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An Essay On The History Of Civil Society

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Sect. VI. Of Civil Liberty.

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their conveyance, effect, if that ruinous maxim should prevail, That the grandeur of a nation is to be estimated from the extent of its territory; or, That the interest of any particular people consists in reducing their neighbours to servitude?

S E C T. VI.

Of Civil Liberty.

IF war, either for depredation or defence, were the principal object of nations, every tribe would, from its earliest state, aim at the condition of a Tartar horde; and in all its successes would hasten to the grandeur of a Tartar empire. The military leader would supersede the civil magistrate; and preparations to fly with all their possessions, or to pursue with all their forces, would, in every society, make the sum of their public arrangements.

HE who first on the banks of the Wolga, or the Jenisca, had taught the Scythian to mount the horse, to move his cottage on wheels, to harass his enemy alike by his attacks and his flights, to handle at full speed the lance and the bow, and when beat from the field, to leave his arrows in the wind to meet his pursuer; he who had taught his countrymen to use the same animal for every purpose of the dairy, the shambles, and the field; would be esteemed the founder of his nation; or, like Ceres and
Bacchus

Bacchus among the Greeks, would be invested with the honours of a god, as the reward of his useful inventions. Amidst such institutions, the names and achievements of Hercules and Jason might have been transmitted to posterity; but those of Lycurgus or Solon, the heroes of political society, could have gained no reputation, either fabulous or real, in the records of fame.

EVERY tribe of warlike barbarians may entertain among themselves the strongest sentiments of affection and honour, while they carry to the rest of mankind the aspect of banditti and robbers*. They may be indifferent to interest, and superior to danger; but our sense of humanity, our regard to the rights of nations, our admiration of civil wisdom and justice, even our effeminacy itself, make us turn away with contempt, or with horror, from a scene which exhibits so few of our good qualities, and which serve so much to reproach our weakness.

IT is in conducting the affairs of civil society, that mankind find the exercise of their best talents, as well as the object of their best affections. It is in being grafted on the advantages of civil society, that the art of war is brought to perfection; that the resources of armies, and the complicated springs to be touched in their conduct, are best understood. The most celebrated warriors were also citizens: Opposed to a Roman, or a Greek, the

* D'Arvieux's Hist. of the Arabs.

chieftain



chieftain of Thrace, of Germany, or Gaul, was a novice. The native of Pella learned the principles of his art from Epaminondas and Pelopidas.

IF nations, as hath been observed in the preceding section, must adjust their policy on the prospect of war from abroad, they are equally bound to provide for the attainment of peace at home. But there is no peace in the absence of justice. It may subsist with divisions, disputes, and contrary opinions; but not with the commission of wrongs. The injurious, and the injured, are, as implied in the very meaning of the terms, in a state of hostility.

WHERE men enjoy peace, they owe it either to their mutual regards and affections, or to the restraints of law. Those are the happiest states which procure peace to their members by the first of these methods: But it is sufficiently uncommon to procure it even by the second. The first would withhold the occasions of war and of competition: The second adjusts the pretensions of men by stipulations and treaties. Sparta taught her citizens not to regard interest: Other free nations secure the interest of their members, and consider this as a principal part of their rights.

LAW is the treaty to which members of the same community have agreed, and under which the magistrate and the subject continue to enjoy their rights, and to maintain the peace of society. The desire of lucre is the great motive to injuries: law therefore has a principal reference to property. It would ascertain the different methods
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by which property may be acquired, as by prescription, conveyance, and succession; and it makes the necessary provisions for rendering the possession of property secure.

BESIDE avarice, there are other motives from which men are unjust; such are pride, malice, envy, and revenge. The law would eradicate the principles themselves, or at least prevent their effects.

FROM whatever motive wrongs are committed, there are different particulars in which the injured may suffer. He may suffer in his goods, in his person, or in the freedom of his conduct. Nature has made him master of every action which is not injurious to others. The laws of his particular society intitle him perhaps to a determinate station, and bestow on him a certain share in the government of his country. An injury, therefore, which in this respect puts him under any unjust restraint, may be called an infringement of his political rights.

WHERE the citizen is supposed to have rights of property and of station, and is protected in the exercise of them, he is said to be free; and the very restraints by which he is hindered from the commission of crimes, are a part of his liberty. No person is free, where any person is suffered to do wrong with impunity. Even the despotic prince on his throne, is not an exception to this general rule. He himself is a slave, the moment he pretends that force should decide any contest. The disregard he throws on the rights of his people recoils on himself; and

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in the general uncertainty of all conditions, there is no tenure more precarious than his own.

FROM the different particulars to which men refer, in speaking of liberty, whether to the safety of the person and the goods, the dignity of rank, or the participation of political importance, as well as from the different methods by which their rights are secured, they are led to differ in the interpretation of the term; and every people is apt to imagine, that its signification is to be found only among themselves.

SOME having thought, that the unequal distribution of wealth is unjust, required a new division of property, as the foundation of freedom. This scheme is suited to democratical government; and in such only it has been admitted with any degree of effect.

NEW settlements, like that of the people of Israel, and singular establishments, like those of Sparta and Crete, have furnished examples of its actual execution; but in most other states, even the democratical spirit could attain no more than to prolong the struggle for Agrarian laws; to procure, on occasion, the expunging of debts; and to keep the people in mind, under all the distinctions of fortune, that they still had a claim to equality.

THE citizen at Rome, at Athens, and in many republics, contended for himself, and his order. The Agrarian law was moved and debated for ages: it served to
awaken

awaken the mind; it nourished the spirit of equality, and furnished a field on which to exert its force; but was never established with any of its other and more formal effects.

MANY of the establishments which serve to defend the weak from oppression, contribute, by securing the possession of property, to favour its unequal division, and to increase the ascendant of those from whom the abuses of power may be feared. Those abuses were felt very early both at Athens and Rome *.

It has been proposed to prevent the excessive accumulation of wealth in particular hands, by limiting the increase of private fortunes, by prohibiting entails, and by with-holding the right of primogeniture in the succession of heirs. It has been proposed to prevent the ruin of moderate estates, and to restrain the use, and consequently the desire, of great ones, by sumptuary laws. These different methods are more or less consistent with the interests of commerce, and may be adopted, in different degrees, by a people whose national object is wealth: and they have their degree of effect, by inspiring moderation, or a sense of equality, and by stifling the passions by which mankind are prompted to mutual wrongs.

* Plutarch in the life of Solon.—Livy.



IT appears to be, in a particular manner, the object of sumptuary laws, and of the equal division of wealth, to prevent the gratification of vanity, to check the ostentation of superior fortune, and, by this means, to weaken the desire of riches, and to preserve in the breast of the citizen, that moderation and equity which ought to regulate his conduct.

THIS end is never perfectly attained in any state where the unequal division of property is admitted, and where fortune is allowed to bestow distinction and rank. It is indeed difficult, by any methods whatever, to shut up this source of corruption. Of all the nations whose history is known with certainty, the design itself, and the manner of executing it, appear to have been understood in Sparta alone.

THERE property was indeed acknowledged by law; but in consequence of certain regulations and practices, the most effectual, it seems, that mankind have hitherto found out. The manners that prevail among simple nations before the establishment of property, were in some measure preserved*; the passion for riches was, during many ages, suppressed; and the citizen was made to consider himself as the property of his country, not as the owner of a private estate.

* See part 2. sect. 2.

IT was held ignominious either to buy or to sell the patrimony of a citizen. Slaves were, in every family, intrusted with the care of its effects, and freemen were strangers to lucrative arts; justice was established on a contempt of the ordinary allurements to crimes; and the preservatives of civil liberty applied by the state, were the dispositions that were made to prevail in the hearts of its members.

THE individual was relieved from every solicitude that could arise on the head of his fortune; he was educated, and he was employed for life in the service of the public; he was fed at a place of common resort, to which he could carry no distinction but that of his talents and his virtues; his children were the wards and the pupils of the state; he himself was taught to be a parent, and a director to the youth of his country, not the anxious father of a separate family.

THIS people, we are told, bestowed some care in adorning their persons, and were known from afar by the red or the purple they wore; but could not make their equipage, their buildings, or their furniture, a subject of fancy, or of what we call *taste*. The carpenter and the house-builder were restricted to the use of the axe and the saw: their workmanship must have been simple, and probably, in respect to its form, continued for ages the same. The ingenuity of the artist was employed in cultivating his own nature, not in adorning the habitations of his fellow-citizens.



ON this plan, they had senators, magistrates, leaders of armies, and ministers of state; but no men of fortune. Like the heroes of Homer, they distributed honours by the measure of the cup and the platter. A citizen, who, in his political capacity, was the arbiter of Greece, thought himself honoured by receiving a double portion of plain entertainment at supper. He was active, penetrating, brave, disinterested, and generous; but his estate, his table, and his furniture, might, in our esteem, have marred the lustre of all his virtues. Neighbouring nations, however, applied for commanders to this nursery of statesmen and warriors, as we apply for the practitioners of every art to the countries in which they excel; for cooks to France, and for musicians to Italy.

AFTER all, we are, perhaps, not sufficiently instructed in the nature of the Spartan laws and institutions, to understand in what manner all the ends of this singular state were obtained; but the admiration paid to its people, and the constant reference of contemporary historians to their avowed superiority, will not allow us to question the facts. "When I observed," says Xenophon, "that this nation, though not the most populous, was the most powerful state of Greece, I was seized with wonder, and with an earnest desire to know by what arts it attained its pre-eminence; but when I came to the knowledge of its institutions, my wonder ceased.—" As one man excels another, and as he who is at pains to cultivate his mind, must surpass the person who neglects it; so the Spartans should excel every nation, "being

“ being the only state in which virtue is studied as the
“ object of government.”

THE subjects of property, considered with a view to subsistence, or even to enjoyment, have little effect in corrupting mankind, or in awakening the spirit of competition and of jealousy; but considered with a view to distinction and honour, where fortune constitutes rank, they excite the most vehement passions, and absorb all the sentiments of the human soul: they reconcile avarice and meanness with ambition and vanity; and lead men through the practice of fordid and mercenary arts to the possession of a supposed elevation and dignity.

WHERE this source of corruption, on the contrary, is effectually stopped, the citizen is dutiful, and the magistrate upright; any form of government may be wisely administered; places of trust are likely to be well supplied; and by whatever rule office and power are bestowed, it is likely that all the capacity and force that subsists in the state will come to be employed in its service: for on this supposition, experience and abilities are the only guides and the only titles to public confidence; and if citizens be ranged into separate classes, they become mutual checks by the difference of their opinions, not by the opposition of their interested designs.

WE may easily account for the censures bestowed on the government of Sparta, by those who considered it merely on the side of its forms. It was not calculated to
prevent

prevent the practice of crimes, by balancing against each other the selfish and partial dispositions of men ; but to inspire the virtues of the soul, to procure innocence by the absence of criminal inclinations, and to derive its internal peace from the indifference of its members to the ordinary motives of strife and disorder. It were trifling to seek for its analogy to any other constitution of state, in which its principal characteristic and distinguishing feature is not to be found. The collegiate sovereignty, the senate, and the ephori, had their counterparts in other republics, and a resemblance has been found in particular to the government of Carthage * : but what affinity of consequence can be found between a state whose sole object was virtue, and another whose principal object was wealth ; between a people whose associated kings, being lodged in the same cottage, had no fortune but their daily food ; and a commercial republic, in which a proper estate was required as a necessary qualification for the higher offices of state ?

OTHER petty commonwealths expelled kings, when they became jealous of their designs, or after having experienced their tyranny ; here the hereditary succession of kings was preserved : other states were afraid of the intrigues and cabals of their members in competition for dignities ; here solicitation was required as the only condition upon which a place in the senate was obtained. A supreme inquisitorial power was, in the persons of the

* Aristotle.

ephori,

ephorî, safely committed to a few men, who were drawn by lot, and without distinction, from every order of the people: and if a contrast to this, as well as to many other articles of the Spartan policy, be required, it may be found in the general history of mankind.

BUT Sparta, under every supposed error of its form, prospered for ages, by the integrity of its manners, and by the character of its citizens. When that integrity was broken, this people did not languish in the weakness of nations sunk in effeminacy. They fell into the stream by which other states had been carried in the torrent of violent passions, and in the outrage of barbarous times. They ran the career of other nations, after that of ancient Sparta was finished: They built walls, and began to improve their possessions, after they ceased to improve their people; and on this new plan, in their struggle for political life, they survived the system of states that perished under the Macedonian dominion: They lived to act with another which arose in the Achæan league; and were the last community of Greece that became a village in the empire of Rome.

IF it should be thought we have dwelt too long on the history of this singular people, it may be remembered, in excuse, that they alone, in the language of Xenophon, made virtue an object of state.

WE must be contented to derive our freedom from a different source; to expect justice from the limits which

are:



are set to the powers of the magistrate, and to rely for protection on the laws which are made to secure the estate, and the person of the subject. We live in societies, where men must be rich, in order to be great; where pleasure itself is often pursued from vanity; where the desire of a supposed happiness serves to inflame the worst of passions, and is itself the foundation of misery; where public justice, like fetters applied to the body, may, without inspiring the sentiments of candour and equity, prevent the actual commission of crimes.

MANKIND come under this description the moment they are seized with their passions for riches and power. But their description in every instance is mixed: in the best there is an alloy of evil; in the worst a mixture of good. Without any establishments to preserve their manners, besides penal laws, and the restraints of police, they derive, from instinctive feelings, a love of integrity and candour, and, from the very contagion of society itself, an esteem for what is honourable and praise-worthy. They derive, from their union, and joint opposition to foreign enemies, a zeal for their own community, and courage to maintain its rights. If the frequent neglect of virtue as a political object, tend to discredit the understandings of men, its lustre, and its frequency, as a spontaneous offspring of the heart, will restore the honours of our nature.

IN every casual and mixed state of the national manners, the safety of every individual, and his political consequence,

quence, depends much on himself, but more on the party to which he is joined. For this reason, all who feel a common interest, are apt to unite in parties; and, as far as that interest requires, mutually support each other.

WHERE the citizens of any free community are of different orders, each order has a peculiar set of claims and pretensions: relatively to the other members of the state, it is a party; relatively to the differences of interest among its own members, it may admit of numberless subdivisions. But in every state there are two interests very readily apprehended; that of a prince and his adherents, that of a nobility, or of any temporary faction, opposed to the people.

WHERE the sovereign power is reserved by the collective body, it appears unnecessary to think of additional establishments for securing the rights of the citizen. But it is difficult, if not impossible, for the collective body to exercise this power in a manner that supersedes the necessity of every other political caution.

IF popular assemblies assume every function of government; and if, in the same tumultuous manner in which they can, with great propriety, express their feelings, the sense of their rights, and their animosity to foreign or domestic enemies, they pretend to deliberate on points of national conduct, or to decide questions of equity and justice; the public is exposed to manifold inconveniences; and popular governments would, of all others, be



the most subject to errors in administration, and to weakness in the execution of public measures.

To avoid these disadvantages, the people are always contented to delegate part of their powers. They establish a senate to debate, and to prepare, if not to determine, questions that are brought to the collective body for a final resolution. They commit the executive power to some council of this sort, or to a magistrate who presides in their meetings. Under the use of this necessary and common expedient, even while democratical forms are most carefully guarded, there is one party of the few, another of the many. One attacks, the other defends; and they are both ready to assume in their turns. But though, in reality, a great danger to liberty arises on the part of the people themselves, who, in times of corruption, are easily made the instruments of usurpation and tyranny; yet, in the ordinary aspect of government, the executive carries an air of superiority, and the rights of the people seem always exposed to incroachment.

THOUGH on the day that the Roman people assembled in their tribes, the senators mixed with the croud, and the consul was no more than the servant of the multitude; yet, when this awful meeting was dissolved, the senators met to prescribe business for their sovereign, and the consul went armed with the axe and the rods, to teach every Roman, in his separate capacity, the submission which he owed to the state.

THUS,



THUS, even where the collective body is sovereign, they are assembled only occasionally: and though on such occasions they determine every question relative to their rights and their interests as a people, and can assert their freedom with irresistible force; yet they do not think themselves, nor are they in reality, safe, without a more constant and more uniform power operating in their favour.

THE multitude is every where strong; but requires, for the safety of its members, when separate as well as when assembled, a head to direct and to employ its strength. For this purpose, the ephori, we are told, were established at Sparta, the council of a hundred at Carthage, and the tribunes at Rome. So prepared, the popular party has, in many instances, been able to cope with its adversaries, and has even trampled on the powers, whether aristocratical or monarchical, with which it would have been otherwise unequally matched. The state, in such cases, commonly suffered by the delays, interruptions, and confusions, which popular leaders, from private envy, or a prevailing jealousy of the great, seldom failed to create in the proceedings of government.

WHERE the people, as in some larger communities, have only a share in the legislature, they cannot overwhelm the collateral powers, who having likewise a share, are in condition to defend themselves: Where they act only by their representatives, their force may be uniformly



employed. And they may make part in a constitution of government more lasting than any of those in which the people possessing or pretending to the entire legislature, are, when assembled, the tyrants, and, when dispersed, the slaves, of a distempered state. In governments properly mixed, the popular interest, finding a counterpoise in that of the prince or of the nobles, a balance is actually established between them, in which the public freedom and the public order are made to consist.

FROM some such casual arrangement of different interests, all the varieties of mixed government proceed; and on the degree of consideration which every separate interest can procure to itself, depends the equity of the laws they enact, and the necessity they are able to impose, of adhering strictly to the terms of law in its execution. States are accordingly unequally qualified to conduct the business of legislation, and unequally fortunate in the completeness, and regular observance, of their civil code.

IN democratical establishments, citizens, feeling themselves possessed of the sovereignty, are not equally anxious, with the subject of other governments, to have their rights explained, or secured, by actual statute. They trust to personal vigour, to the support of party, and to the sense of the public.

IF the collective body perform the office of judge, as well as of legislator, they seldom think of devising rules for their own direction, and are found still more seldom to follow

low any determinate rule, after it is made. They dispense, at one time, with what they enacted at another; and in their judicative, perhaps even more than in their legislative, capacity, are guided by passions and partialities that arise from circumstances of the case before them.

BUT under the simplest governments of a different sort, whether aristocracy or monarchy, there is a necessity for law, and there are a variety of interests to be adjusted in framing every statute. The sovereign wishes to give stability and order to administration, by express and promulgated rules. The subject wishes to know the conditions and limits of his duty. He acquiesces, or he revolts, according as the terms on which he is made to live with the sovereign, or with his fellow-subjects, are, or are not, consistent with the sense of his rights.

NEITHER the monarch, nor the council of nobles, where either is possessed of the sovereignty, can pretend to govern, or to judge at discretion. No magistrate, whether temporary or hereditary, can with safety neglect that reputation for justice and equity, from which his authority, and the respect that is paid to his person, are in a great measure derived. Nations, however, have been fortunate in the tenor, and in the execution of their laws, in proportion as they have admitted every order of the people, by representation or otherwise, to an actual share of the legislature. Under establishments of this sort, law is literally a treaty, to which the parties concern-
ed



ed have agreed, and have given their opinion in settling its terms. The interests to be affected by a law, are likewise consulted in making it. Every class propounds an objection, suggests an addition or an amendment of its own. They proceed to adjust, by statute, every subject of controversy: and while they continue to enjoy their freedom, they continue to multiply laws, and to accumulate volumes, as if they could remove every possible ground of dispute, and were secure of their rights, merely by having put them in writing.

ROME and England, under their mixed governments, the one inclining to democracy, the other to monarchy, have proved the great legislators among nations. The first has left the foundation, and great part of the superstructure of its civil code, to the continent of Europe: the other, in its island, has carried the authority and government of law to a point of perfection, which they never before attained in the history of mankind.

UNDER such favourable establishments, known customs, the practice and decisions of courts, as well as positive statutes, acquire the authority of laws; and every proceeding is conducted by some fixed and determinate rule. The best and most effectual precautions are taken for the impartial application of rules to particular cases; and it is remarkable, that, in the two examples we have mentioned, a surprising coincidence is found in the singular methods of their jurisdiction. The people in both reserved in a manner the office of judgement to themselves, and brought the decision of civil rights, or of criminal questions,

questions, to the tribunal of peers, who, in judging of their fellow-citizens, prescribed a condition of life for themselves.

IT is not in mere laws, after all, that we are to look for the securities to justice, but in the powers by which those laws have been obtained, and without whose constant support they must fall to disuse. Statutes serve to record the rights of a people, and speak the intention of parties to defend what the letter of the law has expressed: but without the vigour to maintain what is acknowledged as a right, the mere record, or the feeble intention, is of little avail.

A populace roused by oppression, or an order of men possessed of a temporary advantage, have obtained many charters, concessions, and stipulations, in favour of their claims; but where no adequate preparation was made to preserve them, the written articles were often forgotten, together with the occasion on which they were framed.

THE history of England, and of every free country, abounds with the example of statutes enacted when the people or their representatives assembled, but never executed when the crown or the executive was left to itself. The most equitable laws on paper are consistent with the utmost despotism in administration. Even the form of trial by juries in England had its authority in law, while



while the proceedings of courts were arbitrary and oppressive.

WE must admire, as the key-stone of civil liberty, the statute which forces the secrets of every prison to be revealed, the cause of every commitment to be declared, and the person of the accused to be produced, that he may claim his enlargement, or his trial, within a limited time. No wiser form was ever opposed to the abuses of power. But it requires a fabric no less than the whole political constitution of Great Britain, a spirit no less than the refractory and turbulent zeal of this fortunate people, to secure its effects.

IF even the safety of the person, and the tenure of property, which may be so well defined in the words of a statute, depend, for their preservation, on the vigour and jealousy of a free people, and on the degree of consideration which every order of the state maintains for itself; it is still more evident, that what we have called the political freedom, or the right of the individual to act in his station for himself and the public, cannot be made to rest on any other foundation. The estate may be saved, and the person released, by the forms of a civil procedure; but the rights of the mind cannot be sustained by any other force but its own.

S E C T.

