if in any shape, some will object, in some shape most have been found willing to accede.

No doubt it may be so presented as to satisfy many supposable assumptions. If religious belief were not a fact, the scientific propriety of the answer would be recognized in the shape in which it finally tests the rectitude of actions by their tendency to promote Human Happiness: if religious belief were universal and uniform, we should presuppose a suitableness in an answer referring actions to their conformity with the Divine Will. But when the theories are blended to meet both cases, the answer is soon seen to satisfy neither, and to lose all logical connection and even identity in the attempt.

Nothing will be done, therefore, towards creating a Science of Law by merely starting afresh the old quarrel of the Stoic and Epicurean systems. I hold, indeed, that the abandonment of Grotius has been an error, and to his principles accordingly I seek to recur. But in this attempt I have (I believe) assumed nothing as a basis which Puffendorf or Bentham need have disputed. Mackintosh's question is the *crux* not so much of the schools as of the science: and must be faced, not only in the construction of that portion of it which belongs to Jurisprudence, but in the essential preliminary, to which these pages are devoted, of laying down the principles upon which the construction must proceed.

In this enquiry one feels it to be contrary to all probable thinking that there should really be anything new to discover. It cannot be that the principles of morality are an unknown tongue to a race which has been held together, for upwards of six thousand years, by their practical assertion. It is, therefore, among the admitted truths of Morals and Jurisprudence that I have sought for such as fill up the character of necessary and universal—truths which are undeducible from any prior principle, and apply, universally, to all the circumstances under which action can be conceived as taking place. After having been at some pains to clear the field of discussion, by getting rid of the foreign elements which so universally encumber our simple ideas of Duty and Law, and thus setting out

with a distinct conception of what the words really mean, I have not hesitated to propose, as a final test of action, the simple principle of Doing as you would be done by. The ordinary truth and general practical value of this principle are admitted by all: its axiomatic character and supreme rank are almost universally forgotten if not positively denied. On the side of its express repudiation we find the authority—not often concurrent—of Leibnitz and Puffendorf. I have, however, ventured to enquire, besides availing myself of some courageous aphorisms from Samuel Clarke, what prior truth there is to which it must be referred, or what conditions of action are without the range of its influence. To have exhausted this enquiry I make no pretension: it will be something if, after the slight account which seems heretofore to have been taken of the principle, I have vindicated its claim to a far more serious attention.

Assuming, however, that we have thus obtained a final test of Duty, we have by no means done all that is needful towards laying a foundation for Jurisprudence. It is not everything morally right which is rightfully compellable. The Moral Law of Force has still to be ascertained: and if this has been less the subject of controversy than the rule of Duty, this is the case apparently, because from the common deficiency of both schools in furnishing principles, materials for controversy have been wanting. On this perplexing topic I may be thought not to have done much

more than to raise the question, Whether the necessity of preserving the *status quo*, which is of so wide an application in Law, is not the ground upon which the use of force at all must be rested. But the main difficulty arises, I take it, at a further point. What is the *status quo*, morally considered? If, as I believe, this difficulty finds its own solution in discussing the point, how far Law is binding upon the conscience, it may be more easy to advance both questions another stage. The *status quo* cannot be stated as an invariable quantity, but its value in the equation may always be deduced from the principle that Law is bound to follow as closely as possible the constantly advancing standard of public morality.

In these speculations, English students of Law as a Science, will find but little in common with those to which they have been accustomed. The reasoning, of course, is different: but even many of the formal definitions must be framed in a new set of terms. For this no advocate of the principles for which I am contending can now be held responsible. A jurist who looks upon Law as part of moral science cannot accept expressions which go to ignore our moral being. Blackstone's statement of the Rights of Nature is conceived on a purely physical basis: nor can it, I think, be safely inferred (to take an instance from a subsequent chapter), that he was prepared to acknowledge it as one of the rights of nature to worship God. There are expressions which

one would gladly accept as such a recognition: but the conditions to which these are uniformly linked are destructive of their practical value, by leaving nothing of the God-given privilege beyond the civil permission. Mere anxiety for accuracy would lead any one to avoid the possibility of a similar result.

This work might easily have been more bulky and more learned; but I doubt if either quality would have been suitable to the present state of the Science in this country. Our studies of Jurisprudence are but beginning. The time has not yet arrived for the elaborateness of disquisition, which is proper for the develop ent of principle already settled. However much I have fallen short of the settlement—and in a new effort of this kind, one must hope for every indulgence—I believe all who have reflected on the subject will agree with me, that the attempt to which I have here confined myself is the step now wanting to our prosecution of jurisprudential science. To escape the necessity of alterations at once numerous and trifling, I have preserved the form of lectures: the substance of the treatise having been delivered in that form at University College. I trust that it is improved by a somewhat anxious revision. I hope, also, that whatever value it has is increased by the appended "Bases of a Science of Law:" in which I have collected, with some attempt at logical consecutiveness, the constructive principles which, in the treatise, are necessarily dispersed through a mass

of controversial matter. Upon this point I cannot refrain from an expression of feeling. It may appear, to my readers, that I have too much sought occasion for controverting the positions of Mr. Austin. That I have unconsciously done so I can readily believe. I differ *toto cœlo* from the principles which the signal perfections of his treatise have established as the foundation of the English School of Jurisprudence. But I am myself of his own training: and no student can do otherwise than refer to the acknowledged Master of the Science in any speculations he may form. The public has waited far too long for the second edition of Mr. Austin's treatise. May I hope that the appearance of this essay, concurrently with more important indications, may persuade him that the gift ought not longer to be delayed.

CHARLES J. FOSTER.

DECEMBER 24*th*, 1853.

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ELEMENTS OF JURISPRUDENCE.

LECTURE I.

"As regards the science of law, properly so called," says a French writer, "England sleeps on for ever."[1] Judging by the silence of our press, the neglect of our universities, the slight recognition of our Inns of Court, and the public indifference, the reproach seems only too just:—1. Since Mackintosh lectured on the Law of Nature and Nations, nothing here has attracted notice, except Mr. Austin's Treatise, published in 1832. This has long been out of print; and a second edition, though long announced, has not yet found its way to the shelves of the publishers. 2. It is at foreign universities that our law students usually seek scientific training. At Oxford and Cambridge Jurisprudence is unheard of. At London University, after maintaining an unequal struggle, it has been deposed, to make way for political philosophy.[2] 3. In the lately-established Lectures of the Inns of Court, each of the leading departments of English Law (Real Property, Common Law, Constitutional Law, and

[1] Lerminier.

[2] See Appendix, note A.

Equity) is very properly made the subject of a separate Lectureship; but it appears to be considered enough for the science to lump Jurisprudence and the Civil Law together. 4. A fund was bequeathed a few years since, for the encouragement of works on Jurisprudence. The conditions are somewhat peculiar; but the result is, I understand, that the Swiney Prize, to which I allude, is given triennially by the College of Physicians and the Society of Arts, each undertaking the adjudication in turn. One is not much surprised to observe, that the prize given on the last occasion by the College was for a work on *Medical* Jurisprudence; and that in the prospectus now before the public of the Society of Arts, it is hinted, in a foot-note, that "attention is particularly requested to *Arts and Manufactures*." But this is surely a mistake. No true lover of a science will willingly give undue prominence to any of its departments. If he consents to such a condition, in the hope of drawing some attention to it, he writes *invitâ Minervâ;* and is dissatisfied in proportion to his success.

Yet no one acquainted with our Law, but will assert for it a highly scientific character. We might, indeed, on this point, rely with much confidence on the opinion of any intelligent non-professional reader, derived from the study of only our books of reference. The admiration expressed by Dr. Parr for "Fearne's Contingent Remainders" would be felt, I think, by any well-trained student who should be sufficiently

versed in our technical terms to open "Harrison's Digest," or "Chitty's Equity Index," at random. And even without this knowledge, large extracts might be made of judicial decisions based upon the primary principles of our moral nature, stating, in language of unequalled felicity, the facts to which they are applied. These extracts could be carried to an extent, bringing to the mind, by degrees, a sense of completeness and coherence of parts not less than surprising. Bentham (who knew English law well enough and loved it little enough to be an unexceptionable witness) has left behind him a generous record of the impression which it made upon him. "Traverse," he says, "the whole continent of Europe, ransack all the libraries of all the jurisprudential systems of the several political states, add the contents all together—you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases."[1] And, in truth, the wonder would be if it were otherwise. The principle upon which the English professional adviser now stakes the fortune of his client, has been tested in every form by the recorded investigations of 800 years. The very language in which it is now stated for his use, and the conditions and manner of its application, are corrected from the actual experience

[1] Bowring's ed., vol. iv. p. 460.

of all that time. While so many other systems have undergone organic change, if not entire re-construction, ours has been adapting itself probably to more climates, has controlled more varied states of society, gone forth with more extended colonies, and walked hand in hand with more hostile creeds than any other that can be named.

It cannot be said then, that we have not great advantages for the construction of a "Science of Law." And if our materials are ample, most assuredly the state of our profession has at no time been such as not to furnish aspirants to the office. Such a treatise, moreover, would really be an era in our scientific literature. Far from being confined to our law-students, it would engage the sympathies of every man of education, and would obtain for its author as gratifying honours as any that can be won by the pen. That the attempt has not been made, is due partly perhaps to our national character. We are apt to believe, that our legal system answers its purpose as well as others—perhaps we should say better—in which attention has been expressly paid to scientific development; and we are perhaps inclined to shift off the blame upon our ethical writers, who, instead of being ready to avail themselves of the invaluable stores of practical moral philosophy which our labours are daily accumulating, are still turning to the "weak and beggarly elements," and fighting out the never-ending quarrel as to the foundation of morality itself.

I think, certainly, that we may fairly call upon our moralists to aid us in removing at least so much of the reproach as arises from the state of their own branch of our common inquiry. We cannot erect jurisprudence into a science, unless moral philosophy affords us some certain foundation upon which to rest it. The unwearied activity of thinkers of all classes for so long a time, must surely have left some points settled; and it may be, that the importance of others, still left doubtful, will not jeopardise the stability of a structure reared carefully upon these. My own belief is, that if we will only keep our purpose distinctly in view, and resolutely disengage ourselves from controversies—which, however closely connected with our inquiry, are still to us collateral, we may, without plunging at all deeply into the history of ethical science, select all we want. We must certainly not encumber ourselves with more: the entire undertaking is gigantic enough, if we may trust a high authority, without any additional burden. "When Leibnitz," says Mackintosh, "in the beginning of the eighteenth century, reviewed the moral writers of modern times, his penetrating eye saw only two who were capable of reducing morals and jurisprudence to a science. So great an enterprise might have been executed by the deep-searching genius of Hobbes, if he had not set out from evil principles; or by the judgment and learning of the incomparable Grotius, if his powers had not been scattered over many

subjects, and his mind distracted by the cares of an agitated life."[1] How much greater must now be the difficulty, when a hundred and fifty years have poured out their abundant additions to the already unwieldy bulk! The object of this course is humbler. We shall attempt the discovery of the fundamental basis of jurisprudence, and endeavour to show under what conditions its primary idea is developed. The development itself is practical law; and if we succeed in our part of the duty, we shall undoubtedly facilitate, to a most important degree, the labours of others, in reducing the whole mass to scientific proportions.

In asking, "What can we know of Law?" I shall not at the outset define what I mean by that term. To do so, would savour of an attempt to prove our conclusions by anticipating them in a definition which might not, after all, be satisfactory. There can be no doubt about the general idea which is conveyed to the mind when we speak of the law of France, or the law of England. Although the law in each country differs widely from the law in the other, there is a meaning readily recognised as identical in the word itself, to whichsoever of the two countries it be applied. It is law as thus understood, which I believe to be capable of scientific reduction; and which, accordingly, I now proceed to investigate.

In the first place, what is Science? For the same

[1] Mackintosh, Introd. Eth. Philosophy.

reason that I have just declined, for the present, to define Law; I prefer upon this point, also, to accept the views of generally recognised authorities. We shall be sufficiently justified by the names of Cousin and Whewell; and the circumstance that their discussions have physical rather than moral science more immediately in view, will furnish an additional guarantee for the satisfactory character of our result, should we succeed in fulfilling their requirements. In the outset of the "Cours d' Histoire de la Philosophie Morale" Cousin examines the several steps of attainable knowledge; pointing out that we arrive at:—1st. the External Condition of Objects; 2nd. the Empiric Law; and 3rd. the Necessary Truth. He shows that the first acquisition is entirely destitute of the certainty of science, the objects of our perceptions being continually undergoing change, and being even affected as to our perceptions of them by the character of our perceiving instrument. "The chameleon darkens in the shade of him who bends over it to ascertain its colours."[1]

If, however, we discover *the laws which regulate* the perpetual changes of individual phenomena, we shall always be able to determine what will be their mode of appearance, and properties at any given time. No longer limited to a sensation so transitory that we cannot say whether it belongs to present, past, or future, the mind extends to the conception of an

[1] Coleridge, Aids to Reflection.

immense series of phenomena, and embraces all parts of duration. Moreover, inasmuch as to know the law of any change is to know the invariable (at least so far as that change is concerned), the mind finds here a resting-place. But even this knowledge does not finally satisfy. It is not absolute but relative: it is true only for a certain order of things. It is also variable; for the very laws which regulate the changes of phenomena change also even as they.

But among these laws, continues Cousin; there are some in which our reason acknowledges the following characteristics:—1. They do not participate in any way in the variableness of phenomena. 2nd. Their modes of existence are rigorously determined, inasmuch as we do not conceive of the possibility of their changing, whatever be our point of view, or the nature of our senses. 3rd. They embrace all that exists in time or space. 4th. Not only do they exist: it is impossible that they should not exist. In fine, our reason conceives of these laws as *immutable*, *absolute*, *universal* and *necessary*. Having reached this, the mind can go no further. It stops here as at the bound of knowledge; but it aspires without relaxation or repose until it has reached it. The fact—the empiric law—the necessary principle—these are the three steps of human thought. The idea passes rapidly across the fact, rests a little in the empiric law, but reposes only on the bosom of the necessary principle.

In the course of some further observations, unnecessary to be referred to particularly, Cousin tells us, that when we have thus arrived at the necessary truth, all further explanation is impossible. Admitting this to be so, one feels, throughout these speculations, that an essential element in scientific enquiry has been forgotten. When Cousin defines universal truth as that which embraces all that exists in space and time, he implies that space and time are themselves elements in our knowledge of universal truth. This is so evident when it is stated, that we may be apt to look upon it as a point taken for granted, and of no further practical importance. Perhaps it would not be important were there no other conceptions of a similarly necessary character with those of space and time; but the fact is, that these conceptions are somewhat numerous, and have, moreover a degree of mutual connection which renders it not always easy either to trace fundamental truths to their legitimate source, or to develop them with an exclusive reference to the relations which they really involve. The axiom, for instance, that things that are equal to the same are equal to each other, is true equally with reference to quantities of space or number, parts of a day, and moral acts; but unless we have in view, in our scientific applications of this axiom, which of these ideas it is that is immediately involved in the special application of it which we are contemplating, we shall find, before advancing far, that we have unconsciously left our path.

It is to bring this element into due prominence that I propose we should avail ourselves of Dr. Whewell's speculations in the Philosophy of the Inductive sciences. I do not hesitate to do so, being unable to perceive that his results have been successfully impugned, notwithstanding the somewhat warm criticism which they have had to encounter. To refer to them briefly, it may be taken as the basis of his principles of scientific enquiry, that there are certain "inevitable general relations [e.g., space, time, force, motion, cause, life, elementary composition, etc.] which are imposed upon our perceptions by acts of the mind, and which are different from any thing our senses directly offer to us."[1] These relations, which Dr. Whewell shortly calls "fundamental ideas," involve "many elementary truths, which enter into the texture of our knowledge, introducing into it connexions and relations of the most important kind, although these elementary truths cannot be deduced from any verbal definition of the ideas involving them. . . They may often be enunciated by means of axioms. . . . Such axioms, tacitly assumed, or occasionally stated, as maxims of acknowledged validity, belong to all the ideas which form the foundation of the sciences, and are constantly employed in the reasonings and speculations of those who think clearly on such subjects."[2]

These ideas, in the course of our scientific inquiries,

[1] Philosophy of the Inductive Sciences, vol. i. p. 26.

[2] *Ibid*, vol. ii. p. 182.

are applied in a primary or in a modified form to facts; and our advance in scientific knowledge is marked by one or other of two results. Either "our conceptions are made more clear in themselves," or "they more strictly bind together the facts" to which they are applied. We may be satisfied as to the first point—our having acquired the requisite clearness of conception—when we "*see* the necessity of the axioms belonging to each idea"; when we "accept them in such a manner as to perceive the cogency of the ideas founded upon them." As to the second point, Dr. W. observes, that "each science has for its basis a different class of ideas; and the steps which constitute the progress of one science can never be made by applying the ideas of another kind of science. No genuine advance could ever be made in mechanics, by applying to the subject the ideas of space and time merely; no advance in chemistry by the use of mere mechanical conceptions, no discovery in physiology by referring facts to mere chemical and mechanical principles. Mechanics must involve the conception of force; Chemistry the conception of elementary composition; physiology the conception of vital powers. Each science must advance by means of its appropriate conceptions. Each has its own field, which extends as far as its principles can be applied."

You will observe, that the language of this last paragraph is carefully guarded. Our author does not

say, that one science can make no use of the ideas appropriate to another; he says only, that it can make no advance by means of those ideas alone. Where the sciences are the same in kind, one science accepts the results of another, and employs them in combination with its own principles. In conformity with this view, we have, at the close of the work, a chapter on the classification of sciences; and, indeed, the classification is presented to us in a tabular form, shewing at a glance the relative order of all the sciences included in it—what each one draws from those that are prior in order—and what it contributes to those which follow.

Dr. Whewell avowedly confines his inquiries to the physical sciences; and we, consequently, have to trace out for ourselves the application of a principle which is of more peculiar importance (as he acknowledges) to our inquiries than to his. There has been no problem probably more difficult than to define the proper limits of jurisprudence. Adam Smith taught long ago, that it was no part of the business of governments to carry on trade. A more modern school has arisen which restricts its province in regard to education; while another regards it as its most sacred duty to enforce theological belief. The only possible way, it seems to me, of settling questions of this kind, is to deal with the non-physical sciences just as Whewell has done with the physical, find out the fundamental ideas of each, place them all in their

right order of development, and give to each the facts it really binds together, uniting them by the bond [or idea], which in truth connects them with that science.

The sciences with which we have more immediately to do, are usually comprehended under the three great divisions of Mental, Moral, and Political. Besides some others, the rank and limits of which are not yet settled, they include Metaphysics, Ethics, Theology, Political Economy, Jurisprudence, and Political Philosophy. In the investigations connected with these sciences, there are ideas of constant recurrence, some of which may with propriety be denominated "Fundamental." Such are Spirit, Sense, Will, Conscience, Necessity, Duty, Right, Wrong, Force, Happiness, Value, Wealth, Labour, Nation, Government, Deity, and the like.

Now it would be entirely out of place to discuss at length the objects of all these Sciences, especially in an Institution which makes full provision for the study of almost all of them apart from this course. We can only gather up some of the general results with a view to indicate the position held with regard to them by Jurisprudence.

Inasmuch as it is from METAPHYSICS that we learn the nature and operations of the Mind; and inasmuch as it is with that mind and its operations that the other Sciences we have named are finally concerned, it is evident that with regard to them all, Metaphysics

must be regarded as the Primary Science. Consequently, wherever its ascertained results enter into the speculations of any of the other sciences, those results must in their enquiries be accepted as axiomatic truths. Where the questions arising in it are still in uncertainty, that uncertainty is the fact to be then proceeded upon. It may be that it will be removed in the secondary science, by means of the principle from which that science evolves itself; but if not, it seems tolerably clear that the science cannot assume what it does not know.

Perhaps you will anticipate that I should place ETHICS next in order; and the two sciences are undoubtedly closely connected. "It is impossible to follow the track of any great moral question without entering into the region of pure metaphysics." It has been said, morever, to be "impossible even to understand the meaning of the problems of metaphysics until we have some acquaintance with the grounds of morality."* But the development of moral duty between man and man undoubtedly implies the knowledge of the relations in which man and man stand to each other. To know what they ought mutually to do, we must know first what they relatively wish. Among the natural and universal desires of human nature the "desire of having," as Dr. Whewell elsewhere nomenclates it, is one of the most readily recognizable. By means of the conditions

[1] Maurice's Essay, *Encycl. Metrop.*

under which we live, this desire is modified into the practical form of a willingness to exchange. It would be impossible to proceed any length in the statement of moral truth without the constant use of expressions and assumption of principles, connected with this idea of exchange. Now, exchangeableness (or as it is technically termed "value") is the fundamental notion of political economy, which furnishes all these expressions and principles of which ethical investigations stand in so much need.

While this determines us to place POLITICAL ECONOMY before ethics, a suspicion may arise whether other sciences ought not also to accompany it. The circumstances which modify the desire of having into the willingness to exchange arise, it is instinctively felt, from the application of the principles of jurisprudence and political philosophy. We might take what we want by the strong arm, without any necessity for exchange, did not these sciences interfere by the institution of law and government. This is true as a matter of fact; and if it were necessary in our economical enquiries to make any use of the principles by means of which the sciences in question lead to these results, we should be bound to place them prior in order. But the truth is that the economist wants none of the conceptions of the jurist or of the statesman. He looks only to the relation of supply and demand; totally indifferent to their origin, or even their moral propriety. One trade is to him necessarily

the same as another. It supplies a want. The jurist, on the contrary, may forbid the gratification of that want as a crime. But were there no such thing as law and government, we should be willing to make an exchange for whatever we wanted, and could not otherwise obtain. I do not, therefore, rank these sciences prior to Political Economy.

POLITICAL PHILOSOPHY is usually considered as having for its object the investigation of the "best" form of government. What then is meant by "best"? If the true equivalent of the term be, that it is that which most promotes the happiness of the community —the science must rank in order prior to that of morals. But, inasmuch as the terms of the definition, and the necessity of explaining them present the science as subordinate; and as, moreover, all government employs force to effect its objects, we have the preliminary enquiry—under what circumstances force can properly be employed. This is evidently a question of Moral Philosophy; which, therefore, comes next in order after Political Economy.

There is this difference between the two sciences; that while the basis of the last-named rests upon the personal desire of the individual, the former looks to the effect of his conduct upon others. Having regard to these effects, it enunciates the axiom, "Men are responsible for their voluntary actions," and combining with this axiom the further postulate (drawn from metaphysics), that "Men are capable of being

influenced in their conduct by causes *ab extra*," it deduces the possibility of conditions under which they may lawfully be restrained. The investigation of these conditions is the business of jurisprudence, which is, therefore, the primary science to which political philosophy is subordinate. The equivalent expression, therefore, denoting the "*best* government" is, that it is that which applies the necessary restraint under the most convenient conditions.

Assuming, however, all this to be true so far, we have not yet reached the root of moral philosophy. We have stated no principle which, by virtue merely of its statement, renders the responsibility above spoken of self-evident. We want some conception and law of duty, which, taken in combination, shall preclude the question—Why ought I to regard the effect of my actions upon others?

I confess that it does appear to me, that, if in any point the Benthamite school of morality have the advantage, it is in the reluctance of their antagonists to close with this issue. Bentham insists upon it with almost passionate energy.[1] "The talisman," he says, in his "Deontology," "of arrogance, indolence, and ignorance, is to be found in a single word, an authoritative imposture, which, in these pages, it will be frequently necessary to unveil. It is the word 'ought;' 'ought or ought not,' as circumstances may be. In deciding, 'you ought to do this,' 'you ought

[1] See also Austin's Province of Jurisprudence Determined, Lects. ii.—iv. *passim*. Appendix, note C, I.

not to do it,' is not every question of morals set at rest?" If the use of the word be admissible at all, it 'ought' to be banished from the vocabulary of morals" (vol. i. p. 32).

A little farther on (p. 72), he supposes a controversy between an ancient and modern moralist. "The modern, as probably he will keep neither his principles nor his temper, says to the ancient, 'Your moral sense is nothing to the purpose, yours is corrupt, abominable, detestable; all nations cry out against you.' 'No such thing,' replies the ancient, 'and if they did, it would be nothing to the purpose; our business was to enquire, not what people think, but what they ought to think.' Thereupon," continues Bentham, "the modern kicks the ancient, or spits in his face; or, if he is strong enough, throws him behind the fire. One can think of no other method at once satisfactory and consistent, of continuing the debate."

To the word "ought," therefore, Bentham always insists upon replying by asking, "why?"

In reviewing this controversy, Whewell pleads, in extenuation of the Butlerian school, the great difficulty to which we must be exposed, when we attempt to express precisely, by means of language, our internal perceptions. "Even with respect to external senses," he remarks, "where the meaning of our terms is naturally much more clear and palpable, an exact treatment of such questions is far from easy. We cannot, by mere language, convey a conception of the

difference of sights and sounds."[1] This is true; but we can, by the aid of language, convey to a person who can see and hear, a perfectly distinct conception of the difference of sights and sounds, however we may fail to express it by means of language alone. What is wanted, is, that we should be able to convey a similarly clear idea of 'oughtness' to persons who *ex concessis* feel precisely as we do ourselves about it. To explain, as Whewell and Mackintosh do somewhat lengthily (especially considering that Bentham fully recognises it) that "right," though always identical in fact with "expedient," is yet a different idea—conveys no more information than it would do, of colour, for instance, to say that colour is always found on an opaque surface, but is something different from the surface itself. One cannot but feel that something much more explicit may justly be demanded. The more absolutely conclusive an answer is intended to be against further inquiry, the more absolutely surely is the enquirer entitled to know at least what the answer means. And if men generally are in the habit—as they are—of saying of actions, that they are right or wrong, and if the idea contained in these terms is at bottom the same, surely there must be some means of ascertaining what it really is.

We say, that the idea is at bottom the same: not that every man has that clear perception of it which would enable him readily to express it in equivalent

[1] Preface to Mackintosh's Dissertation.

terms. In the minds of scarcely any men does the idea present itself in its simple element. Feelings of expediency, accountability, propriety, personal happiness, and the like, blend themselves with it into a state of elementary composition, creating really a new product. If any man of ordinary intelligence were asked what his duty was, it is as near the truth as is probable to suppose his reply as being, "Something I must do." We may also not doubt his assenting to the observation, that the "must" in his case did not involve physical necessity; but if he were pressed further, it is mere conjecture to suggest his reply. He would explain readily his notion of what *made* his duty, and might prelect, greatly to the questioner's edification, upon every theory of duty ranging from Eternal Will to mortal convenience. But the question itself he would not answer further. It is, as we have seen, a main object of scientific enquiry, to obtain distinctness for these primary conceptions. We have in our next chapter to consider the one point left unnoticed in our classification of the sciences, namely, the relation of jurisprudence to theology. In pursuing that enquiry, and others connected with it, we shall, if I mistake not, find that we are eliminating the elements, whose presence mainly disturbs the clearness of our perceptions on this subject.

LECTURE II.

In our last lecture, after accepting the generally recognised division of the sciences with which we have chiefly to do, we stated their relative order as being—1st. Metaphysics; 2nd. Ethics; 3rd. Jurisprudence. Of this last we represented Political Philosophy as a subordinate branch. We have now to consider the relations of Jurisprudence and Theology.

In his Prolegomena to the Law of War and Peace, Grotius says, that his "first care was to refer the proofs of those things that belong to the Law of Nature to some such certain notions, as none can deny without doing himself violence. For the principles of that law, rightly considered, are evident of themselves, almost like things which we perceive through the external senses, which do not deceive us if our organs are without malformation, and other things necessary are not wanting."[1] His definition of the Law of Nature itself is as follows:—"Jus Naturæ est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ

[1] § 39. See Appendix, note B.

rationali ac sociali, inesse moralem turpitudinem, aut necessitatem moralem; ac consequenter ab auctore naturæ Deo talem actum aut vetari aut præcipi."[1] *Natural Law is the dictate of right reason, indicating, with respect to any action, from its consonance with, or opposition to, a rational and social nature itself, that there is in it that which is morally shocking or morally necessary; and, consequently, that it is forbidden or commanded by God, who is the author of Nature.* "And this Law of Nature," he adds, "is so unchangeable, that God Himself cannot change it. For though God's power is boundless, some things can be named to which it does not extend itself; inasmuch as with regard to them, the proposition that they are liable to change is without meaning and self-contradictory. Just as God cannot hinder but that twice two must be four, so neither can He render that otherwise than evil which is evil intrinsically. And this is Aristotle's meaning, when he speaks of some things as discovering their depravity at the first blush. For as the being and essence of things, after they once exist, depend not upon any other, so neither have the properties which necessarily follow that being and essence any such dependence. Such is the evil of some actions, when judged in relation to a nature enjoying sound reason. Therefore even God suffers Himself also to be judged by this Law."[2]

And all that we have said would be true, and the

[1] Book i., chap. i., § 10.1. [2] § 10.5.

law of nature still be in force, although it should be supposed (as it could not be without the highest impiety) either that there were no God, or that He took no concern in human affairs.[1]

Without going further into the propositions of Grotius, I think the following results may be collected:— 1. The idea of right and wrong, and of lawfulness and unlawfulness as naturally involved in it (*jus naturæ*), is one which inevitably attaches itself to all those actions of a reasonable being which affect others besides the agent. 2. Our perception of such actions in this relation, is as intuitive as that of objects in space. 3. We conceive of the [moral] necessity involved in the relation as being so absolute, that we could as soon imagine a change in the relations of particular numbers, as of particular acts being otherwise than they are in regard to right or wrong. 4. The test is, their agreeableness or non-agreeableness to an intelligent nature, conscious of the effect of its own actions upon other beings.

I have purposely abstained from merely reproducing the phraseology of Grotius; and in attempting to throw what I believe to be his meaning into a systematic form, I may have presented to you some ideas which you will hardly be prepared at once to recognise as his. I refer more particularly to the phrase I have used—actions *which affect others*. The only expression which Grotius uses at all like this, is where

[1] Proleg. § 11.

he speaks of actions being conformable *naturâ rationali ac sociali*. The epithet, of course, implies the existence of other beings who can be affected by the acts in question. I might also, perhaps, have assumed, from this word *socialis*, without much impropriety, the existence of a natural desire on the part of the agent, that his actions should affect these beings in such manner as they would wish to be affected. But, not to draw too much from a word, I have adopted phraseology which, besides expressing as little as it indicates, is also supported by the whole scope of Grotius's treatise, and indeed of any treatise on peace and war; viz., to explain our duties towards others.

The view taken by Puffendorf is stated with too much prolixity, to render extract desirable. Referring you to his Law of Nature (book I. chap. ii. § 6, and book II. chap. iii.—on the Law of Nature in General[1]), the following summary will, I believe, exhibit accurately the extent to which he agrees with and differs from Grotius.

It is not true, that actions are good or evil in themselves. Good (or moral necessity) and evil are qualities of human actions, arising from their conformity or nonconformity with a rule or law; and a law is the command of a superior: so that, except in connection with the command of a superior, good and evil are inconceivable. It is true, in point of fact, that such human actions as are agreeable to our social

[1] § 4, 5, 12, 13, 14, 15, 20.

nature are right, and the contrary wrong: but it is agreed, on all hands, that God created man, and gave him that social nature, entirely of his own free will; and that he might have given him any other nature that he thought fit: so that it cannot be that man's actions should be invested with any quality, without regard to His institution and appointment. The moral necessity which is violated by actions repugnant to the law of our nature is not absolute, like the necessity of "twice two" being "four," as suggested by Grotius; for it springs only from the social relation which has been (not of necessity, but of God's pleasure) imposed upon us. It depends, therefore, upon the existence of that relation, and is thus only a hypothetical necessity.

It is no argument against this to say—that if right and wrong are dependent, absolutely, upon the will of God, He might have commanded precisely the opposite kind of conduct to that which He has done, and made even that wrong which is now emphatically right; that, as between man and man, for instance, treachery might have been made a virtue, and compassion a crime: or that, as between Himself and His creatures, He might have commanded us to hate and despise Him, instead of rendering Him our worship and love. These shocking results by no means follow. In establishing a social nature God appointed a fundamental law, of which the virtues, as we conceive them, are necessary developments. Had He done

otherwise, He would have established some other relation, and created, not man, but a monster. The second hypothesis is self-contradictory. A rational being can only conceive of God as his superior and Lord. He cannot be at once the most eminent and the most despicable of beings. It might as well be said that He can die—be untrue—or make those things not done which have been done.

On the other hand, to contend for an eternal rule for the morality of actions, irrespectively of any divine institution, seems (to Puffendorf), to result in the joining with God Almighty some coeval and extrinsic principle, which He was obliged to follow when He assigned the forms and essences of things.

Without defining the law of nature, Puffendorf gives it as an axiom, that "whatever is consistent with a social nature is commanded, and whatever inconsistent forbidden"[1] (§ 15) and asserts (§ 19), that this principle is "in so high a degree adequate, that there is no natural obligation bearing a regard to other men; the reason of which is not terminated here as in the chief head and fountain of duty." "Yet, in order to give these dictates of reason the force and authority of laws, it must be assumed that there is a God, and that His wise providence oversees and governs the world, and the laws and affairs of men."[2]

We have it then, according to Puffendorf's views, laid down as follows:—

[1] B. ii. c. 3.

[2] See at large, § 20.

1. In themselves actions have no moral quality whatever. 2. If a superior being commands or forbids certain actions, they then become right or wrong by virtue of such command or prohibition. 3. The reasonable and social nature of which Grotius speaks has, undoubtedly, in point of fact, been imposed upon us by God. 4. Consequently, actions conformable to this nature are right, and those which are not are wrong. (The law of nature is, therefore, practically the same thing, according to both authors; but, as Puffendorf asserts,) 5. It is necessary in order to the establishment of the law of nature, to assume a being of supreme power and wisdom. (According to Grotius no such assumption is required).

The practical importance of this (apparently speculative) distinction will be seen immediately. Mr. Austin (adhering to Puffendorf) connects the result with Jurisprudence; and, at the same time, defines the province of that science by an argument of which the following is a brief summary. As Morality rests upon Command, so Jurisprudence rests upon Law. For as command is the "expression of a desire," distinguished from other expressions of desire by the power and purpose of the person commanding to inflict evil in case the desire be disregarded; so a law is a species of command, distinguished from other commands in that the obligation which it creates is of a general character, and refers to acts or forbearances of a class. Laws are of two kinds, divine and human. Human Laws are

established either: 1. by persons invested with, and acting by virtue of, the character of political superiors; or 2. by persons who are either not so invested or do not so act. It is the first of these two classes of human laws which is the subject matter of Jurisprudence. What is called International Law is not included; because inasmuch as there is no Superior Power as between Nations, there can be no Command. In like manner, that part of the Internal Law of States which is called Customary Law is not law as such, or by force of the spontaneous adoption of it among the Community. It only becomes Law when it has been brought regularly under the notice of the judicial tribunals of the State, and formally recognised by their decision: it being then to be understood that the State, speaking through its appointed minister, enjoins the future observance of what was, up to that time, not binding. In the same way, that large body of practical moral principle which all Judicatures recognise, is to be considered not as receiving such recognition because it is Law, but as becoming Law by virtue of such recognition.

The result of the Grotian principle is precisely opposite. Morality and Law being independent of Command, the Customs and Moral Principles which *proprio vigore* have won the assent of separate Communities, and the great system of International Law which has bound these Communities together, are all Law, and would be Law, though no Judge had ever

recognised them, and no King ever decreed their observance.

But for the last reference of Mr. Austin's, it might appear that, upon his principles, Law is something which may be detached altogether from Morality. Finding, as it is made to do, a basis in the Command of the Sovereign, there should seem to be no necessity for enquiring farther. But the account taken of these practical moral principles reminds us of the preponderating amount of identity in the systems of civilised communities. For the explanation of this fact, Mr. Austin resorts to the same origin as Puffendorf—conformity to the Will of God, the ultimate authority for them all. And he accordingly considers, at a length for which he is at some pains to apologise, the character of the evidence which is afforded us of the unrevealed Will of the Divine Being; that Will being, as he thinks, unquestionably, the happiness of his creatures.

Thus we see that both these authors—and we may say the writers of that school generally—base Morals and Jurisprudence upon Theology. It is obvious, indeed, that mere Command cannot be accepted as a fundamental basis of moral action. It is open as such to two fatal objections. 1. It does not apply to all the circumstances under which actions have a moral character;—all those cases, namely, in which the actions of one being may affect another. 2. It implies that the infliction of pain is not a thing which in itself

requires justification. A command, it is obvious, has no place except between a superior and one who is subject to his control; so that in no other relation (as e. g. between equals) has the moral law any existence. With regard to the second point, there is surely an incompleteness in the usual definition of a command. It is said to be the expression of desire enforced by the threat of evil in case of non-compliance. But a Command not only threatens evil, it inflicts it. The threat (in which its sole force lies) creates a present apprehension in the mind of the party commanded, that he will suffer by disobedience. This apprehension is a painful state of mind: so painful, that to get rid of it, something is done which would otherwise be foreborne. A command, therefore, is something which requires justification. This must be found either in the rightfulness of the action commanded, or in the right of the superior power to command it. Austin and Paley are here inconsistent with their own principles; asserting the right of the Supreme being to command—not, anything whatever, but whatever is expedient. Puffendorf absolutely rejects this qualification as irrelevant, and refers the whole matter to the Will of God.

There is something, at the first glance, so eminently gratifying at once to the religious and the scientific feelings of the mind in this view of the matter, that one does not wonder at the ready assent which it has

won among widely diversified classes of reasoners.[1] With those contemplations of the excellence of the Divine nature, in which the devout man loves to indulge, it savours almost more of an equivalent expression than of inference to say, that as obedience to the Will of God must be Virtue, so Virtue is obedience to the Will of God. The Puritans carried their view so far, as to insist that no rules of life were of binding force, unless they were to be found in the Sacred Writings; a doctrine which Hooker's Ecclesiastical Polity was written to confute. And to a mind which believes in a Universal Creator, there is beforehand the presumption of scientific propriety in thus literally leading "from Nature up to Nature's God." Even while it acknowledges the necessary character of the relations of number, for instance, and feels that they cannot possibly be other than they are, it can conceive of states of existence to which they have no application, and can believe in One with whom "a thousand years are as one day." For my own part, however, I cannot resist the conclusion, that the principle above stated, and which is involved in all these speculations—that Law and Morals depend upon Divine command—is shown to lead to results equally painful and inadmissible to the moralist, the jurist, and the religious believer. The question we have to answer here may, indeed, be confined to this. Is it a principle of which Jurisprudence can make use? And while we can hardly avoid some hints on

[1] Appendix, note C.

the general subject, it will be to this point we shall address ourselves.

Now the duty which Morals and Jurisprudence respectively have to discharge, I take to be simply this: to furnish a rule of action—voluntary in the one case, and compulsory in the other—which so commends itself to the mind of the person subject to it, as to assure the assent of his consciousness; and, consequently, in the case of its compulsory application, to preclude a sense of tyranny. It will be agreed on all hands, that the legislator may assume the existence of theological belief. That is a matter of fact, independent of the truth of the belief. He must also assume that this belief is a motive of action; for it is upon this motive that his own legislative action is itself proceeding. In his action, again, he must either rest upon the fact, that there is a variety in human beliefs, or he must select some one or more from the rest and act upon that.

We laid it down in our last lecture, that every science must accept as axioms the results of any other science prior to it in point of order; and that where those results are uncertain, it must adopt the uncertainty, unless it has within itself the means for its removal. As Jurisprudence will not be asserted to have any means of settling disputed questions in Theology, this principle would remove religious truth, as a basis of State action, from the cognizance of the Civil Magistrate, and would place religion simply

among those lawful occupations, the exercise of which, as such, it is his duty to protect. I feel, however, that the principle thus laid down is one to which I am not entitled to expect your assent, without a more lengthened consideration than it would be quite right to give to it here; and I believe that we may speedily arrive at a satisfactory result on the other assumption. Assuming, then, that Legislation is to be based upon a specific theological belief, it is, of course, requisite in this, as in any other case, that the basis chosen be abided by and adhered to logically throughout. We must not, for instance, at one point of our argument, assume the existence of a Supreme Moral Governor of the Universe, and then use reasoning which goes to divest Him of the moral attributes. So neither must we begin by resting in pure Deism, and then infer the Divine Will from arguments which imply those attributes. Take which we will, we must take it with all its consequences. If the result be that no Theological belief which we can adopt will serve as a basis, *cadit quæstio.*

Now there are (ultimately) three, and only three, views of the final principle of Theology which it is speculatively possible that the Legislator may adopt—Atheism, Deism (pure and simple), Moral Theism. He must assume either that there is no God; or that there is a God, negativing any further assumption than that of Supreme Power and Wisdom (which almost seems to be Puffendorf's basis); or, thirdly, he

must attribute to the Deity the moral character. All the varieties of religious belief are *quoad hoc* subordinate developments of one of these three.

The first assumption precludes any result; the second, to say the least, does not lead to any; and the third is inconsistent with any. It is so with regard to the first, on the face of it. Atheism is the destruction of Theology itself; and with it, negatives the Supreme Power, to whose will Morality is sought to be finally referred. The inadequacy of the second principle is equally evident on a slight consideration. It is even at variance with the idea of a Supreme Being not Himself moral, to suppose that He approves the moral rules. It is hardly exhaustive of the case to ask, as is sometimes done, what evidence you can give to the Deist of the Divine approval of those rules. Upon the Deist's assumption, they are wholly out of the Divine contemplation. The approval of moral rules is itself a moral act; and, as such, contradicts the assumption upon which we are now resting. The third (moral theism) is no less unfortunate. Admitting the argument rested upon it by Austin and Paley, it is inadequate; while that same argument, properly understood, is, as has been often observed, destructive of its own basis, and has all the effect of a *reductio ad absurdum*.

First, as to inadequacy. Both these authors test the obligatoriness of an action by its tendency to promote happiness; that (happiness) being the will

of God in regard to His creatures. Paley infers this from the considerations, that, upon the whole, men are more happy than otherwise, and that, if the Divine Being had not designed their happiness, it would have been easy, even upon their existing constitution, to have prevented it. Austin, in somewhat unequivocal language, asserts, that an opposite intention would have been "devilish and worthy of execration."[1] Now the facts relied on by Paley are not so absolutely unquestionable, but that the great Apostle of his own faith could say, that if the Christians had no hope but in this life, they were "of all men most miserable";[2] and (not to rely upon the circumstances of unparalleled distress and persecution under which this was uttered) Jeremy Taylor puts it as *the* natural argument for the immortality of the soul, that an existence hereafter is necessary to redress the unequal balance of good and evil which prevails in the life here.[3] The principle laid down by Austin is not questionable, but more; it is inadmissible. It may be a truth morally necessary, that in the fact of creation God designed the happiness of His creatures; but even then it could not be His main and ultimate design. It is not merely an utterance of devotion, it is the expression of a scientific truth, which is contained in the aspiration, "Glory to God in the Highest." Upon any system whatever which pro-

[1] Page 134, n. Appendix, note C, I.

[2] 1 Cor. xv. 19; see also Puff. b. ii. c. 4, §16.

[3] Appendix, note D.

fesses to explain the government of the human race on moral principles, the Glory of the Chief of Beings (who or whatever be esteemed as filling that character) must be an end to which all other objects are subordinate. If the happiness of His creation be the final purpose of the Creator, He exists for an end inferior to Himself. Assuming then that it is a subordinate object only, it is conceivable that circumstances may happen which shall render its fulfilment irreconcileable with the Divine perfection. It may become needful to punish where it was designed to bless; and of a Supreme moral Government it surely need not in terms be asserted, that it must not only be purely moral, but moral at all cost. But without saying that it cannot be made out, that not only was happiness the original design of creation, but that, notwithstanding all that has since happened, it is still the Divine purpose in regard to this life as well as hereafter, I do say, unhesitatingly, that an argument involving all these momentous assumptions, is not one to which, for the purposes we have now in hand, any student can be expected to yield his convictions.

But even when all this is overcome, the insuperable difficulty, the *reductio ad absurdum,* still remains. We are now assuming of the Deity, that He acts upon moral principles. But, as has been observed over and over again, this cannot be true if His will is itself the test of moral actions. That which defines a subject, cannot be a property of the self-same subject which is

defined by it. "To say that they [the laws of the Deity] are good because they are set by the Deity, is to say, that they are good as measured or tried by themselves. But to say this, is to talk absurdly; for every object which is measured, or every object which is brought to a test, is compared with a given object *other than* itself."[1] So that, in working out this last assumption, we first destroy the moral attributes of God, with which we commenced our argument, and then finally test the moral goodness of human conduct by its conformity to something which must be tested by something further. Thus neither of the three assumptions will serve; and whatever terms we may wish to recognise as grounding a satisfactory connexion between Theology and Jurisprudence—however little we may be disposed to insist upon the jurist standing absolutely neuter between contending creeds —we shall at least claim the right to *have* views regarding religious truth. That connexion can never be admissible, which allows us to be neither Atheist, Deist, nor Christian.[2]

It will now be proper that we should follow up our objections to the theories of others, by attempting to construct our own in the spirit of the principles upon which these objections have been founded.

We have already spoken of it as being the practical business of Law (the subject-matter of Jurisprudence), to attain certain moral results by means of compul-

[1] Austin, p. 134. [2] Appendix, note C.

sory action upon the Will; and as being, consequently, the object of the science to inquire under what circumstances this compulsory action is proper. We also assume, that in contemplation of human conduct affecting others, there does arise in the mind a sense of Duty, Responsibility, Right, Oughtness, or by whatsoever other name it may be called; and that it is the idea thus named which is the Foundation of the Moral Sciences.

In these assumptions, we are confining ourselves to clear ground. The subjects of contention do not arise here, but relate to the character of the faculty by means of which we derive this perception—whether it be original or acquired, or its decisions are always right—two points with which we have nothing to do; and to the test employed by the mind, consciously or otherwise, in determining whether any particular actions are agreeable or not to its sense of right—the question we are now to consider.

In the first place, our sense of duty is not confined to any specific relations between sentient and intelligent Beings. We do not think of some relations between such Beings that they involve a duty, and of others that they do not. The particular duty felt to be involved varies, of course, with our idea of the circumstances implied by the relation; but the presence of the obligation is felt equally in all such expressions as "Fear God"—"Honour the king"—"Honour thy father and thy mother"—"Love thy

neighbour"—"Muzzle not the ox which treadeth out his master's corn"—"Shall not the Judge of all the earth do right?" In each of these sentences, the mind recognises an argumentative, a self-proving propriety, in the combination with the act of duty commanded, of the character of the Being towards whom it is presented as due. We are conscious that with regard to any other relation which might be presented to us, corresponding duties would at once approve themselves to our minds. They are all instances of a universal rule. *Whenever we conceive of a plurality of Beings, the conduct of one of whom is capable of affecting another, and that Being is conscious of the effect of his conduct*—wherever, that is to say, there are relations between sentient and intelligent Beings —*there the idea of duty enters into our contemplation of that conduct.*

We say, designedly, capable of *affecting* another; and not, capable of affecting the power or the wealth, etc., of another; because, by such additions, we should either assume some specific relation, or we should say no more than is already implied in the simple expression.

Since, then, our idea of Duty is thus universal, we cannot accept as an equivalent for it any such conceptions as we are wont to express by the terms Justice, Charity, Forbearance, and the like. These are all virtues, but none of them is virtue. We can readily conceive of relations of Being in which

they should have no place. "Si nobis," says Cicero, contemplating the perfections of a future life, "cum ex hâc vitâ migravimus, in beatorum insulis (ut fabulæ ferunt) immortale ævum degere liceret, quid opus esset eloquentiâ, cum judicia nulla fierent? aut ipsis etiam virtutibus? Nec etiam fortitudine indigeremus, nullo proposito aut labore aut periculo: nec justitiâ, cum esset nihil quod appeteretur alieni; nec temperantiâ, quæ regeret eas quæ nullæ essent libidines; ne prudentiâ quidem egeremus, nullo proposito delectu bonorum aut malorum."[1]

And as we cannot accept such a representation of virtue as is connected with a special relation, so, in the same way, no principle will be satisfactory which implies such special relation. Hobbes's principle of Natural Equality among men, might probably suffice for a foundation of all the virtues which have place between man and man: but inasmuch as our idea of duty is not confined to that relation—and does not even imply equality, but extends to equals, superiors, and subordinates, all alike, this principle can only be regarded as carrying us a step farther on perhaps in our enquiry—as being one of those empiric laws in which we may be fain, with Cousin, to rest awhile—but not as assuring to us the certainty of Science, nor affording a complete repose to our minds.

[1] Fragm. Cic. ad Hortens. apud Augustin.

LECTURE III.

In stating, in my last lecture, what I conceived to be involved in the idea of DUTY, I confined it to such actions as affected others. I thus excluded, and I intended to exclude, as not, in point of fact, giving rise in our minds to the conception, all actions which might be contemplated by us as confined in their effects to the agent himself. I did not, of course, mean to deny that there are duties which a man owes to himself as well as those which he owes to others. The classification of prudence along with justice as one of the cardinal virtues, I am in no wise inclined to disturb. But nowhere is the idea of Duty attempted to be referred to a supposed condition of the agent as an isolated being. "If," says Puffendorf, "a man were born only for himself, we confess it would be proper that he should be left entirely to his own disposal, and be allowed to do whatever he pleased with himself. But since, by the universal consent of all wise men, it is acknowledged that the Almighty Creator made man to serve Him and to set forth His glory in a more illustrious

manner, by improving the good things committed to his trust; and since society, for which a man is sent into the world, cannot be well exercised and maintained, unless every one, as much as in him lies, takes care of his own preservation (the safety of the whole society of mankind being a thing unintelligible if the safety of each particular member be an indifferent point), it manifestly appears, that a man, by throwing aside all care of his own life, though he cannot properly be said to injure himself, yet is highly injurious both to Almighty God and to the general body of mankind."[1]

I think that while these enquiries have presented to us the senses of Duty and Law as existing independently of command, whether considered as emanating from any superior or from the Supreme Being, we shall also find ourselves in a condition, by collecting some of the general results, to disengage both from the foreign elements referred to at the close of my last lecture. We shall thus obtain the great desideratum in scientific enquiry, a clear conception of our respective fundamental ideas: and however altered by the admixture, they will probably be distinguishable enough when separated. The sense of Duty, then, is not the sense of self-approbation, nor of personal propriety, nor of self-enjoyment, or the like, considered as arising from the consciousness merely of

[1] Book ii. chap. 4, § 16. See also Smith's "Theory of the Moral Sentiments," part 3.

acting in one way and not in another. The sense of duty is confined to actions which affect others: and none of these senses require, to call them into activity, that our actions should affect any but ourselves. On the other hand, it is not any of such senses as the sense of subjection to the Divine Will, or more generally of accountability, or the desire to produce happiness or the like. The sense of duty embraces all relations with others and includes all acts by which others are affected. These senses refer only to a special class of relations or a limited range of conduct. Although, therefore, all of these senses accompany and greatly resemble the sense of duty, they are not any of them, nor do they make up, the sense itself. It is conceded, however, on all hands, that it is not the sense of physical necessity; and, it must be equally admitted, that the "something which I must do" already spoken of, is necessity. That necessity which is not physical, and the sense of which arises in the mind in contemplating all prospective action affecting others, must be referred to the conception entertained by the mind itself, of the necessary character of all such action. The conception we have of action, as affecting others, is the moral conception: the necessity, consequently, of which we have a sense, in respect of such action, is, simply, a moral necessity. Reduced, thus, to its mere elements, and disembarrassed of all the foreign accompaniments, with one or other of which it is, perhaps, invariably joined, we arrive, at length, at a

clear conception of the fundamental idea of Morals. The sense of DUTY is the *sense of moral necessity*.

I reject, as expressive of the idea of Duty, the phrase "*sense of moral accountability*"; because, as I understand the result of the argument, Duty is a sense called into activity irrespectively of the consciousness of the claim of any other Being to question conduct pursued under it. It is the sense which says,—"I thus act because *I* feel it to be right." But there is a sense of moral accountability, and it is one with which we have to concern ourselves. It appears to me to presuppose the sense of duty neglected, and to be the sense, arising from the consciousness of such neglect, that some other Being is entitled to complain. It is the sense which says,—"I so act because *he* feels it to be right." I distinguish this from the pure conception of Duty, as the combination with that conception which I think is the sense of LAW, the fundamental idea of Jurisprudence.

If it be demanded further, What is it that satisfies the sense of moral necessity? this is a question to be answered not by an analysis of the conception itself, but by ascertaining its primary principle.

Looking, then, for a fundamental law of Duty, considered as applicable to all conceivable relations being sentient and intelligent Beings, and which is, self-evidently, to govern the conduct of such Beings, towards each other, under any circumstances; asking for a principle which is to fulfil the four conditions

of Cousin—of being immutable—absolute—universal and necessary—I can discover none of these demands which is not complied with, in the short expression of *doing as you would be done by.*

But as this has been the subject of some notice, though it has hardly by any author had the importance attached to it of being the fundamental principle of Morals and Jurisprudence, it may be convenient to preface our own observations by a short statement of the views of one or two eminent authorities.

Hobbes, after laying down several principles which he asserts to be Laws of Nature, concludes, by saying:[1]—"Perhaps some man who sees all these precepts of nature derived, by a certain artifice, from the single dictate of reason advising us to look to the preservation and safeguard of ourselves, will say, that the deduction of these laws is so hard, that it is not to be expected they will be vulgarly known; and, therefore, neither will they prove obliging; for laws, if they be not known, oblige not, nay, indeed, are not laws. To this I answer, it is true that hope, fear, anger, ambition, covetousness, vain-glory, and other perturbations of mind, do hinder a man so as he cannot attain to the knowledge of these laws while these passions prevail in him; but there is no man who is not sometimes in a quiet mind. At that time. therefore, there is nothing easier for him to know, though he be never so rude and unlearned, than this

[1] Hobbes' Works, Engl. by Sir W. Molesworth, vol. ii. p. 44.

only rule, that when he doubts whether what he is now doing to another may be done by the law of nature or not, he conceive himself to be in that other's stead. Here, instantly, those perturbations which persuaded him to the fact, being now cast into the other scale, dissuade him as much. And this rule is not only easy, but is anciently celebrated in these words, *quod tibi fieri non vis alteri ne feceris : do not that to others you would not have done to yourself.*"

Puffendorf[1] seizes the occasion to display his learning. Aristotle (he says) being asked how we ought to behave ourselves towards our friends, answered, "As we wish they would behave themselves towards us." Seneca (de Ira 63, c. 12) says, "Let us suppose ourselves in the same circumstances as the person with whom we are angry. That which now puts us in a passion is only the wrong opinion and estimate of ourselves. We are unwilling to suffer what we are willing to do." It is a saying in Confucius, "Never to do to another what you are unwilling to suffer from him." The same precept was made use of by Inca Manco Capace, the founder of the Peruvian empire, with a view to bring his subjects to a civilised life. And, indeed, this is no other than that great rule prescribed by our Saviour Himself, of doing to men as we would be done by.

On the other hand, Puffendorf cites Dr. Sharrock as "of opinion that this rule is not universal; because

[1] B. ii. c. iii. § 13.

if so, a Judge must needs absolve the criminals left to his sentence, inasmuch as he would certainly spare his own life were he in their place. I must needs give a poor petitioner what sum soever he desires, because I should wish to be thus dealt with if I was in his condition. Or I must clean my servant's shoes, because I require him to clean mine. But the rule," continues Puffendorf, "will still remain unshaken, if we observe that not one scale only but both are to be considered: or, that I am not only to weigh and examine what is agreeable to me, but likewise what obligation or necessity lies on the other person, and what I can demand of him without injuring either of our duties. Yet we must confess that this precept cannot be esteemed a fundamental axiom of the Law of Nature, since it is only a corollary of that Law which obliges us to hold all men equal with ourselves, and therefore may be demonstrated *a priori*."

We do not, I think, collect anything positive from these extracts, except that the rule in question is considered by the writers to be useful as a *means of preserving the impartiality of the judgment* in cases where self-love is likely to intervene. Hobbes so uses it; Puffendorf expressly negatives its title to a higher character; and none of the other expressions quoted shew that more was contemplated. Dr. Samuel Clarke, however, in his Evidences of Natural and Revealed Religion, energetically insists upon it as the Fundamental Principle of Morality. He recurs to

the subject more than once; but his views will be fully presented in the following extract[1]:—

"In respect of our Fellow-Creatures, the rule of righteousness is, that in particular we so deal with every man as in like circumstances we could reasonable expect that he should deal with us; and that in general we endeavour, by a universal benevolence, to promote the welfare and happiness of all men. The former branch of the rule is Equity; the other is Love.

"As to the former, viz., Equity, the reason which obliges every man in practice so to deal always with another as he would reasonably expect that other should in like circumstances deal with him, is *the very same* as that which forces him in speculation to affirm that if one line or number be equal to another, that other is reciprocally equal to it. Iniquity is *the very same* in action as falsity or contradiction in theory; and the *same* cause which makes the one absurd makes the other unreasonable. Whatever relation or proportion one man in any case bears to another, the same that other when put in the like circumstances bears to him. Whatever I judge reasonable or unreasonable for another to do to me, that *by the same judgment* I declare reasonable or unreasonable that I in the like case do for him. And to deny this either in word or action is as if a man should contend that

[1] The italics are mine. Those of Dr. Clarke appear to me rather calculated to hide the argument than otherwise.

though two and three are equal to five, yet five are not equal to two and three. Wherefore were not men strangely and most unnaturally corrupted by perverse and unaccountably false opinions, and monstrous evil customs and habits, prevailing against the clearest and plainest reason in the world, it would be impossible that universal equity should not be practised by all mankind; and especially among equals, where the proportion of equity is simple and obvious, and every man's own case is already the same with all others, without any nice comparing or transposing of circumstances.

"In considering, indeed, the duties of superiors and inferiors in various relations, the proportion of equity is somewhat more complex; but still it may always be deduced from the same rule of doing as we would be done by, if careful regard be had, at the same time, to the difference of relation. That is; if in considering what is fit for you to do to another, you always take into the account not only every circumstance of the action, but also every circumstance wherein the person differs from you. And in judging what you would desire that another, if your circumstances were transposed, should do to you, you always consider not what any unreasonable passion or private interest would prompt you, but what impartial reason would dictate to you to desire. For example; a magistrate, in order to deal equitably with a criminal, is not to consider what fear or self-love would cause him, in the

criminal's case, to desire; but what reason and the public good would acknowledge was fit and just for him to expect. And the same proportion is to be observed in deducing the duties of parents and children, of masters and servants, of governors and subjects, of citizens and foreigners: in what manner every person is obliged, by the rule of Equity, to behave himself in each of these and all other relations. In the regular and uniform practice of all which duties among all mankind, in their several and respective relations through the whole earth, consists that Universal Justice which is the top and perfection of all virtues."—Prop. 1. § 4, rule 2.

I think these extracts raise the necessary issues; which we will now examine. You may find the same subjects noticed in the correspondence of Leibnitz (Op. omn. vol. iii.[1]); but they are dismissed with too much brevity for our present purpose; and, upon the whole, I do not remember that there is anything suggested by him which we have not already before us.

1. On comparing Dr. Sharrock's objection — one very commonly taken, by the way—with the replies of Puffendorf and Clarke, I think you will feel that it is satisfactorily met. The rule we are dealing with requires us to put ourselves precisely in the position—in all points—of the person to be affected by our conduct. The case of the boot-cleaning would hardly

[1] P. 388; see Appendix, note E.

puzzle any one who thought twice. If I were a servant and not a master, I should, by the act of entering into the service, have engaged to perform acts of this nature; and the last claim I should think of urging would be to be absolved from the contemplated results of my own undertaking. I should be willing for my master to do by me as I, being a master, actually do by my servant, in the case put. The master is not bound to *become* a servant; on the contrary, to obey the rule, he must continue a master, or he could not act as that relation requires.

Another kind of reply has sometimes been suggested in the case of the criminal, viz.: that it was a pity he did not think of the rule when he was committing the crime. This may be a very good retort; but it is by no means true, that the criminal has, by his own violation of it, put himself out of the pale of the law. There are still duties based upon it which the judge must perform towards him.

The judge's first duty does not, in this instance, affect his own presumable wishes, were he in the criminal's place. He has, in the first place, to act upon it as between the convict and the person he has wronged, and to consider how he would wish to be done by were he the injured person. Supposing he were, not a judge condemning, but the actual witness of the crime being committed, it is clear his duty would be to prevent it if he could. It being now too late for this object, there are still purposes to be

thought of. Compensation may be obtained for the injured person—the criminal may be reformed—similar crimes may be prevented. These are some of the presumed objects of punishment; and, so far as they are effected, punishment is the fulfilling of the law.

But, in fulfilling it, there is still a judicial discretion, of which the criminal may claim the benefit. The first murderer was not suffered to say, "My punishment is greater than I can bear." He may demand its considerate apportionment, regard being had to extenuating circumstances of his crime, or to his own state of physical infirmity. The judge must do as he would be done by, even towards the delinquent; the error consists in forgetting that he must also, and in the first place, do it towards others.

2. These considerations also disprove the opinion of Puffendorf, that the rule is a corollary from the law of "equality," and is, therefore, not fundamental. In the full extent of the rule it cannot be a corollary from the law of equality, for it applies to unequal relations as well. It may be true, that all men are naturally equal, and that this is a very good reason for adopting the rule as between man and man simply; but in the cases put by Dr. Sharrock the question is not raised as between equals, but as between *un*-equals. The argument supposes, and the reply admits, that the servant, for instance, is not equal to his master; for it is urged, on the one hand, that the master ought to do that which puts his servant on an

equality with him; and considerations are presented, on the other, to show that he is by no means under this necessity. "I am to consider," says Puffendorf, "not only what is agreeable to me, but also what obligation or necessity lies upon the other person"—an observation which would be out of place if the relative inferiority of the servant to the master were not an element in the case. It is somewhat strange that Puffendorf should have made the remark just in this connection.

3. The view which I have suggested, that the rule is not a binding law in any way, but is simply a convenient means of insuring the impartiality of our judgment, is stated by Mackintosh[1] more in the way of a self-evident observation than as one requiring any discussion. It must be admitted, that the way in which it is referred to by many of its advocates favours the opinion. Hobbes, as we have seen, uses it only for this purpose. The whole of Adam Smith's[2] discussion of the matter (he does not in terms allude to the rule itself in this connection) is pervaded by the same idea. But the question is, after all, What are the facts? We must use the same tests in this matter as Bentham acquiesced in when he acknowledged, that it would not satisfy the mind, when intending to denote the right or wrong of an action,

[1] Prog. Eth. Philosophy, Remarks on Smith.

[2] Theory, Part 3.

to speak of its uselessness; to use such expressions, for instance, as "It is useless to commit murder." The objection was, that the word "useless" did not convey the idea. So here, we must enquire what is meant by the question, How would *you* like it? Does the questioner, or does the person so addressed, understand this solely as a suggestion offered to aid in forming an impartial judgment of the merits of the proposed action? Is it not rather meant and accepted on all hands not only as an assertion that about that impartial judgment there can be no doubt, but that the state of mind of the person appealed to is one in which the judgment is in danger of being overborne by the will, and requires a conclusive appeal to restore its supremacy?

I believe we may rely upon any man's intuitive consciousness for the answers to this question. But if there be any further doubt, it may be tested by imagining the contrary rule asserted. If the rule be merely an aid to impartiality, all that can be said of the contrary rule is, that it furnishes no guide, and must, therefore, be put by. But I take it we should have something more to say of such directions, as "Do *not* as you would be done by." "*Hate* your brother." "Honour *not* thy father, and *forget* the sorrows of thy mother." These would all be felt by us as moral absurdities on the face of them, intended perhaps to add the sting of irony to the ordinary

severity of reproof. We should use such expressions in moral argument precisely as the *reductiones ad absurdum* in mathematics. "To recommend this course of conduct," we might reason, "would be equivalent to denying that you ought to do as you would be done by," and we should, beyond all question, mean, and be understood to mean, that this settled the question. In morals, just as in mathematics, we should mean to say, that an axiom had been violated.

I think that, as a matter of consciousness, we shall readily feel that this is so. If we wish also to see that this must be so, we shall do well to notice Dr. Clarke's very significant expressions. He says, it will be remembered, not that the rule of doing as you would be done by, is *like* the mathematical axiom of the mutual equality of common equals—what he asserts is, that the two principles are the *same*. And he asserts this identity in so many forms, and with so much energy, that it is impossible to doubt that he meant his words to be taken in their literal meaning. Indeed Mackintosh makes use of this construction, to lay it down that Clarke must be wrong. Agreeing with Mackintosh in his construction, I cannot follow him in his result. By what right (philosophical right, of course, I mean) can we confine the axiom, "Things that are equal to the same are equal to each other," to the properties of matter, or the relations of space and time? Why is not an action a "thing" within the

meaning of that axiom? How can it be otherwise than true of actions, as well as of other things, that those which are equal to the same are equal to each other—that an act done is the same act whether it be done by A to B or by B to A. Both in morals and in mathematics, it is only requisite that A and B respectively stand for the same subjects, whichever place they take in the enunciation of the principle. If we state its application in detail to a particular instance, it will be somewhat as follows.

As between Master and Servant, a given course of conduct (the shoe-cleaning of Dr. Sharrock will do as well as any other) is right.

A is a master and B is his servant. It is, therefore, right for B to clean A's shoes.

Let B be the master and A the servant. It will be right for A to clean B's shoes.[1]

Dr. Clarke thus lays down the position, that where I have judged an action to be unreasonable in another towards me, I have passed judgment on the action itself; and am bound, by my own judgment of it, not to do it towards him, and illustrates this by the algebraic principle of the equality in addition of the same numbers, whatever be their relative places in the summing up. Just as 5 is the same total whether 2 be added to 3 or 3 to 2, so an action which is right,

[1] The first of these cases is obviously an act with which the other two are severally compared, and their agreement with which renders them morally identical.

is right, whether I do it to you, or you to me. Upon this ground it is obvious, that, besides a very important guarantee for impartiality, we have also a self-evidently binding rule. We first insure an accurate judgment of the action itself, by eliminating these considerations which go to blind us in forming our judgment; and then come with an argument which every man's judgment must feel to be conclusive as to his own duty in regard to the action. We may say to him—You now realize the full consequence of this action, and with the full knowledge of what its effects must be for good or for evil on yourself, if you are to be the object of it, you refuse to be that object. Do it not, then, to any other.

I have seen it remarked somewhere, that the finest thoughts of poets and philosophers may find their parallel in the homely proverbs of every-day discourse. The fact (supposing it to be one) was adduced in proof of the intrinsic truth of whatever is great. In this instance, we have a somewhat apt illustration of both of these remarks, in a proverb as homely, perhaps, as any, but which I cannot forbear quoting for its real aid to the argument. "What is sauce for the goose, is sauce for the gander."

I need only add, in concluding this lengthened argument, that it is not my object here to uphold Dr. Clarke, but simply to find a foundation, if I can, for a science of Jurisprudence. You will find, in comparing Mackintosh's remarks with my own views, that

I have availed myself of an important correction of Clarke's language, if not of his theory, in confining the subject to those relations which are conceivable between sentient and intelligent beings. When, however, Mackintosh speaks of Clarke as "incidentally dropping intimations, which are at variance with his system"—in saying, e. g., that the Deity acts according to the eternal relation of things, "in order to the welfare of the whole universe," and that subordinate moral agents ought to be governed by the same rules, "for the good of the public," and observes the *new element* here introduced, he raises an objection which is fatal if not gotten rid of. But Clarke, as it happens, makes use of this last expression, "the public good," in the extract I have employed above; and there it is clearly a development of his theory. The magistrate, he there says, must deal with the criminal according to the dictates of "reason and the public good." The expression here is not only capable of explanation, but is, in fact, necessary to the development of Clarke's principles in the instance put. The judge must consider not only the criminal, but also, and before him, those who have received injury. The injury, you will remember (as Bentham accurately points out), is not confined to the immediate sufferer: in the alarm which it creates, it spreads through the whole community; so that if the "public good" were not consulted, the rule would, *pro tanto*, be violated.

You will not think too much attention has been

given to these preliminaries, if you remember how important it is that we should attain a clear conception of our fundamental principles. The most palpable defect of Butler's scheme of moral philosophy is represented by a warm admirer as being—that it affords no answer to the question, What is the distinguishing quality common to all right actions? And remembering, also, how essential it is to the success of any Law, that it should, up to a certain point, represent the conscientious feeling of the community at large, we shall be anxious to secure for it such an identity of basis with that feeling as alone can secure to both a uniformity of operation.

As the result of our enquiry, we have, at all events, obtained a conception of Duty, the clearness of which is matter of consciousness. We have, moreover, as we think, obtained an elementary principle inseparable from it, adequate to the support of a science of Morals and Jurisprudence. The conception itself holds precisely the relation to action which space holds to matter. We cannot conceive of matter as existing otherwise than in space—we cannot conceive of actions which affect others as being otherwise than Right or Wrong. And as we have now defined the principle of Duty, there is no kind or class of actions to which one of these designations is not necessarily applicable. We can readily conceive of actions as being neither commanded nor forbidden. We daily recognise their existence as "arbitrary." We can also suppose that

the actions of Beings of another sphere have no effect upon human welfare, and are, consequently, neither expedient nor inexpedient, in the sense in which those words are always used in these discussions. But we can conceive of no action whereby a sentient and intelligent Being (so far intelligent, that is to say, as to be conscious of its effects) produces results to other Beings—we can conceive of no such action, whatever be the relations between the active and the passive Being, respecting which the actor may not be addressed with the query—Would you be so done by? We have, therefore, a Primary Law, which is at once universal, immutable, absolute, and necessary. It is necessary, because it cannot but exist (or, to express it differently, because our minds cannot do otherwise than conceive of it) in relation to any action which affects another; it is immutable, as there are no supposable circumstances under which actions may be done, which modify its force; it is universal, as there are no actions which it does not govern; it is absolute, as it is unnecessary to its abstract truth that such Beings as we suppose should have any actual existence, or such actions as we have represented, should ever be performed.[1]

If we are right in these views, we ought, perhaps, to be able to overcome the difficulty which I cited from Dr. Whewell at the close of my first lecture—the difficulty, namely, of expressing precisely by means

[1] Esprit de Loix, Book i., chap. i.

of [mere] language our internal perceptions. My reply was, as you will remember, that although we certainly could not by language explain to persons born deaf and dumb the nature of sights and sounds, we certainly could find words which those who could see and hear would recognise as expressive of their conceptions. So I think in this instance. Having analysed, as I believe, the conception of Duty, and assuming that the sense of Duty is one which universally pervades human nature, we ought to be able to give a description of it, which shall not be merely what I may call the statement of it as a thing (moral necessity), but a representation of its scientific character. Now it appears to me that this is precisely done by Grotius' definition as quoted at the beginning of the second lecture. "The Law of Nature is that which is dictated by sound reason, indicating with respect to any action, from its self-approveableness (*convenientia*), or the contrary, to a reasonable nature, conscious of the effect of its actions upon other Beings, that it has in itself a moral necessity or unworthiness; and is consequently commanded or forbidden by God, the author of Nature." These are terms which, to a non-moral intelligence, would convey no meaning, but which exactly express what I have been attempting to explain as the actual idea and principle of Duty in the human mind. Duty, according to our notion of it, *is* that which is dictated by sound reason. The rule of doing as you would be done by, *does* approve

itself as a matter of sound reason, to a reasonable Nature conscious of the effect of its actions upon others. And not only so; but the terms of the Grotian definition are also not adapted to the views which we have been obliged to reject. There can be no "self-approving dictate of sound reason," in the system which bases Right on the Infliction of Evil; the necessary condition of a command. And, however true it may be that what is right is always expedient, it is equally self-evident that Expediency is not the test of which we are in search. For when we once act upon the assumption that we may deprive an individual of his happiness (which we do *pro tanto* by subjecting him first to apprehension, and secondly to forcible restraint), we can no longer refer to happiness as an ultimate principle. We have made it subordinate in the case of one individual; we cannot make it ultimate by adding to the number. It may add to the probability; but the happiness of a nation, or of the quasi-community of Nations which recognises International Law, is no more to be referred to as the ultimate test of the propriety of a supposed line of conduct, than is the happiness of one of their meanest subjects. "The question," says Dr. Arnold, "may be asked of every created Being, Why he should live at all; and no satisfactory answer can be given, if his life does not, by doing God's will, consciously or unconsciously tend to God's glory, and the good of his brethren. And if a nation's annals contain the record

of Deeds ever so heroic, done in defence of the national freedom or existence, still we may require that the freedom or the life so bravely maintained, should be also employed for worthy purposes or, else even the names of Thermopylæ and Morgarten become, in after years, a reproach rather than a glory.[1]"

Having now stated the fundamental conception of Morals and Jurisprudence, and indicated their probable place in the order of Psychological Sciences, the next thing would be to present, as our Postulates, all that we are entitled to assume from those Sciences which are prior in point of order, and all that we can know of Sciences whose existence we recognise, but whose truths we cannot accept as our basis. For reasons to which I have already alluded, I must refer you, first, to your study of those Sciences for their general principles, and then to what you learn here for the considerations which will guide your selection from them. To one point, indeed, I may allude as an example, and with it I shall close this lecture, because the subject is one of never-ending controversy, and, at the same time, one of which we can undoubtedly obtain all the certainty we want for our purposes. I allude to the existence of the Conscience or Moral Sense.

The question whether we have a moral sense is, of course, not one of Moral Philosophy, but of Metaphysics. The question is simply, Has the mind a

[1] Modern Hist. Inaug. Lecture.

certain faculty, or is it capable of a certain mode of operation; or is it not? Now upon this question of fact, there is, in the first place, no doubt that we do order some actions, mental and physical, with a sense of acting freely, voluntarily, as we please. We also act at certain times under a sense of compulsion. Secondly, with respect to these actions or operations, whichever be the technical term preferred, and whether they be of the mind or of the body, it is also a fact of every day's consciousness, that our minds contemplate them, and form opinions and are the subjects of sentiments in regard to them. When we have done an act, or formed a desire, that act, or that desire does very constantly—I need not now say that it does always—produce a reflex impression upon our own minds. This impression is of a different character, where our act or desire is contemplated as voluntary, from that which is formed where our act or desire was the effect of compulsion. In the former case, there is a sense of oughtness or self-approbation, or the reverse, in regard to our act or our desire; in the latter, there is no such sentiment.

Now I stop here, and ask you to consider what it is which, for the purposes of moral and jurisprudential inquiry, we are asserting. It is simply this—that our own voluntary desires and actions are the subjects of our approving or disapproving contemplation. We do not say how they come to be so, whether by a natural faculty, as the eye sees colour, or

by an acquired faculty, as the eye distinguishes form. We do not assert (thus far, though it may result from some of our preceding speculations) that it is always the same kind of actions and desires which is approved, and the contrary kind which is disapproved. We have drawn not from this, but from other sources, the information what the test is, and we have not asserted at all, that in applying this test the mind is always practically right. All these inquiries and more may yet be capable of exact solution; and if Jurisprudence required certainty, we should have to attempt it. But we shall rely not the less confidently upon the certainty of its results, because the sciences from which it draws inspiration are also concerned with unsettled matters with which it has nothing to do.

LECTURE IV.

HAVING now obtained (as we hope) an accurate and clear conception of the term Duty, and ascertained the principle which is the basis of Morals and Jurisprudence, we have next to state in form the subjects with which the Science is conversant, the facts which it recognises, and the principles which its reasonings involve. In other words, we have to lay down our Definitions, Postulates, and Axioms, just as we do in Mathematics. For, if it be really a science with which we have to do, there can be no question but that all its ideas may be presented as clearly, and that all its conclusions are capable of as rigorous statement as appears in any of the problems of Euclid. We have, no doubt, a difficulty to contend with, from which reasoners in that science are almost entirely free. Our subject is a familiar topic of ordinary discourse; and its terms have accordingly acquired all that looseness which, while submitted to, is fatal to scientific discovery. But, while we should be both unwise and even cowardly did we attempt to conceal from ourselves the magnitude of the difficulty, we shall see immediately, and in the same fact, at once, the great duty of overcoming it, and the almost

certainty, that very much, in that direction, must already have been accomplished. We see, as a fact, the great bulk of mankind willingly submitting themselves to the authority of government, that is to say, to forcible restraint, in their daily concerns of life. The minuteness as well as the general extent of this interference must surely satisfy us that some very accurate conceptions must be entertained of the cases in which such restraint is proper; while the fact that it is restraint, which our science contemplates, and restraint which, if need be, is to be backed up by force, must render us sensitively alive to the duty of not carrying it one step beyond its rightful jurisdiction.

Confining ourselves, then, to the conceptions which a simple Psychology presents to us, and only using the truths and ideas of other connected sciences as we may need them hereafter, we may take, as Postulates, sufficient for our immediate purpose:—

I. Men have the power of voluntarily directing their conduct.

II. Men are liable to affect others, and to be affected themselves by such conduct.

III. Men are capable of being controlled by the expectation of such conduct.

These give us, as the subject-matter of our science, *the voluntary conduct of man, considered as affecting others, and as capable of being controlled.* For the expression of the principles regulating this conduct, we may borrow the axioms of Thomasius, referred to

in the correspondence I have mentioned between Leibnitz and Bierling.

1. Quid tibi vis fieri, alteri feceris.

2. Quid tibi non vis fieri, alteri ne feceris.

Thomasius adds a third, which, while evidently symmetrical with the other two, is not exactly apposite to our subject. It is "Quod vis ut alii sibi faciant, tu tibi facies." This purports to express the principle of a man's duty towards himself; which only comes under our notice so far as it is already included under the other two axioms; by reason, namely, of the effect which his conduct towards himself has upon others.

I think these Postulates and Axioms contain the elements of both Morals and Jurisprudence; and also that they lead us to the distinction between the two sciences considered *inter sese*. It is perfectly conceivable, as an abstract proposition, that the whole science of Ethics might be contained in the first and second Postulates and the first Axiom: but, in point of fact, the idea of control involved in the last postulate and the second axiom is essential to its completeness. Force has, with all moralists, a recognised place in moral philosophy; and it is the combination of this idea of Force with that of Duty which serves as the basis of Jurisprudence. The science of Morals will not have filled its full circumference, until it has answered the question as applied to all possible circumstances—What is the course of conduct which ought voluntarily to be pursued? The sphere of

Jurisprudence is concentric, but of more limited radius. It asks only what is the course of conduct which ought to be enforced. The department of the common science which belongs to Ethics is the Moral Law of Free Action; that of Jurisprudence is the Moral Law of Compulsory Action.

Inasmuch, then, as the third postulate is material, and as the two axioms we have adopted are not merely opposite sides of the same idea, but involve the practical question of the employment or the non-employment of force, it becomes necessary to pursue this distinction, and to trace out, if we can, the boundary line which at every point separates that which is merely right from that which is also rightfully compellable.

The distinction is sometimes proposed between "perfect" and "imperfect" duties, examples being taken from such cases as the payment of one's debts and general charity towards the poor. In the spirit of these examples, it is usually stated, as the mark of a "perfect" duty, that a precise act can be stated, as proper to be done by a specific person to a specific person. I think it must be admitted, that the terms of the definition are borne out by the examples, although one especially may appear, at first sight, to be inconsistent, on the facts, with the principle suggested. It may be remarked, for instance, that while charity to the poor is clearly an imperfect duty, yet some system of poor-laws forms part of all approved legislations. There is not any real inconsistency; for

in all poor-law systems capable of being carried out, the rate-payers and the paupers are legally defined classes, and the duties and rights of each are exactly ascertained. The act is precise and the persons are certain. But the definition is objectionable, because it solves nothing. It is simply a physical statement of the conditions, without which no law is possible: it still leaves it open to enquire under what conditions law is justifiable. Unless you know whom you are to compel, what you are to make him do, and by whom (actually or virtually) the act of compulsion is to be performed, you cannot use the force which we are assuming Morality to allow: but the ascertainment of every one of these points leaves us obviously as much in the dark as ever, whether the force which is thus shown to be possible ought to be employed.

Dr. Adam Ferguson, in entering upon this discussion, remarks, that, "in all the instances in which the right of one man to compel another is acknowledged, compulsion, either in its immediate operation or in its final effect, is *an act of defence*."[1] And from this principle he deduces two further limitations to the employment of force—that it be necessary, and that it be effectual. With even these limitations, however, he shrinks from asserting that Defence is in all cases a sufficient ground for force. "Prudence, as well as humanity," he says, "would, in some instances, reject this authority, and reprobate the appli-

[1] Principles of Moral and Political Science, part ii. c. 3, § 1.

cation of a punishment against which human nature would revolt more than even against the crime itself."[1] No doubt you must not create a worse evil than you cure: but the difficulty is not, after all, with the limitations of the principle, but in the circumstance that the principle itself requires explanation. What *is* defence? If it means protection of a legal right, the argument is in a circle, for the whole question is, What ought to be made a legal right. If it means protection of a moral right, the argument still leaves the question unsolved; for it is not every moral right which can morally be protected by force.

We are conscious of the same deficiency when we have read Bentham's valuable chapter on "The Limits which separate Morals and Legislation."[2] We cannot study it, undoubtedly, without finding that we realize much more fully the bearings of the question: but when we have, as his final conclusion, "Leave to individuals the greatest possible latitude in all cases in which they can only injure themselves: interpose the power of the law only to prevent them from injuring each other," we really cannot say that he has told us anything. What is it, we at once ask, which constitutes an act of injury to another? When is it that not the moralist, but the judge, must say, Stay thy hand? These are questions to which Bentham avoids giving any reply.

[1] Principles of Moral and Political Science, part ii. c. 4. § 2.

[2] Vol. i. Dumont's ed. ch. 12.

We cannot draw the distinction between simple action and omission to act. "Sæpe jure," says Leibnitz, "coguntur homines, non tantum ut non faciant sed etiam ut aliquid faciant." Bentham himself complains of Laws that in matters of humanity they have not gone far enough; and proposes to render the omission to act penal, "when the service is easy to render, and some misfortune results from its refusal;" illustrating this by the examples of not lifting out one who has fallen into a pit, not warning of poison, or leaving a wounded man to perish. Action and inaction, therefore, may be equally matters of compulsion. But Bentham's illustrations lead us to what I believe is the true principle. In each of the cases put, whether something is done or action is abstained from, the same result follows—the *status quo* of the person affected by the conduct pursued is altered without his consent. The principle is one requiring careful elucidation, and in practice some limitations; but I believe that *the preservation of the status quo*, which you will recognise as of wide application in law, is really the test by which the propriety of the law's interference at all may be ascertained.

What we have to shew is, that in every instance in which the law properly interferes, its action is grounded upon a disturbance of the *status quo* by the person with whom it interferes. That it does not always interfere, even when this is the case, we admit; and some principles limiting its interference have already

been alluded to; but if it never interferes, excepting under this condition, our principle is clearly established.

Now, we cannot proceed by way of exhaustive analysis; nor is that requisite. The principle of the law is clear in every case of positive action on the part of the person whom it restrains; it is only when it interferes with his inaction that a question can arise. And even here the difficulty is only one of the first impression. When, to take such instances as are suggested by Bentham, a mother neglects to feed her infant, or a passer-by to render succour to one wounded by thieves, or who has fallen into a pit, the state in which the sufferer actually is at the time of such neglect, is one admitting of continued life and enjoyment. It is only the neglect that renders this continuance impossible. The faculties, overcome by complete exhaustion, will shortly not have the power to rally, which they now possess. The destruction of this power is a positive effect; for which the non-acting person is alone responsible, inasmuch as but for his inaction it would not have happened.

If you look at the cases of murder and manslaughter in our books, you will find not only that omissions are held criminal in both these degrees, but that the criminality is imputed, because it is the omission to act which has caused death. "Where any person," says Justice Williams, "undertaking the duty of supplying an infant with proper food and clothing, and furnished

with the means of discharging that duty properly, wilfully *neglects* to do so, with an intention to cause the death of the child, or to do it some grievous injury, and the child *dies in consequence of such neglect,* such person is guilty of murder. Where the neglect is culpable only and not malicious, such person is guilty of manslaughter. Where a parent supplies food and clothing to another for the purpose of administering to his child, and that other person wilfully withholds it from the child, and the parent is conscious that it is withheld, *and does not interfere*, and the child *dies for want of* proper food and clothing, the parent is guilty of manslaughter."[1]

It may perhaps appear to you that all cases of omission are liable to the same observations, and consequently that the distinction we are seeking for fails to present itself. I think, on examination, you will find it otherwise. Suppose, for instance, it were suggested that for want of warning you had suffered an habitual drunkard to drink himself to death, you would at once reply that that was a result resting with himself. It was in his own power to reform his habits; it was not in the power of the pit-fallen person to escape without aid. And the cases thus excluded from our principle form a class, embracing all those instances in which the prevention of an injury is not independent of the personal Will of the sufferer. In all these cases the disturbance of the *status quo*, though a fact, can-

[1] R. *v.* Bubb, R. *v.* Hook, 4 Cox, Cr. Cases, 455.

not be said to result from the conduct of a third party. So completely is this reasoning acted upon, that according to the well-known doctrine of our law, in cases of seduction, the person immediately injured has no remedy against her seducer; the fact being one which, in juridical contemplation, could not take place without her consent. The injury to her is great and irremediable; and it is an injury of which he is a direct cause; but inasmuch as, after all, it rested with herself, the law holds him (as between them) absolutely guiltless. It only mulcts him at the suit of another party, less directly injured, but to whom the maxim, "Volenti non fit injuria," does not apply.

I shall have other opportunities of referring to this principle, and will only now remind you of the necessity of caution in regard to the time to which the *status quo* must be referred. I need not say more, than that in the ordinary case in which a wrong which has been done is required to be undone, it is the *status quo ante bellum* which the Law contemplates.

I venture, then, to state it as the principle which severs the provinces of Morals and Legislation, that while you are morally bound to take all such opportunities as offer of doing good to your fellow-man, and are not the less bound to act in his behalf, because the effect of what you do may be to raise his condition even immeasurably higher than it is now; while such is your moral duty, the Law's requirements are exactly fulfilled, so long as you abstain from any conduct (act or omission) which, without his assent, would make

his condition other than it actually is. And this, I take it, is the idea which lies at the basis of the definition frequent among institutional writers, but, as it seems to me, very imperfectly explained by them, by which Law is described as a rule, not of human but of "civil" conduct.

It is here that it becomes material to remember that Jurisprudence is an applied science. As in physical Mechanics, we must in this also allow for friction; but, fortunately, we can also, as in that science, nearly estimate the quantum of disturbance it creates. There are cases in which we must, perforce, leave infringements of the *status quo* uninterfered with; but such maxims as "vigilantibus non dormientibus," "de minimis non curat lex," and others, define while they recognise the necessity. When we have made all allowance for such incidents as lapse of time, defects in evidence, the danger of creating greater evils than are sought to be cured, and the like, the whole result, compared with the great mass of matter subject to our control, is almost absolutely inappreciable, and is daily becoming less. In surveying the progress of Jurisprudence, we may still contemplate — with an enthusiasm less warm, perhaps, than that of Mackintosh, inasmuch as our capacity is inferior to his—the "cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason, and gradually con-

tracting, within the narrowest possible limits, the domain of brutal force and arbitrary will."[1]

We have now obtained, as the subject-matter for the regulation of our science, *the voluntary conduct of human beings, altering the status quo of others without their consent.* The next step is to present to ourselves a clear conception of the numerous elements, which enter, so to speak, into the composition of an act or omission, when it is such as calls for the notice of the Law. This is far, indeed, from being a mere matter of amusing curiosity. It is only as we clearly realise what it is in every case which the agent must be considered as having in fact done, that we are enabled to refer the act in question to the class of civil injuries or crimes. It is only thus that we can always pronounce with certainty who is the real doer of the act. The principles which I read to you a few moments back, from a recent decision of Mr. Justice Williams, may serve as an illustration. "*Wilful neglect*" was, in the case there referred to, declared to be murder. "Neglect, culpable, but not malicious," or as it is in another sentence, expressed with a more pointed distinctiveness, "*conscious inaction*," was treated as manslaughter. In like manner, the distinctions between larceny and embezzlement, and the great variety of the forms of action in our old system of special pleading, are all founded upon clear distinctions between the acts done in each case—distinctions carried undoubtedly to a

[1] Law of Nature and Nations.

refinement so burdensome, as well nigh to prove fatal to the system itself; but which, inasmuch as they are founded upon facts of necessary existence, and carrying with them results which do and will differ, must be recognised in any system of procedure adequate to the exigencies of civilised society.

In dealing then with civil conduct, the law looks first to the effect which it has had upon the *status quo*. Upon ascertaining that this is affected, the next point is, whether the effect has been consented to; and this being negatived, the inquiry arises, by whose conduct the effect has been produced. We have already spoken sufficiently of the first question; and may proceed to the second, which will involve much of the last. Consent is shown by some act done declaring consent, or by the omission of some act denoting dissent; and this omission may take place either through forbearance or by neglect. Consent or dissent being an act of the mind, mental capacity is an essential element of the juridical idea. Wherever, therefore, the nature of the case is not such as to preclude dissent, inquiry is made into the mental capacity of the person whose *status quo* is affected. He may be lunatic, idiot, or infant, or may be labouring under incapacity produced by external causes. The case of natural incapacity may be accepted as a fact negativing the consequences of any (physical) expression of consent. Where the incapacity is artificial, it is further to be ascertained by whose act it

has been occasioned. If by that of the person insisting upon the consent, he, of course, cannot be allowed to take advantage of his own wrong. If by that of the (physically) consenting person himself, although the same principle may apply to him also, yet it is to be asked before enforcing it, whether his condition was known to the other party at the time; in which case he is as much bound by the fact of which he has taken the advantage, as if he had actually occasioned it. But the point is not free from difficulty where he is ignorant. There is, in point of fact, no real consent; and it is not now the assumption, that the other party has intoxicated himself with a view to acquire an incapacity for this special occasion. He has simply employed his natural faculties in a way which, considered only in its effect upon himself, the law cannot forbid, but which, by an unanticipated result, has affected the condition of another—has led him to do acts which otherwise he would not have done, and for which he is now claiming benefit, or awaiting punishment at the hand of the law. My own opinion is, that in cases where consent is a justifying element, and the artificial disqualification is not produced by or known to the other party, but is immorally caused by the party himself, he is bound by his consent as one of the consequences of his own act. His case falls within the combined operation of principles which we shall state hereafter, by force of which, while the law cannot restrain him from intoxi-

cation, it is nevertheless not bound to protect him from its results.

I say, where consent is a justifying element. It is not a universal principle that a man can consent to everything which may be done against him. Not being an isolated being, it is an offence in him to commit suicide; and, by the same reasoning, he cannot consent to suffer death by the hands of another. Accordingly, by our law, duelling, when resulting in loss of life, is murder.

You will find in Puffendorf[1] several passages cited approvingly from Aristotle, to the same effect with our general principle. The most pertinent perhaps is the extract from the *Magna Moralia*, lib. i. c. 34, in which he lays it down, that when a man's ignorance is self-caused, and in that ignorance he commits an injury, he is justly responsible. This, he says, is the case of drunken men, who, if they commit any disorder while in that condition, without doubt do real wrong, being themselves the cause of their own state. Bentham[2] reprobates the doctrine; but I confess it appears to me in strict accordance with principle.

To return, for a moment, to the case of natural incapacity. Although, when proved, it precludes further inquiry, yet, inasmuch as the case is exceptional, and excepting, perhaps, in the case of idiocy, not of a permanent character, it requires to be established by the person seeking relief on the ground of it. With

[1] Lib. i. c. 5. s. 10. [2] Dumont's ed., vol. ii. p. 277—8.

respect to infancy, the proof that it has ceased, and that the faculties have acquired maturity, is established, in all modern civilised communities, and also, except during the earliest period, by the Roman Law, by the attainment of a definite age. Thus, up to seven years of age, by our Law, the infant is deemed, as being *doli incapax*, absolutely incapable of committing crimes of a certain order. From seven to fourteen there still remains a presumption in favour of his innocence; but it may now be rebutted by proof of actual malice. In civil matters the age of maturity is twenty-one; within which age (the principle is usually expressed by saying that) he can only contract for necessaries. I confess I doubt very greatly the accuracy of this manner of statement. It is not because a tradesman has relied upon an infant's promise that the Law accords him the price of necessaries, for the law regards him as incapable of making a promise. "The general principle," says Mr. Smith; "which regulates this branch of the law, is, that until an individual has attained the age of twenty-one (which period the law has selected as that at which a person of average capacity may fairly be supposed to have attained sufficient experience to render his natural faculties fully available in the actual business of the world), it is necessary to shield him from the dangers of becoming a prey to others willing to take advantage of his inexperience."[1]

[1] Smith on Contracts, Lect. 8.

This reasoning, resting, as it does, on sheer incapacity in the infant, obviously affects all bargains alike. To infer, as Mr Smith goes on to do, that as there are no means of so shielding the infant "except by placing him under a limited disability to contract, he is accordingly placed under such limited disability," betrays an almost ludicrous obliviousness of the explanation which he has been at evident pains to interpolate in the preceding sentence. The case is one of those (for our objection applies to the whole terminology of what are called *implied* contracts) in which the law acts for the protection of a moral right acquired under circumstances under which there has been no contract whatever; and which moral right is legally cognisable, inasmuch as it is founded upon an alteration of the *status quo* in the person claiming it. The simple principle I am stating is veiled under a mist of technical phraseology; but we shall perceive its presence if we observe that the ground upon which the plaintiff recovers, in these cases, is the proof that he has parted with his goods to supply the infant's necessary requirements.

Assuming, however, that the (formally) consenting party is capable, the effect of his doing so may be neutralised by the ignorance or mistake on which he proceeded. *Non videntur qui errant consentire* is a rule of the civil law, founded equally on common sense and common justice. But the plea is not conclusive. As a general principle, every man is bound

to know the law: and, under the circumstances, he may be bound to know the facts. The large portion of technical law with which all systems inevitably abound, may give the first of these principles an appearance of harshness; but this is removed when it is felt how largely even this technical portion has been established, as being the most convenient practical form of giving expression to the popular conscience; and that he who relies on ignorance of its requirements is, in fact, only attempting to avoid the compulsory obligation to do what he knows to be right.

With respect to ignorance, or mistake of fact (the cases are not precisely identical), the principles, although generally well settled, have, on some points, been the subject of an extraordinary degree of discussion. The points of enquiry are, principally, whether the fact, unknown or misapprehended, is material to the consent; whether it was such as the party could easily have known; whether the error was common to both parties; whether produced in the mind of one by the concealment or misrepresentation of the other; and, if the latter, how far the presence or absence of moral fraud is an essential element in disposing of the case.

We must conclude with a few observations on the point—Who is to be considered the author of the effect produced. The precise physical act which I do may produce effects which I did or did not contemplate, and for which I may be responsible nevertheless. I

stretch out my arm, intending to stretch out my arm; but not intending to strike a person who (consciously or otherwise on my part) is standing within its swing. The question in these cases will often be found to turn with the moral as well as the legal propriety of my personal act. There is an often-cited case[1] which serves as an apt illustration. In an action of trespass for throwing a squib at the plaintiff, whereby he lost the sight of his eye, it appeared that the defendant threw a lighted squib into a market-house where a large concourse of people were assembled, and the squib falling on the standing of B, he, to prevent injury to himself and his wares, threw it across the market-place, where it fell upon the standing of C; and he, from the like motive, threw it among the crowd, where it burst and injured the plaintiff; the Court (*dissentiente* Judge Blackstone) held that the action lay, for the defendant was the person who threw the squib, and if it had then immediately hit the plaintiff, there could have been no doubt; and the new direction and new force given to it by B and C was merely a continuation of the original force impressed upon it by the defendant. Blackstone differed from the rest of the Court, not as to the fact of injury, nor as to the responsibility of the defendant, but as to the form of obtaining redress. Considering that the injury was not the direct effect of the defendant's act, but merely a consequential

[1] Scott *v.* Shepherd, 3 Wills, 403, 2 W. B. C. 892.

result, he thought that the case fell within the province of a form of action different from that employed.

Connected with this part of our inquiry are the principles on which the Law ignores altogether acts done under duress, and refers acts done under the control, influence or authority of others to the persons exercising such control, authority or influence. The husband for his wife, the father for his child, the master for his servant, the owner even for his vicious ox, are all responsible under limits, the general principle of which you will readily perceive. The doctrine is not confined to the effect of acts so authorized upon third persons; it applies also as between the parties themselves, and is extended to every case in which the relations are such as to give one of them a practical superiority of influence over the other. Good faith is requisite in all transactions; but in these cases an *uberrima fides* is required, the absence of which will preclude the retention of benefits, not only where the influence arises from the ties of blood or of marriage, but under such fiduciary engagements as that of an attorney to his client, a physician to his patient, a confessor to his penitent, or a guardian to his ward.

LECTURE V.

INASMUCH as the action of Law is restricted to the case of disturbance of the *status quo*, it follows that men must not be precluded by it from that use of their faculties which does not involve such disturbance. The jurist may acknowledge, no less than the moralist, that a large portion of the action of men is directly grateful to their fellows, that much is indifferent to them, and that in much they will acquiesce. It may, therefore, readily be demonstrated—we will not now enter into the argument—that the Law acts usually rather by way of remedy than of prevention, and that the instances in which it may anticipate the overt act require careful definition.

It is on this principle are founded what are called Rights of Nature, or Rights of Man—rights which have been alternately exposed to extravagant eulogy and indecent contempt; but which have neither the less a real existence because the claims which have been challenged for them of "unalterable," "inalienable," and so forth, are absurdly overstrained, nor may the less certainly be limited or taken away,

because it may be true that, considered in themselves, they are above the reach of the Law's interference.

It may perhaps seem, that a less guarded statement of the principle would have been sustainable. It may appear enough to say, that inasmuch as every man is bound to do as he would be done by, he must be left with so much freedom as will enable him to do as he would be done by. But this statement would be faulty both because it certainly carries us too far, and also because it is not apposite to Jurisprudence, but to Morality. We cannot enable a man to do in all things as he would be done by without also enabling him to do many things otherwise; and if we could, it is not enablement, but restraint, which is the business of jurisprudence. As a merely moral principle, indeed, it is unexceptionable, for there can be no duty where there is no power to discharge it, and powers which avail in morals are moral rights. But since Law acts by restraint only, the recognition accorded to these Rights by Jurisprudence must rest, at all events primarily, on the ground that their exercise is the *status quo*, the disturbance of which is the occasion of its own interference. Inasmuch certainly as Law (being moral) must proceed upon the assumption of moral duties, even although they be such that it cannot enforce their observance, their existence furnishes a supplementary ground for the protection of the Rights necessary to their discharge. The first point is, that against Rights of Nature the Law has no ground

to interfere; the second, that they can claim its protection for the sake of the duties to which they are necessary.

These Rights of Nature then extend to the exercise of the bodily and mental faculties so far as the power to exercise them is essential to the attainment of the moral rights of the individual, or to the discharge of his moral duties. In the English institutional writers you will find these enumerated as consisting of the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation, and the power of locomotion This is hardly satisfactory whether as to accuracy or completeness. It is too extensive for an elementary reduction; it is not extensive enough for a complete account. Strictly speaking, the power of locomotion is already involved in the enjoyment of life and limb; and ought, therefore, not to be expressly stated in terms; while, if we are to limit the idea contained in the first part of the enumeration, and are to understand the rights there spoken of as confined to a right not to be killed, not to be maimed, not to be wounded, not to be poisoned, and not to be slandered, we feel at once that the whole range of the faculties of the mind is ignored. According to this account of the matter, a man has no natural right to exercise his understanding, nor to worship his God. It is not because he may think, but because he has the right to use his fingers, that he may assist himself in his investigations with the pen. He may attend the

religious observances of the Sabbath-day, not because he desires to adore his Creator, but because he has the right of locomotion. This is not a hypercriticism upon an isolated passage. The omission runs through the whole treatises both of Blackstone and Stephen. The right to think is not thought of until we come to the Chapter on Patent and Copyright: the right to worship, as far as I can discover, is not acknowledged at all.

It seems to me, that the error has arisen from a fault I have more than once had occasion to notice, a too exclusive attention to the practical form in which the object sought is, in fact, provided for. In this view perhaps there is no right of nature which cannot be really included in the enumeration I have cited. But in enquiring what it is that the law aims at in its interference or inaction, we must, to a large extent, discard these forms, on the ground that they afford no explanation. Just as we excepted to the definition proposed for a perfect right, not because it was not physically accurate, but because to us it was of no use, so now we must seek for those primary rights, for the sake of which it is that life, limb, and reputation are regarded with so much reverence by the Law.

You will remember Bacon's aphorism—"Finis et scopus juris nihil est aliud quam quod cives feliciter degant;" and you will have observed, that, up to this time I have said nothing (unless inferentially) of the aspect in which Law regards happiness. Undoubt-

edly I should rather accept the above axiom as expressive of the gratifying result, than of the immediate design. The design is the prevention of moral wrong. The protection of the *status quo* involves the maintenance of the *status quo* in which every man is then choosing to be; and thus ensures the satisfaction of his actual desire. Law is, therefore, a universal practical acknowledgment of the right to be happy: which may thus be regarded as the primary source of all other rights. So long as any man does not infringe the same rights in others he is entitled to improve his physical, mental, and moral condition, in any manner, and to any extent; and to exert whatever influence he can for the like improvement in his fellow-men. But, inasmuch as Duty and not Desire is the final purpose of Law, if he places his happiness in immoral gratification—still more, if he seeks to persuade others to the same courses—although, up to a certain extent he cannot be restrained, he will find, that in large measure he acts at his own peril. His immoral acts may go unpunished; his immoral contracts, although his *status quo* may have been altered on the strength of them, will not be sustained.

But since the preservation of the *status quo* is presumably the gratification of natural desire, we shall undoubtedly be much assisted in our further enquiry, by the knowledge of the natural desires of mankind at large. These must, of course, be sought for in the leading treatises on mental philosophy. Perhaps the

most suitable for our purpose is "Whewell's Elements of Morality and Polity." Referring, for full details, to the work itself, I may here note, shortly, that the springs of human action are to be found in the Appetites—the Affections—the Mental Desires—the Moral Sentiments—and the Reflex Sentiments. Of these the Mental Desires are stated to consist, *quoad hoc*, of the Desire of Safety—the Desire of Having—the Desire of Society (Family and Civil)—the Need of a Mutual Understanding—the Desire of Superiority—and the Desire of Knowledge; while the Reflex Sentiments may be classed under such heads as the Desire of Being Loved—the Desire of Esteem—the Desire of our own Approval, and the like.[1]

"The necessity,"[2] continues our author, in a passage which I quote at length, for its strong analogy to the views I am desirous of urging, "of moral rules, and, therefore, of rights, may be illustrated by considering separately the principal springs of action of which we have spoken, and, especially, the mental desires; for these include the appetites and the affections. It is evident that the desire of personal safety requires that there should exist a *Right of Personal Safety*. Without such a right, the desire would give rise to a constant tempest of anger and fear, arising from the assaults, actual or apprehended, of other men. But a Right of Personal Safety, when actually established, holds in check the impulses which give

[1] Elements, b. i. c. 2. [2] Chap. iv. § 79.

rise to such assaults, and reduces the tempest to a calm. In this calm, man, free from extreme agitations of Fear and Anger, can act with a reference to rules founded on other men's rights; and can thus, and no otherwise, exercise his rational and moral nature.

"In like manner, the Desire of Having requires that there should exist a *Right of Property;* for, without the establishment of such a Right, the possession of any objects of desire would, in like manner, give rise to Fear and Anger; and to an agitation of men's minds, in which rational and moral action could not take place. But a Right of Property once established, there may be a state of Repose in which the reason and the moral sentiments can act.

"Again: the Need of Mutual Understanding requires that a *Right of Contract* should exist. If no man could depend upon the actions of other men, every man's actions must be performed in a tumult of vague conjectures, hopes, and fears, like the actions of a man when surrounding objects are whirled about him by shifting winds. But, if the Right of Contract be established, so that one man can depend upon what another has contracted to do, as something certain, the mutual fears are removed; the objects included in the contract, and the intentions of the contractors, become stable things, and man can act with reference to fixed moral rules as his moral nature requires.

"Again, the desire of Family Society requires the establishment of *Family Rights;* that is, of those pecu-

liar rights respecting the members of the Family, to which the Desires point. The husband must have an exclusive right to the society of the wife, as a wife. The father must have rights over his children, which other men have not. Without these ties, which bind Families together in a manner in some respects exclusive, ungoverned bodily desire and irregular affection would tend to transient and capricious unions of man and woman; and these would lead to storms of angry rivalry, and the pains of deserted affection. Moreover, on this supposition, the suffering mother and the starving child have no one to depend on: the child has no one to educate him, to introduce him into Human Society, to bring him acquainted with the rules of action of mankind; and thus to evoke his rational and moral nature. In the bosom of the Family, when its enclosure is protected by Family Rights, the woman and the child are sustained through seasons of helplessness, the desires of Family Society are gratified, and the moral nature of man is unfolded; and thus Family Rights necessarily exist."

In the same way, the Rights of Government are founded upon the Desire of Society, and upon their necessity to the real existence of other rights already described. The Desire of Knowledge also requires Rights which, under the names of the Right of Self-Culture, the Right of Education, and the Right of Freedom of Opinion, and the like, come to be of importance in the stages of society in which men's

habits of thought are much developed. The Desire of Superiority requires that men should have their rights assigned by equal rules; and thus strengthens such rights when they exist. The reflex sentiments have also their corresponding rights—men having a right to their reputation allowed them in the laws of many states.

We cannot fail to be struck with the more enlarged spirit which pervades these speculations. I may observe, too, their accordance with the views already stated, both theoretic and practical: theoretic, in referring every right ultimately to the provision which it makes for the exercise and development of man's moral nature; and practically in the anxiety it evinces for the removal of Anger and Fear—the two passions precisely of which one threatens the *status quo*, and the other distresses by its anticipated violation. One branch, certainly, of the family of Natural Rights appears to have been, even by this author, entirely overlooked. I mean, all those rights which involve action upon others for their sakes, and not for that of the actor, so far as such action is not precluded by their own dissent. The rights which he enumerates are all self-regarding; but an equally important list might have been presented to us of Desires having for their object the good of others, and which must be (and in fact are) recognised by precisely the same reasoning as the others, as the Foundation of corresponding Rights. The right to teach is as well

established, as the right to receive teaching; the right to proselyte, as the right to worship. Looking to what is daily going on in our own country, such an omission, by this unwearied analyst of moral science, is a signal instance of the watchfulness needed by the adventurer into untrodden paths.

We have gotten, then, the right to use force; and we have ascertained the case to which it applies, and the objects it is intended to protect. We have now to inquire in whom it is properly vested. The inability, in general, of men to protect themselves, and the impossibility evidenced by the necessity of protection, of allowing them to be judges in their own case, are the circumstances occasioning this inquiry.

While the necessity of government is acknowledged on all hands, there seems scarcely anything more difficult than to give a satisfactory account of its origin. The theories of Divine Right, Expediency, and the Social Contract, have each still, probably, some adherents, even as usually understood; and it is not an unfounded suggestion, that they are all, in reality, different modes of expressing the same truth. But, not to enter into this matter, I take it as an undisputed fact, that in all communities the stages of development have been, that the Family has expanded into the Tribe, and the Tribe formed itself into the Nation. The point of time at which the change was consummated, may be a question; that it did actually occur, is a fact which we have every right to regard as settled.

Every human being is a Member of a Family, before being a Member of a State. In the family relation, it is matter of instinctive apprehension to attribute the final decision and control to the father. Inasmuch as upon our principle Duty is the foundation of Right, and not Right of Duty, we must refer this right of control to a prior duty in the parent. (As we are now enquiring, not into the limits of subjection to Force, but into the right to use it, the argument which was inadequate at the outset of this chapter is available). We may say, then, and nothing can be more secure of assent than the principle, that the parent is under a duty not to allow lives, which owe their existence to his act, to be sacrificed or deteriorated by his neglect; and, consequently, that all such powers must be vested in him as are necessary to his discharge of this duty. It may be said, moreover (taking purposely the low ground), that on the assumption of his success in discharging it, the life which he has called into being is raised from a possible to a certain benefit, for which gratitude is due; and that the obvious effect of this gratitude is shown in a spirit of yielding to his desire for its own sake, and prior to the appearance of its beneficial tendency. The father's right is therefore a moral right, specially attaching in himself, felt to be such by the members of the family individually, and sustained in its exercise by the union of their several wills. When the Father of the Family becomes the Patriarch of the Tribe, his authority, although not

extending to the same minute detail (much of which naturally devolves upon those who have since become fathers themselves), is still the same in principle, and is sustained by the same support—the sentiment of right and the union of wills. It is, however, to be observed, that by the change of character which it has undergone, it is assimilated with much closeness to the ordinary results, although without the organisation, of a national government. No longer concerning itself with the economies of the household, it now determines the questions which arise between one family, or one head of a family, and another. It must solemnise marriages, enforce contracts, and protect proprietary rights; it may unite the force of the community to repel external attack; and in connection with all these occasions, customs may grow up which it must uphold. All these are possible, some inevitable, while the Society still remains a Tribe. When it has become a Nation, it will do some of these things with different machinery; but it will do little more.

There must, however, come a time, whatever we may suppose of the actual further development of the Tribe, when one at least of the considerations, upon which we have founded the authority of the Patriarch, ceases to have practical weight. The sense of blood relationship must, at length, become lost in the continually increasing remoteness of the degrees of kindred. Enlarged numbers will also require extended

territory, thus bringing the Tribe into relations with other communities, with whom intermarriages will take place, and all the consequences of a divided allegiance may ensue. But not to dwell upon theories, we know that, in fact, history records no instance of a devolution of supreme authority, throughout, in the representatives of the original head. The assumption must, therefore, be, that in every instance there has been a positive change, the course of which undoubtedly we cannot historically trace, but of which we know the result. We come always back to a union of wills, sustaining the acts and decisions of a recognised common authority as rightfully binding upon the whole community. The person now holding that authority has not the *ipso facto* designation to his office which existed in the case of the patriarch. He is not, like his predecessor, the author of the community, and has not, therefore, his responsibility and consequent title. But that he is specially designated above others to the supreme authority—by successful leadership in war or guidance in peace, or by felt superiority in some practical shape—is what all history and all natural theory alike lead us to believe. There is still a union of wills in support of what I may now call the Supreme Public Authority; based, as before, on the combined principle, that it is exercised for the benefit of the entire Community, and that the person who holds it is specially entitled to be invested with its functions.

The result of these speculations will appear more distinctly, if taken in connection with the discussion of the subject contained in Mr. Austin's Sixth Lecture. It may be thus summarised—

That species of superiority which is styled Sovereignty, and the Independent Political Community which it implies are thus distinguished: 1. The bulk of the society are in the habit of obedience to a determinate common superior. 2. Such superior is not in the habit of obedience to a determinate human superior.—If the obedience be not habitual, there is no relation of Sovereignty and subjection. The French Government was independent, notwithstanding the occupation of Paris by the Allies. It obeyed their commands, but not permanently. So the Saxon Government obeyed the commands of the Holy Alliance; but these were too rare to constitute the relation of sovereign and subject. The common superior may be habitually affected by general opinion, and may occasionally obey the commands of determinate parties. If he habitually does so (as a Viceroy) the Society is not independent.

The habitual obedience must be rendered by the bulk of the members; but how often, or how long, or how many, of the members must obey, cannot be precisely determined. The test, therefore, is so far imperfect. It does not (e. g.), answer the question, At what precise point of time after the Civil War between Charles I. and the Parliament,

did the nation become completely an independent political community.

Again, the Society must consist of some considerable number of members. A father and his family may be a natural, but not a political society. But at what precise stage the tribe becomes a nation cannot be determined. The smallest number of one of the Grison states hardly exceeded a few hundreds; the largest was not many thousands. All we can say is, that it must not fall short of a number which may be called considerable.

The above summary, without being exhaustive, is sufficient for our purpose. It shews us the nature of the difficulties we have to encounter. They all start from the principle of command being the basis of Law. Hence, evidently, the requirements of a determinate common superior, and of a habit of obedience on the part of the "bulk" of the community. Hence the query respecting the juridical condition of this country after the civil war. Our view would rather have been that all through that contest, as indeed appears to be the opinion of Mr. Austin, this country never ceased to be a nation. She was throughout a political community; and certainly an independent community. She was throughout a highly organised society; and unless a distinct Head is essential, it may be asked what portion of her organisation (disturbed as its action undoubtedly was) she at any time lost, which was really requisite to the perfect conduct of her affairs.

The dispute was, juridically speaking, simply one of administration. The laws never ceased to exist. Taxes were paid. Courts of Justice sat. Husbands and wives were not reduced to a state of concubinage.[1] The issue of marriages then contracted succeeded in due course to the paternal acres. The very fines imposed by the victorious party, and the secret trusts by which the vanquished sought to escape confiscation prove the unexhausted vigour of the proprietary system. In the same way with respect to the Tribe. If by force of the contests in which it is engaged, it becomes absolutely disorganised before arriving at the national stage of development, there is an end to the question; but if, throughout, it maintains a felt continuity of existence, we do not need to enquire how often, or how long, or how many of, its members must obey a common superior, before we can be certain that it has acquired the complete national character. It may for a portion of time have been without a Head, but its members have never ceased to be a Society. The sentiment of a common membership has burnt unextinguished amongst them amidst the convulsions which have threatened their individual existence. It has been kept alive by identity of blood, the same revered traditions, the same faith and manners, and a common conscience. The Society became political as soon as it ceased to be natural; and it ceased to be natural at the moment when there ceased to be a

[1] See Appendix, note G.

common Authority, whose claim to obedience rested upon the natural, i. e., the patriarchal tie.

I say that it is not by means of bulk or number of members or length of time that we obtain the complete idea of a nation. We can understand how the patriarch Abraham, with 318 trained servants, "born in his house," was strong enough to overcome in battle five Kings, of whom one was Tidal, "King of Nations."[1] The habits of obedience which grow up consolidate and strengthen the society; but in order to be strengthened and consolidated it must already exist. As the Scotch lawyers said, in the Dalrymple case, they are "evidences, not constituents." They have "relation back" to a time anterior to themselves. It is not questioned that our government acted agreeably to international law (to adopt Mr. Austin's test) in their recognition of the Texan and French Republics. Yet when those recognitions took place the Texans were fighting for their existence; and the French president was not appointed, nor the constitution of which he was to be the head definitively settled.

We can accept the expression "Independent Political Society" as an equivalent to the word "Nation"; but I must still protest against the distinction by which Mr. Austin preserves the independence of the French at the time when Paris was occupied by the Allies. It was not because their commands were rare, but because if they had been otherwise they would not have

[1] Genesis, chap. xiv.

been rightful, that France retained her independence. The case was just that which we may suppose ordinarily to happen between two persons, one of whom has been wronged by the other, and has along with his consequent right of redress the power to enforce it. He exercises that power just so far as to enforce that right. Sovereignty is the *right of declaring in the last resort the whole course of moral conduct enforcible throughout the Community.* The right of the Allies was limited to the requirement of special acts for a single purpose.

Admitting, then, that the existence of a Supreme Authority is requisite in point of fact to the permanence and complete organization of a national society, I cannot recognize it as an essential element in the idea. Nor should I describe an Independent Political Community in such terms as Mr. Austin has chosen. If those terms come to the same thing in practical effect with others which I should prefer, it is, nevertheless, because they look only to practical effect, and not to moral design, and because I believe that Law is really something more than a physical machine, that I object to use them. I should prefer, then, to state the idea of a Nation or Political Community as being a Community, *the whole conduct of whose members, so far as it interferes with the status quo, is governed by a moral rule, the authority to enforce which is not derived from the natural tie.* (I use the expression, " whole con-

duct," to distinguish the case of corporations and other smaller associations for limited purposes.) To include the idea of independence, I should add to the above terms, that *the person or body in whom the authority is vested is responsible for the exercise of it to the community, and to them alone.*

Having now, as matter of fact, traced the three stages of social development, in the Family, the Tribe, and the Nation, we have found also in each case an answer to the question—By whom is the right of force to be exercised? It is evident, that it must rest with him who declares formally the case to which it is applicable. It is a principle of the very essence of the action of public authority, that, *cases of necessity except* (*e.g.* homicide *se defendendo*), *the Law allows no force but its own.* And it is a proof which one could wish were not added to others, of the unscientific character of our commentaries, that while this principle is recognized, there is evidently no sense of its being fundamental. The place in Blackstone in which you would expect to find it enforced, is, of course, the Introductory Chapter on the Nature of Laws in General. It is not there alluded to; but if you search diligently into the third volume, through the first chapter on Private Wrongs, you may discover it incidentally stated in the course of an argument upon a subdivision of the subject entitled "Redress by act of the party." By the Roman jurists it was enunciated with sufficient distinctness. "Non est singulis

concedendum, quod per Magistratum publice possit fieri."—*Dig.* lib. 50, tit. 17, l. 176. And in lib. 4, tit. 2, l. 13, which is headed, "Qui per vim extorquet quod sibi debetur, jus crediti amittit," we have the following explanation of the word *vis*. "Cum Marcianus diceret 'vim nullam feci,' Cæsar dixit, Tu vim putas esse solum cum homines vulnerentur? Vis est et tunc, quotiens quis id quod deberi sibi putat, *non per judicem* reposcit. Quisquam igitur probatus mihi fuerit, rem ullam debitori vel pecuniam [debitam] non ab ipso sibi sponte datam, *sine ullo judice* temere possidere vel accepisse, isque sibi jus in eam rem dixisse, jus crediti non habebit." And the whole of their refined system of Rights of Possession is founded, as Savigny has clearly established, not on any mysterious notions attached to the idea of Possession itself, but upon the simple principle, that the person of a human being is sacred from violence; and, consequently, that if any person is found in peaceful possession of a thing belonging to another, it must be obtained from him, not by the strong hand, but only by force of law.

LECTURE VI.

THE terms I have proposed, as conveying the true notion of an Independent Political Community, break in upon a principle which is generally considered to be self-evident and fundamental. "It follows," says Mr. Austin, "from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the power of a monarch, properly so called, or the power of a sovereign number, in its collegiate and sovereign capacity, is incapable of *legal* limitation."[1] And he supports this position by the following *reductio ad absurdum*:—"A monarch, or sovereign number, bound by a legal duty, were subject to a higher or superior sovereign; that is to say, a monarch, or sovereign number, bound by a legal duty, were sovereign and not sovereign. Supreme power, limited by positive law, were a flat contradiction in terms." According to our notions of law, we are certainly not bound by this reasoning, but our own views may be thought to lead to the same result; and in saying that the sovereign is respon-

[1] Lect. vi., p. 268.

sible to the Community for the exercise of his authority, I clearly ran counter to it.

Upon the principles I have proposed, a legal right is distinguished from a moral right, as being one which may be asserted by force; and I have placed the right to use that force in the hands of the sovereign. I have defined the sovereign, moreover, as the person invested with the right of declaring, in the last resort, the whole course of conduct morally enforceable throughout the Community; and it may be suggested, therefore, that I must admit, upon my own principles, that the sovereignty is incapable of legal limitation.

The reply is, that I have throughout limited the principle by another, which strictly applies to this case. I stated it, you will remember, as the essential principle of the Law's action, that, *cases of necessity except* (and I illustrated this by the instance of homicide *se defendendo*), the Law allows no force but its own. The right of revolution is a right of necessity, equally with the right of homicide; and it follows, from this principle, that the sovereignty must, on this point, be under legal limitation, as distinctly as does the right to defend one's life by one's own hand.

I repeat—legal limitation. There would have been no contradiction, even in appearance, had the responsibility I have spoken of been contemplated as merely moral. But, inasmuch as the right of being governed is a right of nature, the right to resist misgovernment is an inevitable consequence (however confessedly

difficult or undesirable it be to state strictly the conditions under which it arises), the exercise of which is an act strictly within the province of Jurisprudence, as we have understood it. It is the use of force for the preservation of the *status quo*. It is force used by the subject against the sovereign, in analogy with the same reasoning by which, in the case of the homicide, force is used by the individual against the subject. I may add, that even upon arguments already adverted to, a revolution and its consequences are accepted as juridical facts in International Law.

We have here an instance of contrasted results in the two systems, which would lead us to desire, before examination, that our own might be the true one. There is no room for our conclusion upon the antagonistic theory. If Law be founded on Command, he who gives the command cannot be subject to the Law; but if Law be simply an equivalent expression for enforceable duty, it is, then, obvious that the sovereign may be amenable to force equally with the subject, should duty be violated by himself. The definition of his authority as being that of declaring, in the last resort, the whole course of conduct morally enforceable throughout the Community, cannot be understood as implying a like authority as between the Community and himself.

But to proceed. There is a well-known distinction between Morality as it actually is, and Morality as it ought to be considered with reference to its final test.

In analogy to this distinction, Mr. Austin also distinguishes Law as it ought to be from Law as it is; and the separation which he draws between them is so complete, as to render them the subjects of two distinct Sciences: the former, of the Science of Legislation; the latter, of the Science of Jurisprudence. If this analogy be sound, the arguments I have been offering up to this time will certainly be disposed of with great facility, for our antagonists will only need to reply, that we have throughout been considering distinct subjects. Unless, however, our views are more seriously inaccurate than I may hope they are, there is not necessarily this divergence between our subjects. I rather hold, indeed, that they are not merely, as Mr. Austin admits, "connected by numerous and indissoluble ties." I regard Law "as it is," and Law "as it ought to be," as one and the same thing.

It may seem, at first sight, that I must admit the distinction. I have been solicitous to connect the sense of Duty, and, consequently, that of Law, with a fundamental principle, applying to the human family at large. I have not, however, sought for a universal Law, to bind the whole species, but have vested in each separate Community the function of determining, through its sovereign authority, what shall be its own Law. The results differ: and although, in thus fixing upon the determining authority, I have simply accepted the facts of history (an observation, however, which would not be conclusive), I have done so with

the undoubted foreknowledge that we should, by means of them, arrive at differences in result. It may be suggested that they cannot all be right, and the conclusion claimed against us may thus appear to be inevitable.

We are not helped, moreover, by the distribution of Jurisprudence into Universal and Particular. The distinction undoubtedly exists; and it bears directly upon the peculiarities in development apparent in different Communities. We may with propriety speak of their differences, irrespectively of their actual importance (whether amounting to absolute contrariety, as in the marriage laws of Turkey and Russia, or ultimately reconcileable, as may be considered the difference between the testamentary powers of the father in this country and in France), as instances of the Particular Jurisprudence of those countries respectively. But, inasmuch as their existence is the natural consequence of the principle, which vests the right of fixing the law in the sovereigns of those countries, we must accept them equally with the principle itself; so that the division, although perfectly valid, is unavailable.

But we do not need it. Our quarrel is with the analogy proposed. We do not acknowledge that Law and Morality can be tried by the same test, nor that where Morality fails, Law necessarily fails with it. We have throughout insisted on the distinction—and it is one recognised by our opponents—between what

is morally right and what is rightfully compellable. Moreover even the enforceable portion of duty is not morally enforceable in all countries, nor for all times. Morality is undoubtedly immutable in its primary element; and its decision is, consequently, certain in all the cases which can be submitted to it. But the intellectual conception only of these cases is progressive, much more their actual occurrence; and the rate of progress is not the same in all Communities. The test of the moral propriety of the law of each one severally is its conformity with the state of moral feeling which there prevails. A perfect system of Jurisprudence is one which provides adequately for the protection of all the rights of nature. But all the rights of nature do not exist where the Desires upon which any of them are founded are not felt. There are no states of society in which some are not recognised, and the corresponding rights provided. A few sustain a precarious existence even in the dark places of the earth. Where civilisation affords her light, they develop themselves with a rapidity constantly increasing, until every decision of the Courts of Justice may be regarded as registering a new accession to the list. But it registers them only as occasion arises, and is authentic evidence only within the limit of the influences by which they have, in point of fact, been created. To transport to Turkey our splendid system of equity doctrines relative to husband and wife, or to attempt to enforce our libel law in the mines of Siberia, would be a simple

absurdity. The necessary conditions are not there for their application. It would be calling for bricks where there is no straw.

In thus proposing to test law by the actual state of moral feeling, I do not anticipate being met with the observation that in the onward progress we have supposed, the Law of a Community does not always keep pace with its morality. Were this apparently true to a greater extent than will be contended, it would only result from a defective adaptability in the spirit of the government to that of the people, which (being submitted to by them in such a case) would go to disprove such an advance in popular morality as might, on other grounds, be believed to have taken place. It is a principle requiring certainly careful application, but one, nevertheless, which is axiomatic in enquiries of this nature; that a people in earnest will always infuse their spirit into the constituted authorities. If they do not do so, it is because they are not in earnest, and they are responsible for what they do not remove. The most despotic governments are no exception to the rule. The objection with which we are now dealing, presented in its most effective form—the question, namely, whether the Law may be satisfied with representing the *average* conscience of the community—may be dismissed with a reference to practicability. The law cannot protect rights which nobody acknowledges.

But let us be clear as to what we are asserting. We

say that Law is not bound to make provision for such rights of nature as are founded on Desires not generally felt in the Community. But this may involve much more. Abstinence from the protection of a Right of Nature may be equivalent to the protection of that which, according to an improved morality, is no right at all. It may even involve the recognition of a state of things which is not merely an imperfect morality, but is opposed to morality altogether. Is Law in such a case what it ought to be?

Let this question be fairly understood. In so far as Morality is not what it ought to be, and in so far as in consequence Law is founded upon an imperfect basis, Law is not what it ought to be; and this is the case in every Community on the face of the globe. But this is not the question.

The question concerns the practicability of accounting for law and also explaining its terminology, by means of the same course of enquiry. This practicability is asserted by us and denied by our opponents. They contend that Law ought to be, and is not, the enforcement of perfect morality; and they regard the "ought to be" as something practically so different from the "is" as to require a separate line of scientific investigation to explain it. That investigation they abandon; contenting themselves solely with the latter.

We assert, on the contrary, that Law is not, and ought not to be, the enforcement of perfect morality; but that it ought to be the enforcement of morality as it actually exists. In this sense we hold that Law is

what it ought to be. And we think that all the questions really involved are to be answered by means of one science.

Our answer then must be that Law is what it ought to be when it satisfies the moral standard of the Community, or is not farther behind it than is due to the imperfection involved in all human arrangements; and that we conceive that in practice Law does fulfil these conditions.

Take, for instance, the case of Mahommedan polygamy. According to our notions, this system runs directly counter to the moral law. It not only does not provide for the natural rights of women; it gives to men privileges to which they are not entitled. While it continues, there are heights of moral perfection to which neither sex can attain. Yet I apprehend you felt the absurdity when I suggested sending over to Turkey the whole body of our separate use doctrines. The system is agreeable to their notions, both the men's and the women's. A Turkish wife would feel her modesty outraged by a proposal to avail herself of the freedom of every English girl. The law there answers the test which we originally proposed as the basis of the law's action. It preserves the *status quo*; and it makes the best provision of which the circumstances admit for its improvement. Anger and Fear are reduced to limit, if not entirely removed; and the members of the Society are better able than under any other order of things they would be to exercise and develop their moral nature.

The principle on which we rest the assertion thus illustrated has been already stated, in saying that the law cannot protect rights which every one denies. Set forth more precisely, it would run as follows:—Law cannot enforce moral principle which is not felt among the community; and ought not to enforce moral principle which the community condemns.

But this solution raises another question; which, if it has received an answer upon the system of our opponents, has received one to which must be attached a very different meaning from that which we are seeking. According to them, whatever is commanded under terrors sufficient to ensure obedience is, therefore, binding law. But, in the sense that it is therefore binding upon the conscience,—this is a conclusion to which, upon our principles, we can by no means arrive. The fact that Law can only represent the average conscience of the Community, proves that there must always be among its members those who have moral rights which, in their own nature, are fit for enforcement; but which are without the pale of its actual protection. It certainly cannot be contended that those who (by the supposition) have attained a higher stage of moral perfection than is reached by the Community at large, are bound to debase their moral nature, and descend to the relative state of imperfection subsisting around them. Their part, obviously, is to raise the rest to their own standard, and adapt the Law to the further stage of acquirement.

But, in this position, what are their rights? The

case is frequently stated, as if, while their right to change the law, if possible, must be recognised, this is all that belongs to them: that so long as the law continues to exist, it is their duty, if they do not obey it, to submit to the penal consequences of its infraction. I think this opinion can scarcely have been sufficiently considered. It is admitted that there does exist *a* right of Revolution. The existence of this extreme involves every lesser degree of opposition which ranges between itself and simple non-obedience to the law. The end sought, whether by non-obedience, by the attempt to change the law, or by revolution, is the cessation of personal subjection to its requirements. This end, then, is the principle upon which these rights respectively depend; and may, consequently, be acted upon as a right in itself where these modes of giving it effect are inadequate or unavailable. They, therefore, who possess moral rights entitled to the protection of the Law, may justly seek to nullify its refusal of that protection in their own persons, as well by active avoidance of its penal sanctions as by passive non-obedience to its commands. They are entitled, further, to seek to change the Law itself, either by using the means which it has provided for its own amendment, or by changing the authority by whose voice it is finally declared.

The men of whom we are speaking have not all these rights in all cases; and it must be at every man's own peril (and it is no light peril), that he asserts himself to be of the class of men to whom alone they

can be attributed. The moral right asserted may not be such as to justify the resort to measures necessary to its vindication; or it may not be, in fact, a moral right at all. On both points, however, we are not without some *indicia*.

A large portion of the nominal Law of every Community is practically obsolete. It has become so partly by the change in the relations which it was designed to control; but in great measure, also, because it was based upon ignorance of the true character of the relations themselves. Forestalling, regrating, and engrossing, were offences by the common law of this country down to barely ten years' since;[1] and were, moreover, the subjects of express statutory punishment from the reign of Edward the Sixth. Yet the marked paucity of cases in the books shews that, long before these acts ceased to be offences, the law was a dead letter. It was not certainly because they were not of daily occurrence; but because the community did not acknowledge their criminality. It was a law which at length everybody violated; but which must have begun to be violated, in the first instance, by one or a few persons seeking to extend their trade, in a way which the universal imitation of their conduct by the Community, and the acquiescence of the Supreme Authority, now proves to have been legitimate.

Another case is that in which the moral propriety of the Law, as actually in force, is a point of admitted

[1] See 7 and 8 Vict. c. 24.

doubtfulness among the community itself; or, next to this, where the Law upon the same subject in other Communities is agreeable to the moral principle asserted by the dissentient citizen. Both of these circumstances concur, in the dispute now carrying on in this country respecting the Law of Marriage within the prohibited Degrees.

A test of value, although undoubtedly of less invariable conclusiveness, is constantly afforded by the juridical recognition, as applied to other cases, of the principle contended for. Few juridical systems are so perfectly self-consistent, but that they present here and there glimpses of principles not generally admitted. An argument for the further application of these principles may frequently be drawn from the manner of their first appearance, or from the classifying character of the cases which they have already been allowed to govern. The strength of this argument may vary from the feebleness of a problematical suggestion to the certainty of actual law. This last is as nearly as possible the state of things, when the opinion of a leading counsel has been obtained upon a case, the circumstances of which have never been brought before the legal tribunals.

I shall not dwell longer upon this part of my subject; but it was needful to say so much, if it were only to stay the too ready charge of availing myself of the cover of a scientific investigation to preach comfortable doctrine to promoters of popular discontent.[1]

[1] Appendix, note H.

From the same motive, I have abstained thus far from referring to the instances which arise first to the mind in connection with the questions we have just been discussing. Time was when the non-recognition of religious rights, even in this country, went the length of burning heretics at the stake; and time is still when the most horrible enormities of slavery do but shew forth the practical working of United States' Law.

In neither of these extreme cases, do I flinch from the position that the Law has been throughout, in this country, and is now, in the United States, what it ought to be,—in the plain sense of its being the inevitable result of the moral standard of the respective Communities. It was and is what it ought to be, because it could and can be nothing else. With us the juridical recognition of the universality of religious rights is still below the perfect standard; but the preferential right accorded to some to proselyte is not now carried to the point of negativing the right of others to believe. The changes which have been successively imposed upon our legal system may readily be referred to as marks of our national progress in the attainment of clear moral perceptions in regard to this prime right. In the case of United States' slavery, the flagrancy of the wrong there perpetrated is such as almost to set at nought the attempt at calm deliberation. One cannot help hoping, even against hope, that the system must soon be brought to an end, from the very strain which it must be to our human faculties to go on persevering in the indescribable

iniquity which every man knows and feels that every day's slavery actually brings. The only lesson we can learn from this last instance is, that it should teach us how needful an element it is of the right of revolution that it should present an adequate chance of success.

This is all; for it is not this case which presents to us the severest trial of duty—the hardest task of deciding whether it be right to obey, to resist, or to suffer. It is the sheer case of Weakness against Oppression, without one moral element on the side of the strong. But the heretic consciously opposes himself to men who verily believe they are doing God service. He may be able largely to perceive that their motives are corrupted by the infirmities and vices of humanity, but he is also sensible that those same infirmities, at least, have their full share of actual influence on what he is himself doing. He is sustained only by the conviction, strong it must needs be, that there has been given to him, in a way in which they have not received it, truth more vital than blood. A portion, surely, of the spirit which must animate such witness may be thought to belong to those who, having attained to the consciousness of truth less absolutely vital, and attended in their assertion of it with less grave consequences than is his, yet, for its sake, submit to the hard constructions and the long exclusion from usefulness in other fields, which are the unrelenting lot of every man, who will not yield himself to the *sic volo* of a more lax morality. More generally

than we are wont to remember, do those high motives prompt to act and suffer, which the Jurist must always venerate; but which, limited by the contracted sphere of his duty, he can neither recognise in the person of the citizen, nor adopt as the basis of the law. Were it otherwise, Demosthenes could not have sworn by the slain at Marathon, nor the Church have exulted in the noble army of her martyrs.

If I have for a moment exceeded the limits appropriate to these speculations, the fault may be forgiven, when it is remembered how essential it is to their completeness, to ascertain how far Law is morally binding, and how impossible it is in the enquiry to forget that those of whom it is recorded that the world was not worthy, won that praise in its violation. But we have now examined, I think, the principal elements which enter into our conception of what Law is. In attempting its definition, I cannot, of course, accept terms which are framed upon the principle that it is derived from command; but neither am I certain that the phraseology of those with whom in general I coincide in this matter, is entirely free from confusion. Mr. Austin objects to anything being considered as strictly law, except that which is commanded by God to His human creatures, or by man to man. The consideration of his objections will be the most convenient preparative for our own conclusion.

His view, then, is, shortly, that such expressions as the laws of matter, of motion, etc., are metaphorical

only; and that their use is to be attributed to "that uniformity, or that stability of conduct which is one of the ordinary consequences of a Law proper," and he objects to such expressions, because "no property or character of any metaphorical law can be likened to a sanction or duty;" which only exists where the party subject to the Law is an "intelligent" being.

It is rather a strong expression surely to say that there is nothing in these laws metaphorical, which can be likened to a sanction. By the word *sanction* is understood on all hands that quality of a law by virtue of which it produces obedience; namely, the threat it holds out of inflicting evil in case of disobedience. Through this threat, we are told, the Law acts directly on the will of the person commanded, and ensures his compliance. What, then, is a sanction (all this being conceded) but something which acts *ab extra* on the internal constitution of the being controlled by it. If the evil threatened be not evil in the apprehension of that being it produces no effect, and according even to the school we are opposing, there is no law. A law is only a law in proportion as it certainly produces its effect; and its only power consists in its adaptation to the being whom it is intended to control. Now, this is just the case of a law of matter, or of motion. If I let fall a stone which is at rest, what I do is to set in operation the (so-called) Law of Gravity:—a law which acts upon some quality in the stone, not better understood by me, certainly, than is

the will of a human being, and called by a name expressive of my ignorance, but not, therefore, less really existing, and which, being so acted upon by the law which I bring into operation, causes it to fall.

But the stone has no intelligence. This is a grand distinction undoubtedly. We cannot trace any sort of identity between WEIGHT and FEAR—unless it be this, that both render the being in which they reside controllable by external influences. But in this circumstance the resemblance is close; and it is the only resemblance essential to the presence which Mr. Austin denies of a law proper. In both cases there is the same object, the same mode of action, and to a certain extent the same result. By the application of external circumstances affecting the internal constitution, a particular effect is in both cases sought, and in one case is uniformly obtained; but what is extraordinary, especially considering the tenets of this school, is that where the result is not absolutely ensured but is liable to failure, *there* is the Law; while, where the result is inevitable, there is none.

A distinction, not alluded to by Mr. Austin, may do something towards explaining this failure, but will certainly not strengthen the position we are attacking. The law of matter produces its effect with certainty, because it acts upon the normal condition of the body controlled. The command set to the intelligent being may fail, beeause it is only in his abnormal state that it can influence him at all. Men have their duties

enforced upon them, if we must go to the bottom of the matter, not by reason of their intelligence, but by reason of their want of it.[1] It is just so far as man approaches the lower animals that Law (*quâ* Command) has power over him; and just so far as he is raised above their level that its power is lost in the higher influences to which he renders up his being. *Jus Naturæ est dictatum rectæ rationis.*

I almost fear that these comments may seem hypercritical, unless it be remembered that the whole distinction respecting intelligence is unnecessary and unfounded, but for the assumption that law is a species of Command. The distinction is not a proof of that assumption; it is only a consequence of it. Remove it, and a non-intelligent being is the subject of Law, in the same sense as men are the subjects of the Laws of Jurisprudence. As I understand the matter, the idea of external influence is not the primary element in the conception of Law; its true characteristic is uniformity of operation. It is always true of the Law Moral that it applies, just as it is always true of the Law Physical that it operates. The cause of its operation not being uniform is one which does not affect its own character as a law, inasmuch as it results from the imperfect state of our moral constitution.[2]

I said that I thought there was some confusion in

[1] See a hint to this effect in Bierling's Letter to Leibnitz. Appendix, note E, p. 143.

[2] Esprit de Loix, b. i, c. 1.

the definitions of those with whose views I in general agree. Where, for instance, we define Law as a *rule* of action, etc., we are in danger of falling again into the very error which we have been at so much pains to avoid. The words "rule," "command," etc., have a common ambiguity. They refer either to the act of commanding, or to the thing commanded. In the former sense they involve Mr. Austin's theory; in the latter, the reverse. But, with our strong tendency to personify Law, we shall hardly retain the last idea —the true one, as I conceive—with sufficient clearness, unless we adopt a word free from all trace of this ambiguity. If we speak of Law as a *course* of conduct, the danger will be avoided.

We may now, then, pass on to frame our Definitions, either upon the principle of isolating Jurisprudence from what we have found to be its kindred sciences, or upon the principle that the ideas and principles which it obtains from them are to be taken as implied in our terms. Thus, as Moral Philosophy may be termed the Science of *Duty*, so Jurisprudence is the Science of *Law*. As the sense of Duty is the sense of moral necessity simply, and excluding the notion of physical compulsion; so the sense of Law is the sense of the same necessity, in combination with the notion of physical compulsion as present in aid of its requirements. Law, therefore, may be shortly defined, and distinguished from Duty, by the phrase Moral Accountability. The subjects-matter, therefore, of

the two sciences respectively may be stated as being, with regard to Morals, that portion of human action as to which the agent is under a moral necessity only; and with regard to Jurisprudence, that portion as to which he is morally accountable. The sense of Moral Necessity is wholly internal, contemplating nothing but the urgency arising from the agent's own consciousness. The sense of Moral Accountability involves the same urgency, but associates with it an urgency of additional force, arising from the consciousness which the agent, in contemplating his action, attributes in respect of it to others. The urgency of the first kind is confined to the cases in which the agent does not look upon his action as affecting the *status quo* of others, or if affecting it, as doing so in such a manner as that they consent, or may be presumed to consent, or may be assumed not to dissent. The urgency of the second class arises in the cases contrary to these. The name of that which is morally necessary is *Right*, or doing as you would be done by; the name of that for which there is moral accountability is *Wrong*, or doing as you would not be done by. It will range along with these Definitions to distinguish Duty as the rule of *moral* conduct, from Law as the rule of *civil* conduct. By means of these and similar modes of expression, may be conveyed to any person conversant with our past discussions a notion both adequate and just of the Science of Law, its elementary conception,

fundamental principle, and province or subject-matter. But if we are desirous of a Definition, so far complete in itself as, at all events, not to involve these somewhat numerous explanations, we must, I think, define Law as *that course of human conduct which is morally enforceable by public authority*. The word "course" I have explained already. I use the word "human" in preference to the phrase, "conduct between *man and man*," both because this latter expression might be thought (not correctly, perhaps,) to exclude conduct between communities of men, and also because it would certainly exclude from our province cruelty to animals, unless considered with respect to the injury resulting to some owner. The expression, "morally enforceable," has, perhaps, the advantage of meeting the case of waiver of a right, which the word "enforced" would hardly consist with, but is more significant as asserting the right of disobedience to an immoral law. The reference of all that ought to be enforced to "public authority" has been already made. It needs, therefore, only to be added, that by omitting the word "supreme" we avoid the exclusion of International Law.

The object, then, of Jurisprudence, considered as being the science of which the subject is thus defined, is to develop Law in all the possible relations between Man and Man, considered as amenable to some public authority. These relations are readily reducible to a few leading divisions. Men may be amenable to

Law as members of the same state: or as members, respectively, of different states. As such members, they may be subject or sovereign, either towards each other, or of the Community to which they respectively belong. Or, finally, it may be the Communities of which they are members that are amenable to the Law.

The consideration of cases arising between subjects of the same state or between the subject and his sovereign belongs to the department of Municipal (or Internal and Colonial) Law. That which regulates the relations between members of different states is usually called Private International Law. The last case falls under the regime of Public International Law, or, according to its older name, the Law of Nations.

A complete treatise would examine, first, the manner in which Law is authoritatively declared, under the several heads of Custom, Judicial Decision, Statute and Treaty. It would then consider briefly, under the names of Acts and Events, the circumstances calling for the Law's interference; and would finally survey the whole field of Law under the twofold aspect of Law of Things and Law of Persons; examining, under the first, what that is respecting which Law interferes, and the general character of such interference; and, under the second, the nature of the modifications rendered necessary by reason of the special condition of persons affected or interfered with. In both aspects

are to be studied, the rights proper for enforcement, the evidence proving the existence of such rights in individual cases, the manner of their enforcement, and, it may be, the punishment due to their violation. The subject will then have been exhausted, of what, for the sake of a short phrase, I propose to call NATURAL LAW.

Having thus reached the close of my labour, I have only to point out, by a brief retrospect, the conclusion to which I have led you, and by what road. I have, at the outset, been solicitous to ascertain what kind of knowledge it is which is really entitled to the scientific rank; and have, I believe, stated the conditions of scientific enquiry in terms sufficiently rigorous, to assure you that at least no difficulty on this score is sought to be evaded. In compliance with these conditions, I have first examined the relative place of Jurisprudence and of other leading non-physical sciences with which it is undoubtedly connected in order, and have next analysed, somewhat painfully perhaps, the Elementary Conceptions from which it more directly springs of Duty and Law. With these conceptions I have associated principles, the axiomatic character of which I have done my best to establish against the authority of high names. This led me into two courses of enquiry, and required at least an attempt to mark out the boundary line between them. If this subject undoubtedly requires more consideration than in various parts of these Lectures I have been able to give to it, it will be remembered, on the

high authority of Mr. Austin, that it is "perhaps the hardest of the problems which the science of ethics presents."[1] But as the Jurist ought only to enforce what the Moralist would desire to do, it was still necessary, even after the ascertainment of a line of separation, to treat the enquiries as common. I passed, perhaps, from the common to the debateable ground between Morals and Jurisprudence, when I quitted the examination of the rights of nature and entered upon the enquiry,—In whom is vested the right to use force? Having defined the sovereignty, we were thenceforth clearly within our peculiar territory. It was then requisite to examine the relations between the sovereign and the subject, and, finally, to define Law. In the course of this investigation many points of enquiry have been altogether omitted; and perhaps not one has received the investigation necessary to a full treatment of the subject. But it is not the actual construction of a Science of Law which I have attempted in these Lectures; I have sought only to establish the principles upon which, as I believe, and successful attempt at such construction must be based. Of the necessity of first ascertaining these I need not speak. If I have really contributed towards their earlier settlement, my labour has not been in vain.

[1] P. 172, note.

BASES FOR A SCIENCE OF LAW.

It is the business of Morals and Jurisprudence to furnish a rule of action in regard to others—voluntary in the one case, and compulsory in the other — which shall so commend itself to the mind of the person subject to it, as to assure the assent of his consciousness; and, consequently, in the case of its compulsory application, to preclude a sense of tyranny.

Our first care must be to establish the rule upon some such certain notions as none can deny without *doing himself violence.*

If Morals and Jurisprudence be really Sciences, their ideas must be capable of being presented as clearly, and their principles of being stated as rigorously, as are those of mathematics.

The idea of Right and Wrong, and of lawfulness or unlawfulness as naturally involved in it, is one which inevitably attaches itself to all the voluntary actions of a reasonable being, which affect others besides the agent.

The perception of such actions in this relation is as intuitive as that of objects in space.

We conceive of the necessity involved in the relation as so absolute, that we could as soon imagine a change in the relations of particular numbers as of particular acts being otherwise than they are in regard to Right and Wrong.

The conception supposes—*a plurality of beings, who are intelligent, self-determining, and mutually sentient.*

The conception is—*of a principle of action between such beings necessarily resulting from the relation involved in these attributes.*

The relation is what is called the moral relation; the conception is the moral conception; the necessity is moral necessity.

The name for Moral Necessity is DUTY. The sense of Duty is the sense of Moral Necessity, or the Moral Sense.

That to which the Moral Sense attributes Necessity is the doing RIGHT.

Right is—doing as you would be done by.

Right is not always done.

The not doing Right, or the doing as you would not be done by, is WRONG.

From the consciousness of doing wrong, arises the sense that the Being affected is entitled to complain; the sense of MORAL ACCOUNTABILITY.

Accountability involves restraint.

The introduction of this element necessitates separate investigation; and renders convenient a distinctive nomenclature. The sense of moral accountability may be called the *Jural* sense; the idea of moral accountability is the idea of LAW.

The reason which (in moral contemplation) obliges every man so to deal always with another as he would reasonably expect that others should, in like circumstances, deal with him, is the same as that which forces him in (physical) speculation to affirm that if any one line or number be equal to another, that other is reciprocally equal to it.

Iniquity is the same in action as self-contradiction in theory; the same cause which makes the one absurd intellectually, makes the other absurd morally.

Whatever relation one man in any case bears to another, the same that other, when put in the like circumstances, bears to him.

The axiom, "things that are equal to the same are equal to each other," is true equally of space, time, number, and MORAL ACTION.

Men have the power of voluntarily directing their conduct.

Men are liable to affect others, and to be affected themselves, by such conduct.

Men do both right and wrong.

Men are capable of being controlled by the expectation of conduct to be pursued towards them.

There are moral and jural relations between men.

LAW is auxiliary to Duty; its final purpose is—*the prevention of Wrong.*

To prevent Wrong, it must be first known what is Right; to know what men ought mutually to do, it must be first known what they relatively wish.

The results of Metaphysics are the postulates of Morals; the results of both are the postulates of Jurisprudence.

Men's desires are founded upon their Appetites, Sentiments, Affections, Opinions, and Beliefs.

Appetites, Sentiments, and Affections, agree; Opinions, and Beliefs differ.

Morals and Jurisprudence afford no means of reconciling the difference.

Rights, founded upon the Desires, must proceed upon the basis of such agreement and difference respectively.

Jurisprudence must protect the enjoyment of the natural desires so far as it consists with the dictates of Morality.

Such enjoyment is a Right of Nature.

The rights of nature extend to the exercise of the bodily and mental faculties, so far as the power to exercise them is essential to the discharge of the

moral duties of the individual, or to the attainment of his moral rights.

Their complete enjoyment involves the possibility of action otherwise than in conformity with their design.

Such action, if not infringing on their exercise in others, is non-moral, and therefore non-jural action.

The interference of the Law *is limited to such exercise of the Rights of Nature as disturbs their exercise by others.*

Such exercise may be termed disturbance of the *status quo*. The necessity of preserving the *status quo* is the case for the interference of the Law.

The subject-matter for the regulation of the Law is—the voluntary conduct of men altering the *status quo* of others without their consent.

Conduct, answering to this description, is styled CIVIL Conduct.

Since men do wrong, the application, in individual cases, of the principle of accountability, i. e., the RIGHT OF FORCE, must be vested elsewhere than in the person seeking to avail himself of it.

This person may be agent or patient; the principle applies indifferently.

But though neither can be entrusted with the right, both are interested in its due exercise; and the

person claiming to exert it must draw his authority from their consent.

Natural ties, or personal volition, place men in Societies formed for the purpose of regulating their mutual conduct towards each other, either generally or in specified particulars.

Such Societies are Families, Tribes, Corporate or Uncorporate Bodies, and Nations.

In every such Society the application of the principle of accountability is sanctioned as against each member by the Society as a whole.

The Right of Force necessarily attaches exclusively (cases of necessity excepted) to *that member of the community who declares formally on its behalf the cases to which it is applicable.*

A NATION is a Community, the whole civil conduct of whose members is finally regulated by an authority, not derived from the natural tie, and vested in a person or body responsible for the exercise of it to the Community, and to it alone.

The name of this authority is, SOVEREIGNTY.

Cases of necessity except, the Sovereign has the exclusive right of force in and for the Community.

The cases of necessity are—where the Sovereign cannot protect the essential rights of nature, in the person of any individual member, or will not in the case of the community at large.

That which is morally right, is not, therefore, rightfully compellable.

That which is *per se* rightfully compellable is not compellable for all times or for everywhere.

A perfect system of Jurisprudence is one which recognises all the rights of nature.

All the rights of nature do not exist where the Desires, on which any of them are founded, are not felt.

These desires are most rapidly developed in a state of civilisation; the recorded decisions of Courts of Justice may be regarded as a register of the corresponding Rights of Nature.

The state of the register depends upon the rapidity of development. It is authentic evidence only within the sphere of the influences which have caused it.

That ought to be the Law of each Community which *expresses the state of moral feeling prevalent in the Community.*

Law expresses the average moral feeling of the Community.

There are always members of the Community whose moral standard is higher than the average.

Such members of the Community are not bound to debase their moral nature.

The actual declaration of Law by the Sovereign is not *absolutely* binding, even while it continues.

The essential characteristic of Law is uniformity of operation.

It is always true of the Law Moral that it applies, just as it is true of the Law Physical that it operates; the Law Moral would always operate but that the moral condition of man's nature is abnormal.

In so speaking, Law is personified: the true idea of Law is that it is a *course* of operation.

The subject-matter of Jurisprudence is NATURAL LAW; or, *that course of human conduct which is morally enforceable by public authority.*

APPENDIX.

Note A, Page 1.

At London University, Law is, among the Faculties, what the University itself has been said to be among the Universities—the Cinderella of the sisterhood. It has one scholarship and one medal. The name of Jurisprudence has lately been expunged from the Calendar, and the phrase "Principles of Legislation" substituted. The following questions from the Calendar will show how far I am justified in complaining that the examination can hardly be recognised as a *Law* examination at all.

1852.

Define a pure monarchy.

Define a pure aristocracy.

Define a pure democracy.

Define a mixed government.

To which of the pure forms does the present government most nearly approach?

Is the monarchical element strongest in England, in France, or in the United States of America?

With respect to the election of representatives, state the advantages and disadvantages—

a Of open or secret voting.

b Of voting by lists or separately for each candidate, or for each two candidates, or for each three.

c Of voting at a predetermined place and time, or by means of voting-papers left at the houses of the voters, and collected by a public officer.

1853.

Give examples of a centralized government, and of a localized government.

State generally the matters which ought to be disposed of by the central government of a country.

State the arguments for and against the conversion of the English poor-rates into a national rate on all property.

State the arguments for and against the construction and management of railroads by the state or by private companies.

Define representation, and state whether nomination or delegation is essential to it.

Define delegation.

State the arguments for and against the allowing official persons to be members of the House of Commons.

NOTE B, PAGE 21.

"Primum mihi hæc cura fuit, ut eorum quæ ad jus naturæ pertinent probationes referrem ad notiones quasdam tam certas, ut eas nemo negari possit nisi sibi vim inferat. Principia enim ejus juris, si modo animum recte advertas, per se patent atque evidentia sunt, ferme ad modum eorum quæ sensibus externis percipimus; qui et ipsi bene conformatis sentiendi instrumentis, et si cætera necessaria adsint, non fallunt."—*Grotius, Proleg.*, § 39.

Note C, Page 31.

I.

"When we say that a human law is good or bad, or is worthy of praise or blame, or is what it should be or what it should not be, or is what it ought to be or what it ought not to be, we mean (unless we intimate our mere liking or aversion) this; namely, that the law agrees with or differs from a something to which we tacitly refer it as a measure or test.

"For example, according to either of the hypotheses which I stated in preceding lectures, a human law is good or bad as it agrees or does not agree with the law of God; that is to say, with the law of God as indicated by the principle of utility, or with the law of God as indicated by the moral sense. To the adherent of the theory of Utility, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in *his* opinion, it is consonant or not with the law of God, inasmuch as it is consonant or not with the principle of general utility. To the adherent of the hypothesis of a moral sense, a human law is good if he likes it, he knows not why; and a human law is bad if he hates it, he knows not wherefore. For in *his* opinion, that his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity.

"To the atheist, a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For the principle of general utility would serve as a measure or test, although it were not an index to an ulterior measure or test. But if he call the law a good one without

believing it useful, or if he call the law a bad one without believing it pernicious, the atheist simply intimates his mere liking or aversion. For unless it be thought an index to the law set by the Deity, an inexplicable feeling of approbation or disapprobation can hardly be considered a measure or test. And in the opinion of the atheist there is no law of God which his inexplicable feeling can point at.

"To the believer in a supposed revelation, a human law is good or bad as it agrees with or differs from the terms wherein the revelation is expressed.

"In short, the goodness or badness of a human law is a phrase of relative and varying import. A law which is good to one man is bad to another, in case they tacitly refer it to different and adverse tests.

"The Divine Laws may be styled good in the sense with which the atheist may apply the epithet to human. We may style them good or worthy of praise, inasmuch as they agree with utility, considered as an ultimate test. And this is the only meaning with which we can apply the epithet to the laws of God. Unless we refer them to utility, considered as an ultimate test, we have no test by which we can try them. To say that they are good because they are set by the Deity, is to say that they are good as measured or tried by themselves. But to say this is to talk absurdly; for every object which is measured, and every object which is brought to a test, is compared with a given object other than itself. If the laws set by the Deity were not generally useful, or if they did not promote the general happiness of his creatures, or if their Great Author were not wise and benevolent, they would not be

good or worthy of praise, but were devilish and worthy of execration."—*Austin's Province of Jurisprudence determined*, p. 133, n.

II.

"Now, because moral *obligation* depends, as we have seen, upon the will of God, *right*, which is correlative to it, must depend upon the same. Right, therefore, signifies *consistency with the will of God.*

"But if the Divine will determine the distinction between right and wrong, what else is it but an identical proposition to say of God that he acts *right?* or how is it possible to conceive even that He should act *wrong*? Yet these assertions are intelligible and significant. The case is this: by virtue of the two principles that God wills the happiness of His creatures, and that the will of God is the measure of right and wrong, we arrive at certain conclusions; which conclusions become rules; and we soon learn to pronounce actions right or wrong according as they agree or disagree with our rules without looking any further: and when the habit is once established of stopping at the rules, we can go back and compare with these rules even the Divine conduct itself; and yet it may be true (only not observed by us at the time) that the rules themselves are deduced from the Divine will."—*Paley's Moral and Political Philosophy*, Book 2, c. x.

III.

"I cannot forbear remarking a great change which has taken place in the whole manner of reasoning on the topics of morality and religion from what prevailed in the last century, and, as far as my information extends, in any preceding age. This, which is an age of revolutions, has

also produced a strange revolution in the method of viewing these subjects, the most important by far that can engage the attention of man. The simplicity of our ancestors, nourished by the "sincere milk of the word," rather than by the tenets of a disputatious philosophy, was content to let morality remain on the firm basis of the dictates of conscience and the will of God. They considered virtue as something *ultimate*, as bounding the mental prospect. They never supposed for a moment that there was anything to which it stood merely in the relation of a *means*, or that within the narrow confines of this momentary state anything great enough could be found to be its *end* or *object*. It never occurred to their imagination that that religion, which professes to render us superior to the world, is, in reality, nothing more than an instrument to procure the temporal, the physical good of individuals or of society. In their view, it had a nobler destination; it looked forward to eternity: and if ever they appeared to have assigned it any end or object beyond itself, it was a union with its Author, in the perpetual fruition of God. They arranged these things in the following order: Religion, comprehending the love, fear, and service of the Author of our being, they placed first; social morality, founded on its dictates, confirmed by its sanctions, next; and the mere physical good of society they contemplated as subordinate to both. Everything is now reversed. The pyramid is now inverted: the first is last, and the last is first. Religion is degraded from its pre-eminence into the mere handmaid of social morality; social morality into an instrument of advancing the welfare of society; and the world is all in all. Nor have we deviated less from the example

of antiquity than from that of our pious forefathers. The philosophers of antiquity, in the absence of superior light, consulted with reverence the permanent principles of nature, the dictates of conscience, and the best feelings of the heart, which they employed all the powers of reason and eloquence to unfold, to adorn, to enforce; and thereby formed a luminous commentary on the *law written on the heart*. The virtue which they inculcated grew out of the stock of human nature: it was a warm and living virtue. It was the moral man, possessing in every limb and feature, in all its figure and movements, the harmony, dignity and variety, which belong to the human form: an effort of unassisted nature to restore that image of God, which sin had mutilated and defaced. Imperfect as might be expected, their morality was often erroneous; but in its great outlines it had all the stability of the human constitution, and its fundamental principles were co-eval and co-existent with human nature. There could be nothing fluctuating and arbitrary in its more weighty decisions, since it appealed every moment to the *man within the breast;* it pretended to nothing more than to give voice and articulation to the inward sentiments of the heart; and conscience echoed to its oracles. This, wrought into different systems, and under various modes of illustration, was the general mode which morality exhibited from the creation of the world till our time. In this state revelation found it; and, correcting what was erroneous, supplying what was defective, and confirming what was right, by its peculiar sanctions, superadded a number of supernatural truths and holy mysteries. How is it, that on a subject on which men have thought deeply from the moment they

began to think, and where, consequently, whatever is entirely and fundamentally new must be fundamentally false; how is it, that in contempt of the experience of past ages, and of all precedents human and divine, we have ventured into a perilous path, which no eye has explored, no foot has trod, and have undertaken, after the lapse of six thousand years, to manufacture a morality of our own, to decide by a cold calculation of interest, by a ledger-book of profit and of loss, the preference of truth to falsehood, of piety to blasphemy, and of humanity and justice to treachery and blood?

"In the science of morals we are taught by this system to consider nothing as yet done; we are invited to erect a fresh fabric on a fresh foundation. All the elements and sentiments which entered into the essence of virtue before, are melted down and cast into a new mould. Instead of appealing to any internal principle, everything is left to calculation, and determined by expediency. In executing this plan, the jurisdiction of conscience is abolished, her decisions are classed with those of a superannuated judge, and the determination of moral causes is adjourned from the interior tribunal to the noisy forum of speculative debate. Everything, without exception, is made an affair of calculation, under which are comprehended, not merely the duties we owe to our fellow-creatures, but even the love and adoration which the Supreme Being claims at our hands. His claims are set aside, or suffered to lie in abeyance, until it can be determined how far they can be admitted on the principles of expediency, and in what respect they may interfere with the acquisition of temporal advantages. Even here, nothing is yielded to the sugges-

tions of conscience, nothing to the movements of the heart; all is dealt out with a sparing hand, under the stint and measure of calculation. Instead of being allowed to 'love God with all our heart, and all our strength, the first and great commandment,' the portion of love assigned him is weighed out with the utmost scrupulosity, and the supposed excess more severely censured than the real deficiency.

"Thus, by a strange inversion, the indirect influence of Christianity, in promoting the temporal good of mankind, is mistaken for its principal end; the skirts of her robe are confounded with her body, and the powers of the world to come, instead of raising our thoughts and contemplations from earth to heaven, from the creature to the Creator, are made subservient to the advancement of secular interests and passions. How far these sentiments accord with the dictates of inspiration, the most unlettered Christian may easily decide, 'Love not the world,' said the disciple who leaned on the breast of his Lord, 'neither the things that are in the world; for if any man love the world, the love of the Father is not in him. And the world passeth away, and the lusts thereof; but he that doeth the will of God abideth for ever.' Such was the idea entertained by an inspired apostle of Christian virtue. Let us now turn to the modern philosopher. Virtue, he will inform us (including the whole sum of our duties), is merely an expedient for promoting the interests and advantages of the present world; of that world which, in the eyes of John, was passing away, and whose value he so solemnly depreciates. What admirable consistency! What elevated theology! If we can suppose this holy apostle acquainted with what passes upon earth, what pleasure it must afford his glorified

spirit, to find his sentiments so well understood, and so faithfully interpreted!"—From "*Sentiments proper to the present Crisis,*" *a Sermon preached in* 1803, *by the Rev. Robert Hall.—Bohn's Standard Library.*

NOTE D, PAGE 35.

"In order to his own glory, and for the manifestation of his goodness, and that the accidents of this world might not overmuch trouble those good men who suffered evil things, God was pleased to do two great things. The one was, that he sent his Son into the world to take upon him our nature, that every man might submit to a necessity from which God's own Son was not exempt, when it behoved even Christ to suffer, and so to enter into glory. The other great thing was, that God did not only by revelation and the sermons of the prophets to his church, but even to all mankind, competently teach and effectually persuade, that the soul of man does not die; that though things were ill here, yet to the good, who usually feel most of the evils of this life, they should end in honour and advantages. And, therefore, Cicero had reason on his side to conclude, that there is a time and place after this life wherein the wicked shall be punished and the virtuous rewarded: when he considered that Orpheus and Socrates, and how many others, just men and benefactors of mankind, were either slain or oppressed to death by evil men. Compare Heb. xi. 35—39. *And all these received not the promises.* But when virtue made men poor; and free speaking of brave truths made the wise to lose their liberty: when an excellent life hastened an opprobrious

death, and the obeying reason and our conscience lost us our lives, or at least all the means and conditions of enjoying them: it was but time to look about for another state of things, where Justice should rule, and Virtue find her own portion. And therefore men cast out every line and tried every argument; and sometimes proved it well, and when they did not yet they believed strongly: and they were sure of the thing even when they were not sure of the argument."—*Extract from Jeremy Taylor, cited from Coleridge's Aids to Reflection* (23*rd Aphorism on Spiritual Religion*).

Note E, Page 49.

I.

Bierlingii ad Leibnitium.

"Scire cupis, quomodo Dn. Thomasius distinguat justum decorum et honestum. En principia ejus, in compendium redacta, prout illa exposuit in fundamentis juris naturæ et gentium. Duo inveniri statuit hominum genera, insipientes atque sapientes, et hos rursus diversorum esse graduum, perfecte sapienti vero non dari. Pergit duplicem normam hic oriri, coactivam scilicet quam vocat normam imperii, et directivam, vel persuasivam, quam vocat normam consilii. Extremè stultos qui nec inter se, nec cum sapientioribus pacem colunt, imperio in ordinem redigendos esse; apud eos qui sapere incipiunt, prudenter temperandum esse imperium et consilium; qui vero aliquos in sapientia progressus fecere, nullo prorsus imperio opus habere, sed consilio regi posse. Primum et universale juris naturæ, seu omnis doctrinæ moralis, ita enim hanc vocem accipit, principium esse. Facienda, quæ vitam hominum reddunt

et maxime diuturnam et felicissimam; et evitanda quæ vitam reddunt infelicem et mortem accelerant. Felicitatem consistere in pace hominis interna et externa. Externam conservari per regulas justi, promoveri per regulas decori: internam acquiri per regulas honesti. Fluere exinde principium regularum justi: quod tibi non vis fieri, alteri ne feceris: duobus verbis, Neminem læde. Principium regularum decori: quod tibi vis fieri, alteri facies; scilicet, præstabis aliis officia humanitatis, beneficii et alia ad quæ jure cogi nequis. Principium regularum honesti: quod vis ut alii sibi faciant, tu tibi facies. Id est, reprimes passiones excedentes, deficientes excitabis, et ita affectus quantum fieri potest ad æquilibrium reduces.

II.

Responsio Leibnitii.

" Gratias ago quod mihi sententiam amplius Thomasii exponere voluisti; in qua multum boni invenio, quædam tamen annotanda habeo. Probo discrimen inter insipientes et varios eorum gradus qui in sapientiâ profecere. Concedo insipientes cogi debere imperio; atque id est, quod Aristoteles voluit, quum quosdam dixit naturæ servos. Addo etiam quanto quis minus habet sapientiæ tanto magis opus habere imperio cogentis. Sed quod addit vir egregius, ut refers, *qui aliquos in sapientia progressus facere, nullo prorsus imperio opus habere, sed solo consilio regi posse*, id quidem admittere non ausim. Oportet magnam esse sapientiam, cui omnia tuto fidas. Paucissimi sunt tales sapientes, et si qui sunt, non cognoscuntur. Puto igitur tutissimum esse, efficere, ut quam minimum liceat impune peccare. Cæterum hæc non ad quæstionem juris sed utilitatis per-

tinent, nec in hoc agitur quid sit justum aut rectum, sed qua ratione optime obtineri possit executio decreti, quod dictat quid sit rectum.

"II.—Ait porro: *primum et universale juris naturæ seu omnis doctrinæ moralis* (ita enim hanc vocem accepit) *principium esse, facienda quæ vitam hominum reddunt et maxime diuturnam et felicissimam: evitanda quæ vitam reddunt infelicem et mortem accelerant.* Hoc primum principium ego non admitto, quia omnia restringit ad hanc vitam brevem et mox finiendam nulla ratione habita vitæ æternæ. Posita enim Divina providentia, et animæ humanæ immortalitate (quæ utique naturali ratione cognosci possunt atque adeo jus naturæ fundant) fieri potest, ut præsenti vitæ ejusque commodis sapiens ob æterna bona renunciare possit debeatque. Sed et, seposita immortalitate, interdum mors huic vitæ præferenda videbitur sapienti; facile equidem corrigemus hoc principium si dicamus generatim quærendam vitam felicem evitandam infelicem; tunc vero explicandum erit uberius, in quo vera felicitas consistat. Itaque pergo tecum. *Felicitatem*, ait ille, *consistere in pace hominis externa et interna. Externam conservari per regulas justi, promoveri per regulas decori, internam acquiri per regulas honesti.* Hic vellem expositum satis discrimen inter pacis *conservationem et promotionem.* Certum est apud multos plus nocere violationem decori, quam justi; metuunt enim homines violantem regulas justi, sed spernunt violantem regulas decori, et facilius offendunt eum quem spernunt, quam quem timent. Putem etiam, observationem regularum justi et decori necessariam esse ad pacem internam. Qui regulas decori violat, solet sibi ipsi displicere et pudore affici. Qui regulas justi violat, non raro sentit conscientiæ

malæ laniatus et ictus, si quid scilicet superest illo pietatis. Ut taceam, pœnæ presentis metum sive a læso sive a magistratu.

"III.—Explicantur deinde discrimina justi, decori, honesti: sane ingeniose. *Justi* regula esse dicitur, *quod tibi non vis fieri alteri ne feceris*, seu *neminem lœde; Decori* regula, *quod tibi vis fieri alteri facito*. Denique *honesti* regula, *quod vis ut alii sibi faciant, hoc tu fac tibi.* Hæc sane non spernenda est explicatio trium regularum juris, neminem læde, suum cuique tribue, honeste vive. De quibus etiam in mea methodo et in præfatione Codicis Diplomatici egi. Subest tamen et hic aliquid difficultatis. Nam per secundam regulam dicuntur intelligi officia ad quæ quis jure agi nequit. Sed hoc verba ejus non ferunt. Nam sæpe jure coguntur homines non tantum ut aliquid non faciant, sed etiam ut aliquid faciant. Ut taceam, in utraque regula plurimum esse difficultatis. Multa enim volumus non recte, an ergo hoc recte ab aliis exigemus? Alia ergo regula opus foret quæ explicaret etiam quid velle oporteat. Præterea tanta est dissimilitudo et inæqualitas inter homines, ut non semper ab aliis recte exigamus, quod illi recte exigunt a nobis. Atque ideo nec semper mihi debeo, quod alii sibi debent. Itaque licet aliquid his regulis insit præclari, tamen fundamenta justi, decori, honesti non exhauriunt; nec mea voluntas spontanea satis tuta est mensura debitæ alienæ."—*Opp. omn.*, *vol.* v., *pp.* 386—9.

NOTE F., PAGE 55.

It can readily be conceived, as a reply upon this representation, that, after all, I have not ascertained what is right, but have only established that, when that *is* discovered,

it is our duty to do it: a position, it may be added, not very likely to be questioned. But *pace talium*, to establish this, is to establish the whole system of Morality. Considered apart from the duty to do it, the word "right" can only mean "conformity to the relations between the agent and the patient"; and the question, "What is right?" must, accordingly, receive a different answer for each set of relations. But the duty of conforming to these relations rests in all cases upon the same principle. It is this principle, and not the actual character of the relations to which it is applicable, which has been the subject of so much enquiry. I confess, that but for the remark of Leibnitz, elsewhere cited, "*Alia ergo regula opus foret quæ explicaret etiam quid velle oporteat,*" I should hardly have thought this explanation necessary.

Note G, Page 102.

I.

"After the dispute between the King and the Parliament came to a contest of arms, both parties, of course, sought to raise money for carrying on the war by any means that could be made available.... The Long Parliament began by voting supplies of six subsidies and a poll-tax (estimated as equivalent in all to twelve subsidies or about £600,000), the produce of which, though nominally granted after the usual form to the Crown, was paid into the hands of a Board of Parliamentary Commissioners; by whom it was actually in great part expended in the support of the war against the royal cause. Recourse, however, was soon had, when it became evident that the war could

not be brought to an end in a single campaign, to a regular system of taxation, which, under the name of the monthly assessment for the maintenance of the army, produced alone a much larger revenue than had ever before been collected in the kingdom from all other sources together. This assessment varied from about £35,000 to £120,000 per week in the first year of the war; it was continued under the name of a land-tax throughout the Protectorate, and its entire produce, in the nineteen years, from November. 1640, to November, 1659 is stated to have been not less than £32,172,321. Another new species of tax first imposed in 1643, under the name of the excise .... is calculated to have produced £500,000 a year." — *Pict. Hist. England*, Book 7, c. iii., vol. iii. p. 525.

II.

"The Judges had gone their rounds, passing with flags of truce through the districts held by opposite armies, and holding their courts, with sheriffs who, at other times, headed the levies of their respective counties in the field. And it is remarkable and memorable to all posterity, and glorious to the character of our country, that throughout this great struggle, from first to last, there is no instance on record of private assassination or popular massacre, nor of plunder, except under the orders of war. *Non internecinum inter cives fuisse bellum; de dignitate atque imperio certasse.*"—*Lord Nugent's Memoirs of Hampden*, vol. ii. p. 401.

III.

Blackstone speaks of an act which was passed soon after the restoration (12 Car. II. c. 33), as a legislative *declaration* of the validity of the marriages which had been

contracted under the commonwealth. The statute provides "for the avoiding all doubts and questions" that such marriages [which had been celebrated before Justices of the Peace instead of *in facie ecclesiæ*], shall be deemed to be and to have been valid, as if performed according to the rites of the Established Church. But whether the act be regarded as declaratory or enactive, the argument is the same; namely, that it was impossible to treat the connections then formed as other than legal marriages.

Note H, Page 120.

The compatibility with undoubted high worth as to personal character, of a deliberate disregard of the declared Law of the community, is best evidenced by the familiar history of Quaker marriages. I cite the following from a text writer (previously to the recent change), who will not be suspected of undue leaning against the law or towards the religious body concerned:—"Since the act (22 George II. c. 33, which left Quaker marriages as they were) the validity of the marriages of Quakers does not appear to have come in question, at least, in any reported case. This has partly arisen from their peaceful and prudent habits, and, perhaps, partly from the circumstance of its not being either the interest of any member of their own families, or the disposition of the Crown, to raise the objection, If the law on this subject should not be fixed by a legislative measure, and if the question should call for a judicial decision, the Courts would, no doubt, be strongly inclined, on obvious principles of reason and justice, as well as from the number and

respectability of the persons interested, to support these marriages, whatever difficulty there may be in finding grounds upon which their validity can be reconciled with the former Law. Perhaps the least objectionable mode of sustaining them would be to consider the saving clause in the Marriage Act as a recognition precluding the enquiry into their former condition.—*Roper's Husband and Wife, ed. by Jacob,* vol. ii. p. 481.